

**Framing the Food Fights:  
How Mass Media Construct and Constrict Public Interest  
Litigation**

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## Introduction <sup>1</sup>

A distinctive consumer-oriented reform politics, sometimes labeled “public interest liberalism,” emerged in the United States during the 1960s (McCann 1986; Vogel 1978; Rabin 1976). The hallmarks of this political campaign included: first, a traditional progressive commitment to enhancing ordinary citizen capacity to render accountable powerful corporate producers for their often harmful practices; second, new substantive goals of increasing the safety and health of manufactured products, workplaces, and the social and natural environments that affect, however differently, most citizens in our nation, and; third, a distinctive investment in litigation or, more broadly, “legal mobilization” politics as a key element of the reform strategy

This vision of legal mobilization politics has drawn on traditional progressive reform movements but taken its specific strategic cues from the civil rights movement in the post-WWII era. The early success of Ralph Nader during the 1960s in appropriating such tactics for middle class consumer and environmental issues and the proliferation of idealistic young public interest lawyers in the 1970s further nurtured faith in this type of reform politics. Especially appealing for many activists in this legacy has been the capacity of litigation to focus political efforts on discrete corporate culprits and policy issues without being coopted by either centrist political parties or hierarchical, unresponsive, bureaucratic institutions of the state. In short, this legalistic public interest politics has expressed a distinctive new form of American middle class liberal progressivism committed to mobilizing “judicialized” government for the advancement of public safety, health, and welfare (see McCann 1986; Vogel 1981).

The politics of legal mobilization by middle class public interest groups as well as by racial minorities, women, labor, and other liberal-left (and conservative) activists over the last half-century has drawn considerable study from social scientists. Robust traditions of scholarly study have interrogated the “impact” of such litigation (Johnson and Canon 1984; Rosenberg 1991), the complex dimensions of legal mobilization activity (Scheingold 1974; McCann 1994; Silverstein 1996), the challenges of “cause lawyering” (Sarat and Scheingold 1998), and other facets of this “politics of rights” (Scheingold 1974; Brigham 1996). Such scholarship ranges widely in its questions, findings, methods, and conclusions.

Most studies, especially by political scientists, emphasize that legal mobilization campaigns aim to effect change largely through the “radiating effects” of litigation on differently situated social actors, both “directly” on alleged wrongdoers through actual or threatened enforcement actions, and “indirectly” on lawmakers, potential issue allies, and the general public (Galanter 1983; Canon and Johnson 1984; Rosenberg 1991; McCann 1994). The dissemination of messages – among parties to disputes, their legal representatives, and their allies or opponents as well as among third party lawmakers such as judges, juries, and legislators, and generally to the broader public – about legal claims, possible enforcement actions, and broader social visions has routinely been

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<sup>1</sup> The laborious coding work for this paper was conducted by an extremely diligent and talented group of undergraduate research assistants at the University of Washington: Keith Hiatt, Sidney Lewis, Colleen Melody, Michael Pope, and Terra Stewart.

conducted through a variety of channels. But it is through the news production process of corporate mass media that legal “naming, blaming, and claiming” are most broadly communicated among relevant actors and publics, especially on matters of general social concern. Indeed, the self-conscious effort to package legal knowledge and narratives for dissemination in the mass news media has been a hallmark of public interest litigation.

Nearly all scholarly studies have recognized the efforts by activist groups to coordinate litigation and publicity campaigns as interactive strategic endeavors. “Media-oriented stagecraft and legal advocacy ... constitute the complementary tactics of modern professional policy advocates” (McCann 1986: 205). Hence, many studies have examined the quantity and scope of news coverage generated by particular legal claims and litigative actions to measure the effectiveness of *Brown v. Board of Education* (Rosenberg 1991), animal rights litigation (Silverstein 1996), gender-based pay equity politics (McCann 1994), and Native-American treaty rights campaigns (Dudas 2003). A few scholars have explored these dynamics of litigation-based publicity and news coverage in terms of “agenda-setting” theory (Bohte, Flemming, Wood 1997).

We note a most curious oversight in such studies, however. While the *quantity* of media attention to litigation tends to receive much attention as an indicator of impact, the *substantive content or quality* of the coverage has drawn far less scrutiny. This is important, after all, for the news practices of journalists and editors contribute in distinctive ways to the “construction” of public interest litigation. Systematic pressure to “sell” news in simplistic, appealing, even titillating ways that attract readers and thus advertising dollars and to fit news rapidly and cheaply into simplistic, standardized “scripts” (see Bennett 2002) make mass media important sources of mass legal knowledge production. Indeed, law itself, as a form of constitutive knowledge, is significantly produced and reproduced by the narratives circulated by print and electronic news along with other forms of mass produced entertainment. That constitutive content justifies attention to the qualitative content as well as quantity of coverage.

This recognition regarding the substantive role of mass media in legal knowledge production has not entirely escaped the notice of socio-legal scholars generally. A huge body of scholarship has documented the role of the media in shaping public understanding of crime and the criminal justice system. A much smaller but still important group of scholars has analyzed how federal appellate court rulings, especially regarding matters of constitutional law, are covered in the press (Slotnick and Segal 1998; Brigham 1996). One of us has summarized much of both literatures in a recent book (Haltom 1998). Moreover, debates over tort reform in the last several decades have generated increased attention to media reporting of civil disputing and litigation practices (Garber and Bowen 1999; Galanter 1993; Bailis and MacCoun 1996). Our own recent book provides the most systematic study to date regarding the complex interplay of interest group politics, mass media reporting, and cultural values – what we label the “instrumental, institutional, and ideological” factors – at work in constructing public knowledge about the civil legal system (Haltom and McCann 2004).

However, few efforts have been made to develop similar analyses regarding the role of the mass media in substantively shaping the character, scope, and terms of specific reform litigation campaigns (but see Bloom 2003; Dudas 2003). If our own study of tort reform is correct that the mass media exercise decisive power in the production of legal knowledge and disputes about civil litigation generally, it stands to reason that both

general and focused media coverage are likely to shape particular public interest litigation efforts in important ways, defining their “social reality” and influencing their potential for mobilizing support and effecting change. Indeed, we suggest that, just as the mass media have been recognized as a discrete “political institution” or even “fourth branch” of government (Cook 1999), so is it also a key institutional domain contributing to the mass construction specifically of legal knowledge and practical legal action.

This article reports on our new research regarding the role of mass media in shaping the politics of one recent high-profile topic of consumer litigation – that challenging the allegedly duplicitous marketing of unhealthy “fast food” to increasingly obese American citizens. Our report will: first, summarize the recent campaign by consumer activists to use litigation to challenge allegedly irresponsible marketing of unhealthy fast food by greedy corporations; second, summarize our findings from our forthcoming book study of public debates over tort litigation, especially those regarding tobacco litigation, which multiple parties have invoked to support their position in the new legal “food fights;” and, then, present new data regarding mass media coverage of obesity litigation over the previous two years. *The key question in this study concerns how the mass media, in constructing the terms of legal disputes, become a contributing player in the mass politics of legal knowledge production, issue agenda setting, and lawmaking.* Our conclusion is that news coverage has constructed fast food litigation in ways that privilege cultural norms of “individual responsibility” and skew the moral debate in favor of corporate producers against consumers. These findings confirm the thesis of our earlier book study, but they suggest previously unexplored implications about the dimming prospects for consumer-oriented public interest litigation generally in the contemporary era. Most important, media coverage tends both to eviscerate the “public” dimensions of public interest lawsuits and to discredit the key advocates of consumer rights as participants in national debates on government policies. One way to summarize our thesis is by noting that the fate of Ralph Nader’s distinctive model of litigation-based reform may have become nearly as futile as his independent electoral gambits for change in our corporate-dominated neo-liberal political culture.

### **Food Fights: The Litigation Campaign Against Fattening Fast Food**

The Evolution of a Campaign. The legal campaign against deceptive marketing of fattening foods is only a few years old, but it has been nurtured by a variety of long and short-term contextual factors. For one thing, scientific research regarding the linkage between the high-fat, high-sugar content of Americans’ diets and their increasing proclivity for obesity has developed steadily over the last half century, and high-profile studies by nutritionists proliferated rapidly during the 1990s. Eric Schlosser’s much-publicized *Fast Food Nation* (2001) crystallized public attention on the shockingly noxious system of fast food production in modern mass society. Other more scholarly books, such as Marion Nestle’s *Food Politics: How the Food Industry Influences Nutrition and Health* (2003), amplified the issue among academic audiences. The proliferation of diet books and media buzz about weight loss treatments, plans, and wonder drugs – much of it profit-driven drivel, but some of it reliable public information

and prudent counsel – further focused citizen awareness on the growing problem of obesity and its medical, if not social, costs. Officials in the FDA and leaders of health organizations likewise began to direct attention to the issue. As Kelly Brownell of Yale’s Center for Eating and Weight Disorders has put it, “People are exposed to a toxic food environment...It really is an emergency” (Stern 2002).

