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The Ethics of Tort Tales: What Should Lawyers Do When Media Gets It Wrong?

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THE ETHICS OF TORT TALES: WHAT SHOULD LAWYERS DO WHEN MEDIA GETS IT WRONG?

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ABSTRACT

What should lawyers do when confronted with inaccurate media coverage? This essay contends that the Model Rules of Professional Conduct should be read broadly to encourage lawyers and their professional organizations to challenge misleading media accounts vigorously. At least three reasons support an expansive reading of lawyers' obligations to counter what scholars have called "tort tales": dramatic, personalized accounts, like the infamous McDonald's coffee case, which exaggerate the system's cost, inefficiency, and arbitrariness. First, dramatic stories can have a disproportionate effect on perceptions, deeply shaping public understanding and affective response to the courts and tort system. Second, tort tales are not anomalous. Building on prior research and replicating earlier statistical analyses using new data, we show that tort tale coverage is part of a pattern of inaccurate, incomplete, and negative stories as compared to coverage of other modes of injury compensation, such as social insurance programs. Finally, recent public questioning of the legitimacy of the U.S. Supreme Court reinforces the narrative of a broken system, lending urgency to the need for lawyers to defend the system and bolster its reputation. The call for lawyers to confront skewed media accounts of the tort system does not mean that they should ignore its weaknesses or abandon legislative reform efforts aimed at improving it. Instead, lawyers should work with media and existing organizations to promote more balanced coverage, and seek targeted reforms that reflect best evidence, not flawed press accounts.

I. INTRODUCTION

In the 1990s, Stella Liebeck won a nearly \$3 million jury verdict against McDonald's for spilling a cup of coffee on her lap.¹ The case became fodder for comedians

1. Andrea Gerlin, *When Spilled Coffee is Worth \$2.9-Million*, TAMPA BAY TIMES, (Sept. 1, 1994), <https://www.tampabay.com/archive/1994/09/02/when-spilled-coffee-is-worth-2-9-million/>.

on late-night television and a poster child for the tort reform movement. Millions of dollars for spilled coffee? Ridiculous! The *San Diego Tribune* captured the popular zeitgeist: “When Stella Liebeck fumbled her coffee . . . 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.”²

This version of events, as we now know, was deeply flawed. Part of the problem was that, with a few notable exceptions, media accounts were inaccurate.³ As the story grew into an urban legend, mass media often mischaracterized even basic details of the accident, reporting that Ms. Liebeck heedlessly put the coffee between her legs while driving off.⁴ In fact, the car was parked when the incident happened, and Ms. Liebeck was in the passenger seat.⁵ Because the vehicle lacked a flat surface, she placed the coffee between her legs to add cream and sugar.⁶ When she removed the lid, the coffee spilled.⁷ More importantly, the coffee was not merely “hot;” it was scalding—hot enough to give her third-degree burns through her clothes.⁸

Media also tended to gloss over McDonald’s culpability—it’s practice of serving dangerously hot coffee had generated hundreds of prior complaints—and misrepresented Ms. Liebeck’s decision to litigate, which hardly fit the profile of a greedy litigant.⁹ Ms. Liebeck had never sued anyone before her accident.¹⁰ Instead of running to her lawyers, she first wrote to McDonald’s to ask for help with her medical bills, which included the costs of skin graft surgery for her burns.¹¹ She resorted to litigation only after the company offered a paltry settlement and refused to change its practices.¹² Media also typically failed to report that the court reduced the jury’s initial punitive damages award to three times her compensatory damages (adopting a formula advocated by many tort reformers).¹³ Finally, media reports offered little policy context. Ms. Liebeck turned to the courts in part because she lacked adequate health insurance.¹⁴ From this perspective, this story arguably illustrates a *strength* of the tort system: namely, its ability to fill—at least partially—gaps in the social safety net in the United States. This omission is even more striking given that the story broke during the Clinton Administration when healthcare reform was on the front

2. WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 183 (2004) (arguing that distorted media coverage of the Liebeck case is indicative of how media covers the tort system more generally) (hereinafter *DISTORTING THE LAW*). See also New York Times, *Scalded by Coffee, Then News Media*, N. Y. TIMES (Oct. 13, 2013), <https://www.nytimes.com/video/us/10000002507537/scalded-by-coffee-then-news-media.html>.

3. See, e.g., Gerlin, *supra* note 1 (describing the jury’s rationale for awarding such large punitive damages); *DISTORTING THE LAW*, *supra* note 2, at 183–226 (offering a detailed analysis of mass media’s inaccurate coverage of the McDonald’s coffee case).

4. Gerlin, *supra* note 1.

5. *DISTORTING THE LAW*, *supra* note 2, at 185.

6. *Id.*

7. *Id.*

8. *Id.* at 186.

9. *Id.* at 186, 190.

10. *DISTORTING THE LAW*, *supra* note 2, at 208.

11. *Id.* at 186–87.

12. *Id.* at 206.

13. *Id.* at 195.

14. *Id.* at 226.

pages.¹⁵

The McDonald's coffee case illustrates what socio-legal scholars call a "tort tale:" a dramatic but misleading anecdote about the tort system that lacks context and exaggerates its cost, inefficiency, and arbitrariness.¹⁶ This article asks: What should lawyers do when mass media get it wrong?

We argue that the American Bar Association's Model Rules of Professional Conduct should be interpreted broadly to encourage lawyers and professional associations to correct inaccurate or misleading media coverage of the tort system. Three main factors support an expansive reading of lawyers' duty to respond to tort tales: (1) the literature on social psychology and political communication underscores that vivid stories and their framing can play an outsized role in shaping public perception, which is crucial to the legal system's legitimacy; (2) there is mounting evidence that tort tales are part of a pervasive pattern of inaccurate, negative, and biased coverage of the tort system; and, (3) the recent spate of high-profile questioning of the Supreme Court's legitimacy and calls for extreme court-curbing measures may reinforce perceptions that the civil justice system is broken and not worthy of respect. Whether recent criticisms amount to a looming legitimacy crisis is a matter of contention,¹⁷ but even those who have found that the Court's legitimacy has proven resilient in the past warn that it should not be taken for granted.¹⁸ It is a finite resource and must be protected and nurtured. Given the combination of persistent negative

15. DISTORTING THE LAW, *supra* note 2, at 226.

16. *Id.* at 5–6 (conveying that the term "tort tale" refers to modal coverage of the American tort system by mass media; coverage that includes exaggerated claims about its cost, inefficiency, and arbitrariness); Jeb Barnes & Parker Hevron, *Framed? Judicialization and the Risk of Negative Episodic Media Coverage*, 43 L. & SOC. INQUIRY 1059, 1074–75 (2018) (defining a "tort tale" as an article that is episodically framed and highly negative as indicated by the presence of three "standard critiques" that apply to any injury compensation regimes, such as the regime is costly, it is inefficient, and it features incompetent decisionmakers and bogus claims, which are rising) (hereinafter *Framed?*).

17. Compare Bruce Ackerman *Trust in the Justices of the Supreme Court is Waning. Here are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html>; and Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court's Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 5, 2018), <https://www.sacbee.com/opinion/california-forum/article2199317565.html> (both contending that high levels of partisanship on and surrounding the Court cast a shadow over its legitimacy); with Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240, 2246 (2018) (arguing that the "Court has largely retained its reputation with the public while recognizing that different dimensions of judicial legitimacy may be in tension, presenting dilemmas for the Court) (hereinafter *Legitimacy Dilemma*). Grove's assessment accords with those of leading political scientists. See, e.g., James Gibson & Michael Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. POL. SCI. 201, 205–06 (2014) (reviewing survey data and concluding that the Court enjoys a reservoir of public goodwill and legitimacy) (hereinafter *The Legitimacy of the Supreme Court*).

18. For example, Gibson and Nelson, who argue that the Court enjoys deep support, concede that it is "far from bottomless." *The Legitimacy of the Supreme Court*, *supra* note 17, at 205. Grove also recognizes that public support for the Court is "sticky but movable." *Legitimacy Dilemma*, *supra* note 17, at 2252. In a 2020 opinion piece, reflecting on the confirmation process of Justice Samuel Alito just prior to the confirmation of Justice Amy Coney Barrett, Gibson wrote: "Dueling ad campaigns, both for and against Alito's confirmation, were virtually indistinguishable from the sorts of ads one ordinarily sees in electoral politics. As a result, many Americans came to see the court as just another political institution. Consequently, the court's legitimacy was tarnished." *The U.S. Supreme Court's Legitimacy is in Great Danger*, ST. LOUIS POST-DISPATCH (Oct. 20, 2020), https://www.stltoday.com/opinion/columnists/james-l-gibson-the-u-s-supreme-court-s-legitimacy-is-in-great-danger/article_f4f9f4e2-3108-5eb9-97bd-79ce8607f7fc.html; see also JAMES L. GIBSON AND GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFORMATIONS: POSITIVITY THEORY AND THE JUDGMENT OF THE AMERICAN PEOPLE* (2009).

media coverage and prominent concerns about judicial legitimacy, the time seems ripe for lawyers to defend the tort system in the court of public opinion.

To be clear, the point is not to heap false praise on the U.S. tort system (or the civil justice system more generally). The tort system has many flaws that need redress, and lawyers have an ethical duty to address them.¹⁹ But it also has a heroic side. It provides ordinary people a partial means to hold wrongdoers accountable and augment often-patchy social benefits.²⁰ Under these circumstances, lawyers and their professional associations have a collective responsibility to paint a clear picture of the tort system's strengths and weaknesses. To discharge that duty, lawyers must understand how to best communicate with the press, provide the type of information that journalists are most likely to use, and, when they do join efforts to reform the system, ensure that reforms reflect the best available data on the underlying problems.

II. ON RULES, CANONS, AND BEST PRACTICES

In 1983, the American Bar Association's House of Delegates approved the Model Rules of Professional Conduct, which have been adopted in 49 states and the District of Columbia as of 2018.²¹ Most of the Model Rules naturally govern lawyers' obligations to their clients and are enforced through disciplinary proceedings, such as actions punishing lawyers for the misuse of client funds or breach of client confidentiality.²² Some rules, however, concern lawyers' broader obligations to the law, their profession, and the courts. These rules are not enforced through disciplinary processes; instead, they are aspirational and encourage lawyers to adopt best practices.²³

19. See MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 1983) (urging lawyers to participate in activities aimed at "improving . . . the legal system.").

20. See generally ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2019) (discussing the policy role of tort law in the United States and contrasting it with other industrialized democracies with more generous social benefit programs) (hereinafter *ADVERSARIAL LEGALISM*); Jeb Barnes and Thomas F. Burke, *With the Coronavirus, When Government Stumbles, Litigation Will Step In*, *THE CONVERSATION* (May 29, 2020), <https://theconversation.com/with-the-coronavirus-where-government-stumbles-litigation-will-step-in-137465>.

21. The ABA lists the following states and District of Columbia as adopting the Model Rules and their date of adoption (as of March 28, 2018): Alabama (5/2/1990), Alaska (4/14/1993), Arizona (9/7/1984), Arkansas (12/16/1985), Colorado (5/7/1992), Connecticut (6/23/1986), Delaware (9/12/1985), District of Columbia (3/1/1990), Florida (7/17/1986), Georgia (6/12/2000), Hawaii (12/6/1993), Idaho (9/3/1986), Illinois (2/8/1990), Indiana (11/25/1986), Iowa (4/20/2005), Kansas (1/29/1988), Kentucky (6/12/1989), Louisiana (12/18/1986), Maine (2/26/2009), Maryland (4/15/1986), Massachusetts (6/9/1997), Michigan (3/11/1988), Minnesota (6/13/1985), Mississippi (2/18/1987), Missouri (8/7/1985), Montana (6/6/1985), Nebraska (6/8/2005), Nevada (1/26/1986), New Hampshire (1/16/1986), New Jersey (7/12/1984), New Mexico (6/26/1986), New York (12/16/2008), North Carolina (10/7/1985), North Dakota (5/6/1987), Ohio (8/1/2006), Oklahoma (3/10/1988), Oregon (1/1/2005), Pennsylvania (10/16/1987), Rhode Island (11/1/1988), South Carolina (1/9/1990), South Dakota (12/15/1987), Tennessee (8/27/2002), Texas (6/20/1989), Utah (3/20/1987), Vermont (3/9/1999), Virginia (1/25/1999), Washington (7/25/1985), West Virginia (6/30/1988), Wisconsin (6/10/1987), and Wyoming (11/7/1986). Several U.S. territories have also signed on, including Guam, Northern Mariana Islands, and the Virgin Islands. California is the exception. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, <https://bit.ly/2ETOMHV> (last updated Mar. 28, 2018). While each state bar association implements these rules, given their wide adoption, discussing Model Rules has broad implications for the reading of each state's rules.

22. See Louis Parley, *A Brief History of Legal Ethics*, 637 *FAM. L. Q.* 637, 637–45 (2000) (providing a concise overview of efforts to codify legal ethics and their adoption).

23. *Id.* at 639.

Rule 6, for example, states that lawyers should “aspire” to fifty hours of pro bono services yearly, which may include “participation in activities for improving the law, the legal system or the legal profession.”²⁴ There is not much formal elaboration of Rule 6. For example, the American Bar Association (“ABA”) issues opinions on the rules and posts them on its website. There are only two such opinions relating to pro bono services: one on judges encouraging pro bono work, and the other on sharing court-awarded fees arising from pro bono services.²⁵ We could find no opinion on the duty to bolster the legal system or profession. However, the ABA’s comment on Rule 6 reinforces its intended breadth. It states:

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.²⁶

It should be added that the ABA’s Public Education Division sponsors the annual Law Day referred to in the comment.²⁷ The ABA Public Education Division’s mission includes advancing “public understanding of the law and society” and “educating the public about . . . the law, the courts, and the legal system.”²⁸ So, while correcting misleading media accounts of the legal system is not explicitly mentioned in the rules, comments, or an official ABA ethics opinion that we are aware of, it seems to fall squarely within activities related to ABA programs that are specifically referenced.

It is worth noting that the ideal of lawyers as guardians of the law’s reputation is not novel. The Model Rules’ predecessor, the Model Code of Ethics, provided that lawyers, as “public officials,” must “maintain and improve our legal system” and ensure it functions “in a manner that commands public respect.”²⁹ The Code’s notes further explained as follows:

As President Theodore Roosevelt aptly put it, ‘Every [person] owes some of [their] time to the upbuilding of the profession to which [they] belong.’ Indeed, this obligation is one of the great things which distinguishes a profession from a business. The soundness and the necessity of President Roosevelt’s admonition insofar as it relates to the legal profession cannot be doubted.³⁰

Encouraging lawyers to safeguard the legal system and profession’s reputations also

24. See MODEL RULES OF PRO. CONDUCT r. 6.1(b)(3) (AM. BAR ASS’N 1983) (contending that lawyers have an obligation to improve perception of the legal system) (hereinafter MODEL RULE 6.1(b)(3)).

25. ABA Comm. on Pro. Ethics & Grievances, Formal Op. 93-374 (1993); ABA Comm. on Pro. Ethics & Grievances, Formal Op. 470 (2015).

26. MODEL RULE 6.1(b)(3), *supra* note 24, at cmt. 8.

27. *Our Programs*, AM. BAR ASS’N, https://www.americanbar.org/groups/public_education/programs/ (last visited Oct. 19, 2022).

28. *Division for Public Education*, AM. BAR ASS’N, https://www.americanbar.org/content/aba-cms-dotorg/en/groups/public_education/ (last visited Oct. 19, 2022).

29. MODEL CODE OF PRO. RESP. EC 8-1, EC 8-7 (AM. BAR ASS’N 1969) (contending that lawyers have reputational and professional—rather than simply monetary—reasons to promote the legal profession).

30. *Id.* at EC 8-1, note 1 (quoting Arthur T. Vanderbilt, *The Five Functions of the Lawyer: Service to Client and the Public*, 40 A.B.A.J. 31, 31–32 (1954)).

resonates with academic accounts of judicial legitimacy.³¹ In his 2018 book, Richard Fallon, Jr., offers a useful synthesis of the literature by identifying several key definitions of legitimacy, including “sociological legitimacy.”³² Sociological legitimacy rests on whether the public views the law and courts as worthy of respect and obedience.³³ Tom Tyler’s widely cited work on why litigants obey courts fits squarely within this definition of legitimacy.³⁴ Drawing on social psychology, Tyler argues that judicial legitimacy turns on litigants’ perceptions about the fairness of underlying procedures and is crucial to citizens’ willing compliance with the law.³⁵ Political scientists take a similar tack, rooting judicial legitimacy in favorable public opinion.³⁶

Martin Shapiro arrives at a comparable conclusion from a different angle.³⁷ He argues that the legitimacy of courts rests on a basic social logic—the “logic of the triad”—which holds that people naturally turn to third parties when they need help resolving disputes.³⁸ This triadic relationship, however, is inherently unstable, because it collapses into a two-against-one in the eyes of the loser as soon as the court rules. To ameliorate this problem—for it can never be eliminated and thus the legitimacy of the courts is always somewhat tenuous—judges must maintain their reputations as neutral arbiters of the law in the eyes of the public. These parallel conceptions of sociological legitimacy underscore the link between cultivating public opinion and enhancing the legal system, which provides a scholarly foundation for our reading of Rule 6.

