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Selling Influence: Using Advertising to Prejudice the Jury Pool

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TABLE OF CONTENTS

I. Introduction	686
II. Advertising's Effects on Jurors	692
A. How Advertising May Influence Jurors	692
1. Association	694
2. Networks of Associations	695
3. Framing and Schemas	696
4. The Cueing Process	697
5. Priming and Closure	697
6. Elaboration	698
7. Emotion and Memory	699
8. The Relevance Factor	700
B. Assessing the Impact of Peripherally Processed Advertisements	701
C. Advertising's Dependence on Context	702
III. Defining Juror Bias	703
A. Fair Juror Standards in Criminal Trials	703
B. Fair Juror Standards in Civil Trials	711
C. Social Scientists' Analysis of Jury Bias	713
IV. Possible Remedies for Advertising-Induced Juror Bias .	716
A. Using the Commercial Speech Doctrine to Suppress Pretrial Advertising Campaigns	717
B. Using Procedural Remedies to Eliminate Juror Bias	721
C. Gagging Lawyers to Prevent Pretrial Advertising Campaigns	724

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I. INTRODUCTION

Assume that before jurors were chosen for Timothy McVeigh's trial, federal prosecutors purchased advertising time on Denver television stations to show pictures of the Oklahoma Federal Building in ruins, of firefighter Chris Fields carrying a dead baby out of the rubble, and of crying relatives looking at the devastation.¹ Imagine that at the end of each advertisement, superimposed over a particularly heartwrenching picture, was the word "Remember."² Or consider the consequences if the plaintiffs' attorneys in the O.J. Simpson civil trial had placed advertisements on Los Angeles County television stations showing a white Ford Bronco slowly driving on a freeway, followed by the word "Justice" overlaid on a single glove.³

Advertisements have rarely been the issue in prejudicial cases in which extrajudicial publicity has allegedly caused unfair trials. Instead, these cases usually involve news stories revealing information not admitted at trial, or inflammatory comments from attorneys. Judicial decisions and social science research concerning jury bias have also dealt primarily with news reports—sometimes inaccurate, sometimes inflammatory—but news articles, nonetheless. However, advertisements may be an even more serious impediment to empanelling a fair jury than are news stories, since advertisements appeal to seated or prospective jurors' emotions. As one commentator said: "Critics of the jury system occasionally claim that jury verdicts are more likely to be driven by whim, prejudice, or emotion than by the hard facts of the case."⁴

Research suggests that jurors acting on emotions will likely fail to carefully consider evidence during deliberations.⁵ Studies also show that advertising often effectively accomplishes its purpose by appeal-

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1. See *Tiny Victim Shown in Dramatic Photo, A 1-Year-Old Girl, Died of the Injuries*, N.Y. TIMES, April 21, 1995, at A23.
 2. The federal prosecutors in the McVeigh trial did not purchase television advertising time.
 3. Of course, Daniel Petrocelli, the plaintiffs' lead lawyer in the civil case against O.J. Simpson for the wrongful death of Ron Goldman, and John Kelly, representing Nicole Brown Simpson's estate, did nothing of the kind. See generally B. Drummond Ayres Jr., *Civil Jury Finds Simpson Liable in Pair of Killings*, N.Y. TIMES, Feb. 5, 1997, at A1 (summarizing the result of the civil trial against O.J. Simpson).
 4. Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 162 (Robert E. Litan ed., 1993).
 5. Kristy Lee Bertelson, *From Specialized Courts to Specialized Juries: Calling for Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 28 (1998) (citing Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49 (1997)).

ing to people's emotions.⁶ If under some circumstances news reports can bias a jury, advertisements about a pending trial certainly could do the same. This Article argues that trial judges should, and do, have the constitutional authority to order attorneys not to publish advertisements about cases in which the attorneys are representing clients. This contention is based on the U.S. Supreme Court's ruling that trial judges may prohibit officers of the court from extrajudicial speech reasonably likely to cause an unfair trial.⁷ As this Article explains, advertisements are intended to influence people and, when used by attorneys to reach potential or sitting jurors, may be more likely to cause a "substantial likelihood of material prejudice" than nearly any other form of expression.⁸