It was in this context that public interest lawyers entered with a plan for action. The specific catalyst, precedent, and sources of revenue for obesity litigation were provided by the successful legal campaigns against tobacco corporations in the 1990s. After decades of failed efforts to use judicial proceedings to call Big Tobacco to account for its deceptive marketing of its addictive, deadly products, both private and public trial attorneys scored impressive victories in the courtroom, and then in backroom bargaining, during the second half of the decade. Several of the attorneys who landed blows for both the public good and their private bank accounts in fighting tobacco quickly saw new possibilities for health reforms in challenging fast food producers on similar grounds. The earlier campaign provided a corps of experienced reform leaders, a potentially winning strategy, and substantial financial resources for the crusade against fatty foods.

One such prominent attorney crossing over from tobacco conquests to contests over fast food marketing is Richard Daynard, a Northeastern law professor and chair of its Tobacco Products Liability Project. But by far the most important leader has been John Banzhaf III, an energetic professor at the George Washington School of Law and public interest lawyer. Having been deemed a “Trial Lawyer’s Trial Lawyer” and one of the 100 most influential people in Washington D.C., Banzhaf developed his reputation as founder of the Action on Smoking and Health (ASH) campaign fighting the Big Tobacco, winning him designation as the “Ralph Nader of the Tobacco Industry.” He is a man who loves to generate publicity for his legal campaigns, and he is exceptionally successful at both, as a quick look at his website attests (<http://banzhaf.net/>). Perhaps no one has contributed more to making the Big Mac “rival Big Tobacco as public health enemy No. 1 in the nation’s courts” (Stern 2002). Banzhaf and his students have sponsored or consulted in the most important litigation efforts against the fast food industry to date.

Reform Ends and Means: Following the Anti-Tobacco Model. The parallels to the battle against tobacco corporations are highly instructive about both the ends and means of the new campaign against quick corporate cuisine. The campaign against big tobacco produced only minimal forms of regulatory control and no victories in the courtroom from the 1950s through the late 1980s (Haltom and McCann 2004; Mather 1999). The tobacco industry, which generated billions of dollars in revenue each year, simply had too much political and social power. Tobacco corporations expended considerable resources for campaign financing and congressional lobbying schemes. Their armies of lawyers used what one observer called “Scorched Earth, Walls of Flesh” tactics to destroy challengers. Moreover, the tobacco industry contributed many jobs at the level of production and, especially, retail sales around the nation. Indeed, small retail convenience stores rely on cigarette sales for their very existence. Perhaps the most important economic factor, though, was that both state and federal governments came to depend on the enormous revenues from taxing tobacco sales. The tobacco industry also proved adept at developing a powerful ideological defense. It effectively mobilized the

traditional American ideals of “individual responsibility” to insulate its production and profiteering from public control. After all, tobacco spokespersons repeated endlessly, consumers must bear the burden for the products that they buy and ingest. This is why in the 1960s, when it could no longer deny the well-demonstrated health dangers from tobacco consumption, the industry agreed to federal requirements about publicizing such dangers in the marketing and packaging of their products, thus somewhat ironically further reducing corporate liability for consumer choices because consumers could no longer plead ignorance about health risks.

Advocates of healthier food production and consumption faced similar barriers to winning government legislative and regulatory support. Health advocates, public interest groups, and lonely legal crusaders are as materially disadvantaged against Big Mac as were the diminutive political Davids challenging the Goliath of Big Tobacco. After all, fast food and vending generate many billions of dollars every year for corporations who are capable of wielding considerable power in Congress and throughout the federal regulatory establishment, even despite increasing concerns from FDA and other officials. Like tobacco, fast food provides a steady diet of jobs, sales revenues, and taxes on which government leaders depend. Traditional lobbying efforts to put the issue on the legislative agenda have been an important part of the new consumer movement against the fast food industry, but, as on many other issues, reformers recognize the low chances for success by this route alone.

Moreover, the traditional American ethic of “individual responsibility” has presented an even more formidable ideological stumbling block for reformers of the fast food industry. This is because fast food differs from tobacco in at least three fundamental ways. First, fast food has not been demonstrated to be physically addictive in the ways were eventually proved for tobacco. As such, consumer’s choices of different foods are arguably less fettered than the actions of dependent, needy nicotine users. Second, whereas the health risks of tobacco can be isolated and vary little with exogenous factors, the dangers of health food are inseparable from the effects of other life choices about exercise, overall diet, and the like as well as genetic predispositions. Demonstrating how fast food contributes to heart attacks thus is more difficult than making the causal linkage between a lifetime of smoking and lung cancer. A third related difference is that small uses of tobacco have been proven to be dangerous, both in contributing to long-term health risks and raising the risk of addiction. This is not true for fatty fast foods, which seem to pose little risk when eaten in moderation. Both institutionally and ideologically, then, the challenges facing fast food warriors parallel but even exceed those for anti-tobacco reformers.

Nevertheless, the new advocates of consumer health have found quite instructive the distinctive, and seemingly successful, strategic campaign developed by anti-tobacco crusaders in the 1990s. The reformers in each successive struggle have resorted to the staple *institutional strategies* developed by previous generations of liberal public interest advocates – targeted litigation coordinated with multi-dimensional publicity campaigns exposing the wrongs of corporate producers and the dangers of their products. High profile lawsuits were filed by, among others, a group of Hindus (sponsored by protégés of Banzhaf) against McDonald’s for using beef tallow in their advertised vegetarian French fries; by a 270 pound man in New York blaming five fast food companies for his obesity-related health problems; and by representatives of children in several venues around the

nation. As noted earlier, the attraction of tort litigation has been its capacity to bypass some of the formidable institutional capacities of corporations to block congressional and bureaucratic initiatives while focusing attention directly on specific wrongdoers. As we shall see shortly, individual cases of litigation have generated modest attention from the press, while the overall legal campaign has generated considerable attention in a short time.

The fast food opponents likewise followed the anti-tobacco strategists' three most effective *substantive claims* to advance their respective cases before the courts of judges, juries, and public opinion alike. *First*, the anti-tobacco campaign accelerated in the late 1980s and 1990s when litigation revealed conclusively a long history of deception and duplicity by industry officials regarding their knowledge about the health effects of tobacco use, including their own scientific research and intentional use of new ingredients to increase the addictive power of cigarettes. These exposures significantly undermined the credibility of corporate producers and marketers as well as their claims about the informed, free choices of consumers. Critics of the fast food industry have similarly leveled the claim about inadequate disclosure and even deception. Virtually every lawsuit has contended that fast food marketers fail to produce adequate or accurate information about fat, sugar, and chemical contents of the expeditious victuals they peddle. Such was at the heart of the claim by Hindus and other vegetarians against McDonald's about misrepresentation of French fries, a claim that produced a formal apology and \$12 million settlement. It also was the core point of the argument by Caesar Barber, who filed legal claims challenging McDonald's, Burger King, Wendy's and KFC for his excessive, dangerous weight. As attorney Banzhaf put it to Paula Zahn on CNN American Morning (2002),

Basically, he's saying that if the same standards we applied to other foods – for example requiring disclosure of calories and fat content – were applied to fast food restaurants; if they provided warnings, as, for example, dozens of other manufacturers do, like other well known hazards such as electrocution; he probably wouldn't have been obese and suffered these problems. It's an opening gun in trying to make the fast food companies bear some of the responsibility, not all, but some of the responsibility for the huge cost of the epidemic of obesity.

Such allegations of non-disclosure and, especially, deception constitute claims that can be contested by tort lawsuits under traditional consumer law.<sup>2</sup>

It is relevant that judges in a number of cases have explicitly opened the door for further litigation on this claim about misrepresentation of information to consumers. For example, while dismissing the initial claims of attorneys on behalf of several children against McDonald's, Judge Robert Sweet urged a revision of the pleadings with these recognitions of social fact and legal principle:

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<sup>2</sup> “Since the law recognizes that consumer protection statutes can be violated by not disclosing material facts as well as by outright lying, the failure of major fast food chains to clearly and prominently disclose the fact and calorie content of many of their meals might also support a class action law suit” (Banzhaf 2002:2).