To summarize, the Model Rules (and Code) not only set forth what lawyers *must* do to avoid sanction, but also point to what they *should* do as members of a profession

31. See LEGITIMACY DILEMMA, *supra* note 17, at 2240 (collecting authority and offering a thoughtful review of the legitimacy literature).

32. RICHARD FALLON, JR., LAW AND THE LEGITIMACY OF THE SUPREME COURT (2018). In his analysis, Fallon identifies two additional types of legitimacy: moral and legal legitimacy. Moral legitimacy is a normative concept and hinges on whether the public should respect and obey the courts; Fallon offers Nazi Germany as a paradigmatic example of an illegitimate regime. *Id.* at 21, 24. Legal legitimacy centers on the quality of the courts’ opinions and reasoning, concentrating on whether its behavior is consistent with accepted norms and practices of legal decision-making. *Id.* at 35–36. See also STEVEN BURTON, JUDGING IN GOOD FAITH (1992) (arguing that legitimacy rests of judges applying open-ended laws using “good faith” interpretations of legal principles); and JASON WHITEHEAD, JUDGING JUDGES: VALUES AND THE RULE OF LAW (2014) (providing an ethnographic analysis of “good faith” judging); see generally LIEF CARTER & THOMAS BURKE, REASON IN LAW (2016) (discussing the elements of “good” legal reasoning). Sociological, moral, and legal legitimacy can sometimes conflict, which further complicates the discussion. So, when a court adjusts its legal decisions to garner public support, it may be sacrificing some legal legitimacy to gain sociological legitimacy. See *Legitimacy Dilemma*, *supra* note 17, at 2254. According to some, Chief Justice Roberts’ vote in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), provides a recent example, as Roberts allegedly changed his vote and upheld Obamacare to protect the Court’s public image. See JOAN BUSKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIME OF CHIEF JUSTICE JOHN ROBERTS, 221–22, 233–48 (2019) (arguing that Roberts switched his vote); but see *Legitimacy Dilemma*, *supra* note 17, at 2254–55, nn.57 & 58 (expressing doubt and collecting authority). Fortunately, this article need not resolve these conceptual tensions or empirical debates.

33. FALLON, *supra* note 32, at 21.

34. TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

35. *Id.* at 40–68. See also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & L. 283, 284 (2003); Tom R. Tyler, *Evaluating Consensual Models of Governance: Legitimacy-Based Law*, 61 NOMOS 257, 260 (2019).

36. See generally *The Legitimacy of the Supreme Court*, *supra* note 17, at 205–06 (providing an overview of the field).

37. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

38. *Id.* at 1–2.

uniquely qualified to educate the public (and lawmakers) about the law.³⁹ Any interpretation of these aspirational rules must be mindful that lawyers have limited time for pro bono services. Nevertheless, we contend Rule 6 should be read broadly to call on lawyers and their professional organizations to vigorously respond to tort tales and protect the tort system's standing in the eyes of the public. This broad interpretation of Rule 6 is consistent with scholarly understandings of sociological legitimacy as well as the open-ended language of the Model Rules and Code.⁴⁰ Again, lawyers need not embellish the tort system's benefits or create a universe of "alternative facts." Rather, lawyers should use their expertise to promote a balanced account of the system and seek reforms designed to target specific, well-established problems.

III. WHY SHOULD LAWYERS CARE ABOUT TORT TALES?

It is one thing to acknowledge that, in an ideal world, lawyers should respond to tort tales; it is another to say that, in the real world, this should be given priority. Put differently, why should lawyers care enough about tort tales to spend precious time responding to them? Stories are just stories, right? In a word, no. Stories are central to how we learn about the world, and a story's framing can shape how people process information, think about issues, and develop affective responses to them.⁴¹ Of course, stories can take many forms, and tort tales represent a particular type of narrative. Tort tales are dramatic, negative, and framed *episodically*, meaning that they use personalized vignettes to illustrate complex issues, as opposed to *thematically*, meaning stories that convey complex issues using statistical, historical, or other contextual information.⁴² For example, reporting on inflation by describing a family's struggles to pay their grocery and gas bills would be an episodically framed story. By contrast, using the rise in the consumer price index to report on inflation would be thematic framing. At the most general level, episodic framing focuses attention on selected aspects of multifaceted events and places them in a narrow field of meaning.⁴³

Problems emerge when this field of meaning is slanted, and tort tales can tilt perceptions in several ways. First, tort tales can distort public perceptions by getting facts wrong about a case or the tort system, or omitting important details or context. These

39. See MODEL CODE OF PRO. RESP. EC 8-1, EC 8-7 (AM. BAR ASS'N 1969); MODEL RULE 6.1, *supra* note 19.

40. See rules cited *supra* note 39.

41. See generally Dietram Scheufele, *Framing as a Theory of Media Effects*, 49 J. COMM'N 103 (1999) (describing how framing differs from other media effects, such as priming and agenda-setting).

42. See generally Shanto Iyengar, *Framing Responsibility for Political Issues: The Case of Poverty*, 12 POL. BEHAV. 19 (1991).

43. See, e.g., Iyengar, *supra* note 42 at 21–23 (developing a framework of narrative framing that includes two primary types of narrative frames: episodic and thematic); Shanto Iyengar, *Speaking of Values: The Framing of American Politics*, 3 FORUM 1, 4–7 (2005) (arguing that highlighting certain political values is a form of framing); Kimberly Gross, *Framing Persuasive Appeals: Episodic and Thematic Framing, Emotional Response, and Policy Opinion*, 29 POL. PSYCH. 169, 177–83 (2008) (arguing that episodic and thematic frames can lead people to have different affective responses); Lene Aarøe, *Investigating Frame Strength: The Case of Episodic and Thematic Frames*, 28 POL. COMM'N 207, 208–12 (describing the conditions by which episodic or thematic frames can more powerfully affect someone); and Porismita Borah, *Conceptual Issues in Framing: A Systematic Examination of a Decade's Literature*, 61 J. COMM'N 246, 255–57 (describing the results of a meta-analysis of the political communication literature on framing).

errors, of course, are not mutually exclusive. As noted at the outset, coverage of the McDonald's coffee case often managed to misreport key facts and omit crucial context.⁴⁴

Second, attention-grabbing stories like the McDonald's case can have disproportionate effects on public understanding of the tort system as a whole.⁴⁵ The reason stems from the "availability heuristic": a cognitive rule of thumb in which people infer that the ease of recalling past events reflects their actual likelihood.⁴⁶ The more dramatic and shocking an event, the more likely people will believe it will happen. A standard example involves air travel. Simply reading an account of an airplane crash to someone undermines their assessments of air travel safety. Under this logic, vivid tort tales will negatively affect the public's view of the tort system, as people will likely infer that these easy-to-remember "horror stories" are indicative of the system as a whole.

For these reasons, tort tales risk biasing public perceptions about the law and how people feel about legal processes.⁴⁷ Tort tales also provide ammunition for corporate interests that seek to enact blanket tort reforms that cut off access to the courts regardless of the merits of individual claims (as opposed to, for example, seeking targeted reforms aimed at controlling frivolous lawsuits, or streamlining cumbersome administrative procedures).⁴⁸ Finally, negativity towards the tort system and tort claimants in general

44. See discussion *supra* Part I.

45. Daniel Bailis & Robert MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 L. & HUM. BEHAV. 419, 427 (1996) (contending that, among other distortions, median and mean jury awards are considerably overrepresented by media).

46. See Daniel Kahneman & Amos Tversky, *Prospect Theory: Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 284–89 (1979) (describing how people underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341, 345 (1984) (arguing that people overweigh the potential occurrence of improbable events).

47. See, e.g., W. LANCE BENNETT, *NEWS: THE POLITICS OF ILLUSION* (10th ed. 2016) (arguing that distorted media coverage can have deleterious effects on how people understand policymaking) (hereinafter *THE POLITICS OF ILLUSION*); W. LANCE BENNETT ET AL., *WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA* (2007) (arguing that political reporting that is contingent on access can lead journalists toward deeply flawed conclusions); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007) (describing a psychological model for understanding how frames affect public opinion); Dennis Chong & James N. Druckman, *Dynamic Public Opinion: Communication Effects Over Time*, 104 AM. POL. SCI. REV. 663, 664 (2010) (arguing that researchers must be aware of temporal dynamics when trying to assess the impact of framed information); Gross, *supra* note 43, at 170; Iyengar, *supra* note 42, at 23; and Aarøe, *supra* note 43, at 208–12. See also Michael McCann & William Haltom, *Framing the Food Fights: How Mass Media Constructs and Constricts Public Interest Litigation* (Center for the Study of Law and Society Bag Lunch Speaker Series, 2004), escholarship.org/uc/item/2rc29425; *DISTORTING THE LAW*, *supra* note 2, at 1–5 (discussing how repeated stories shape our collective sense of "common sense" about the court system).

48. See generally Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777 (1995) (proposing a new regime for determining pain and suffering in jury awards); Bailis & MacCoun, *supra* note 45, at 427; Steven Garber & Anthony Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 L. & SOC'Y REV. 93, 121–22 (1999) (arguing that verdicts for defendants in automotive product liability cases went unreported by newspapers); Neil Feigenson & Daniel Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCH. PUB. POL'Y & L. 444, 474–76 (2001) (describing the interplay of media coverage, perception of risk, and public policy in the context of air bag regulation and finding that skewed reporting affected damage awards in a hypothetical tort suit against a car manufacturer); Laura Beth Nielson & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and the Litigation Crisis*, 15 STAN. L. & POL'Y REV. 237, 257–63 (2004) (arguing that media coverage of employment discrimination law is biased and serves to reinforce inaccuracies about it); Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539 (2006) (describing the distortive effects of media reporting that tends to primarily focus on large jury awards); and STEVEN DANIELS & JOANNE

may bias jurors and limit their willingness to recognize claims.⁴⁹

IV. ARE TORT TALES SO WRONG?

An obvious rejoinder is that tort tales are not *all* wrong. The American tort system is costly, unpredictable, and inefficient.⁵⁰ If tort tales accurately capture some key aspects of the system, why set the record straight?

As any lawyer knows, telling only part of a story can be quite misleading. Given their episodic framing, tort tales inherently focus attention on individual disputes. This narrow framing obscures dynamics that might place the tort system's admitted costs, inefficiencies, and unpredictability in a different light. For example, a story about a large verdict in a single case, standing alone, fails to consider its ripple effects. While the literature on the deterrence value of tort law is far from definitive, scholars have found that the "fertile fear of litigation" has stimulated significant organizational change in areas ranging from police misconduct and sexual harassment to wheelchair access.⁵¹ Similarly, episodic framing tends to overlook how reliance on litigation may stem from the provision of limited social benefits. Even asbestos litigation—which has come to represent many of the worst excesses of the American tort system—had its roots (at least in part) in the inadequacy of workers' compensation programs.⁵² These programs were designed to cover traumatic injuries, like broken arms and legs, and not slowly-manifesting occupational diseases, like asbestosis and mesothelioma.⁵³

These points matter. It is one thing if a handful of plaintiffs are winning the "litigation lottery" while others suffer;⁵⁴ it is quite another if the fertile fear of litigation creates beneficial "radiating effects" beyond individual cases.⁵⁵ Similarly, people

MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE (2015) (arguing that tort reform efforts, particularly in Texas, have thwarted plaintiffs' access to the full power of the law).

49. Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 85–87 (arguing that jurors can be swayed by popular perceptions of the tort system).

50. See generally ADVERSARIAL LEGALISM, *supra* note 20, at 26–29 (relying on dozens of comparative studies that show American litigation is often too slow and costly for ordinary claimants to use and too unpredictable for organizations to plan for); JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM (2011) (describing the costs and delays associated with asbestos litigation) (hereinafter DUST-UP).

51. Compare ADVERSARIAL LEGALISM, *supra* note 20, at 166–71 (offering a mostly critical overview of the mixed evidence on deterrence); with CHARLES EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (2009) (describing how the "fertile fear of litigation" has prompted local governments to change their practices governing police misconduct, sexual harassment, and playground safety) (hereinafter MAKING RIGHTS REAL); Jeb Barnes & Thomas Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 L. & SOC'Y REV. 493, 515 (2006) (describing how perceived threats of litigation correspond to more effective organizational responses to the Americans with Disability Act's access requirements); and Jeb Barnes & Thomas Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 L. & SOC'Y REV. 167, 170–71 (2012) (detailing organizational variables that shape levels of organizational responses to the ADA's access requirements and the threat of litigation).

52. DUST-UP, *supra* note 50, at 79–91.

53. *Id.* at 20–21.

54. See JEFFREY O'CONNELL, THE LITIGATION LOTTERY (1979); PHILLIP HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (2011) (both sharply criticizing the excesses of litigation, especially the tort system).

55. See MAKING RIGHTS REAL, *supra* note 51; CARL BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2001) (cataloguing the positive benefits of

“flocking” to the courts to “cash in” is one narrative; people turning to the courts because they have little recourse to adequate social benefit programs and healthcare, like Stella Liebeck, is entirely different.⁵⁶

In sum, tort tales illustrate some well-established pathologies of the tort system that need to be addressed. Questionable claims, erratic decisions, delays, and costly proceedings have arguably created a system that manages to be too expensive and slow for many ordinary plaintiffs to use, and too unpredictable for businesses to plan for or insure against.⁵⁷ The inherent costs and complexity of the system, moreover, do not fall evenly. It is the “repeat players”—typically savvy, affluent organizations—who are best poised to absorb the costs of the system (or pass them on to consumers) and capitalize on its complexities at the expense of ordinary litigants.⁵⁸ Yet, tort tales are one-sided by definition. Even Robert Kagan, who is generally critical of the tort system, acknowledges what he calls the “two faces” of American-style litigation, which includes a beneficial side.⁵⁹ Reading Rule 6 broadly encourages lawyers and their professional associations—which are generally obligated to improve the legal system and protect its reputation—to bring this holistic picture to the public and make sure that policy dialogue on tort reform reflects our best understanding of how the system works in practice.⁶⁰

V. ARE TORT TALES PERVASIVE?

The need for practitioners to respond to tort tales is a function, at least in part, of the overall quality of media coverage of the system. After all, if tort tales were few and far

litigation); and Marc Galanter, *Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 117–42 (Keith Boyum & Lynn Mather eds., 1983) (coining the term “radiating effects” and discussing the ways in which individual cases can have influence beyond the parties to the suit).

56. See Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 L. & SOC. INQUIRY 5, 7, 16–17 (2009) (arguing how placing asbestos litigation in historical context changes its normative implications) (hereinafter *In Defense of Asbestos Tort Litigation*).

57. ADVERSARIAL LEGALISM, *supra* note 20, at 160–74 (providing a detailed overview of the costs and inefficiency of the tort system).

58. See Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (hypothesizing that “repeat players” have systematic advantages over “one shotters” in civil litigation); John Coffee, *Class Wars: The Dilemma of Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (describing how sophisticated actors transformed complex rules governing class actions into a tool favoring large corporate defendants); BURT KRITZER & SUSAN SILBEY, *IN LITIGATION: DO THE HAVES STILL COME OUT AHEAD* (2003) (collecting essays on the structural advantages of repeat players); Shauhin Talesh, *The Privatization of Public Rights: How Manufacturers Construct the Meaning of Consumer Protection Laws*, 43 L. & SOC’Y REV. 527 (2009); Shauhin Talesh, *Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements*, 37 L. & POL’Y 1 (2015) (both Talesh articles detail the ways in which well-organized interests leverage their organizational advantages to bend complex rules and procedures in their favor); Jeb Barnes & Thomas Burke, *Untangling the Concept of Adversarial Legalism*, 16 ANN. REV. L. & SOC. SCI. 473, 482 (2020) (describing the uneven distribution of costs of adversarial legalism); and NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014) (arguing how a commitment to rights and litigation among liberals following World War II, aided by the subsequent emergence of “law and order” politics and the so-called War on Drugs, resulted in mass incarceration).