Consider a civil case in which an attorney spoke to the public not through interviews with reporters, but by placing advertisements on a local cable television system. In April 2002, in an out-of-the-way courthouse in Trinidad, Colorado, a defendant (Wal-Mart) was granted a change of venue based on a finding that the plaintiff had tainted the jury pool with prejudicial pretrial advertising.⁹ The ruling was part of a class action suit by Wal-Mart pharmacists who claimed that Wal-Mart had violated the terms of their employment contract, particularly relating to overtime compensation.¹⁰

The basis for the change of venue request was two thirty-second television commercials that the plaintiffs' law firm Frank Azar & As-

6. See generally COGNITIVE AND AFFECTIVE RESPONSES TO ADVERTISING (Patricia Cafferata & Alice Tybout eds., 1989) (a collection of papers written by academic and industrial researchers presenting ideas, theories, and approaches regarding consumer responses to advertising); EMOTION IN ADVERTISING: THEORETICAL AND PRACTICAL EXPLORATIONS (Stuart J. Agres et al. eds., 1990) (a collection of articles written by various industry practitioners exploring the complex relationship between emotion and advertising).

7. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

8. Cf. *Gentile*, 501 U.S. at 1073-74 (1991) (stating that lawyers, as officers of the court, do not enjoy the protection of the First Amendment of the Constitution of the United States to the same extent as other professionals regarding their right to solicit business and advertise).

9. *Culver v. Wal-Mart Stores, Inc.*, No. 99CV161 (Dist. Ct. Las Animas County, Colo. filed Dec. 22, 1999).

10. *Id.* Approximately 9,000 former or current Wal-Mart Stores pharmacists were members of the class nationwide, arguing that the company improperly took certain deductions from their paychecks and refused to pay them for overtime work. The pharmacists claimed breach of contract, unjust enrichment, and violation of state labor laws. The plaintiffs asked for \$200 million in damages. Record at 475, 497-98, *Culver* (No. 99CV161). After the judge granted the change of venue motion, the class action was transferred to state court in Denver. *Culver v. Wal-Mart Stores, Inc.*, No. 02CV3487 (Dist. Ct. Denver County, Colo. filed Apr. 29, 2002). The 596 current or former Wal-Mart pharmacists who comprised the Colorado class settled the lawsuit in 2003. See Cindy Rodriguez, *Wal-Mart's Bargains May Prove Costly*, DENV. POST, Dec. 15, 2003, at B1.

sociates ran in the local Trinidad market area.¹¹ These commercials dramatized a historical event that took place decades before just outside Trinidad—the Ludlow Massacre.¹² The commercials visually and verbally described how mine workers and their family members were killed in 1914 when the workers went on strike for better, fairer pay and safer working conditions.¹³

Using a selection of historical black-and-white photographs, the advertisements showed workers organizing and then being fired upon by troops hired by, according to the commercials' narrative, "corporate capital."¹⁴ Other visuals depicted the death and destruction that resulted from the troops' setting fire to the workers' tent village where women and children were hiding in holes under the tents that had been dug to shield them from gunfire. In a transition to modern times, slightly more than halfway through each thirty-second commercial, the plaintiffs' attorneys—Frank Azar and John Barkely—were featured prominently as they spoke to the audience, giving what adver-

11. The advertisements ran 1,232 times in the Trinidad area between November 15, 2001 and December 30, 2001. The advertisements were carried on the Trinidad cable television channels showing CNN, ESPN, Lifetime, and TNN. The Trinidad trial was scheduled to begin April 8, 2002. The judge scheduled to hear the case recused himself. Judge Joseph Quinn was appointed to rule on the defendants' motion for change of venue. Record at 499, *Culver* (No. 99CV161).