Chicken McNuggets, rather than being merely chicken fried in a pan, are a Frankenstein creation of various elements not utilized by the home cook.... Chicken McNuggets, while seemingly a healthier option than McDonalds hamburgers because they have 'chicken' in their names, actually contain twice the fat per ounce as a hamburger. It is at least a question of fact as to whether a reasonable consumer would know – without recourse to the McDonald's website – that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger (cited at <http://banzhaf.net/obesitylinks>).

Then, after being equally critical of the hidden dangers of McDonald's French fries, the judge concluded (seemingly unaware of the pun): "If plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of McDonalds' products were not commonly well known and thus that McDonalds had a duty towards its customers" (ibid).

*Second*, tobacco reformers drew on experiences in other areas of legal reform to focus on the special costs for particular groups of plaintiffs. Anti-tobacco activists made considerable headway in spotlighting the effects of exorbitantly funded corporate marketing campaigns targeting children, who arguably are more susceptible to cleverly suggestive advertising and less capable of making informed, mature choices that may prevent addiction. In addition, lawsuits highlighting the impact of smoke toxicity and death on the spouses of smokers and on those involuntarily exposed to ("second-hand") smoke also proved powerful arguments in court and before the public, largely because they represented widespread injuries for which the victims themselves could not be held responsible.

In the same way, challengers to the fast food industry have targeted corporate marketing aimed at impressionable children. "Everybody is looking at children as the vulnerable point in this," notes Marion Nestle, a professor of nutrition at New York University (Stern 2004). One notable campaign in Seattle pressured the school board to reject the exclusive contracts with Coca Cola for school vending machines that came with corporate payouts to the under-funded districts. As in tobacco cases, corporate profiteering from junk food sales at the expense of the most vulnerable proved to be a promising target in the courts and mass media alike. Moreover, one of the first and most publicized legal victories was by a group of Hindus and Sikhs whose religious and cultural principles were violated when they unwittingly ingested beef products that McDonald's claimed were not present in their much heralded French fries. The fact that such plaintiffs were highly religious in character and McDonald's so duplicitous again dramatized the more general dynamics at stake in the food fights. As in the tobacco wars, allegations of moral character for plaintiffs, defendants, and attorneys have figured prominently in the trying of cases by judges, juries, and the mass public (Haltom and McCann 2004).

*Third*, the biggest transformation in the anti-tobacco campaign came when state attorneys general shifted the debate over the relative responsibility of consumer choices about whether or not to smoke to the involuntarily assumed public costs of health care caused by tobacco sales. Attorneys showed that smoking imposed billions of dollars in tax and insurance costs paid by ordinary people who never lit up the noxious product.



These claims became the basis for massive lawsuits and negotiated payouts by the tobacco industry in the late 1990s, in many ways fundamentally redefining the terms of the battle. A similar logic seems to be the next step in the food fights as well. Fast food critics like to cite a Surgeon General's report that obesity can be linked to 300,000 deaths and \$117 billion in health costs each year, almost as much as smoking, and dozens of times the costs of the Enron scandal, thus raising the question whether those who are obese or contribute to obesity should absorb their fair share of costs. Indeed, reformers cite another study showing that each obese person imposes an average of \$1500 more on health costs each year than a healthy person (Banzhaf 2004). "Some argue that there is a right to voluntarily engage in unhealthy behaviors, but there certainly is no right to require others to subsidize the huge costs" (Banzhaf 2002:2). Identification of collectively shared costs thus has provided a critical component of reformer appeals for an increased government role in requiring full disclosure about, in limiting production of, and in encouraging healthy alternatives to the fast food that is bloating the body politic.

Reformers have proposed a variety of ways to effect redistribution of the costs, including increases in health insurance paid by the obese and higher taxes on foods that are high in fat, sugar, and calories. These mechanisms would attempt to legally manipulate conventional market forces to increase the costs of choosing actions producing obesity, thus redistributing burdens more equitably and providing incentives for healthier choices. This approach would require national legislation, however, which has been vigorously opposed by powerful corporate institutions and the many politicians responsive to their interests. Hence, while Banzhaf has insisted that "legislation to fight obesity is preferable to litigation," which must be a "last resort," he adds that "if legislators don't legislate, then litigators will litigate" to compel public policy development (Banzhaf 2004). Litigation offers two general routes to change. First, lawsuits might directly force corporations to internalize the costs of unhealthy food marketing and, hence, to alter their practices of production and marketing (Banzhaf 2002). This would require huge punitive damages awards, which seem unlikely in the near term. In the meantime, the most promising short-run tactic has been use of litigation to put the general issue on the public agenda and to generate mass support for government policy action. "Remember, many social movements were kick-started by litigation," such as civil rights, environmental, sexual discrimination and tobacco laws, John Banzhaf argued at the recent conference on obesity lawsuits at Northeastern University. "This type of litigation is picking up speed and the food industry is worried," he said (Higgins 2003).

All of the above themes were cleverly and humorously conveyed in the documentary film "Super Size Me" that played throughout North America in early 2004. Its constant refrain "Sue the Bastards" underlined the dominant strategy to effect change in public policy, corporate production, and consumer practices.

The Legal Crusaders, Their Motives, Their Image. For reasons that will be more apparent soon, it is worth noting here the self-conscious efforts of the new health reformers to portray themselves as pure, noble, and publicly spirited in their motivations (see McCann and Haltom 2004). No doubt these reform lawyers are very aware of the pervasive negative images of trial lawyers and civil plaintiffs as inherently greedy, opportunistic, and manipulative. For example, Banzhaf's crusades against Big Tobacco and various other exploitive corporate practices earned him a variety of unflattering designations, including that he was a "radical," a "legal flamethrower," and even a "legal

terrorist” (see Banzhaf 2004). This is one reason why Banzhaf always makes it clear that “not only does he not make a cent from the suits that he inspires, he would, in fact, much rather not bring them in the first place. He would love it if the government would overhaul the food industry to make people healthier, just as he would have preferred the government to take action on smoking unprompted.” In short, Banzhaf assiduously anticipates and rebuffs charges by critics that he is greedy, litigious, and irresponsible. Instead, he proudly displays the mantle of the responsible public citizen and legal leader.

This effort is even more clearly demonstrated in a long public interview with Harish Bharti, a Banzhaf protégé living in Seattle who led the legal campaign for Hindu vegetarians against McDonald’s misrepresentation of their beef-enhanced French fries (Bharti 2002)<sup>3</sup>. Bharti celebrates his own moral values as a religious person and immigrant in the United States. “Our immigrant community should keep their heads high because we stand for principles and values. This is a land of laws and opportunity. Standing up for your rights and principles is important and pays. It is important to give our children a message that they don’t have to be shy to follow traditional family values and should be proud of their own culture.” He invokes the classic logic of a public servant in defending his role as a cause lawyer for consumers.

I love my work because as an attorney, I step into the shoes of the attorney general to enforce the laws of our land. Basically, this is the job of the attorney general to do. The only difference is attorney generals get paid a salary by taxpayers, whereas, when I am doing the job of the attorney general, I am not paid a dime by taxpayers. I only get paid if we prove our case and get damages from the offending corporation. Then only will the court award our fees, to be paid again by the offending corporation. This doesn’t cost anything to taxpayers.

He addresses in passionate terms the issue of motivation, distancing himself from the greedy corporate law-breakers whom he challenges.

A lawyer’s job is to protect the community from law-breakers. This is not just a business for profit. Imparting justice is God’s work and has to be pure and whole-hearted. Anyone who is in this business for himself or money is in the wrong business and will end up a frustrated individual. Law practice is all about sacrifice.... I do not charge an hourly fee to my clients. I spent costs from my own pocket. If I lose, clients owe me nothing. If I win, the court awards fees to be paid by the defendant.... I have represented numerous needy individuals without charging any fee. Money is the last thing a lawyer should think about. Clients/causes always comes first.

All in all, his motivation is moral the deepest sense. “I thought fighting for justice, as a lawyer, is the best way to serve God.”