59. ADVERSARIAL LEGALISM, *supra* note 20, at 22–24 (describing how even asbestos litigation, which has become a paradigmatic example of the cost, inefficiency, and unpredictability of the tort system, offered benefits by raising public consciousness of the problem and holding heedless asbestos companies accountable); see also *In Defense of Asbestos Tort Litigation*, *supra* note 56.

60. See MODEL RULE 6.1, *supra* note 19.

between or contradicted by the bulk of coverage, responding to them would be less urgent.⁶¹ The concern about the potential impact of repetitive coverage has roots in political communication literature's arguments about "priming effects:" the effect of prior stimuli on the perception of subsequent events.⁶² From this vantage, consistently positive coverage of the tort system might increase skepticism towards tort tales, making them more likely to be seen as the exception, not the rule. Pervasive critical coverage would do the opposite and reinforce the negative themes of tort tales, making people more likely to believe overly-negative portrayals of the system.

So, we need to place tort tales in context and understand how they unfold within the wider coverage of the tort system. As discussed below, the data are discouraging. Waves of studies and new data show that media accounts of the tort system tend to be inaccurate, incomplete, and systematically biased.⁶³ This skewed coverage explicitly underlines many of the themes of tort tales, underscoring the obligation of lawyers and their professional associations to offer more balanced accounts of the tort system to the public.⁶⁴

A. The First Wave of Scholarship: Identifying Broad Patterns of (Mis-)Coverage

As political rhetoric intensified over tort reform, media coverage of the tort system also ramped up. In the shadow of this greater interest, scholars probed the extent to which media provided an accurate picture of the tort system. They found that media missed the mark on even the most basic attributes of the tort system. Daniel Bailis and Robert MacCoun, for instance, published one of the first widely cited studies in this genre, comparing aggregate media reporting on the tort system with the findings of academic studies.⁶⁵ As seen in Table 1 below, the numbers are not even close. Mass media underreported the amount of auto accident cases by 58 percent while overreporting the amount of products liability and medical malpractice suits by 45 percent and 18 percent, respectively.⁶⁶ Meanwhile, media coverage tended to overstate plaintiff victories—media coverage suggested plaintiffs won 85 percent of the time—compared to academic studies in which researchers found that plaintiffs won in 48 percent of cases.⁶⁷ Similarly, media exaggerated plaintiff damage awards, with the mean figure in media reporting being over seven times that in academic studies.⁶⁸ The reporting of the median damage award was even more skewed: over seventeen-times higher in media coverage than in academic

61. See James N. Druckman et al., *Competing Rhetoric Over Time: Frames Versus Cues*, 72 J. POL. 1 (2010) (using experiments to argue that frames encountered early in the opinion formation process have outsized influence, even after respondents are presented with alternative frames).

62. Shanto Iyengar et al., *Experimental Demonstrations of the "Not-So-Minimal" Consequences of Television News Programs*, 77 AM. POL. SCI. REV. 848, 855–56 (1982) (using experiments to demonstrate that viewers of the news afford more weight to prominently featured stories); Jon A. Krosnick & Donald R. Kinder, *Altering the Foundations of Support for the President Through Priming*, 84 AM. POL. SCI. REV. 497, 509–11 (1990). See also Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 224–27 (2016) (using multiple methods to show how one-sided media coverage of Supreme Court decisions help shift public opinion).

63. Bailis & MacCoun, *supra* note 45.

64. *Id.*

65. *Id.*

66. *Infra* Table 1.

67. *Id.*

68. *Id.*

studies.⁶⁹

Table 1. Media Portrayals of Basic Attributes of the Tort System.
(adapted by authors from Bailis and MacCoun 1996)

Source	Type of Case	Plaintiff Win Rates	Plaintiff Awards (000)
Academic Studies	Auto: (60%) Products: (4%) Medical: (7%)	48%	Mean: 802 Median: 93.5
Media Sample	Auto: (2%) Products: (49%) Medical: (25%)	85%	Mean: 5,861 Median: 1,750
Difference	Auto: -58% Products: +45% Medical: +18%	+37	Mean: +5,059 Median: +1,656.5

B. The Second Wave: Recurring Themes of Tort Tales

About a decade later, William Haltom and Michael McCann published their influential work, *Distorting the Law*.⁷⁰ They built on the first wave of studies by carefully analyzing the specific content of a large sample of articles in multiple news outlets and providing in-depth case studies of high-profile tort tales.⁷¹ They found that media coverage was highly negative and, like the McDonald's coffee case, tended to emphasize the fault of individual claimants as opposed to defendants, or other factors that might place litigation in better perspective.⁷²

Perhaps most importantly for this analysis, Haltom and McCann found the persistence of several recurring negative themes about the tort system.⁷³ As seen in Table 2 below, 952 general articles included 1,001 critiques of the civil litigation system. The most common themes were that litigation costs too much, lawyers are greedy, damages are soaring, too much litigation is hurting American society, and lawsuits tend to be frivolous. In looking at these data, Haltom and McCann conclude that, while the specific causes of this negative coverage may be difficult to pinpoint, "we are certain . . . that *these national newspapers have widely circulated tort reform themes*,"⁷⁴ thereby reinforcing the gist of high-profile tort tales.

69. *Id.*

70. DISTORTING THE LAW, *supra* note 2; William Haltom et al., *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 L. & SOC. INQUIRY 288 (2013) (arguing that media discourse surrounding tort litigation against Big Tobacco affected its framing, leading people to criminalize Big Tobacco's actions).

71. See generally DISTORTING THE LAW, *supra* note 2.

72. *Id.*

73. *Id.* at 171.

74. *Id.* (emphasis in original).

Table 2. Claims about Legal System in General Articles (n=952).
(reproduced from Haltom and McCann 2004)

Rank	Claims	Frequency
1	Litigation costs too much	256
2	Lawyers are greedy	193
3	Civil damages have soared	134
4	Too much litigation injures society	105
5	Civil suits tend to be frivolous	78
6	Citizens too often act like victims	67
7	Defendants are often ripped off	49
8	Too many lawyers bedevil U.S.	27
9	Jurors tend to be incompetent or biased	27
10	Americans are too litigious	22
11	Litigants are greedy	17
12	Judges tend to be incompetent or biased	16
13	An irrational "tort tax" burdens U.S.	10
	Total	1,001

C. *The Third Wave: New Data on Patterns of Media Coverage Across Injury Compensation Systems*

Our work (first published in a peer-reviewed pilot study and replicated here using new data) adds to the literature by comparing media coverage of litigation with other modes of injury compensation.⁷⁵ These comparative data afford greater leverage on a crucial issue: namely, whether media is *particularly* prone to negative anecdotal coverage when reporting on the courts, or whether tort tale coverage is just another example of reporting conventions and practices that shape coverage of all injury compensation regimes, regardless of institutional setting.⁷⁶

In addition to bringing media coverage of the tort system into sharper focus, understanding comparative media coverage has important practical implications for our argument. If stories on injury compensation regimes vary, this suggests negative and anecdotal coverage is not inevitable. By contrast, if coverage of *all* types of injury compensation regimes skews negative and anecdotal, then media biases in this area are more likely to be structural. Changing deeply embedded reporting practices that shape all coverage of injury compensation policy is a daunting task. Variation in coverage of injury compensation policy, by contrast, suggests opportunities for a variety of narratives within any conventions and structural constraints. As a result, a comparative analysis may not only help us understand the contours of coverage but also reveal opportunities for shifting coverage.

To assess whether media coverage of the courts is particularly negative, we analyzed over 1,200 articles from the *New York Times*, *Washington Post*, and *Wall Street Journal*

75. See *Framed?*, *supra* note 16, at 1061, 1066 (arguing that closely-matched policy areas allow researchers to study the counterfactual of a highly litigious policy area); see also JEB BARNES & THOMAS BURKE, HOW POLICY MAKES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION 4–5 (2015). All data for this article and our pilot project are available from the authors upon request.

76. See *Framed?*, *supra* note 16, at 1061.

on asbestos litigation and the Black Lung Injury Program, which is a federally administered no-fault trust fund.⁷⁷ As discussed below, both regimes addressed comparable issues and were subject to very similar critiques by experts.⁷⁸ Under these circumstances, we would expect roughly equivalent coverage. Yet, at least in our sample, media were significantly more likely to provide negative, episodic coverage of litigation than its bureaucratic alternative. Moreover, our earlier study included a closer reading of a sample of stories from the *New York Times*, whose editorial board's liberal political orientation would seem to favor positive, or at least more balanced, coverage of the tort system. Yet the thematic stories in the *Times* tended to echo the themes of tort tale coverage. These stories failed to mention why claimants turned to the courts or the courts' efforts to urge Congress to replace litigation with more efficient injury compensation regimes.⁷⁹

i. Research Design and Case Selection: Overview

Because this study replicates the large-N analysis of our earlier pilot study using new data, they share the same research design and methods.⁸⁰ Nevertheless, it is important to reiterate the details of our design and methods to understand our findings and how they add to prior scholarship.⁸¹ The gist is that we use the logic of experiments to explore whether shifts in institutional settings influence the framing and tone of media coverage. As discussed in our earlier study, the logic of experiments informed two key aspects of our research design.⁸² First, in implementing experiments, researchers often match subjects on background characteristics prior to randomly assigning the treatment. The idea is that randomization is not perfect in practice and matching subjects prior to assignment can help ensure the creation of similar control and treatment groups.⁸³ So, we sought injury compensation policies that were relatively well-matched.⁸⁴ Second, experiments often rely on randomization to help account for confounding factors that might explain any observed differences between the control and treatment groups. Applying this logic to our observational study, we sought injury compensation policies where a “historical accident,” a quirk in circumstance unrelated to media coverage, directed the policy areas towards different institutional paths, one involving litigation and the other involving a social insurance program.⁸⁵ Of course, the orderly logic of experiments never seamlessly applies

77. Our pilot study examined media coverage from a single outlet, the *New York Times*, and the total sample was 392 articles. The sample in the present study includes three-times the number of news sources and over three-times the number of articles (1,221 versus 392).

78. *Infra* Part V.C.2.

79. *Infra* Part V.C.6.

80. *Framed?*, *supra* note 16.

81. The following sections draw heavily from our earlier work. For the original discussion of our design and methods, *see id.* at 1062–74. For more on experimental research design, *see* THAD DUNNING, NATURAL EXPERIMENTS IN THE SOCIAL SCIENCES (2012).

82. *See Framed?*, *supra* note 16, at 1062.

83. Kosuke Imai et al., *Misunderstandings among Experimentalists and Observationalists about Causal Inference*, 171 J. ROYAL STAT. SOC'Y 486 (Series A, No. 2) (2008) (arguing that multiple tools exist to allow researchers to explore causal inference).

84. *See Framed?*, *supra* note 16, at 1062.

85. *Id.* at 1065.

to the messy world of observational data. Accordingly, we added a number of controls in our statistical analyses in an attempt to account for features of coverage that might influence framing and tone of the stories in our sample, regardless of the degree to which the underlying policy relied on litigation to compensate injury victims.⁸⁶

ii. Case Selection Part I: Matching

The first step of our research design was identifying cases that highlight the effect of institutional settings on media coverage. We began with the conventions that govern how journalists put together stories. Since at least 1917, reporters have relied on the “Five Ws and One H” method of information gathering and storytelling.⁸⁷ This method instructs journalists to consider the who, what, when, where, why, and how of a story.⁸⁸ These issues provide journalists an analytic lens for bringing complex, newsworthy events into focus and translating them into articles. Using this framework, we sought cases that featured similar who, what, where, when, and why, but differed on *how* victims receive compensation (e.g., the institutional setting of injury compensation).⁸⁹ The idea is that stories with the same who, what, where, when and why should yield similar media coverage, unless the *how* matters.⁹⁰ As noted above, no two cases will align perfectly in practice, but the asbestos and black lung injury compensation cases are reasonably well matched.⁹¹

86. *Infra* Part V.C.4.

87. *See Framed?*, *supra* note 16, at 1066.

88. *See* JAMES G. STOVALL, *WEB JOURNALISM: PRACTICE AND PROMISE OF A NEW MEDIUM* (2004) (contending that the basic building blocks of a well-reported story are similar across media types); STEPHANIE CRAFT & CHARLES N. DAVIS, *PRINCIPLES OF AMERICAN JOURNALISM: AN INTRODUCTION* (2016) (describing the evolution of reporting conventions in the United States); RENÉ CAPPON, *ASSOCIATED PRESS GUIDE TO NEWS WRITING: THE RESOURCE FOR PROFESSIONAL JOURNALISTS* (1999) (describing the conventions of news reporting); and BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* (2014) (exploring modern journalism and the declining trust that Americans have in it).

89. *See Framed?*, *supra* note 16, at 1068–69.

90. *Id.* at 1068.

91. *Id.* at 1069; *see infra* Table 3.

Table 3. Who, What, When, Why, Where and How of Black Lung and Asbestos Injury Compensation. (from Barnes and Hevron 2018)

Question	Issue(s)	Coal	Asbestos
Who?	Key Initial Political Stakeholders	Workers, Single Industry, and its Insurers	Initially similar, eventually multiple industries
What?	Public Health Issues	Widespread occupational disease with long latency periods from dust exposure	Same
	Science	Initially contested but signature disease(s) eventually recognized	Same
	Compensation issue	Explosion of unanticipated claims	Same
	Program Operation	Criticized by experts as costly, inefficient, and featuring bogus claims	Same
When?	Critical Juncture for Policy Formulation	Late 1960s/Early 1970s	Same
	Critical Juncture for Policy Retrenchment	Early 1980s	Early 1980s and 2000s
Why?	Reason for seeking new remedy	Inadequacy of workers' compensation programs (the problem of "drift")	Same
Where?	Location of claiming	Regionally concentrated (in coal mining states)	Initially regionally concentrated, eventually national
How?	Mode of Compensation	<i>Bureaucratic legalism</i>	<i>Adversarial legalism</i>

a. Who are the key stakeholders?

Injury compensation policies typically pit claimants seeking compensation against payors, who are asked to foot the bill.⁹² Black lung and asbestos feature similar stakeholders: claimants, their lawyers, and unions, versus claimants' employers, insurance companies, and defense counsel. Initially, both cases involved single industries.⁹³ In black lung, coal mine owners and operators were central. In asbestos litigation, the asbestos crisis began as a "one-company" problem: Johns-Manville and a small number of asbestos mining and manufacturing companies.⁹⁴ This changed after Manville and many other original defendants filed for bankruptcy under Chapter 11 in the 1980s, and asbestos litigation spread to thousands of companies, including at least one company from 75 of the

92. See *Framed?*, *supra* note 3, at 1067.

93. *Id.*

94. *Id.* at 1067–68.

83 categories of economic activity in the Standard Industrial Classification, which seeks to capture all types of businesses within the American economy.⁹⁵

b. What happened?

Black lung and asbestos injury compensation are multifaceted policies that encompass significant public health, scientific, compensation, and administrative issues.⁹⁶ Here, the stories line up well.⁹⁷ First, as public health issues, both cases involve occupational diseases related to dust exposure, and both feature illnesses with long latency periods among workers in politically well-connected industries. Second, both share some scientific similarities in that the diagnosis of the underlying illnesses and the scope of the health risks were initially contested but, over time, scientists identified several “signature” diseases associated with the products—black lung disease, or pneumoconiosis, in the coal case and asbestosis and mesothelioma in asbestos.⁹⁸

Third, from an administrative perspective, both feature “woodwork” effects, as the recognition of new remedies attracted swarms of unexpected claims.⁹⁹ Not surprisingly, surges of unanticipated claims produced fiscal and operational crises.¹⁰⁰ Finally, experts criticized both policies on very similar terms. The federal government published at least twelve reports from 1972 to 2009 faulting the black lung program.¹⁰¹ The reports repeatedly found inefficient administration, fraudulent claiming practices, and inaccurate cost projections.¹⁰² Beginning in 1983, the RAND Institute for Civil Justice published seven reports about asbestos litigation.¹⁰³ These reports raised similar concerns about

95. See DUST-UP, *supra* note 50, at 26.

96. See *Framed?*, *supra* note 16, at 1068.

97. *Id.*

98. *Id.*

99. See Mitchell LaPlante, *The Woodwork Effect in Medicaid Long-Term Services and Supports*, 25 J. OF AGING & SOC. POL’Y. 161, 163–64 (2013) (contending that after programs are expanded an increase in enrollment often follows); see also *Framed?*, *supra* note 16, at 1068.

100. *Framed?*, *supra* note 16, at 1068.