12. See Richard Delgado & Jean Stefancic, *Home Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 789–90 (citations omitted):

[D]uring the coal boom in southern Colorado, in the period roughly from 1900 to 1915, company towns were built by the Colorado Fuel and Iron Company, using a grid pattern that contrasted with earlier adjacent Hispanic settlements built around central plazas. These mining camps, having no central gathering places, destroyed traditional Hispanic community, but, being relatively large, inadvertently provided an opportunity for activism to develop. Workers, dissatisfied with or denied their wages or paid in worthless scrip, and angered by extortionate prices at the company store, struck. When the strike began, the company evicted them from their homes in the camps, serving notice on the residents of thirteen tent colonies located near the entrance to the mines. By 1914, the United Mine Workers Union was providing financial support for 21,500 striking workers. Foreshadowing what was to come later when Mexicans became surplus labor, Colorado sent its National Guard to keep an eye on things. And on April 20, 1914, as happened earlier with the Indians at Sand Creek, the troops opened fire with rifles and a machine gun on the colonies, many of whose residents (also perhaps recalling what happened at Sand Creek) had dug trenches and cellars. But the militia burned the tents, opened fire, and killed at least eighteen workers in what has come to be known as the Ludlow Massacre. Massacre victims included Mexicans, Italians, some Anglos, many other ethnic miners, and children.

See also HOWARD M. GITELMAN, *LEGACY OF THE LUDLOW MASSACRE: A CHAPTER IN AMERICAN INDUSTRY RELATIONS* (1988) (discussing the consequences of the Ludlow Massacre on the course of industrial relations).

13. Record at 6–7, 55, *Culver* (No. 99CV161).

14. Judge Quinn described the advertisements in his oral ruling. *Id.* at 499–500.

tising experts refer to as “the call to action.”¹⁵ The attorneys admonished Trinidad residents to “never forget” their civic responsibility to defend workers struggling for fair pay. One advertisement closed with the attorneys standing in front of the Ludlow Massacre memorial statue, located near Trinidad; the other ended with the attorneys standing in front of the Las Animas County courthouse where the modern day trial was scheduled to be held.¹⁶

The question before the judge was whether the advertisements had contaminated the jury pool in Trinidad and, further, whether the impact of the commercials could be determined in voir dire,¹⁷ through procedures commonly used to evaluate the impact of pretrial publicity.¹⁸ This case is particularly illustrative, because the commercials

15. See, e.g., WILLIAM WELLS, JOHN BURNETT & SANDRA MORIARTY, *ADVERTISING: PRINCIPLES & PRACTICE* 335 (6th ed. 2003).
16. Record at 51–52, *Culver* (No. 99CV161).
17. One trial judge translates “voir dire” from the French as meaning “to see, to speak.” Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 *SMU L. REV.* 1755, 1763 (2001) (citing John McClellan Marshall, *Free From Any Bias or Prejudice: Voir Dire*, 6 *VOIR DIRE* 20 (Fall 1999)). That is, voir dire—questioning the jury pool to avoid seating biased or otherwise unqualified jurors—allows attorneys to see and talk with prospective jurors, determining if any of them already have made up their minds. *Id.* Dees also notes that *Black’s Law Dictionary* defines voir dire as “to speak the truth.” *Id.* (citing *BLACK’S LAW DICTIONARY* 1569 (7th ed. 1999)). For a detailed discussion on the merits of the voir dire process see S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 *BROOK. L. REV.* 290 (1972–1973).
18. The judge based his ruling for a change in venue on the advertisements’ effects on potential jurors:

Las Animas County has a population of 15,207 persons of which 9,078, or 60 percent, live in Trinidad. There are 4,500 homes in Trinidad and about 80 percent, or 3,600 of these homes, subscribe to cable TV. . . .

I find that the Ludlow ads had a very high frequency—that is, the number of times the viewer was exposed to the ads—and there was also a very high recall by viewers exposed to the ads. [Sixty-three] percent of those persons who viewed the ads were able to recall that Mr. Azar sponsored the ads, and . . . I find about 40 percent of those persons who viewed the ads were likely to have been influenced by the Ludlow ads in favor of the plaintiffs. . . . [Forty-four] percent of those persons who viewed the Ludlow ads had a more favorable view of Mr. Azar than before viewing the ads, and 32 percent of those who viewed the ads had a more favorable view of Mr. Barclay than they had before viewing the ads.