This intense concern for portraying a squeaky clean moral character and high-minded public motivation for lawyers and plaintiffs alike, we shall see, represents a

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<sup>3</sup> All quotations in the remainder of this section are taken from the Bharti website (2002).

prudent understanding of American politics, especially in the contemporary media age. These efforts are noteworthy, for such prudence is woefully lacking among many tort lawyers, especially those high-rollers who preach social justice while raking in and ostentatiously displaying considerable material wealth from their labors (Haltom and McCann 2004: ch. 4). Whether or not Banzhaf and his cohort of advocates are successful in projecting their own restrained, noble image through the looking glass of mass media constructions, however, is one important concern in the subsequent analysis.

### **The Construction of Tobacco Litigation by Mass Media: Perils in the Political Parallels?**

It thus should be clear that the recent food fights have represented a classic clash of liberal public interest advocates for citizen-consumers against allegedly irresponsible corporate producers and their products. Indeed, in motivation, goals, and strategy, the recent reformers represent an expression of moralistic and legalistic politics firmly in the tradition of Ralph Nader, Gerry Spence, and the legions of other public interest lawyers starting dating back to the 1960s. However, how has this legal mobilization politics played in the mass media, the primary means by which the reformers are known to their potential supporters, adversaries, and the general public?

We investigated this question as a follow-up study to our recent book (2004). The empirical studies reported in that volume found that mass media reporting was skewed to particular types of big-money cases, emphasized certain elements of events while wholly ignoring key issues that mattered most for jurors and judges, and fueled public concern about greedy plaintiffs, opportunistic lawyers, and a legal system out of control. However, our study covered indiscriminately all types of litigation, and did not distinguish public interest lawsuits from individual personal injury claims and other civil actions.

The findings most directly relevant to our new study concerned the legacy of tobacco litigation. Our analysis traced the parallel between changing “frames” of the contest between Big Tobacco and its critics in court and in the news. While the “individual responsibility” frame remained prevalent throughout, it yielded somewhat to increasing attention to corporate deception in the early 1990s and the “public costs” logic of the states’ attorneys general litigation and Master Settlement in the mid-1990s, only to return attention again to the default individual responsibility frame and obsession with plaintiffs’ attorneys fees by the late 1990s. This durability of the individual responsibility frame, despite overwhelming evidence of tobacco industry fraud and relentless marketing of deadly products, tracked public opinion polls, which momentarily bowed toward recognition of corporate responsibility in the mid-1990s but rocketed again to 3:1 support for the individual responsibility ethos by late in the decade. Critical attention to plaintiffs’ attorneys and their allegedly exorbitant awards initially publicized by tobacco advocates but dutifully reproduced by the mass media seemed to contribute to this return to default consensus. All in all, despite undeniably dramatic achievements in the courtroom and political backrooms, anti-tobacco litigators could not mobilize durable public support for the challenge to the tobacco giants. The legacy is a powerful example

of how savvy politics and media constructions shape public knowledge of and about law and legal action.

These latter findings are relevant because, as we noted earlier, advocates and opponents in the legal food fights invoke the tobacco wars legacy in defense of their position. Our book alerted us to several likely patterns. We expected, first, that mass media constructions of disputes over junk food would be framed primarily in terms of individual vs. corporate responsibility for unhealthy consumption practices, with the former more common than the latter and little attention even given to matters of the public costs or government responsibility. We also expected less sympathetic treatment of obese plaintiffs and their attorneys relative to corporate defendants, although media constructions may vary with the traits of the defendants. The next section will document how our preliminary findings match up with these expectations based on our earlier research.

### **News Coverage of Legalized Food Fights: Preliminary Findings**

Methodology. Our methodology for the study was simple and relatively orthodox. We first ran a search in LexisNexis Academic for newspaper articles featuring “obesity” or “fat” and “litigation” or “lawsuit” in headlines or lead paragraphs during the years 2002 and 2003, when the most prominent lawsuits made the news.<sup>4</sup> After screening out international papers, irrelevant articles, and duplicated stories, the search turned up 111 articles in which obesity litigation had been prominently featured in major domestic newspapers over this period. Each article was coded by a trained research assistant according to a scheme grounded in our earlier studies and revised after experimentation in a small pilot study. An abridged version of the coding scheme instructions is provided in Appendix One. The two primary groups of variables related, first, to the conceptual themes used to make sense of the disputes or issues at stake, and, second, to the portrayals of character and motive of the different actors involved in the disputes.

The articles resembled in many ways those found in our much more massive data set for the earlier book project. Over one half (59) were “general” articles about the larger issues and phenomenon of fat food litigation rather than about a specific legal case. Indeed, it is surprising that many articles mentioned no specific cases at all, although it is clear that the conference at Northeastern Law School about fast food litigation drew a fair amount of attention. Also, the articles were generally short, and therefore thin in content. Over half of the articles (52.3%) were 500 or fewer words; 77.55 were under 800 words; and 87% were under 1000 words; the longest was 3998 words. Teachers who assign essays to students can appreciate the constraints on content inherent in such limited reports. Many specialists in media analysis emphasize how these space constraints, along with those of limited time and budgets for investigation, encourage use

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<sup>4</sup> Using standard academic forms at LexisNexis, we searched for “obesity or obese” and for “lawsuit or sue” and for “fast food” in “Headlines, Lead Paragraphs, and Terms” in the “Major Papers” source-designation under “General News.” LexisNexis features approximately 28 domestic newspapers under “Major Papers.”

of familiar “scripts” and conceptual frames by journalists to make news familiar, accessible, “normal” (see Bennett 1996; Haltom and McCann 2004) Our coding aims to pick up on some of these framing elements.

The Tobacco Connection. We begin by addressing whether news coverage emphasized two features that seem prominent in the movement literature of those legal reformers challenging fast food with lawsuits. We noted earlier, first, that reformers and their critics alike repeatedly invoke the legal battle over tobacco as an important, empowering, and informative precedent for the new campaign against junk food. It thus is surprising that news coverage in the 28 newspapers in the sample does not give more attention to the linkage. Of the 111 articles, only 49, or 44%, mention the connection. Even far more surprising, the leading legal advocate of courtroom challenges to fast food, John Banzhaf III, who seems hellbent on publicizing the cause and his role in it, is named in only 21 articles, although those articles often discussed him thoroughly and repeatedly. Together, only 15 articles mention both Banzhaf and the tobacco legacy. This suggests at the outset that the legal knowledge packaged for readers of print news is rather truncated and that legal challengers to junk food merchants may have trouble broadcasting their version of the fast food debate.

Scripted Frames: The Focus on Finger-Pointing. The first general area for which we coded was the thematic frameworks, or what discourse analysts call “frames,” that journalists used to present disputes over unhealthy food to the mass public. As noted earlier, communications scholars emphasize that reporters respond to pressures of short deadlines, limited funding, and market imperatives to make news accessible and interesting by using familiar, pre-formulated scripts to package news stories. These scripts often reproduce dominant cultural narratives and values, condensed into morsels in personalized, dramatized terms, and infused with practices of “balanced commentary” from two (rarely more or less) different points of view on the matter (see Bennett 2002). As we have demonstrated elsewhere (2004), most civil legal disputes can be fit into this format extremely easily. Moreover, we have already speculated about the terms in which food fights are framed for readers. In short, we expected that legal struggles over apportioning exclusive responsibility for obesity between consumers and corporate producers would be the focus of news stories, perhaps along with some attention to the fees that attorneys make in the process. These themes would prevail, we anticipated, at the cost of muting other reasonable frames, such as the shared responsibility of corporations and individuals emphasized by law, the collective social costs of unhealthy food, the unequal distribution of those costs, and, especially, the appropriate role of state-administrated regulatory institutions to address these costs.

The findings generally fit our expectations. A look at the bottom row on Table One reveals a total of the coded frames found in the 111 news articles. The “individual responsibility” theme highlighting the moral liability of consumers for what they eat is by far the most prevalent theme, with 315 manifestations. The “corporate responsibility” theme was detected a total of 125 times, while the “corporate duplicity” frame structured the storylines 159 times. If one adds the two latter frames together (284 total) as two dimensions of corporate responsibility, they nearly match (90%) the incidence of the individualistic responsibility frame. This pattern no doubt owes to journalistic norms of “balance” and objectivity in presentation; reporters interview one side of plaintiffs who

pin responsibility on corporations, while the “other side” reverses the direction of responsibility to consumers.