101. *Id.*

102. In 1973, the Social Security Administration published the first federal report on the functioning of the black lung program. Several more reports before 2004 were written by the General Accounting Office (which was later re-named the Government Accountability Office). See generally U.S. DEP’T. LAB., BLACK LUNG PROGRAM STATISTICS: CLAIMS FILED UNDER PART C OF THE BLACK LUNG BENEFITS ACT: 2001–2016 (2016); U.S. GEN. ACCT. OFF., HRD-77-77, REPORT TO THE SENATE COMMITTEE ON HUMAN RESOURCES, PROGRAM TO PAY BLACK LUNG BENEFITS TO COAL MINERS AND THEIR SURVIVORS—IMPROVEMENTS ARE NEEDED (1977); U.S. GEN. ACCT. OFF., HRD-80-81, REPORT TO THE CONGRESS OF THE UNITED STATES, LEGISLATION TO ALLOW BLACK LUNG BENEFITS TO BE AWARDED WITHOUT ADEQUATE EVIDENCE OF DISABILITY (1980); U.S. GOV. ACCOUNTABILITY OFF., GAO-10-7, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON HEALTH CARE, COMMITTEE ON FINANCE, U.S. SENATE, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS’ ABILITY TO PURSUE CLAIMS (2009); and U.S. SOC. SEC. ADMIN., B-164031(4), REPORT TO CONGRESS, ACHIEVEMENTS, ADMINISTRATIVE PROBLEMS, AND COSTS IN PAYING BLACK LUNG BENEFITS TO COAL MINERS AND THEIR WIDOWS (1972).

103. See James S. Kakalik et al., *Costs of Asbestos Litigation*, RAND INST. FOR CIV. JUST. (1983) (estimating the enormous costs of asbestos litigation, including \$10 billion for the insurance industry, and an increasing caseload); James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses*, RAND INST. FOR CIV. JUST. (1984) (describing how the average asbestos case involved almost twenty defendants); Deborah R. Hensler, *Asbestos Litigation in the United States: A Brief Overview*, RAND INST. FOR CIV. JUST. (1991) (describing the enormous costs of handling asbestos-related injury compensation in the courts); and Deborah R. Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, RAND INST. FOR CIV. JUST. (2001)

asbestos litigation, pointing to its costs and delays, inconsistent and unpredictable jury awards, and surging claims, including questionable claims by the “worried well.”¹⁰⁴

c. When did it happen?

Both stories featured similar ebbs and flows over time. For our purposes, they begin in the late 1960s, when miners and asbestos workers started turning to state workers’ compensation programs to address occupational illness.¹⁰⁵ These programs—which were intended for workers with traumatic injuries like broken arms and legs, rather than slowly manifesting occupational diseases like pneumoconiosis, asbestosis, and mesothelioma—offered limited, and in some cases no, compensation to workers.¹⁰⁶ Both cases reached critical turning points in the late 1960s, when workers sought new remedies beyond workers compensation programs, and then again in the early 1980s during a period of policy retrenchment after a surge of unanticipated claims threatened to overwhelm these remedies.¹⁰⁷ Both asbestos and black lung cases continue to generate waves of new claims.¹⁰⁸

d. Why did it happen?

Similar institutional dynamics drove these stories. When workers sought to adapt existing workers compensation programs to meet their needs, businesses and their insurance companies vigorously resisted.¹⁰⁹ They questioned the legitimacy of the claims, doubted the science, and argued that workers’ injuries stemmed from smoking and not dust exposure in the workplace.¹¹⁰ The businesses and insurance companies insisted that the workers’ claims were barred under the existing statutes of limitations.¹¹¹ The result was a classic example of “drift”—the failure of existing programs to adapt to new risks, resulting in significant gaps in the social safety net—which Jacob Hacker calls the most pervasive institutional dynamic in contemporary U.S. social policy.¹¹²

(describing at 33 that asbestos injury claimants receive a small fraction of claim value) (hereinafter *A New Look at an Old Issue*).

104. See sources cited *supra* note 103.

105. Jeb Barnes, *Why Asbestos Litigation Won’t Go Away: Because Asbestos Won’t Go Away*, THE CONVERSATION (2019), <https://theconversation.com/why-asbestos-litigation-wont-go-away-because-asbestos-wont-go-away-110085>.

106. See *id.*

107. Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 248 (2004).

108. See Howard Berkes & Theo Balcomb, *Advanced Black Lung Cases Surge in Appalachia*, NATIONAL PUBLIC RADIO (2016) (arguing that actual cases of black lung-related illness may be ten times greater than official reports); Barnes, *supra* note 105 (describing the recent round of litigation against Johnson & Johnson related to asbestos in the talc in its baby powder and the underlying dynamics of why asbestos litigation persists).

109. See DUST-UP, *supra* note 50, at 20–21; BARNES & BURKE, *supra* note 75, at 118–21 (describing how limitations in compensation from social insurance programs encourage claimants to turn to the courts); see also Jeb Barnes & Thomas Burke, *With the Coronavirus, When Government Stumbles, Litigation Will Step In*, THE CONVERSATION (2020) (discussing how gaps in the social safety net generally encourage litigation).

110. See sources cited *supra* note 109.

111. *Id.*

112. Hacker, *supra* note 107, at 246; see also Jeb Barnes, *Debunking the Myth of Legislative Gridlock as Laws and Policy are Made in the Nation’s Capital*, THE CONVERSATION (2021) (discussing drift in general and using the failure to change the federal minimum wage as an example); Warren Snead, *The Supreme Court as an Agent*

e. Where did it happen?

The geographic locations—the “where” of these stories—are not as well matched as other dimensions. At the outset, some similarities did exist. Coal miners are geographically concentrated in tightly knit communities; in 2020, five states accounted for 71 percent of total U.S. coal production.¹¹³ Many asbestos claimants were also initially geographically concentrated in a few states (such as Texas and California) and regions (such as the “Golden Triangle” area along the Sabine River on the border of Texas and Louisiana).¹¹⁴ As a result, the first wave of asbestos litigation centered in ten federal and state courts.¹¹⁵ Over time, however, as asbestos litigation expanded, the asbestos crisis became truly national in scope.¹¹⁶

f. How did it happen?

The “how” of these cases starkly differs. As elaborated below, faced with limited options within existing state programs, coal miners successfully lobbied for a federal compensation program to address their concerns.¹¹⁷ This program, the Federal Black Lung Program, illustrates what Robert Kagan calls “bureaucratic legalism.”¹¹⁸ It is a no-fault, social insurance program—funded by a surcharge on coal production and administered by the federal government—that awards benefits according to detailed payment schedules.¹¹⁹ Conversely, asbestos workers and their allies have been unable to convince Congress to create a federal administrative program to address the asbestos crisis, despite many attempts and the urgings of experts, the Supreme Court, several congressional leaders, and presidents.¹²⁰ Instead, asbestos workers successfully turned to the tort system, a classic example of “adversarial legalism,” in which parties and their lawyers seek damages from specific companies through privately funded lawsuits.¹²¹

iii. Case Selection Part II: Selection Mechanism

Matching makes intuitive sense. Aligning cases on a variety of key dimensions and allowing one factor to vary naturally facilitates comparison. However, the logic of experiments pushes us to do more than line up cases. It also requires consideration of the

of Policy Drift: The Case of the NLRA, AM. POL. SCI. REV. 1–14 (2022) (discussing the dynamics of drift in labor law) (hereinafter *The Supreme Court as an Agent*).

113. 2019 *Total Annual Coal Production by State*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/todayinenergy/detail.php?id=44536#:~:text=Wyoming%20produces%20more%20coal%20than,relatively%20smaller%20%25%20in%202019> (last visited Oct. 19, 2022).

114. See BARNES & BURKE, *supra* note 75, at 118 (describing the “Golden Triangle” region).

115. See Deborah R. Hensler et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts*, RAND INST. FOR CIV. JUST. (1985) (arguing that federal courts in California, Massachusetts, New Jersey, eastern Pennsylvania and eastern Texas, as well as state courts in Alameda (California), Los Angeles, Middlesex (New Jersey), Philadelphia, and San Francisco saw the majority of asbestos cases).

116. *A New Look at an Old Issue*, *supra* note 103, at 11.

117. DUST-UP, *supra* note 50, at 21.

118. ADVERSARIAL LEGALISM, *supra* note 20, at 12–13 (defining bureaucratic legalism).

119. DUST-UP, *supra* note 50, at 21.

120. *Id.* at 50–52.

121. ADVERSARIAL LEGALISM, *supra* note 20, at 13–14 (defining bureaucratic and adversarial legalism) and 148–52 (discussing asbestos litigation as a classic example of adversarial legalism).

selection mechanism or data generation process—meaning how cases are “assigned” to different “treatments.” In laboratory or survey experiments, the data generation process is straightforward: researchers randomly assign subjects to treatment and control groups.¹²² Yet, real life is not a lab-controlled experiment; we cannot randomly assign injury compensation policies to different types of compensation regimes. We can, however, think about how history “assigned” the black lung case to bureaucratic legalism and the asbestos case to adversarial legalism. As noted above, these stories began in the late 1960s, as both miners and asbestos workers started to seek compensation from state workers’ compensation programs.¹²³ These programs proved inadequate in both cases.¹²⁴ At this point, the story features a critical contingency that steered our cases along different institutional paths—one leading to bureaucratic legalism, the other to adversarial legalism. Under the law, workers’ compensation programs generally bar workers from suing their employers for workplace injuries. As a result, neither miners nor asbestos workers could file tort suits against their employers.¹²⁵ In the case of black lung disease, this rule effectively barred litigation, because mining companies happened to own the mines, which “provided” the coal dust that made workers sick.¹²⁶

Faced with limited workers’ compensation programs and blocked from the courts, coal miners were forced to seek legislative relief.¹²⁷ They responded by organizing, forming local organizations and conducting wildcat strikes. Their first legislative victory was in the late 1960s when West Virginia passed major workers’ compensation reforms. Building on this momentum, miners, their unions, and key allies like Ralph Nader then turned their attention to Washington, D.C., where, aided by publicity from the Farmington mine disaster in 1968, they lobbied federal lawmakers. Their efforts paid off in 1969 when Congress created the Federal Black Lung Program.¹²⁸ At the time of its creation, the Black Lung Program was passed as a temporary measure, but Congress expanded it in the 1970s.¹²⁹ It survived budget cuts during the Reagan Administration and continues today with more than 25,000 claimants. It remains the subject of intense local political interest

122. DONALD P. GREEN, SOCIAL SCIENCE EXPERIMENTS: A HANDS-ON INTRODUCTION 44–50 (2022).

123. See discussion *supra* Part V.C.c.

124. See Hacker *supra* note 107, at 246; Jeb Barnes, *Courts and the Puzzle of Institutional Stability and Change*, 61 POL. RSCH. Q. 636, 639–44 (2008) (discussing how litigation fits within the dynamics of institutional change); and DUST-UP, *supra* note 50, at 20–21. See also *The Supreme Court as an Agent*, *supra* note 112, at 1–14 (discussing how the Supreme Court can facilitate drift by reading laws narrowly).

125. *Framed?*, *supra* note 16, at 1071.

126. It should be noted that this legal requirement is not ironclad. There was some tort litigation associated with coal exposure. Some employees of Johns-Manville in California, the leading asbestos manufacturer, were able to circumvent the ban against suing employers directly for workplace injuries. But the Johns-Manville case was unusual in this regard. Looking at the cases overall, adversarial legalism predominates asbestos litigation while bureaucratic legalism characterizes black lung litigation. BARNES & BURKE, *supra* note 75; *Framed?*, *supra* note 16.

127. See generally ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER (1998) (offering a general history of the black lung crisis); BARBARA ELLEN SMITH, DIGGING OUR OWN GRAVES: COAL MINERS AND THE STRUGGLE OVER BLACK LUNG DISEASE (1987) (offering a general history of the black lung crisis); and JOHN R. NELSON, JR., BLACK LUNG: A STUDY OF DISABILITY COMPENSATION POLICY FORMATION (1985) (providing a detailed legislative history of the passage of the black lung program and its reform).

128. *Framed?*, *supra* note 16, at 1071.

129. *Id.*; see generally NELSON, *supra* note 127.

in places like West Virginia.¹³⁰

History played out differently in the asbestos case. Whereas coal miners were effectively blocked from using the courts, many workers exposed to asbestos were not, because third-party companies—not their employers—supplied the products that caused their illnesses.¹³¹ This happenstance opened the door to litigation against these suppliers, which creative lawyers exploited by developing novel tort claims to hold manufacturers and mining companies strictly liable for damages caused by asbestos products sold in a “defective condition unreasonably dangerous to the user or consumer” without adequate warnings.¹³²

Once asbestos workers enjoyed their initial success in the tort system, trial lawyers nationwide began to take notice.¹³³ In a flurry of case filings, they consolidated their legal victories, amassed evidence and practical experience, and began to establish an infrastructure for assembling huge inventories of claims.¹³⁴ In response to soaring litigation, corporate defendants countered with their own complex litigation strategies—adapting the tools of Chapter 11 bankruptcy, settlement, and, for a time, class action lawsuits to aggregate claims and cap their liability on a company-by-company basis.¹³⁵ This produced an ironic result: the more individual companies successfully limited their liability through innovative litigation strategies, the more asbestos litigation spread overall as aggressive plaintiffs’ lawyers devised novel theories to target new companies in the supply chain.¹³⁶

From a research design perspective, a quirk in circumstance—whether employers or third-party contractors happened to be the source of the toxic dust that made workers sick—lies at the root of the institutional settings of our cases.¹³⁷ Returning to the logic of experiments, while not a random assignment of a treatment, this type of historical accident is unlikely to cause any difference in media coverage between the cases.¹³⁸ Thus, this feature of the cases, combined with their alignment, offers some additional analytic leverage in making comparisons between them.¹³⁹

Of course, the argument that these two cases have useful research design features

130. Kellie Lunney, *Black Lung Benefits for Miners Included in Manchin Spending Deal*, BLOOMBERG TAX (July 28, 2022), <https://news.bloombergtax.com/daily-tax-report/black-lung-benefits-for-miners-included-in-manchin-spending-deal> (a provision to extend the excise tax on coal production that funds the program was included in the last-minute reconciliation deal between Senate Democrats in 2022).

131. *Framed?*, *supra* note 16, at 1072.

132. *Id.* The critical provision in the Restatement of Torts (Second) states: “One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer,” even if the seller “has exercised all possible care in the preparation and sale of his product.” RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965). The Restatement went on to explain, in comment k, that unavoidably unsafe products would not be considered unreasonably dangerous as long as they were “properly prepared, and accompanied by proper directions and warning.” *Id.* at cmt. k.

133. *See generally Framed?*, *supra* note 16.

134. *Id.* at 1072.

135. *Id.*

136. *See* RICHARD NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007) (providing a comprehensive overview of mass tort litigation); *see also* BARNES & BURKE, *supra* note 75, at 123–26.

137. *See generally* NAGAREDA, *supra* note 136.

138. *Id.*

139. *Id.*

does not imply that they are representative of injury compensation regimes in the United States; they are not.¹⁴⁰ It is difficult to imagine any small number of cases representing such a diverse population.¹⁴¹ Instead, we selected these cases because they provide a promising basis for assessing whether the “how” of injury compensation policy shapes media coverage, even when policies share similar who, what, why and when characteristics.¹⁴²

iv. Additional Controls

In a truly randomized experiment, all potential factors that might explain the difference across the treatment groups are “controlled for” by the experimental design, typically the random assignment of the treatment.¹⁴³ However, in an observational study that uses the logic of experiments like ours, it is important to account for factors that might contribute to differences in media coverage other than the underlying structure of the policies.¹⁴⁴ Accordingly, we added a number of controls related to media coverage as part of our large-N statistical analysis and as a complement to the other features of our research design that are rooted in experimental logic.¹⁴⁵

Specifically, one concern was that journalists’ reliance on different types of sources might affect the framing of articles, regardless of the institutional structure of the underlying policy.¹⁴⁶ Experts, for example, seem likely to emphasize statistical and historical information about policies, irrespective of whether the policies feature adversarial or bureaucratic legalism.¹⁴⁷ If so, articles that use experts as primary sources might skew towards thematic framing, also regardless of whether the policies rely on bureaucratic or adversarial legalism.¹⁴⁸ By contrast, claimants might stress their particular experiences with the policy, providing information that might encourage anecdotes and episodic framing.¹⁴⁹ Similarly, pro-payor groups (such as businesses, insurers, trade associations, and defense counsel) may underscore the policies’ flaws, so that stories quoting them are more negative.¹⁵⁰ Accordingly, we controlled for expert, pro-payor, and pro-claimant sources (victims and organized trial attorney interests, for example) as well as cases where the identity of the source was unclear.¹⁵¹

Extending this logic, we accounted for other aspects of coverage that could influence

140. *Framed?*, *supra* note 16, at 1072.