Record at 500–02, *Culver* (No. 99CV161). The judge also noted the impact of Wal-Mart’s corporate advertising, including those featuring “Wal-Mart’s support for the African-American book club and African-American heritage and clean drinking water and missing children and handicapped children, and also an ad emphasizing the fact that Wal-Mart’s employees appear to be very happy with their work.” *Id.* at 502–03. Judge Quinn concluded:

[T]he Ludlow ads by the Azar law firm have resulted in the plaintiffs acquiring an undue influence over the attitudes and mindset of many of the inhabitants of Las Animas County who viewed the ads on television. . . . The natural and probable [effect] of the ads on a jury panel will be to

used were not typical pretrial publicity in which either the defendant or plaintiff is discussed. Rather, in these commercials neither the pharmacists nor Wal-Mart was mentioned. Thus, determining the effects of the commercials on the jury pool required an entirely different understanding of message impact than that of the traditional tests to determine the impact of pretrial publicity.

Advertisements are meant to accomplish precisely what judges want to prevent—influencing decisions, usually at some later point in time when a consumer is considering a purchase. Creators of advertisements, like trial lawyers, have the ability, when they want to use it, to “deceiv[e] one’s listeners or readers with partial truths.”¹⁹ When advertisements lead to decisions about what cola or laundry detergent to purchase, advertising is a useful tool in a capitalistic society. However, when advertisements influence decisions about a defendant’s guilt or innocence, or which party wins a lawsuit, advertising can undermine a democratic society.

Democracy and the United States Constitution demand public confidence in fair jury decisions.²⁰ The Sixth Amendment to the U.S. Constitution requires that juries in criminal trials be “impartial,”²¹ the Fifth Amendment ensures that criminal defendants be given “due process of law,”²² and the Fourteenth Amendment guarantees citizens “due process of law.”²³ A fair trial, secured by these constitutional protections, is among the “most fundamental of all freedoms,”²⁴ the

create a link, whether subconsciously or consciously, between Mr. Azar and Mr. Barclay on one hand, and the very same rights to fair pay for employees that precipitated the Ludlow Massacre. This link . . . will result in predisposing a substantial number of potential jurors to favorably view the cause of the employees seeking fair pay from their employer as the plaintiffs are seeking in this case. . . .

I am convinced that the effect of the Ludlow ads has created a bias, whether conscious or subconscious, on the part of viewers in favor of plaintiff employees seeking fair pay against their employer. . . . In light of the limited population of Las Animas County and extensive penetration of the Ludlow ads, selecting a fair and impartial jury in Las Animas County would be extremely difficult and a risky task at the very best.

Id. at 505–07.

19. George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 990 (1997).
20. See Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 262–64 (1996) (Press coverage “helps make government institutions more accountable,” including courts, being “an effective restraint on possible abuse of judicial power which enhances the quality and integrity of the process, with benefits to both the defendant and society as a whole.”).
21. U.S. CONST. amend. VI.
22. *Id.* amend. V.
23. *Id.* amend. XIV, § 1.
24. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

Supreme Court has said, and is necessary for “the preservation and enjoyment of all other rights.”²⁵

However, the First Amendment’s protection for “the freedom of speech [and] of the press”²⁶ may conflict with the Sixth Amendment’s stated guarantees²⁷ and the Seventh Amendment’s implied assurances of a fair civil trial.²⁸ News stories and editorials in print and electronic media reveal information that might not be presented at trial, including defendants’ confessions, past criminal histories, and polygraph test results.²⁹ Appellate courts have overturned some jury decisions due to inflammatory publicity.³⁰ Despite earlier justices’ concern about pretrial news coverage,³¹ the U.S. Supreme Court recently has made it more difficult for defendants to show that media coverage prejudiced their trials.³²

Part II of this Article uses communication theory to discuss the ways in which advertisements may affect jurors and potential jurors. Part III summarizes historical and contemporary court decisions in-

25. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., with Stewart & Marshall, JJ., concurring in judgment).

26. U.S. CONST. amend. I.

27. *Id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

28. *Id.* amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . . [and jury decisions will be reviewed only] according to the rules of the common law.”).