This apparent balance is a bit less equal than it might seem at first glance, however. Manifestations of the responsibility and corporate duplicity themes occur in roughly the same number of same articles, while they are omitted in 59 and 63 articles respectively; 32 articles mention neither corporate frame, while another 25 only mention only one of the themes a single time. The individual responsibility theme is omitted in only 28 articles, while 21 articles provide only one instance of the frame. Put another way, 62 (56%) of the articles accord substantial attention to the individual responsibility theme, while 54 (49%) include substantial attention to only one of the corporate responsibility themes. This suggests only minimal imbalance in the direction of the individual responsibility theme, further confirming the journalistic propensity for including “both sides” in framing debates.

**Table One**  
**Framing Schemes**

Sum of Mentions Mean Mentions	Plaintiff's Individual Responsibility	Corporate Responsibility to Consumer	Corporate Duplicity	Responsibility Shared by Parties	Attorneys' Motives
McDonald's French Fries (n=6)	21 3.5	9 1.5	26 4.3	1 0.2	0 0.0
Caesar Barber Suit (n=21)	59 2.8	9 0.4	50 2.4	6 0.3	26 1.2
School Vending Machines (n=10)	30 3.0	16 1.6	12 1.2	3 0.3	7 0.7
All Other Civil Cases (n=59)	205 3.5	91 1.5	71 1.2	10 0.2	16 0.3
Totals (n=96)	315 3.3	125 1.3	159 1.7	20 0.2	49 0.5

Several other findings in the data on framing are relevant as well. For one thing, the “shared responsibility” frame barely surfaces in reporting. This is important confirmation of the media proclivity is to revel in zero-sum conflicts and blame games between parties, rather than legal concepts which permit, even encourage, shared liability. This confirms one finding of our book: routine media scripts tend to exaggerate the adversarialism of legal disputing that pundits disparage and lament, often in highly moralistic terms (Haltom and McCann 2004). For that reason, we are a bit surprised to find that media framings focusing on (plaintiffs’) attorneys fees show up only 49 times, in 29 of the 111 (26%) articles. This may still be significant, adding to skepticism about plaintiffs and their lawyers while displacing attention to corporations and their attorneys. But we shall see that the most dramatic skewering of lawyers for the plaintiffs takes other forms in these articles.

Finally, and perhaps most important, our pilot study showed virtually no presence of the “social costs” frame that challengers to junk food emphasize in their own publicity

statements as the foundation for urging more expansive regulatory action.<sup>5</sup> Only sixteen on the 111 articles mention the issue, and only three give the issue any prominence at all. This point further underlines that the mass media largely eviscerate the “public” dimensions of public interest lawsuits, reducing them to conflicts among private parties with narrow claims. By this measure alone, there is considerable reason to doubt whether public interest litigation has successfully contributed to the politicization of fast food as a public issue of widespread concern.

Portraying the Players. Our second general coding scheme produced even more dramatic results. Coders were asked to mark each time a positive or negative descriptive term was used regarding the personal character or motivation of one or more players in disputes about fast food. Such descriptive terms are especially important in stories that focus on locating subject responsibility, for they mark subjects as either deserving or undeserving of respect, credibility, or sympathy. The coding instructions provided examples of terms taken from articles. Moreover, coders were asked to assess the explicitness or intensity of the description; if notably dramatic or bold, the description could be multiplied by a factor of “2.” For example, an “overweight” plaintiff or a “wealthy” lawyer should each receive a negative “1”: a “fat” person or “dumbass” plaintiff (actual terms in articles) or “greedy” lawyer each would get a negative 2. By contrast, a “middle class” plaintiff, an “informed” consumer, or a “committed” lawyer would each get a positive “1.” A “thoroughly well informed” consumer, an “unimpeachable” plaintiff, or a “publicly spirited” attorney would get positive “2”s.<sup>6</sup> Finally, another multiplier of “2” was added to descriptions that appeared in either article headlines or first lines, which media scholars suggest are by far the most read and most remembered segments of news stories.

So what did we find? The last column of Table Two (“Totals”) pretty much says it all, but we will try to highlight a number of particular comparisons. We begin with the aggregate descriptions of key players from all the articles together. Overall, plaintiffs or consumers racked up 691 negative points, as opposed to a negative 277 for

<sup>5</sup> We did not code for this frame because it did not initially show up, but we have good reason to think that “responsibility” oriented themes generally trump efforts to generate more social-welfare and less blame-centered understandings of the issues at stake. We are undertaking to document this tendency in follow-up studies.

<sup>6</sup> We emphasize that language is indeterminate, and that descriptive terminology can be open-ended, holding different meanings for different readers in different contexts. As such, we assessed terms very carefully with reference to the specific context of the debates over frivolous litigation, rights claiming, and legal blaming., a political discourse in which, we have already demonstrated, allegations of responsibility and finger pointing for blame matter a great deal. In this context, terms that could mean many things otherwise take consistently coded content. A fuller treatment is accorded in Haltom and McCann 2004. But, we note here the key standard of subject deservingness or undeservingness that turns on capacity for rational self-control, for productive activity, and for discipline. Greed, opportunism, indulgence, over-consumption, and displacement of blame are key terms of opprobrium for all sides. Self-reliance, productive activity, moderation, reasonableness, and self-control are considered virtues. Of course, the actions and actors accorded these assessments are not self-evident either. Again, we use the exchanges in well-publicized debates over legal naming and rights claiming to provide specific readings of descriptive terms in news coverage. We cannot account for the infinite variety in how these signals may be received by various audiences, but we can assess them in terms of the well-defined public debates among primary parties to the disputes.

defendants/corporations, for an overall rough ratio of 5:2. Positive scores were 34 points for plaintiffs and 140 for defendants, at a rough 1:4 ratio. When computed together, the net score for plaintiffs was negative 657 to negative 137 for defendants, for a nearly 5:1 ratio (descriptions, multiplied by explicitness and placement) stacked against plaintiffs. The characterizations of attorneys are even more stunning; net scores for plaintiffs' attorneys are a negative 192 to net negative 1 for defense attorneys. The resulting negative 192:1 ratio is well beyond even our boldest expectation, and many magnitudes greater than we found in our general study of tort litigation coverage generally. One can hardly envision a more thoroughly hostile presentation of plaintiffs and their attorneys relative to corporate defendants. Amidst this radical imbalance of reporting, it should not escape notice that negatives overall dominate reporting for both sides, with few positives for anyone, thus confirming widespread popular complaints about news media cynicism (see Bennett 1996). The data underline emphatically the point that press stories embrace the negative, and especially scorn for plaintiffs and their lawyers. This again is important, for while claims of individual and corporate responsibility appear in relatively equal quantities, advocates for the former are treated far more negatively than for the latter. The "impartiality" ethic of journalists generates a superficial semblance of "fair and balanced" reporting that disappears under systematic scrutiny.

**TABLE TWO**  
**Characterizations of the Disputants**

Cell entries consist of the <b>sum</b> of positive or negative characterizations of the "players" in each row and the arithmetic <b>mean</b> of such characterizations per article in each column.		McDonald's Fries (n=6)	Caesar Barber (n=21)	Vending In Schools (n=10)	All Other Civil Cases (n=59)	Totals (n=96)
Plaintiff	Positive	0	8 (0.4)	3 (0.3)	10 (0.2)	34 (0.3)
	Negative	40 (6.7)	155 (7.4)	55 (5.5)	395 (6.7)	691 (6.2)
Plaintiff's Lawyer	Positive	0	2 (0.1)	5 (0.5)	8 (0.1)	23 (0.2)
	Negative	43 (7.2)	56 (2.7)	59 (5.9)	100 (1.7)	215 (1.9)
Defendant	Positive	6 (1)	10 (0.5)	9 (0.9)	72 (1.2)	140 (1.3)
	Negative	47 (7.8)	56 (2.7)	22 (2.2)	162 (2.8)	277 (2.5)
Defendant's Lawyer	Positive	0	0	0	0	0
	Negative	0	0	0	1 (0.0)	1 (0)
Jury or Jurors	Positive	0	0	1 (0.1)	3 (0.1)	3 (0)
	Negative	0	4 (0.2)	0	0	5 (0.1)
Judge	Positive	0	0	0	1 (0.0)	1 (0)
	Negative	0	8 (0.4)	0	2 (0.0)	15 (0.1)
Totals	Positive	6 (1)	20 (1.0)	18 (1.8)	94 (1.6)	201 (2.1)
	Negative	130 (21.7)	279 (13.3)	136 (13.6)	660 (11.2)	1204 (12.5)



We had speculated at the start that coverage of cases would vary according to the different profiles and claims of plaintiffs. This proved to be very accurate, again beyond our expectations. We used four specific disputes in this legacy to interrogate differential media treatment.<sup>7</sup> We consider first the case of the Hindu vegetarians who challenged McDonald's for misleadingly advertising that their French fries had no beef content (Column labeled "McDonald's Fries"). The case generated rather less coverage than expected, a total of only six articles. The Hindu plaintiffs received a net negative score of 40, while the defendants elicited 47. This is far and away the most favorable, or balanced, of any coverage for plaintiffs in our study. No doubt this reflects, as we had surmised, the principled, religious basis of the plaintiffs' claim, the palpably deceptive actions of the corporation, and the fact that the latter settled for over \$10 million and a public apology for wrongdoing. That the plaintiffs scored only a draw with defendants in the court of mass media for their complete triumph in court thus seems significant. Moreover, journalists permitted removal of the gloves in describing attorneys; lawyers for the plaintiffs, including the very virtuous Harish Bharti profiled earlier, received 43 negative points while the corporate lawyers netted 0, in six separate articles. This is the aspect of this specific story most consistent with the others.