141. *Id.*; *see also* sources cited *supra* note 127.

142. In the language of research design, we have intentionally traded greater potential internal validity for less external validity (or generalizability). Some may still wonder if there is something inherent about asbestos that connects it to litigation. If this were so, we would observe other countries addressing asbestos injury compensation through lawsuits. They do not. Instead, they rely on bureaucratic legal systems that are closer to the Black Lung Program. *See* ANDREA BOGGIO, COMPENSATING ASBESTOS VICTIMS: LAW AND THE DARK SIDE OF INDUSTRIALIZATION (2013); ADVERSARIAL LEGALISM, *supra* note 20, at 147–48.

143. *Framed?*, *supra* note 16, at 1072.

144. *Id.*

145. *Id.* at 1073.

146. *Id.*

147. *Id.*

148. *Framed?*, *supra* note 16, at 1073.

149. *Id.*

150. *Id.*

151. *Id.*

the framing of articles independently of a policy's institutional setting.¹⁵² First, our sample includes articles from three major newspapers: the *New York Times*, *Wall Street Journal*, and *Washington Post*.¹⁵³ It is possible that each outlet has its own style and practices that might influence the framing of stories. To account for this possibility (and other unobserved attributes of the papers that might affect coverage), we created dummy variables for each newspaper.¹⁵⁴ Second, wire services (including United Press International, Associated Press, and Reuters) tended to write shorter stories, which may be less likely to provide detailed, anecdotal coverage, so we controlled for them.¹⁵⁵ Third, we coded for front-page stories on the grounds that high-profile articles might be written differently and given additional space (and thus have more room for anecdotes).¹⁵⁶ Fourth, we controlled for non-news coverage (op-eds, editorials, and letters to the editor) on the theory that this type of article tends to emphasize general commentary and opinion, rather than reporting specific anecdotes or data on the policies.¹⁵⁷ Finally, we were concerned about temporal dynamics due to the ever-changing mass media business, the evolution of both policy areas, and the shifting salience of the different regimes over time. Accordingly, we added a number of variables related to time, including the year in sample, year in sample squared, and year in sample cubed to account for the possibility of a variety of temporal dynamics, and tested for robustness across models that controlled for time differently.

v. Data and Measures

As noted above, we analyzed newspaper articles from 1969 to the present about asbestos litigation and the black lung program in the *New York Times*, *Washington Post*, and *Wall Street Journal*, which are prominent and ideologically diverse newspapers.¹⁵⁸ We identified our sample from these sources in steps. We began by casting our net widely with broad searches of the LexisNexis Academic and ProQuest databases using the following terms: “asbestos litigation,” “asbestos lawsuits,” “asbestos claims,” “asbestos compensation,” “black lung,” “black lung disability fund,” “black lung AND disability fund,” “black lung AND legislation,” “Federal Coal Mine Health and Safety Act of 1969,” and “Black Lung Benefits Act.” Knowing that these searches might yield redundant and irrelevant articles, we next carefully read each article to make sure they belonged in the

152. See generally HERBERT GANS, *DECIDING WHAT'S NEWS* (1979) (conveying elements of newsworthiness); Jeffrey S. Peake, *Presidents and Front-Page News: How America's Newspapers Cover the Bush Administration*, 12 INT'L J. OF PRESS/POLITICS 4 (2007) (emphasizing that articles appearing on the front page of newspapers are more newsworthy).

153. *Framed?*, *supra* note 16, at 1073.

154. *Id.*

155. *Id.*

156. See Lutz Erbring et al., *Front-Page News and Real-World Cues: A New Look at Agenda-Setting by the Media*, 24 AM. J. OF POL. SCI. 1, 21–25 (1980) (contending that newspaper consumers use a story's placement on the front page as a cue in their assessment of the story's importance).

157. See Russell J. Dalton et al., *Partisan Cues and the Media: Information Flows in the 1992 Presidential Election*, 92 AM. POL. SCI. REV. 1, 112–14 (1992) (arguing that non-news stories comprise an important part of the multiple messages that mass media provide about a campaign).

158. We stress that these data are counts of coverage types; they distinguish articles based on their content but not on how influential they might be in public discourse.

sample. This two-step process yielded 1,221 distinct stories on the policy regimes—392 from the *Times*, 286 from the *Post*, and 543 from the *Journal*.

Table 4 lists our main variables and measures. The primary explanatory variable was the type of policy represented by the black lung program (a bureaucratic legal regime) and asbestos litigation (an adversarial legal regime).¹⁵⁹ To test for robustness, we ran the analysis using alternative measures, including a more refined measure of the regimes that disaggregated stories on the black lung program, collective litigation processes (such as Chapter 11 reorganizations, class actions, mass settlements, claims facilities, and multidistrict litigation), and individual asbestos lawsuits.

159. See ADVERSARIAL LEGALISM, *supra* note 20, at 3–21 (describing the general concepts and characteristics of bureaucratic and adversarial legalism).

Table 4. Summary of Main Variables and Measures.
(from Barnes and Hevron 2018)

Variable Name	Measure
Negative Episodic Coverage	(0,1) article was framed episodically and featured at least three standard critiques
Asbestos Litigation	(0,1) subject of article asbestos tort litigation
Regime type	(0,.5, 1) subject of article (black lung injury compensation, collective asbestos litigation, individual asbestos tort litigation)
New York Times	(0,1) article appears in <i>The New York Times</i>
Wall Street Journal	(0,1) article appears in <i>Wall Street Journal</i>
Washington Post	(0,1) article appears in <i>Washington Post</i>
Claimant first quote	(0,1) article's first quote from a pro-claimant source, such as victims' group or plaintiff's lawyer
Payor first quote	(0,1) article's first quote from a pro-payor source, such as defendant company representative or defense lawyer
Expert first quote	(0,1) article's first quote from an expert source, such as law professor or doctor
Unclear first quote	(0,1) article's first quote from a source whose identity is not clear based on a Google search
Wire services	(0,1) article written by wire service (Associated Press, UPI, Bloomberg News, or Reuters)
Front page	(0,1) article appeared on the front page
News	(0,1) article was a news story (as compared to being an op-ed, editorial, or letter to the editor)
Number of critiques	(0 to 5) the number of times an article features the following themes: (a) the system is costly, (b) the system is inefficient, (c) claims are growing, (d) claims tend to be unmeritorious, and (e) decision-makers are incompetent
Year in sample	1 for 1969, 2 for 1970, etc.
Year squared	1 ² , 2 ² , etc.
Year cubed	1 ³ , 2 ³ , etc.

Our main dependent variable was the presence of “tort tale” media coverage—articles that were both highly negative in tone and episodically framed.¹⁶⁰ We accounted for this type of media coverage in three steps. The first was coding the frequency of what

160. See DISTORTING THE LAW, *supra* note 2, at 147–82.

we call the “standard critiques” of injury compensation policies. These critiques were derived from Haltom and McCann’s content analysis and the themes in the expert reports on the black lung program and asbestos litigation.¹⁶¹ They are: (1) the system is costly, (2) the system is inefficient, (3) claims are growing, (4) claims tend to be unmeritorious, and (5) decision makers are incompetent.¹⁶²

The second step was determining whether the article was framed episodically or thematically based on a holistic assessment of the article’s content. Recall that *episodic* frames “present an issue by offering a specific example, case study, or event-oriented report (e.g., covering unemployment by presenting a story on the plight of a particular unemployed person).”¹⁶³ *Thematic* frames “place issues into broader context” often using statistics, “e.g., covering unemployment by reporting on the latest unemployment figures and offering commentary by economists or public officials on unemployment’s impact on the economy.”¹⁶⁴ We measured the framing of media coverage in several ways, including a five-point Likert-type scale reflecting the degree of episodic coverage (zero for fully thematic, one for primarily thematic, two for mixed, three for primarily episodic and four for fully episodic), a three-point Likert-type scale (negative one for thematic, zero for mixed and one for episodic), and a simple dummy variable to indicate whether the story was primarily or completely episodic (meaning that it received a three or higher on our five-point scale).¹⁶⁵ Because our results were consistent across these measures, we present the simplest measure—the dichotomous dummy variable—for ease of interpretation. The final step involved combining our measures of the frequency of the standard critiques and type of framing to identify *negative episodic coverage*, which we defined as primarily or completely episodic coverage featuring three or more standard critiques.¹⁶⁶

vi. Findings

Consistent with our pilot study, asbestos litigation coverage is significantly more episodic and negative than its black lung counterparts.¹⁶⁷ Table 5 offers a snapshot of key differences using descriptive statistics. Despite the substantive similarities of the cases, coverage starkly differed. Eighty percent of asbestos litigation coverage was episodic,

161. *Id.*

162. *Id.* (providing a detailed content analysis of coverage of the civil litigation system and finding that critiques of the tort system appearing in mass media usually take one of five specific forms).

163. See Gross, *supra* note 43, at 171 (using the aforementioned example to illustrate the differences between episodic and thematic frames).

164. *Id.*

165. The vast majority of cases (over 95 percent) were framed primarily or completely episodically or thematically. Only a handful of cases were coded as “mixed.” Excluding these cases did not change our results.

166. To assess the reliability of our measures, we separately coded a random sample of 10 percent of our cases and compared the results using a Kappa Test—a standard statistical analysis of whether intersubjective consensus among coders is likely to be a matter of chance. A Kappa score of .80 or higher is generally considered to indicate reliable measures. See Richard J. Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 *BIOMETRICS* 1, 165 (1977). The Kappa score for all variables in our analysis was .85 or higher, suggesting highly reliable measures. Our codebook is available upon request, and offers additional information about the coding of the standard critiques and narrative frames as well as the reliability of our measures.

167. See *infra* Table 5.

while thirty-three percent of black lung coverage was episodic.¹⁶⁸ On average, coverage of both policy areas was negative, as each featured at least one critique; this is to be expected given the expert critiques of both regimes. Asbestos coverage was the most negative, averaging 2.21 standard critiques per article, while black lung coverage averaged 1.27 critiques.¹⁶⁹ Finally, coverage of asbestos litigation was more than four times more likely to feature highly negative episodic stories than black lung coverage (23.5 percent versus 4.9 percent).¹⁷⁰ All of these differences are statistically significant beyond the .01 level.

Table 5. Differences in Framing and Tone of Coverage (n=1,221).

Feature	Asbestos Litigation	Black Lung	Differences in Means
Percent Episodic	80%	33%	47%***
Average No. of Critiques	2.21 (of 5)	1.27 (of 5)	.94***
Percent Highly Negative Episodic	23.5%	4.9%	18.6%***

Digging deeper, coverage of asbestos litigation was statistically more likely to feature highly negative episodic coverage, as indicated by anecdotal stories that include three or more standard critiques.¹⁷¹ Table 6 reports our findings across a variety of model specifications. Model 1 is our full model, which examines how coverage shifts as we move from black lung to asbestos litigation coverage with all of the controls. As seen in the Model 1 column, asbestos litigation coverage was positively and significantly related to highly critical episodic coverage beyond the .01 level, including the control variables listed in Table 4 above.¹⁷² Holding the other values at their means, the predicted probability of negative episodic coverage grows from less than five percent to nearly twenty percent as coverage shifts from black lung to asbestos tort litigation.¹⁷³ These findings were robust across different ways of controlling for time (Models 2 and 3) as well as when we differentiated among coverage of the black lung trust, collective asbestos litigation, and individual asbestos suits (Model 4).¹⁷⁴ We ran additional robustness checks using the number of critiques (zero to five) as the dependent variable and, again, found nearly identical results.

168. *Id.*

169. *Id.*

170. *Id.*

171. *See infra* Table 6.

172. *Id.*

173. *Infra* Figure 1.

174. *Id.*

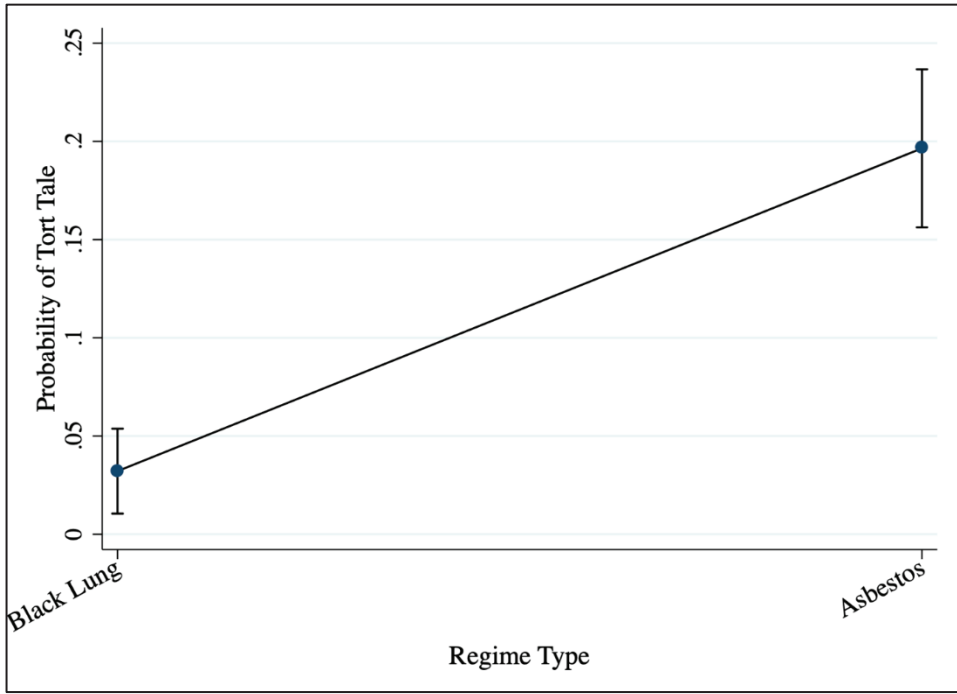
Table 6. Logit Regression of Highly Negative Episodic Coverage (n=1,221).

VARIABLES	Model 1 Coefficient (S.E.)	Model 2 Coefficient (S.E.)	Model 3 Coefficient (S.E.)	Model 4 Coefficient (S.E.)
Asbestos Litigation	1.997*** (0.407)	2.222*** (0.432)	2.364*** (0.370)	-----
Regime Types	-----	-----	-----	1.437*** (0.192)
First Quote - Claimant	1.314*** (0.270)	1.352*** (0.271)	1.353*** (0.271)	3.808*** (1.011)
First Quote - Payor	0.804*** (0.247)	0.809*** (0.247)	0.813*** (0.247)	2.454*** (0.600)
First Quote - Expert	0.862*** (0.237)	0.883*** (0.237)	0.887*** (0.237)	2.446*** (0.571)
First Quote - Unclear	0.726** (0.363)	0.716** (0.362)	0.715** (0.361)	2.338** (0.845)
New York Times	0.0425 (0.246)	0.0515 (0.246)	0.0527 (0.246)	1.236 (0.300)
Wall Street Journal	-0.571** (0.226)	-0.550** (0.225)	-0.548** (0.225)	0.711 (0.157)
Wire Services	-1.074*** (0.346)	-1.107*** (0.346)	-1.088*** (0.345)	0.309*** (0.106)
Front Page	0.287 (0.255)	0.314 (0.255)	0.318 (0.255)	1.287 (0.323)
News Story	-0.551** (0.246)	-0.598** (0.246)	-0.585** (0.245)	0.591** (0.144)
Year in Sample	0.253** (0.124)	0.0227 (0.0504)	-0.00712 (0.00898)	1.528*** (0.179)
(Year in Sample) ²	-0.0102** (0.00464)	-0.000561 (0.000932)	--	0.985*** (0.00444)
(Year in Sample) ³	0.000122** (5.60e-05)	--	--	1.000*** (5.53e-05)
Constant	-4.796*** (0.951)	-3.392*** (0.531)	-3.201*** (0.418)	0.00398*** (0.00379)

*** p<0.01, ** p<0.05, * p<0.1, Percent correctly predicted= 78%, Model 1 LR chi² (13) = 151.54, Model 1 Prob. > chi² = .0000

Note: Washington Post is the omitted category in variables related to the sources of coverage.

Figure 1. Predicted Probabilities Tort Tale Coverage by Subject
(with 95% Confidence Intervals).