29. Most common law countries, other than the United States, make clear that the media may not publish such prejudicial information. *See generally* Michael Ches-terman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt With in Australia and America*, 45 AM. J. COMP. L. 109, 116 (1997) (Australia “gives primacy . . . to the fairness of trials as against claims of the media . . . for freedom of speech,” and applies “deterrence through penal sanctions . . . for publishing material which threatens to prejudice the fairness of a current or forthcoming criminal trial.”); Joanne Armstrong Brandwood, Note, *You Say “Fair Trial” and I Say “Free Press”: British and American Approaches to Protecting Defendants’ Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1431 (2000) (English courts see prejudicial publicity, particularly publishing confessions and prior criminal records, as inimical to fair trials, will stop trials adversely affected by prejudicial publicity, and may impose strict limits on publishing information about pending cases, enforceable by contempt).

30. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

31. *See, e.g.*, *Irvin*, 366 U.S. at 729–30 (Frankfurter, J., concurring) (“How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they enter the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused?”).

32. *See Mu’Min v. Virginia*, 500 U.S. 415 (1991) (affirming a Virginia Supreme Court ruling that there was no violation of the defendant’s Sixth Amendment right to an impartial jury or Fourteenth Amendment right to due process because the judge refused to question prospective jurors about their exposure to specific news reports).

volving prejudicial publicity in criminal and civil cases, including research investigating juror bias. Part IV examines means of limiting or proscribing case-related advertisements that have a potential to cause juror prejudice, including judges issuing restrictive orders restraining attorneys' speech, applying the commercial speech doctrine, and using voir dire to identify biased jurors. Part V concludes that the U.S. Supreme Court's *Gentile v. State Bar of Nevada*³³ decision gives judges the power to stop attorneys from publishing case-related advertisements, that the commercial speech doctrine is not applicable to such situations, and that voir dire may not be an effective method of preventing jury decisions that have been influenced unfairly by advertisements.

II. ADVERTISING'S EFFECTS ON JURORS

News story effects are primarily cognitive—*i.e.*, focused on knowledge—and can be evaluated with survey research.³⁴ In some cases, the news also may affect attitudes. Although it is more difficult to determine a message's effect on attitude change, it is possible to do so with a carefully designed survey that compares the population in the jury pool with a control population uncontaminated by the news coverage. Cognitive message strategies are referred to in consumer behavior theory as the central route to persuasion³⁵ and occasionally are used in advertising, particularly when there is news to announce or a product feature to explain.

A. How Advertising May Influence Jurors

Advertising may deliver cognitive impact, although the impact of advertising is more likely to be found in emotions and associations, particularly when the message is dominated by visuals.³⁶ In contrast to the central route, this affective approach is referred to as the peripheral approach to persuasion.³⁷ With the peripheral route, impressions are formed at the margins of thought and are largely

33. 501 U.S. 1030 (1991) (holding that the trial judge may impose a restrictive order banning extrajudicial statements reasonably likely to cause an unfair trial).

34. See, e.g., Silvia Knobloch et al., *Effects of Salience Dimensions of Informational Utility on Selective Exposure to Online News*, 80 JOURNALISM Q. 91 (2003) (describing results of a study conducted to test the effect that manipulation of salience dimensions has on online newsmagazine readers).

35. See generally Richard E. Petty et al., *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135 (1983).

36. See generally ANN MARIE BARRY, VISUAL INTELLIGENCE: PERCEPTION, IMAGE, AND MANIPULATION IN VISUAL COMMUNICATION 253–55 (1997) (discussing how the concept of visual intelligence in advertising affects the viewer's emotions and associations).