We expected that the case of school children exposed to corporate vending machines secured by special "school donations" for monopoly contracts would fare favorably in the media. Not so. Plaintiffs received a net negative rating of 52 in the ten articles, while defendants scored negative 13, for a 4:1 ratio against children as deserving victims (see column "Vending in Schools"). Not so surprising, perhaps, is that attorneys for the plaintiffs were again treated even far more negatively, a score of 54:0 relative to defendants' attorneys. It is relevant in this case, though, to remember that, while the moral argument pitted vulnerable children against manipulative corporate giants, the actual legal case in Seattle involved parents and other representatives of children suing the school board to force termination of contracts with the sugar drink marketers. Critics of the litigation deftly aimed their charges against litigation as a way to change school board policies, thus displacing the focus on children. Such is the character of the systematic backlash against rights claiming in the contemporary era, which journalists dutifully report and reproduce. Overall, because the actual plaintiff identities were mixed and murky, the significance of coverage in this case is problematic.

The story of Caesar Barber is, by contrast, clear and emphatic. Barber, a middle aged, overweight Black worker, was ripe for portrayal through a variety of negatively racialized, class-oriented stereotypes emphasizing lack of discipline, inadequate self-control, and greed. His case, even though dismissed before trial, received by far the most extensive (21 articles) media treatment. Barber, the plaintiff, received a net negative score of 147, while the five defendant corporations received net negative ratings of 46, for a 3:1 negative representation of the plaintiff, surprisingly better than the representatives of the children in the previous case. Once again, the most extreme ire seemed directed toward his attorneys, by a 56:2 net negative ratio.

Finally, we take up our last category of disputes: those designated as "other than the previous cases." Nearly all of these 59 articles (over half the sample) were generally

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<sup>7</sup> We included in our coding scheme a fifth category, which was a check on our coders. The case of "Barbara Smith (large woman) lawsuit against fast food restaurants" was fabricated by us, and never occurred. None of our coders entered data for that fictitious case.

about anti-fat litigation, with few specific referents; plaintiffs, defendants, and their attorneys were mostly cast in terms of abstract categories, which means that the descriptions take on generalizable meaning. In this amorphous group of articles, plaintiffs (or consumers) were accorded a net 395 negative rating; corporate fast food vending defendants were given a negative 90; the ratio is nearly 9:2 against plaintiffs. This is, again, stunning. But consider as well the treatment of attorneys: plaintiffs' lawyers were portrayed with a negative 92 rating relative to a net negative 1 for corporate legal defense. In the abstract, without specific people in the picture, the media coverage of actors generating consumer litigation against fast food vendors is portrayed in extraordinarily negative light.

One conclusion of our previous book seems, in light of this survey regarding public interest litigation challenging fast food, understated. Media treatment of rights advocates and legal mobilizers in the food fights dramatically reproduces and amplifies reactionary assaults by corporations and their front groups. One need not agree with the ends or means of junk food fighters to recognize the problematic role of media in portraying, and hence influencing, the struggle. The dominant narratives that circulate in our mass culture not only discredit legal mobilization campaigns, but they defame the causes themselves by debasing the victims and their representatives.

Beyond Numbers: A Brief Look at Sample Text. Readers at this point may be weary and wary of our numbers. Hence we provide just a brief glimpse of actual characterizations of lawsuits, using our initial case study of the Caesar Barber legal claim against five fast food restaurants. The lawsuit was covered gleefully in scores of print and electronic news venues. The articles that we surveyed were in the mold of standard legal lore about frivolous litigation – focusing on the outrageous claim and obese, seemingly undisciplined character of the plaintiff, accented by assessments that the lawsuit was “ridiculous,” “senseless,” “baseless,” “irresponsible,” “frivolous,” and the like. Headlines underlined the message with parody: “Whopper of a Lawsuit” (*ABC NEWS.com*), “Want a class-action with that burger?” (*FOXNEWS*), “Lawsuit: Hold the Fat” (*Newsday*); “Fast Food Junkies Sue Eateries Over Fatty Food” (*Boston Herald*); “Would you like fries with that lawsuit?” (*CNN*). Opinion essays quickly followed, with titles such as: “Fat Police Are Here,” “Sue Your Way to Fame and Fortune” “In war on fat, it’s the food’s fault,” and “Burger fans view lawsuit as bum steer,” which ends with line “We sue too much in this country” (Michael Stetz, *San Diego Union-Tribune*). In the *Time Online* commentary, “A lawsuit to choke on,” the editorialist concluded, “Americans are going to have to decide if they want to be treated like adults.” “It’s not your fault. And there’s money to be made,” noted columnist Kathleen Parker. An *Online News* alternative website stated what most journalists hinted at more subtly: “Big Fat Man Sues Self for Being Such a Dumbass.”

Even the careful, astute reader might miss, amidst such jocular condescension, that this lawsuit, like others, was a classic act of legal mobilization to draw public attention to the issue of fast food vendors’ pervasive deceptions, the huge profits that they provide, and the collective costs they impose (see McCann 1994; Mather 1998). Only a few stories noted as well the fact that doctors, nutrition experts, consumer groups, and even FDA officials praised the lawsuit for raising an important public issue. Meanwhile, corporate funded opponents displayed their art by quickly making the story another

memorable, if quite distorted, icon. One group ran a prominent full-page ad in major magazines, showing a huge naked belly falling over belted pants, bearing the title “Did you hear the one about the fat guy suing the restaurants? It’s no joke. He claims the food was too cheap so he ate too much! Learn more about the erosion of personal responsibility and common sense. Go to: ConsumerFreedom.com.” That may not be the last word, but it surely seems to capture the reigning conventional wisdom reproduced by news media at this moment in history.

From News to Notions: Public Opinion. We conclude our analysis of media coverage regarding the legalized food fights with a brief note about public opinion on the legalized food fights. Our earlier study of similar reporting patterns about tobacco litigation found an amazing correlation between news narrative framing and public opinion. Our interpretation does not jump to simple conclusions about causality. We suggest not that the mass public is brainwashed or that journalists simply follow public opinion. Rather, mass production of legal knowledge is a complex process of multiple interactive factors in which media practices often figure prominently.

The parallels between media reporting and extant public opinion data again are striking for the food fight litigation. Polls surveying public opinion revealed that Americans have opposed lawsuits against tobacco companies and pinned responsibility for the dangers of smoking on individual smokers by roughly 3:1 margins for decades, except for a very brief time period in the mid-1990s (see Haltom and McCann 2004, ch. 7). The even more negative press coverage of legal junk food fights is matched by more negative opinion polls. A Gallup poll in 2003 concluded “nearly 9 in 10 Americans oppose the idea of holding fast-food companies legally responsible for the diet-related health problems of fast-food junkies” (Saad 2003). A recent WNBC poll in New York similarly revealed that 83% of respondents reported that restaurants should not be held responsible for the health of their customers (Consumer Freedom 2004).