Not all coverage in our sample was episodic. Twenty-eight percent of the total sample was thematic, which could have provided critical context. Yet, the thematic coverage of individual asbestos tort litigation tended to reinforce the negative tone of the episodic coverage. Indeed, it was typically *more* negative than the episodic coverage, averaging 3.04 standard critiques compared to 2.04 in the episodic articles. This difference was statistically significant beyond the .01 level.¹⁷⁵

To get a better sense of the texture of this coverage, we examined the thematic and episodic asbestos litigation stories in the *New York Times* in our initial study, reading them holistically to understand their recurring narratives. We chose the *Times* because it has been recognized as an agenda-setter among news organizations, a phenomenon dubbed the “New York Times Effect” and, given its liberal editorial bent, would seem to be more likely to provide relatively positive thematic coverage.¹⁷⁶

Although more broadly framed than the episodic stories, which focused on single cases, the vast majority of the *Times*’ thematic coverage failed to place litigation or the asbestos crisis within a general institutional or policy perspective.¹⁷⁷ For example, ninety-

175. *Id.*

176. See Guy Golan, *Inter-Media Agenda Setting and Global News Coverage*, 7 JOURNALISM STUD. 323, 324–27 (2006) (demonstrating that the *New York Times* tends to drive other media outlets’ decisions about what topics to cover); Marilyn Roberts et al., *Agenda Setting and Issue Salience Online*, 29 COMM’N RSCH. 452, 452–54 (arguing that the *New York Times* affects discourse on online message boards); and Maxwell McCombs, *A Look at Agenda-Setting: Past, Present, and Future*, 6 JOURNALISM STUD. 543, 546 (2005) (conveying that the *New York Times* continues to play an important agenda-setting role).

177. See THE POLITICS OF ILLUSION, *supra* note 47, at 36–37 (criticizing political coverage for too often being

six percent of the *Times*' thematic coverage of individual asbestos lawsuits concentrated on the administrative operations of asbestos litigation or the politics of specific asbestos litigation reform proposals (as opposed to the tort system more generally or broader issues related to injury compensation). Finally, we found no discussion of the courts' attempts to encourage Congress to replace litigation with a comprehensive injury compensation program, even though several Supreme Court cases prominently called for congressional action.¹⁷⁸

A small handful of *Times* articles did connect asbestos litigation to broader concerns, but they tended to reinforce the overall negative bent of the coverage. Only one article, for example, discussed asbestos litigation as part of the wider issue of compensating workers for occupational diseases.¹⁷⁹ One could easily imagine an article that described how asbestos workers were forced to litigate given the inadequacy of workers' compensation programs and Congress' repeated failure to act; this article did not. Instead, it emphasized how "cases go on for years, legal expenses are high, jury awards run to six figures and no one is satisfied with the results."¹⁸⁰

One might argue that it is unrealistic to expect sophisticated institutional accounts from newspapers. Yet more nuanced interpretations of the asbestos crisis were available, but ignored. By the mid-1980s, for example, reporters could have drawn on books by fellow journalists on how inadequate workers' compensation and healthcare benefits forced asbestos workers to turn to the courts.¹⁸¹ Alternatively, they could have looked to academic studies that explain why litigation often springs up through gaps in the U.S. social safety net.¹⁸² There were also comparative studies of workers exposed to asbestos in countries like the Netherlands, whose workers suffered five to ten times the rate of asbestos-related disease than American workers, and yet filed hardly any lawsuits because they received relatively generous medical and unemployment benefits from the state.¹⁸³

In short, decades of mass media studies suggest that tort tales like the McDonald's

devoid of context).

178. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (stating that asbestos litigation "defies customary judicial administration and calls for national legislation.").

179. Tamar Lewin, *Man-Made Hazards Pose More than a Medical Problem*, N.Y. TIMES at B7 (August 29, 1982).

180. *Id.*

181. See, e.g., PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1986) (describing how Clarence Borel, the plaintiff in the first federal decision that recognized products liability claims against asbestos manufacturers for failure to warn workers about the dangers of its products, was forced to rely on the tort system after receiving meager workers' compensation benefits for his asbestos-related injuries); MICHAEL BOWKER, *FATAL DECEPTION: THE TERRIFYING TRUE STORY OF HOW ASBESTOS IS KILLING AMERICA* (2003) (describing the trajectory of asbestos tort litigation in the U.S.).

182. See *ADVERSARIAL LEGALISM*, *supra* note 20, at 152–65 (explaining cross-national differences in the interrelationship between tort law and social insurance programs); see also Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LAW ON SAFETY AND INNOVATION* (P. Huber and R. Litan eds., 1991) (arguing that many countries have similar or even broader tort laws as a formal matter but that other countries provide greater social benefits, which contributes to lesser reliance on the courts).

183. See HARRIET VINKE & TON WILTHAGEN, *THE NON-MOBILIZATION OF LAW BY ASBESTOS VICTIMS IN THE NETHERLANDS: SOCIAL INSURANCE VERSUS TORT-BASED COMPENSATION* (1992); DUST-UP, *supra* note 50, at 27 (demonstrating that in the Netherlands, a nation with a strong social safety net, the rate of asbestos litigation rate was negligible); and *ADVERSARIAL LEGALISM*, *supra* note 20, at 22–24.

coffee case are part of a pattern.¹⁸⁴ Earlier analyses show that coverage of the tort system is often inaccurate and one-sided, reflecting negative themes favored by tort reformers.¹⁸⁵ The result is a considerable gap between media coverage and leading academic studies.¹⁸⁶ Both our earlier study and this replication analysis (using new data) add that media accounts of tort litigation are particularly skewed, as stories about asbestos litigation are significantly more episodic and critical than stories of the federal black lung program, despite their substantive similarities.¹⁸⁷ Even the thematic coverage of asbestos litigation in the *New York Times* seemed conceptually narrow and negative, missing how tort fits within the broader story of social policy “drift,” and the role of litigation in our patchy welfare state.¹⁸⁸ The silver lining is that coverage of injury compensation regimes varies. This variation suggests that tort tale coverage is not preordained and that opportunities exist for shifting discourse.

VI. A LOOMING LEGITIMACY CRISIS?

Just as tort tales unfold within broader coverage of the tort system, media coverage of the tort system coincides with coverage of the Supreme Court, which tends to be highly prominent and may engender additional priming effects. There are a number of ways that media coverage can prime people’s view of the Court, including reporting on specific decisions, coverage of the politics surrounding the Court’s makeup, and stories on the legal system as a whole.¹⁸⁹ For example, research suggests that media reporting on specific decisions can influence people’s overall view of the Court by suggesting that partisanship, rather than sound legal reasoning, motivates justices.¹⁹⁰ Similarly, cues from overtly partisan sources about specific decisions can shape people’s view of the Court.¹⁹¹ Scholars have also found that highly partisan confirmation battles can tarnish the Court’s image.¹⁹² It may be that media coverage of the politics surrounding the Court can have a comparable effect on the public’s view of the tort system more generally. Under these circumstances, current controversies over the legitimacy of the Supreme Court and calls for its reform

184. *The Legitimacy of the Supreme Court*, *supra* note 17, at 214.

185. Bailis & MacCoun, *supra* note 45, at 419, 423–24.

186. *Id.* at 427.

187. *Framed?*, *supra* note 16, at 1082.

188. *Id.* at 1083–84.

189. Although priming studies have typically focused on how primes affect people’s views of individual politicians or candidates for office, research demonstrates that people’s views toward institutions can also be affected by priming. See David C. Kimball, *Priming Partisan Evaluations of Congress*, 31 LEGIS. STUD. Q. 63, 66 (2005); see also JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFORMATIONS: POSITIVITY THEORY AND THE JUDGMENT OF THE AMERICAN PEOPLE 7, 119 (2009).

190. Dino P. Christensen & David P. Glick, *Chief Justice Roberts’s Health Care Decision Disrobed: The Microfoundations of Supreme Court Legitimacy*, 59 AM. J. POL. SCI. 403, 405–06 (2008) (contending that nonlegalistic media coverage of the Supreme Court’s decision on the constitutionality of the Patient Protection and Affordable Care Act hurt perceptions of the Court’s legitimacy).

191. Tom S. Clark & Jonathan P. Kastellec, *Source Cues and Public Support for the Supreme Court*, 43 AM. POL. R. 504, 504, 507, 510–11 (2015) (arguing that partisan politicians are crucial in the shaping of public attitudes towards the Supreme Court); Miles T. Armaly, *Extra-judicial Actor Induced Change in Supreme Court Legitimacy*, 71 POL. RES. Q. 600, 606, 610 (2018) (contending that, in the mind of the public, the Supreme Court is not immune from criticisms of its legitimacy by elected politicians).

192. Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. 32, 33–35 (2018) (hereinafter *Has Trump Trumped?*).

reinforce the need to act now and challenge biased media accounts.¹⁹³

Whatever aspects of negative stories about the Supreme Court may reinforce tort tale coverage, there is no denying the spate of negative media coverage of the Supreme Court following partisan battles over filling judicial vacancies and controversial decisions in recent years. These battles have intensified both in frequency and acrimony—from the nomination of Merrick Garland to fill the seat vacated by Justice Antonin Scalia’s death and the confirmation hearings of Justice Brett Kavanaugh, to the eleventh-hour appointment and confirmation of Amy Coney Barrett to fill Justice Ruth Bader Ginsburg’s seat.¹⁹⁴ In the shadow of these events and the Court’s handing down of *Dobbs v. Jackson Women’s Health Organization*,¹⁹⁵ which overturned *Roe v. Wade*,¹⁹⁶ pundits on the left have argued that Justice Neil Gorsuch holds a stolen seat, as the Senate refused to give President Barack Obama’s nominee, Merrick Garland, a confirmation hearing despite the fact that the next presidential election was almost a year away.¹⁹⁷ Others argue that a number of justices, including Justices Thomas, Alito, Gorsuch, and Kavanaugh, are less legitimate because they were appointed by presidents and/or confirmed by a Senate that did not represent a majority of the populace.¹⁹⁸ The same logic applies to Justice Barrett. And this is only a partial list of challenges to the Court’s legitimacy.¹⁹⁹

These concerns extend beyond the chattering class. Numerous public officials have directly doubted the Court’s legitimacy.²⁰⁰ Eric Holder, President Obama’s former

193. Amelia Thomson-DeVeaux, *Why the Supreme Court’s Reputation Is At Stake*, FIFTYTHREE (Oct. 12, 2020, 6:00 AM) <https://fivethirtyeight.com/features/why-the-supreme-courts-reputation-is-at-stake/>; Andre P. Audette & Christopher L. Weaver, *Faith in the Court: Religious Out-Groups and the Perceived Legitimacy of Judicial Decisions*, 49 L. & SOC’Y REV. 999, 1000–01, 1003 (2015) (arguing that judge’s religious beliefs can affect public perceptions of judicial decision-making).

194. Thomson-DeVeaux, *supra* note 193.

195. 142 S. Ct. 2228 (2022).

196. 410 U.S. 113 (1973).

197. E.g., Editorial, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html>.

198. E.g., Michael Tomasky, *Supreme Court’s Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>.

199. See *Legitimacy Dilemma* and accompanying notes, *supra* note 17, at 2240–42 (discussing partisan controversy over filling judicial vacancies and other arguments questioning the Court’s legitimacy). See also Editorial, *The Supreme Court Isn’t Listening, and It’s No Secret Why*, N.Y. TIMES (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html> (arguing that the Supreme Court’s legitimacy “has been squandered in the service of partisan victories.”). Another area of concern is the Supreme Court’s increasing use of its so-called “shadow docket”—the issuing of orders without full briefing or arguments. William Baude, *Foreword: The Supreme Court’s Shadow Docket* 1–5, 12–25 (Pub. L. & Legal Theory, Working Paper No. 508, 2015), <https://bit.ly/3FhSprM>. Professor Stephen Vladeck noted that such orders are nothing new and often routine for such tasks as adjusting briefing schedules or allowing parties to file “friends of the Court” briefs. However, the Court has recently used the shadow docket for more than just addressing routine matters, such as granting “emergency relief” for implementing policies still pending judicial review, granting stays of execution, and granting injunctive relief to block local action when lower courts would not. Professor Vladeck argues,

[f]or a Court whose legitimacy depends largely on the public’s perception of its integrity, the growth of unseen, unsigned, and unexplained decisions that disrupt life for millions of Americans can only be a bad thing—and is reason enough for the Court to bring more of these rulings out of the proverbial and literal shadows.

Stephen I. Vladeck, *The Supreme Court Needs to Show its Work*, THE ATLANTIC (March 10, 2021, 9:35 AM), <https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238/>.

200. Justin Wise, *Holder: Supreme Court’s Legitimacy Can Be Questioned After Kavanaugh’s Confirmation*,

Attorney General, tweeted that “[w]ith the confirmation of Kavanaugh and the process that led to it, (and the treatment of Merrick Garland), the legitimacy of the Supreme Court can be justifiably questioned.”²⁰¹ Senators Feinstein, Blumenthal, and Markey have echoed these sentiments,²⁰² as has Justice Elena Kagan, who has expressed concern that a politically divided Court could erode its legitimacy.²⁰³ Jamie Crooks and Samir Deger-Sen, former law clerks for Justice Anthony Kennedy, have also sounded the alarm, arguing that the politicized confirmation process of Justice Barrett threatens the Court’s hard-earned respect among the public.²⁰⁴ Self-described “liberals” and “institutionalists,” they “worry that a large swath of the nation, told a Democrat cannot fill a vacancy in an election year but a Republican can, will dismiss the court as yet another partisan body.”²⁰⁵ Senator Elizabeth Warren argued that the Court “set a torch” to its own legitimacy by overturning *Roe v. Wade*.²⁰⁶

These criticisms are not confined to Democrats and liberals.²⁰⁷ In the run-up to the 2020 presidential election, in the period between Election Day and the inauguration of President Joseph Biden, the courts faced an onslaught of litigation from the Trump campaign challenging the election.²⁰⁸ Journalists speculated that Trump’s large number of appointments to the federal lower courts and last-minute appointment of Justice Barrett would tilt any challenges in his favor.²⁰⁹ However, the federal courts, including the Supreme Court and a number of Trump-appointed judges in the lower courts, repeatedly

THE HILL (Oct. 8, 2018, 8:03 AM), <https://thehill.com/homenews/administration/410356-holder-supreme-courts-legitimacy-can-be-questioned-after-kavanaugh/>; Peter Hasson, *Democrats Attack Supreme Court’s Legitimacy After Kavanaugh’s Confirmation*, DAILY CALLER (Oct. 6, 2018, 6:20 PM), <https://dailycaller.com/2018/10/06/democrats-supreme-court-illegitimate-kavanaugh/>; Sophie Tatum, *Justice Kagan Worries About “Legitimacy” of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM), <https://www.cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html>; Jamie Crooks & Samir Dager-Sen, Opinion, *We Were Supreme Court Clerks. Its Legitimacy is Now in Question*, N. Y. TIMES (Oct. 25, 2020), <https://nyti.ms/3Dz16Ou>.

201. Wise, *supra* note 200.

202. Hasson, *supra* note 200.

203. Tatum, *supra* note 200. Incidentally, recent experimental research has indicated that public comments from justices—such as Kagan’s “off-bench” rhetoric—can have a positive impact on people’s perceptions of the Court’s legitimacy. Logan Strother & Colin Glennon, *An Experimental Investigation of the Effect of Supreme Court Justices’ Public Rhetoric on Perceptions of Judicial Legitimacy*, 46 L. & SOC. INQUIRY 435, 436, 439, 450–51 (2019).

204. Crooks & Dager-Sen, *supra* note 200.

205. *Id.*

206. Edward Helmore & Ramon Antonio Vargas, “*They Set a Torch to It: Warren Says Court Lost Legitimacy with Roe Reversal*,” THE GUARDIAN (June 26, 2022, 1:35 PM), <https://www.theguardian.com/us-news/2022/jun/26/elizabeth-warren-democrats-question-supreme-court-legitimacy>.

207. Cameron Jenkins, *Trump Slams Supreme Court Decision to Throw Out Election Lawsuit*, THE HILL (Dec. 12, 2020, 8:52 AM), <https://thehill.com/homenews/administration/529940-trump-slams-supreme-court-decision-to-throw-out-election-lawsuit>; Daniel Politi, *Texas GOP Chair Allen West Suggests Secession After Supreme Court Shoots Down Election Lawsuit*, SLATE (Dec. 12, 2020, 10:10 AM), <https://slate.com/news-and-politics/2020/12/texas-gop-chair-allen-west-secession-supreme-court.html>.

208. Lauren Garretson & Frances Goins, *Current Litigation: U.S. Supreme Court Decisions*, AM. BAR ASS’N (April 30, 2021), https://www.americanbar.org/groups/public_interest/election_law/litigation/.