Lawyer activist John Banzhaf invokes only slightly less negative polling results to propose reasons for optimism. An essay on his website cites a 2002 *National Law Journal* study that found 53% of potential jurors would side with tobacco companies if they were sued by a smoker, and only 28% would side with the plaintiff. He likens this to a 2003 survey by Brown DecisionQuest, a litigation research team, showing that 56.5% would side with a corporate fast-food peddling defendant sued by an obese person, and 24.4% would most likely award damages to the plaintiff (Banzhaf 2004). Banzhaf grounds his hopes in an assumption that the tobacco campaign was a huge success and the movement to challenge fast food merchants as still in its infancy. Our own analysis, by contrast, suggests that the challenge to big tobacco, however successful in courts and elite political negotiations, achieved little for victims of smoking, for efforts to educate the public about smoking, and, most important, for the campaign to mobilize public support for greater legal control of tobacco production and marketing (Haltom and McCann 2004). Indeed, after half a century of litigation, the public still opposes litigation blaming tobacco companies for their deadly practices by a 3:1 ratio. One reason for this is that the ethos of individual responsibility still dominates the normative framing of the issue for most citizens. That the public is likely to express greater support for the more complicated, ideologically difficult case for increased government action against fast food vendors seems far-fetched. And as long as media reporting of the issue,

along with familiar narratives stigmatizing trial lawyers and plaintiff rights claiming generally, circulate widely, the mass-generated produced conventional wisdom is likely to remain relatively secure and stable.

### Implications

We develop three different levels of generalizable implications from the findings presented above.

Law, Media, and the Politics of Food Fights. Our framing analysis of news constructions of the junk food fights confirms our initial expectations. The general stranglehold of the responsibility ethic and “blame game” logics in news narratives about junk food litigation wield huge influence in both our legal system and broader culture. Moreover, the uneven, often subtle, but undeniable tendency to brand plaintiffs in stigmatizing terms as irresponsible, undisciplined, and greedy, thus debasing the normative designs and political message of their litigation campaign, likewise parallels our earlier study. We also found some evidence supporting our expectation that different plaintiff profiles would elicit different degrees of negative treatment: Hindu vegetarians received the most balanced treatment, no doubt because of their principled, religious lifestyles and the explicitly deceptive corporate practices they challenged; the overweight working class African American male received the most negative treatment, perhaps reflecting ways in which his obesity was filtered through a lens of racial and class stereotypes. Finally, trial lawyers for consumer plaintiffs, despite self-conscious efforts to act in self-sacrificing and publicly spirited manner, were accorded overwhelmingly unflattering treatment across the board in ordinary news production. All of this adds up to a highly negative portrayal of the recent legal mobilization campaign against the corporate Frankenstein of fast food production. It thus is not surprising that public opinion polls register very little support for litigation against fast food producers in general. Again, we do not suggest that news coverage has *caused* such negative opinions in any simple sense, but rather that mass media form a powerful part of the larger processes of knowledge production in American public life, at once reflecting and reproducing the influence of dominant instrumental actors and ideological values.

These features of news coverage both parallel and reinforce our findings about anti-tobacco litigation. Despite what liberal reformers hope and some analysts have projected, the impediments to legal mobilization politics on both issues are substantial. For those interested in predicting how other similar issues play out politically, we offer three general insights. First, lawyers’ fates are influenced by their capacity to cultivate, in word and deed, an image as responsible, principled advocates of justice, in an attempt to fend off inevitable presumptions of greed and opportunism. A bow to humility probably helps in this regard. Such gambits may fail, but inviting dismissal through arrogance and ostentatious display is hardly a good strategy (see Haltom and McCann 2004: ch. 4). Second, choosing plaintiffs who are difficult to brand as undeserving also seems to matter a great deal. That the Hindu vegetarians fared relatively well in court and mass media is instructive. By contrast, the much-scorned campaign on behalf of school-age kids again

may underline the difficulty of constructing any plaintiffs as sympathetic in the present climate.

Finally, litigation aiming to pin the tail of responsibility on a corporate foe does not automatically open up the public agenda to more expansive policy discussions about increased government regulation, insurance reform, increased medical benefit subsidies, or other statist “social” policies at odds with individualistic “blame game” logics (see Haltom and McCann ch. 4, 8). We expect quite the opposite: battling over exclusive responsibility for widespread harm may impede and divert effective agenda setting. It is almost astounding, for example, that the debate over fast food has barely acknowledged the class-based factors at stake in consumption of food that is, above all, cheap and accessible as well as fast (but see Associated Press 2004). But all these points are consistent with evidence suggesting that complex “structural” arguments and redistributionist policy frames are anathema for the media or alien to the public. In short, legal mobilization to increase consumer health against corporate profit-making capacities faces a mountain of obstacles from mass communication processes that will be extremely difficult to overcome.

Liberal Legal Mobilization in the Neoliberal Era. Some readers may find that the case study developed here has relatively little broader significance. How many of us can get excited or fearful about fast food, given all the other dangers and wrongs apparent in American society? Despite the enormity of the costs at stake, the issue surely does not rank high on the scale of social injustices or public problems for progressives, much less for conservatives. But we suggest that there is more significance in the issue than might be assumed. Our argument is in part normative, but it also fundamentally has analytical value regarding the changing currents of power relations in contemporary U.S. politics.

The key to our argument is in underlining the linkages between mass constructions of obesity litigation and the fates of other rights campaigns – parallel personal injury issues like gun control; antidiscrimination for minorities, women, the disabled, gays and lesbians; affirmative action; welfare rights; abortion; health care reformer; equal education, etc.– in modern America. It is hardly a secret that a massive neoliberal and neoconservative backlash against citizen rights, and especially those of the most disadvantaged, has been growing in the U.S. (and other developed nations) over the last several decades (Goldberg-Hiller 2002; Dudas 2003). However, while considerable scholarship has documented the general ideological shifts under way and the assaults on specific policy issues, little attention has been granted to linkages among these struggles and their institutionalized narrative representations in the mass media. Campaigns such as the food fights seem relevant to this latter enterprise in several ways.

First, linking the food fights to the broader wave of anti-rights movements expands recognition about the scope of the backlash, adding another dimension to the breadth of the culture wars reshaping every facet of American society. Second, analyzing the core discursive terms of the struggle over unhealthy food played out in the mass media can clarify the symbolic and material connections to other campaigns. In fact, the brazen dismissals of obesity litigation in some ways provide uniquely explicit, transparent expressions of the broader attack on rights, cause lawyers, and legal strategies that challenge existing power relations. Ideologically, our analysis of the role of the responsibility ethic and the propensity to stigmatize rights claimants as undeserving

builds on recognition of these dynamics in other struggles more closely linked to class, racial, gender, and other forms of hierarchy. Recognizing such linkages also, conversely, underlines the little recognized inequalities – of those low-income people who most consume fast food, and for the mass of consumers relative to powerful corporations – at stake in struggles over unhealthy food.

Materially, it is relevant that battles over junk food marketing, and over products liability generally, signal the addition of newly committed corporate players to the backlash. Many corporations that traditionally have tried to distance themselves politically from divisive social issues like abortion, racial discrimination, gay rights, and the like have been increasingly drawn in by legal battles as organizational actors in conservative politics, possibly increasing the solidarity of the political Right and clarifying divisions in society. It is instructive in this regard to note that think tanks, foundations, and donors long active in various assaults on the “liberal” social welfare and regulatory state have in recent years joined the battle against trial lawyers and their efforts to mobilize tort law. In this perspective, the fusion of organized politics and media construction around obesity lawsuits identifies yet another brick in the growing wall of hegemonic power in corporate America. Finally, the unabashed bashing of obesity litigation also exposes fully the role of media in shaping public understanding, debates, and lawmaking more generally – a role that is arguably more subtle and difficult to demonstrate in other areas of social policy.