209. James Zimrin, Opinion, *Could Justice Amy Coney Barrett Deliver the Election to Trump?*, THE HILL (Oct. 26, 2020, 2:30 PM), <https://thehill.com/opinion/judiciary/522767-could-justice-amy-coney-barrett-deliver-the-election-to-trump>; Lisa Mascaro, *Barrett Confirmed a Supreme Court Justice in Partisan Vote*, ASSOC. PRESS (October 26, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07>.

rejected Republican challenges to the 2020 presidential election, including a high-profile case brought by Texas and other states challenging the results in a number of battleground states.²¹⁰ The Court may have bolstered its reputation for independence among some by standing up to the President and his Republican allies, but it did not escape the political fray.²¹¹ To the contrary, its ruling triggered an immediate partisan backlash from the right.²¹² President Trump reacted with disgust, weighing in on Twitter, “The Supreme Court really let us down. No Wisdom, No Courage!”²¹³ The head of the Republican Party in Texas at the time, Allen West, went further and called for his state to secede and “form a union of states that will abide by the constitution.”²¹⁴ Some journalists are anticipating similar types of fights in upcoming elections.²¹⁵

This questioning of the Court from both sides of the political aisle has been combined with calls for major reforms, including rethinking life tenure, stripping the Court’s jurisdiction, disobeying its decisions, and expanding its size to dilute the influence of recent appointees.²¹⁶ Professor Tara Leigh Grove explains:

For those who study the federal judiciary, this onslaught is jarring. Although the Supreme Court has been subject to attacks in the past, recent decades have been periods of relative calm. Indeed, many court-curbing measures—including court packing and disobeying court orders—have been off the table since the mid-twentieth century.²¹⁷

Some might dismiss all of this as “hot air”—part of today’s overheated rhetoric

210. Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html>; Jess Bravin & Deanna Paul, *Supreme Court Rejects Texas Challenge to Biden’s Victory in Presidential Election*, WALL ST. J. (Dec. 12, 2020, 12:23 AM), <https://www.wsj.com/articles/trump-campaign-loses-wisconsin-election-lawsuit-11607713668>; Masood Farivar, *Trump-Appointed Judges Balk at Efforts to Overturn the Election*, VOICE OF AM. (Dec. 2, 2020, 3:17 PM), <https://www.voanews.com/2020-usa-votes/trump-appointed-judges-balk-presidents-efforts-overturn-election>; William Cummings et al., *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 9:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

211. Todd Ruger, *Supreme Court Denies Trump Election Challenge*, ROLL CALL (December 11, 2020, 6:51 PM), <https://rollcall.com/2020/12/11/supreme-court-denies-trump-election-challenge/>; Anthony Zurcher, *US Supreme Court Rejects Trump-Backed Bid to Overturn Election*, BBC (December 12, 2020), <https://www.bbc.com/news/world-us-canada-55283024>.

212. Zurcher, *supra* note 211.

213. Jenkins, *supra* note 207.

214. Politi, *supra* note 207.

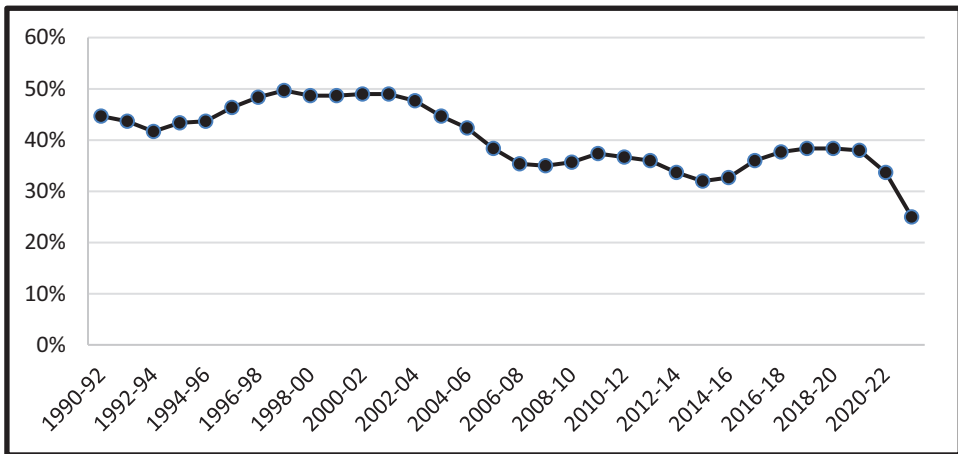
215. See, e.g., Noah Millman, Opinion, *Imagine It’s 2024, and Republicans are Declaring Trump President*, N.Y. TIMES, (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/opinion/trump-2024.html>; Barton Gellman, *Trump’s Next Coup Has Already Begun*, THE ATLANTIC (Dec. 9, 2021, 3:21 PM), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/>; Damon Linker, Opinion, *Trump 2024 Could Be American Democracy’s Zero Hour*, THE WEEK (Aug. 3, 2021), <https://theweek.com/donald-trump/1003257/trump-2024-stop-the-steal>.

216. LEGITIMACY DILEMMA, *supra* note 17, at 2240–42. See also Emily Bazelon, Opinion, *How to Fix the Supreme Court*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html> (collecting essays from legal experts on reforming the Court, including proposals to pack the Court, threaten Court packing, impose term limits on the justices, and establish a new court to resolve constitutional issues similar to other countries like Germany and France).

217. LEGITIMACY DILEMMA, *supra* note 17, at 2241 (citing Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467, 488–517 (2018)). Professor Grove currently holds the “Vinson & Elkins Chair in Law at the University of Texas School of Law,” and focuses much of her research on “the federal judiciary, interpretive theory, and the constitutional separation of powers.” Tara Grove, *Biography*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L. (2022), <https://law.utexas.edu/faculty/tara-grove/>.

among insiders—which the public ignores or does not take seriously. It is true that we must be careful in drawing causal arrows from pejorative media coverage of the courts to public attitudes. But some rigorous studies have tied accounts depicting the Court as politicized with diminished perceptions of its legitimacy.²¹⁸ Moreover, public confidence in the Court is declining.²¹⁹ Figure 2 tracks the percentage of Americans that have a “great deal” or “quite a lot” of confidence in the U.S. Supreme Court over time.²²⁰ The Figure provides running three-year averages from 1990 to 2022—as well as the most recent results from 2022—and shows a steady drop in confidence in the Court, reaching a historic low of 25% in 2022.²²¹

Figure 2. Percent with "Great Deal/Quite a Lot of Confidence" in the U.S. Supreme Court: Running Three-Year Averages 1990-2022 and 2022 from Gallup (compiled by authors from Jones 2022).



Certainly, the Justices themselves seem concerned.²²² Shortly before his retirement,

218. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 594–95 n.8, 612–15 (2017) (arguing that the appearance of being “politicized,” such as strategic behavior by judges, affects perceptions of legitimacy more than “principled” behavior—even if the principles are ideological); see also *Has Trump Trumped?*, *supra* note 192, at 35, 38–39 (arguing that criticisms of the court on legal grounds had much smaller effects than “perceptions that the Court’s decisions are politicized . . .”). The same scholars found that ideological disagreement with the Court’s decisions had only a minor effect on support for the Court. James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court’s Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 168–70 (2015).

219. Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Lows*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>.

220. See *infra* Figure 2.

221. *Id.* (data for this figure was collected from the first graph presented in the poll’s findings). The Gallup poll is not alone in finding a significant erosion of public confidence in the Court. A recent study sponsored by NPR-PBS News Hour and Marist Poll found that a percentage of the public with a “great deal/quite a lot” of confidence in the Supreme Court of the United States has fallen from 59% in February 2018 to 39% in June 2022, after the Court overruled *Roe v. Wade*. *NPR/PBS NewsHour/Marist Poll of 941 National Adults*, MARIST POLL NATIONAL TREND at 8 (June 25, 2022), <https://bit.ly/3zkJT7H>.

222. Jamelle Bouie, *The Supreme Court Seems Awfully Nervous About Its Own Legitimacy*, N.Y. TIMES (Oct. 4, 2022) <http://www.nytimes.com/2022/10/04/opinion/roberts-alito-kagan-barrett-thomas.html>.

Justice Stephen Breyer argued on CNN that the Court is not comprised of “junior varsity politicians,” and that disagreements among the justices were “jurisprudential” and not political “in the ordinary sense of politics.”²²³ Justice Barrett sounded similar themes in a speech at the McConnell Center at the University of Louisville, stating that “judicial philosophies are not the same as political parties” and that the Court was not populated with “a bunch of partisan hacks.”²²⁴ Erwin Chemerinsky, the Dean of UC Berkeley’s Boalt Hall School of Law, in an opinion piece in the *L.A. Times*, rejoined that “[i]f Supreme Court justices don’t want to be seen as ‘partisan hacks,’ they should not act like them.”²²⁵

Scholars debate whether these trends amount to a crisis. Some note that public confidence in the Court remains somewhat “sticky”²²⁶ and still exceeds other branches of government, especially Congress, in which only seven percent of those surveyed expressed a “great deal” or “quite a lot” of confidence in a recent Gallup poll.²²⁷ In an extensive review of the literature in 2014, James Gibson and Michael Nelson analyze the results of a survey that uses a battery of questions about the Court’s legitimacy.²²⁸ Looking at this data, Gibson and Nelson note that it is mostly positive, but variable, as the Court performs better on some questions than others.²²⁹ For example, few want to do away with the Court, but many believe it should be more accountable.²³⁰ Gibson and Nelson conclude that support for the Court remains solid but qualified, stating that “the Supreme Court does enjoy a reservoir of goodwill, but that reservoir is far from bottomless.”²³¹ Yet Gibson more recently acknowledged that highly partisan fights over the confirmation of justices have taken a toll on the Court’s standing.²³² Prominent constitutional scholars share this concern. Bruce Ackerman has argued that partisanship over the Court “will predictably

223. Ariane de Vogue, *Breyer Defends State of Supreme Court in Interview with CNN’s Fareed Zakaria*, CNN (Sept. 19, 2021, 10:39 AM), <https://www.cnn.com/2021/09/19/politics/breyer-fareed-zakaria-gps/index.html>.

224. Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court is ‘Not a Bunch of Partisan Hacks,’* CNN (Sept. 13, 2021, 9:45 AM), <https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html> (quoting Mary Ramsey, *Justice Amy Coney Barrett Argues US Supreme Court Isn’t a ‘Bunch of Partisan Hacks,’* COURIER J. (Sept. 12, 2021, 7:24 PM), <https://bit.ly/3N7stRE>).

225. Erwin Chemerinsky, *Are Supreme Court Justices ‘Partisan Hacks’? All the Evidence Says Yes*, L.A. TIMES (Sept. 19, 2021), <https://www.latimes.com/opinion/story/2021-09-19/supreme-court-justices-amy-coney-barrett-politics>.

226. Hannah Hartig, *Before Ginsburg’s Death, A Majority of Americans Viewed the Supreme Court as ‘Middle of the Road,’* PEW RSCH. CTR. (Sept. 25, 2020), <https://www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road/>.

227. Jeff Jones, *Confidence in American Institutions Down to Average New Low*, GALLUP (July 5, 2022), <https://bit.ly/3TGFxQn> (stating that confidence in the Supreme Court is now only slightly above the presidency (25 to 23 percent) having a “great deal” or “quite a lot of confidence” and far less than small business, the military and police (with 68, 64 and 45 percent expressing a great deal or quite a lot of confidence, respectively)); Megan Brennan, *Congress Approval Rating Drops to 18%, Trump’s Steady at 41%*, GALLUP (July 30, 2020), <https://bit.ly/3D9P6jO>.

228. *The Legitimacy of the Supreme Court*, *supra* note 17, at 201.

229. *Id.*

230. *Id.* at 205–6; *see also supra* Figure 1.

231. *The Legitimacy of the Supreme Court*, *supra* note 17, at 205–15. Political scientists agree that public support for the Supreme Court is solid but not unlimited or fixed. However, there are lively debates on a whole host of issues related to the Court’s legitimacy; these include its sources and whether its decisions can shift public opinion.

232. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENT OF THE AMERICAN PEOPLE* (2009); *see also* James Gibson, *The U.S. Supreme Court’s Legitimacy is in Great Danger*, ST. LOUIS POST-DISPATCH (Oct. 20, 2020), <https://bit.ly/3DwBmBC>.

destroy the court's legitimacy in the coming decade."²³³ Dean Chemerinsky has agreed, writing about the current "cloud over the court's legitimacy."²³⁴

Ultimately, we do not need to resolve whether the Supreme Court faces a full-blown, looming, or only potential legitimacy crisis. For our purposes there are two crucial points of consensus among scholars. First, different strands of negative media coverage about law and courts may buttress one another through priming effects. Second, the courts' reputation is not fixed; it can change and should not be taken for granted. The confluence of biased coverage of the tort system with (1) high-profile questioning of the Court's legitimacy, (2) the call for major reforms, (3) the overall decline in levels of confidence in the Court, and (4) the scholarly consensus that the judicial legitimacy is mutable all suggest action is needed now.

VII. POLICY RECOMMENDATIONS

We are primarily empirical scholars. Nevertheless, we believe that data on media coverage of the tort system warrants a response from the legal community as part of a broader obligation to maintain fair and balanced accounts of how the tort system works. This aspirational obligation cannot be reduced to a simple formula, in which a particular level or amount of negative media coverage automatically triggers a duty to respond. Instead, we contend that whatever the threshold of skewed coverage may be and however it is measured, tort tale coverage has surpassed it. The time has come for lawyers as a community to present both the strengths and weaknesses of the system to the public. To do so, lawyers must effectively engage in public discourse. In that spirit, we offer several practical suggestions.²³⁵

A. Take Mass Media Seriously as Allies

To set the record straight, lawyers must find ways to communicate successfully. In formulating a plan of attack, members of the legal profession must recognize that they do not enjoy a sterling reputation for honesty and ethical behavior. Gallup has a long running poll on perceptions of the perceived integrity of different professions. Comparing the polls over the last five years tells a consistent story. In its December 2017 poll, Gallup found that people rated judges' honesty and ethical standards on par with auto mechanics and much worse than other professions.²³⁶ The percentage of people rating judges with low or

233. Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-201812209-story.html>.

234. Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, The Supreme Court's Legitimacy Is In Question*, SACRAMENTO BEE (Oct. 5, 2018, 10:50 AM), <https://www.sacbee.com/opinion/california-forum/article219317565.html>; see also Dawn Johnsen, *The Supreme Court's Legitimacy Crisis and Constitutional Democracy's Future*, in DEMOCRACY UNCHAINED: HOW TO REBUILD GOVERNMENT FOR THE PEOPLE (Paper No. 408) (Dawn Johnsen et al. eds., 2020), <http://dx.doi.org/10.2139/ssrn.3547693> (warning that Trump appointees to the federal bench will be out of step with public opinion for decades to come, casting a pall over its legitimacy).

235. We thank participants on a panel during the 2020 annual meeting of the Law & Society Association for their thoughtful comments on an earlier draft of this section, especially Professor Cristina Tilley, who has written extensively on the intersection between law and media.

236. *Honesty/Ethics in Professions*, GALLUP, <https://news.gallup.com/poll/1654/honesty-ethics->

very low ethical standards was 15%, which was one percentage point more than auto mechanics (14%) and much more than medical doctors (4%), grade school teachers (5%), and nurses (2%).²³⁷ Lawyers fared even worse with a 28% rating, effectively doubling the negative ratings of judges (15%) and auto mechanics (14%).²³⁸ Indeed, lawyers' negative ratings were closer to those of car salespeople (39%) than medical doctors (4%).²³⁹ In its January 2022 poll, the numbers were very similar, as the percentage of people giving judges a low or very low rating was 18%, while that number was 30% for lawyers.²⁴⁰

Under these circumstances, it would be naïve for lawyers to rely solely on direct public campaigns to burnish their and the courts' reputations. Lawyers must acknowledge the importance of media in its mission to educate the public. Part of taking journalists seriously as potential allies means that lawyers must approach journalists with respect, even if they bristle at the prevalence of negative coverage.²⁴¹ It also means cooperating with journalists in ways that are helpful. Media training is crucial on this score, because it will help lawyers to be prompt in their responses to journalists' inquiries, to be more aware of the daily-deadline cycle, and to accept that they may not be in full control of their quotes and how they are used in a story.²⁴²

B. Utilize Existing Platforms

Lawyers need not work from scratch. Many attorneys belong to professional associations, which can speak for them as a group.²⁴³ Some professional associations, like the American Bar Association ("ABA"), have public relations arms, which have a long history of interfacing with media.²⁴⁴ State bar associations, including those in California, Texas, and New York, have similar media operations.²⁴⁵ For example, the "For the Media

professions.aspx (last visited Sept. 15, 2022) (reporting longitudinal results of its ethics in professions polls).