The normative implications of such insights no doubt matter for defenders of equality, civility, and democratic principle. But even apart from such commitments, we hope that our study contributes to more sophisticated analysis about the role of mass media in the construction of public life and circuits of power in our complex society. In particular, as scholars increasingly expand the study of legal mobilization politics to include recognition of widespread legal counter-mobilization efforts (Dudas 2003; Goldberg-Hiller 2002; Bloom 2003), so does an appreciation of the considerable role of mass media become more important as well. As we demonstrate, the media play an active, constitutive role in the construction of social relations, disputes, and possibilities. Analyses of contests over legal meaning that do not account for how institutions of mass knowledge production shape public contests can only fall woefully short.<sup>8</sup>

**The Mass Media as Legal Institutions.** Most generally, we want to suggest through our study that the mass media play a fundamental role in the production and reproduction of law itself. After all, we live in a cultural environment where images of law saturate the news we read, the TV shows and movies we watch, the novels we indulge, the cartoons that make us laugh, the jokes we exchange with each other, the entire range of mass mediated knowledge. To the extent that law is understood as a body of knowledge, a complex tradition of discourses, symbols, logics, and modes of reasoning, so must we confront the means by which that knowledge is generated, circulated, consumed, and incorporated into practical action. It is not enough to

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<sup>8 8</sup> We note that our findings are unclear in their implications for some specific types of legal mobilization – especially by environmentalists – that are seeking to *prevent* new policies or practices, such as development in the wilderness, green spaces, or ecologically fragile areas. This suggests another rich area of potential future study.

recognize, with realists, the gap between popular narratives and official practice, between legal fantasy and legal reality. Nor is it enough to follow some cultural scholars in simply interrogating isolated cultural texts. Rather, the narratives about law that we absorb from corporate-produced entertainment and infotainment become essential parts of our legal imagination, vivid referents that constitute our actions as legal subjects in everyday life – as jurors, lawyers, and officials, but also as workers, students, consumers, neighbors, family members and the like. To put it most plainly, newspapers, magazines, TV shows, and other organs of the mass media are every bit as much institutions of legal construction as are judicial trials, administrative rulemaking processes, and police decisions in the street. Indeed, citizens act on mass produced images, understandings, and expectations identified with law as they assume roles as legal actors, infusing official legal processes with constructions of the “outside” mass culture, verifying a continuous circulation of knowledge that we identify as law, as legal ‘reality,’ across the many domains of modern life. Regardless of the institutional site where legal practice is studied, we miss a great deal if we ignore the degree to which mass produced knowledge of and about law is present and powerful, contributing to the ongoing constitution of legality.

## APPENDIX

### “Getting Fat” Coding Scheme

Numbered items will go into electronic coding scheme.

**General Instructions:** 1) Fill in items #1-3. 2) Read article through. 3) Read article again and mark in margins 4-9, then add up & fill in summaries in blanks. 4) Read article again for framing themes, items #10-14, then add up & fill in. 5) Complete #16-18.

1) **Text Number** (#1---) \_\_\_\_\_

**Source Type:**      \_\_\_\_\_ **Newspapers**                      \_\_\_\_\_ **Magazines**  
                                  \_\_\_\_\_ **Transcript of Electronic**                      \_\_\_\_\_ **Other**

**Text title:** \_\_\_\_\_

2) **Text date**    \_\_/\_\_/\_\_

3) **Number of words in text (from L/N)**    \_\_ \_\_ \_\_ \_\_



**Items 4-9 refer to references to character (personal traits) of major actors in the lawsuits. Coders should mention each different reference to a character trait (may be *more than one in a sentence*). Each reference should be calculated for:**

- **whether it is positive (+) or negative (-) about that person.** The common negatives will refer to greed, sloth, laziness, or other types of irresponsibility. The positives will refer to private virtue, to hard work, to productivity and justifiable profit, to contributions to safety or justice, to “common sense.” Actors may be referred to with no evaluative language at all, in which case you record no value. “The plaintiff filed a lawsuit against McDonald’s” and “The jury awarded \$3 million” would not receive mention. “Mr. Welles blamed the corporation for the fact he got fat from stuffing himself on fast food” – would be a negative for the plaintiff, while “Ms. Anderson was a self-made success” would be positive.
- **the “power” of a descriptive reference, multiplying by a 1 (indirect, mild) or a 2 (direct, explicit, powerful).** A “fat” man is a 2; a man who is 6 feet tall and 270 pounds (implying fat) is a 1. A lawyer who stands to make \$1 million is a 1; a lawyer who is “greedy” or “rich” or a “pirate” is a 2. An attorney who is “fending off an onslaught of similar lawsuits” is a 2, but a lawyer who has “assembled a strong defense” is a 1. An “unlucky defendant” would be a 1 but a “blameless entrepreneur” would be a 2.
- **the placement of the reference.** References that are in the title or the first paragraph are multiplied by a factor of 2. All other references are multiplied by 1.
- **Record in the text, by each mention, the type of person and the total of a x b x c.** The text “The fat jerk blamed everyone else for his problems” in the first paragraph scores -1X2X2= 4. Write P4 in the margin by the reference. If the last paragraph says, “The corporation responded that it had published its calorie content on the box,” score +1X1X1=1; write D1 in the margin.
- **By the coding scheme number for each actor, add up all the positives for each actor and all the negatives for each actor** (all the P’s, D’s, etc)

4) **P - Plaintiffs** (those who sue corporate producers or retailers)

\_\_\_\_\_ **Negative**                      \_\_\_\_\_ **Positive**

Look for characterizations as lazy, indulgent, greedy, undisciplined, exploitive, given to blaming others for own failures. Or positive characterizations as concerned about own health, responsible, committed to healthy society or justice.

5) **D - Defendants** (fast food vendors or processed food makers)

\_\_\_\_\_ **Negative**                      \_\_\_\_\_ **Positive**

Look for allegations of irresponsibility, duplicity, and/or greed as negatives and for positive remarks suggesting they bear no responsibility

for indulgence of others, they give consumers options, and/or they only respond to market.

6) **PA - Plaintiffs' attorneys**

\_\_\_\_ **Negative**                      \_\_\_\_ **Positive**

Look for negative references to greed, opportunism, or zealotry, and/or positive references to “tireless fighters for health” or the public interest.

7) **DA - Defendants' attorneys**

\_\_\_\_ **Negative**                      \_\_\_\_ **Positive**

Look for negative references to greed, opportunism, reckless disregard for health or honesty. Positive references might refer to them as knowledgeable authorities or advocates of “common sense” or agents of moderation.

8) **JR - Jurors**

\_\_\_\_ **Negative**                      \_\_\_\_ **Positive**

Positives will cite jurors or juries as informed, fair, and/or insightful. Negatives will state that juries or jurors tend to be soft-headed, soft-hearted, duped, and/or political.

9) **JD – Judges**

\_\_\_\_ **Negative**                      \_\_\_\_ **Positive**

Same types of attributes as jurors.

**Items 10-14 will refer to “general interpretive frames” or themes that inform the article story lines.** Mention each reference to a frame, *no more than one reference per sentence*. If more than one reference to a frame appears in single sentence, code **either** as “sr” (Shared Responsibility, #13 below) if appropriate **or** code the first-mentioned frame. Note that these references are not evaluated directly for positive or negative implications, although they often connote values. These refer to the thematic ways issues are defined. If five references in three sentences refer to blaming fat plaintiffs for eating too much, mark down **pr** three times in margins. We are not weighting these. **A raw sum for the total of all items marked in the margins will go into the electronic coding scheme for 10-13.**

10) **ir – Individual responsibility** of specific plaintiff or consumers generally (consumers are responsible for what they eat; enjoy freedom of choice; should blame themselves for conditions they might have anticipated; tend to eat too much; usually take responsibility for their own decisions; sometimes litigate to avoid responsibility for outcome)

11) **cr - Corporate responsibility** to consumer/plaintiff **for healthy food, or offering healthy food choices/options** (watch out –not same as #12 below)

**12) cd – Corporate producer responsible full disclosure of accurate information about products (often in connection to fact of corporate duplicity) – this is often the key issue for lawsuits, not unhealthy food but deception**

**13) sr - Shared responsibility mixed in one claim – producer responsible for full disclosure, and consumer responsible for smart choice, both at once**

**14. af – Attorneys’ motivations and fees – real issue is the lawyers or/and money**

**15. Specific types of lawsuits mentioned? (circle each one.)**

- a) Hindu vegetarian lawsuit against McDonald’s fries
- b) Caesar Barber (obese Black guy) lawsuit in NY against several fast food corps
- c) Barbara Smith (large woman) lawsuit against fast food restaurants
- d) Vending machines in schools (may include Seattle schools and Coca Cola)
- e) Other – please list on form

**16. Point in dispute for each lawsuit mentioned in article.** If article mentions multiple lawsuits, fill in value for each lawsuit mentioned.

- a. No claim yet filed; just “blaming” and alleging
- b. Lawsuit filed but pre-trial
- c. During trial
- d. Post-trial, no appeal mentioned
- e. Post trial, appeal planned or pending
- f. No mention of dispute stage

**17. Are obesity lawsuits linked to legacy of tobacco litigation?**

- a) yes b) no

**18. Is John Banzhaf (architect of many lawsuits) quoted/mentioned in the article?**

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