237. *Id.*

238. *Id.*

239. What was the least trusted profession according to the poll? Lobbyists (58%), many of whom are lawyers. *Id.*

240. Lydia Saad, *Military Brass, Judges Among Professions at New Image Lows*, GALLUP (Jan. 12, 2022), <https://bit.ly/3DJuLUd>. Lobbyists remained at the bottom of the list, as 63% of respondents rated them with low or very low levels of honesty and ethical standards. *Id.* The role of judges in responding to negative media accounts is also worth considering, as they could represent a powerful voice in public discourse on how the system works. However, we bracket a discussion of judges' obligations to engage public discourse, because they are governed by separate federal and state codes of professional conduct. *See, e.g.*, Code of Conduct for U.S. Judges (Jud. Conf. 2019), <https://bit.ly/30sLg1h>; Cal. Code of Jud. Ethics (Cal. 2020), <https://bit.ly/3TGZo1Q>; and Tex. Code of Jud. Conduct (Tex. 2022), <https://bit.ly/3gOTcqq>. *See also* ABA Model of Jud. Conduct, Canon 2, Rule 3.1 (AM. BAR ASS'N 2020), <https://bit.ly/2Q0mv6K>.

241. *See* Nicola Kenyon, *Dealing with the Press: What Lawyers Need to Know*, LAW. MONTHLY (April 29, 2020), <https://www.lawyer-monthly.com/2020/04/dealing-with-the-press-what-lawyers-need-to-know/>.

242. *Id.*

243. Aebrá Coe, *ABA Decline: Why Are Fewer Lawyers Joining the Club?*, LAW360 (July 24, 2018), [legalmosaic.com/wp-content/uploads/2018/07/ABA-Story.pdf](https://www.legalmosaic.com/wp-content/uploads/2018/07/ABA-Story.pdf) (noting that 14.4% of all lawyers in the United States are members of the American Bar Association).

244. *Contact Media Relations*, AM. BAR ASS'N, <https://www.americanbar.org/news/contact-media-relations/> (last visited August 28, 2022).

245. *For the Media Hub*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Media_Resources&Template=/CM/HTMLDisplay.cfm&ContentID=45902 (last visited Aug. 10, 2022); *see also* *Media Contacts*, N.Y. STATE BAR ASS'N, <https://nysba.org/media-contacts/> (last visited Aug. 10, 2022); *News Releases*, STATE BAR OF CAL., <https://www.calbar.ca.gov/About-Us/News/News-Releases> (last visited Aug. 10, 2022).

Hub” on the State Bar of Texas website states that the bar “strives to help journalists produce work that educates the public about the legal system and the rule of law.”²⁴⁶ Lawyers should consider working with these types of organizations when they have cases that fairly illustrate the tort system in action.

In addition to leveraging the potential messaging power of professional associations like the ABA or state bars, which naturally have their own political, economic, and policy agendas, lawyers should work with think tanks and non-profit organizations, some of which are affiliated with law schools. For example, since 1998, the Center on Civil Justice at New York Law School has pushed back on common tort tale tropes by publishing pieces debunking various myths, such as the common refrain that the U.S. civil justice system is facing an “explosion” of tort litigation.²⁴⁷ Other non-profit organizations, such as Public Justice, which was founded by trial lawyers in 1982, connect high-impact litigation with strategic communications.²⁴⁸ Finally, for-profit consulting companies have recognized that lawyers and law firms can benefit from considered interactions with mass media. They strategize with practitioners about how to present details of a case to the public, using mass media as a conduit.²⁴⁹

These recommendations—media training for lawyers and understanding the relative impact of the framing of a case—resonate with practitioners. The executive director of Public Justice told us that while statistics can be manipulated, his organization has had greater luck in the court of public opinion when presenting episodic examples of the positive side of the tort system, such as veterans filing a class action lawsuit after being cheated by a bank.²⁵⁰ Similarly, the founder of a leading legal media and marketing firm in Texas lent credence to these suggestions. A former reporter, he observed that lawyers are socialized into the notion that public opinion is a third rail that should have no bearing on their conduct. He has found that simply engaging with media and trying to get both sides of a case reported often leads to successful outcomes for his clients.²⁵¹

Obviously, there is no centralized hierarchical structure that monitors the veracity of media coverage of tort or harmonizes media campaigns among lawyers, professional organizations, non-profits, consultants, and academics. We would expect coordination problems, but the prospect of some dissonance should not overshadow the need for lawyers to take advantage of opportunities for public engagement. The hope is that by formulating the need to respond to tort tale coverage as an aspirational ethical obligation, the Model Rules can serve as a common touchstone for these efforts within existing professional networks. Moreover, as questions inevitably arise, there is a procedure for clarifying the Model Rules through the ABA comment process.²⁵² There is also the ability to sponsor

246. *For the Media Hub*, *supra* note 244.

247. See the Center’s website for a list of publications at <https://www.law.nyu.edu/centers/civiljustice/publications>. See also *Infra*, Tables 1 and 2 and accompanying text on media’s misrepresentations of the tort system.

248. See *About*, PUB. JUST., <https://www.publicjustice.net/who-we-are/mission/> (last visited August 31, 2022).

249. Telephone Interview with Mike Androvett, President/Chief Executive Officer, Androvett (Aug. 10, 2022).

250. Telephone Interview with F. Paul Bland, Executive Director, Public Justice (Aug. 9, 2022).

251. Telephone Interview with Mike Androvett, President/Chief Executive Officer, Androvett (Aug. 10, 2022).

252. See *Comments*, AM. BAR ASS’N, <https://bit.ly/3D3UzbK> (last visited Sep. 12, 2022).

public-facing programs and panels in forums like Law Day,²⁵³ as well as myriad other conferences and forums on professional development and continuing legal education that happen at the state and local levels.

C. Leverage Media Biases (Early and Often)

Mass media prefer stories to statistics.²⁵⁴ Forewarned is forearmed. Instead of pointing only to dry academic studies loaded with numbers (like this one), lawyers' groups should identify anecdotes and develop narratives that better capture how the tort system works. Here, the McDonald's coffee case offers some useful lessons—some cautionary, some hopeful. First, it clearly illustrates the power of anecdotes, as the inaccurate tort tale version of the case dominated public discourse and remains iconic.²⁵⁵ Second, it illustrates the possibility of offering counter-narratives, even in the paradigmatic case of tort tale coverage, as some major media outlets published stories that corrected the inaccuracies of initial coverage.²⁵⁶ The *Wall Street Journal*, for example, ran an extensive story that rectified some of the story's flaws and offered some context for the underlying lawsuit.²⁵⁷ The *New York Times* produced a short documentary revisiting the story, which provided key details about the underlying claim and its merits.²⁵⁸ Finally, the McDonald's coffee case illustrates the importance of being proactive—the value of acting early and often—as the initial versions of stories can be difficult to dislodge from the public imagination once they take hold. We encourage lawyers to be “first movers” in framing coverage of new cases and developments within the tort system.

Scholars can contribute to the formulation of media campaigns by systematically testing different communication strategies. In a recent study, for example, Michael Nelson and James Gibson conducted a randomized survey experiment to explore the impact of the source and content of criticisms of the Supreme Court.²⁵⁹ They found that law professors who argued that the Court's decisions were politicized had the greatest negative impact on public opinion.²⁶⁰ It would be useful to perform similar experiments on which sources, types of content, and framing have the most positive effects on public opinion, especially when subjects have been primed by tort tale coverage.²⁶¹

253. See *History of Law Day*, AM. BAR ASS'N, <https://bit.ly/3WhQWIn> (last visited Sep. 12, 2022).

254. Telephone Interview with Mike Androvett, President/Chief Executive Officer, Androvett (Aug. 10, 2022). See also THE POLITICS OF ILLUSION, *supra* note 47, at 39.

255. See DISTORTING THE LAW, *supra* note 2, at 183–306.

256. See Andrea Gerlin, *How Hot Do You Like It*, WALL ST. J. (Sept. 1, 1994), <https://bit.ly/3FnJ8P1> (hereinafter *How Hot Do You like It*); *Scalded By Coffee, Then News Media*, N.Y. TIMES (Oct. 21, 2013), <https://nyti.ms/3D8yPeV>; and Hilary Stout, *Not Just a Hot Cup Anymore*, N.Y. TIMES (Oct. 21, 2013), <https://nyti.ms/3zjk1cf>.

257. *How Hot Do You Like It*, *supra* note 256.

258. *Scalded By Coffee*, *supra* note 256. See also Stout, *supra* note 256 (additionally, reporters reviewed the 2011 HBO documentary concerning the case. HOT COFFEE (The Group Entertainment 2011)).

259. *Has Trump Trumped?*, *supra* note 192.

260. *Id.* at 32, 38–40.

261. Parker Hevron, Assoc. Professor of Pol. Sci., Tex. Woman's Univ, Presenter at the Annual Meeting of the Law and Society Association: Turning to the Courts: Experimental Evidence of the Impact of Litigation on Public Attitudes (May 2020) (on file with author). We, along with our colleague, Elli Menounou, find on a preliminary basis that telling subjects that litigants had exhausted other remedies before filing a lawsuit significantly improved attitudes towards them. *Id.* See also David M. Engel, *The Oven Bird's Song: Insiders*,

D. Seek Targeted, Data-Based Tort Reforms

Our focus has been on correcting media coverage. But there is a nexus among media discourse, public policy debates, and tort reform efforts, both in the Model Rules and in practice.²⁶² Recall that the comment to Rule 6.1, which we read broadly to encourage lawyers to set the record straight, explicitly acknowledges the “value” in lawyers “lobbying to improve the law, legal system, or profession.”²⁶³ In practice, the concern is that the combination of tort tales, the availability heuristic, and priming effects threaten to create the false impression that bogus claims are rampant.²⁶⁴ This media environment provides ammunition for interests that lobby for overly broad “discouragement” tort reforms, policies aimed at chilling the filing of claims regardless of a claim’s individual merits.²⁶⁵

Damage caps arguably illustrate this point. By limiting the amount of money that plaintiffs can recover across the board, damage caps seek to reduce incentives to sue, thereby weeding out frivolous claims. Yet data on medical malpractice claims, a supposed hotbed of questionable litigation,²⁶⁶ paint a more complex picture. On one hand, they show that, overall, ordinary citizens *underutilize* the legal system, as plaintiffs with medically-justified claims often “lump” their injuries.²⁶⁷ On the other hand, some questionable claims are indeed brought.²⁶⁸ From this perspective, damage caps can be seen as over-inclusive because, by definition, they target *successful* lawsuits, not unmeritorious ones.²⁶⁹ The result is deeply ironic: in the name of discouraging bogus lawsuits, damage caps formally limit recoveries in cases where juries have found defendants liable.²⁷⁰ As an

Outsiders, and Personal Injuries in an American Community, 18 L. & SOC’Y REV. 551, 561 (1984).

262. MODEL RULE 6.1(b)(3), *supra* note 24, at cmt. 8.

263. *Id.*

264. THOMAS BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 18 (2002) (ebook) (providing a typology of tort reforms and identifying discouragement reforms as the most common); DANIELS & MARTIN, *supra* note 48, at 31 (analyzing tort reform strategies in Texas); SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* 8 (2015) (ebook) (describing how changes to the rules of civil procedure can serve to retrench the courts). See generally Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293 (2016) (describing the various ways in which Congress is seeking to limit the reach of the courts).

265. BURKE, *supra* note 264.

266. See generally Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients — Results of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370 (1991).

267. See Richard Miller and Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC’Y REV. 525, 527 (1980) (describing the phenomenon of “lumping it”).

268. See generally Brennan, *supra* note 266. See also ADVERSARIAL LEGALISM, *supra* note 20, at 165 (collecting authority); Miller & Sarat, *supra* note 267, at 527; Herbert Kritzer, *The Antecedents of Disputes: Complaining and Claiming*, 1 OÑATI SOCIO-LEGAL SERIES 1 (2011); and David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury*, 44 LOY. L.A. L. REV. 33, 33–68 (2010).

269. See Kritzer, *supra* note 268, at 17.

270. Some may counter that the goal of damage caps is to reign in “out of control” juries, the threat of “break-the-bank” settlements, and the incentives for doctors to practice overly “defensive” medicine. But jury awards are subject to appeal and, as noted earlier, some scholars argue that the “fertile fear of litigation” has positive effects. See MAKING RIGHTS REAL, *supra* note 51, at 13–15. Even if these are legitimate policy goals, we believe that surgical approaches are better than blanket damage caps at addressing inappropriate jury awards and bogus legal theories. Regardless of whether one disagrees with this example, we believe the broader point holds: namely, public discourse, whether media accounts or debates on tort reforms, should reflect the data, not tort tale themes.

alternative, lawyers could advocate for reforms that more narrowly aim at frivolous claims, cumbersome procedures, or particular abuses. Examples include requiring defendants to have the medical basis of malpractice claims screened by independent panels of doctors (but require them to pay all attorney fees and court costs if the panel certifies the lawsuit), or replacing asbestos litigation with a federally administered no-fault compensation program in response to flaws that are well-documented.²⁷¹ Of course, successfully passing reforms is always a steeply uphill battle,²⁷² but obstacles in enacting reform should not bar the pursuit of reforms intended to address well-founded concerns.

Some may dismiss these recommendations as jejune. The politics of tort reform—as well as the broader anti-litigation narratives and media biases that support them—are deeply engrained.²⁷³ As political scientists, we are well aware of the potency of politics, partisan rhetoric, and reporting conventions over data, carefully calibrated public policy arguments, and balanced coverage—lessons painfully reinforced by our reading of the data on media accounts of the tort system. But, in some ways, that is our point. Relying on ordinary politics, existing policy debates, and routine reporting is not enough. By framing the need to speak out as part of existing aspirational rules of professional ethics—a set of rules rooted in notions of community service rather than material interests—we are calling on lawyers' sense of obligation as professionals to use their voice to attempt to improve media, public, and policy discourse on the tort system at a time when a growing body of evidence shows negative and misleading media biases.

The difficult—some might say quixotic—nature of the task is not a reason for complacency. As practitioners told us, it is important not to cede the field of public opinion to existing actors, given the policy significance of tort.²⁷⁴ After all, every industrialized nation must confront the question of compensating victims of unexpected losses as well as holding powerful interests accountable for negligent and reckless conduct.²⁷⁵ In the U.S., tort law remains central to our response to these issues,²⁷⁶ whether they involve routine cases, like auto accidents, or more complex ones involving public health disasters, such as asbestos,²⁷⁷ opioids,²⁷⁸ tobacco,²⁷⁹ lead paint,²⁸⁰ and others.²⁸¹ Attempting to enlist the power of lawyers' sense of professionalism in the fight over setting the record straight seems worthwhile, even if no guarantees exist for success.

271. See DUST-UP, *supra* note 50, at 49–55.

272. See generally BURKE, *supra* note 264 (describing the challenging politics of passing different types of civil litigation reform packages). See also DUST-UP, *supra* note 50, at 55 (describing the failure to pass asbestos litigation legislation despite ostensibly favorable political conditions during the George W. Bush administration).

273. BURKE, *supra* note 264, at 6.

274. Telephone Interview with Mike Androvett, President/Chief Executive Officer, Androvett (Aug. 10, 2022); Telephone Interview with F. Paul Bland, Executive Director, Public Justice (Aug. 9, 2022).

275. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 332 (4th ed. 2019) (ebook).

276. ADVERSARIAL LEGALISM, *supra* note 20, at 126–55 (discussing the tort system). See generally DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991).

277. See generally DUST-UP, *supra* note 50; *A New Look at an Old Issue*, *supra* note 103.

278. See generally Abbe R. Gluck et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. L. MED. & ETHICS 351 (2018).

279. See generally MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION (3d ed. 2011).

280. See generally DONALD GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS A PUBLIC HEALTH PRESCRIPTION (2010) (ebook).

281. See generally NAGAREDA, *supra* note 136.

VIII. CONCLUSION

Adverse public narratives about the tort system cast doubt over the law and courts' public standing, which is central to judicial legitimacy. Recent stories calling into question the Supreme Court's validity in the aftermath of contentious and highly partisan fights over the confirmation process and controversial decisions have arguably darkened this shadow. These negative stories are not inevitable, as indicated by significant variation in coverage of similar injury compensation regimes. Instead, tort tales are socially constructed. Lawyers and their professional associations' expertise, resources, and privileged position provide them a significant building permit for this process of social construction. They should use it. Indeed, they have an ethical obligation to do so, even if—*especially* if—they are swimming against the tide of powerful political forces and deeply entrenched narratives, which reflect media biases towards sensational stories about multi-million dollar judgments for spilled cups of coffee.