37. See *id.*

unreasoned. How a person feels about a favorite beverage, for example, is not the product of a rational assessment, but rather a result of images presented through advertising combined with personal experiences drinking the beverage. The tools of the peripheral route strategy include emotional appeals, associations, images, likeability, lifestyle cues, and links to celebrities. Most brand image and emotional advertising strategies are designed to stimulate peripheral processing, a theory explained in the Elaboration Likelihood Model ("ELM"),³⁸ which leads to a state of involvement with the message that is largely beyond measure. At least, there are no good tests of involvement that might be useful to evaluate this element of peripheral processing.³⁹

Furthermore, advertising, with the exception of direct-response advertising, is designed to generate a delayed response—that is, at some point in the future when the right cues are in place they will stimulate the desired response, such as buying a product or voting for a candidate. Brand advertising exemplifies this: When a television viewer sees an advertisement for McDonald's, the viewer probably will not immediately drive to a McDonald's restaurant and order a hamburger. However, McDonald's advertises so that, at some time in the future when the viewer is hungry and considering choices to assuage that hunger, the viewer will consider McDonald's. The advertising strategy is that the emotional impact of the McDonald's advertisements will linger and motivate the viewer to move from considering possible options—called the "evoked set"⁴⁰—to choosing McDonald's.

The Ludlow Massacre commercials involved both central and peripheral processing. Typically, the cognitive task viewers face is to understand the historical narrative. However, there is also impact at the peripheral, emotional level. This is where these commercials become problematic for jurists, because this impact is difficult to uncover using traditional pretrial publicity methodologies.

No social science studies about media publicity and juror bias have examined the impact of advertisements. However, research about advertising in other contexts supports the argument that advertisements are able to create as much, if not more, bias among jurors as are news stories.

38. John T. Cacioppo et al., *Central and Peripheral Routes to Persuasion: An Individual Difference Perspective*, 51 *J. PERSONALITY & SOC. PSYCHOL.* 1032 (1986).

39. See Lynda L. Kaid, *Political Advertising*, in *HANDBOOK OF POLITICAL COMMUNICATION* 249 (Dan R. Nimmo & Keith R. Sanders eds., 1981); John L. Lastovicka & D.M. Gardner, *Components of Involvement*, in *ATTITUDE RESEARCH PLAYS FOR HIGH STAKES* 53 (John C. Maloney & Bernard Silverman eds., 1980).

40. J. PAUL PETER & JERRY C. OLSON, *CONSUMER BEHAVIOR AND MARKETING STRATEGY* 156 (1999).

1. Association

The impact of most advertising lies in the area in which people learn about a product or brand in a largely noncognitive, even nonrational way, through associations and feelings. To understand this, consider the two basic types of learning theories—cognitive and conditioned learning—and how they apply to advertising and marketing strategy. Cognitive learning is based on a presentation of facts, explanations, and arguments leading to understanding. This is the same theory that was referred to earlier as the central route to learning used by news stories.

Conditioned learning, on the other hand, is created by linking one thing with another, creating an association that is learned through repetition. In the famous Pavlovian experiment that led to the development of the theory of conditioned learning, the dog learned through repetition to associate food with a bell.⁴¹ Research has found that when emotions and feelings are also part of the association, they strengthen the learning and lock the association in memory, and those same feelings can serve as a cue to reactivate the message from memory.⁴² Although advertising messages sometimes use a cognitive strategy, they frequently are designed to enhance associations and affective responses. Advertising scholar Ivan Preston has developed the Association Model of Advertising to explain how this critical process drives advertising.⁴³

In other words, a paired association is the strategy behind advertising that seeks to equate a brand with a positive experience, such as a particular soft drink with teenage fun, or a brand of cigarettes with the independence of a cowboy and the West. People learn these associations from advertising and other marketing communication sources.⁴⁴ But people largely are unaware of how the associations are acquired and to what extent they are embedded in their minds.⁴⁵ Fur-

41. For a description of the Russian psychologist Ivan Pavlov's experiments regarding dogs conditioned to salivate when a bell is rung because of their association of the ringing bell with food, see, for example, Camille A. Nelson, *Carriers of Globalization: Loss of Home and Self Within the African Diaspora*, 55 FLA. L. REV. 539, 551 n.36 (2003).

42. See Thomas J. Page, Jr. et al., *The Memory Impact of Commercials Varying in Emotional Appeal and Product Involvement*, in EMOTION IN ADVERTISING 255, *supra* note 6.

43. See Ivan Preston, *The Association Model of the Advertising Communication Process*, 11 J. ADVERTISING 3 (1982).

44. See GIEP FRANZEN & MARGOT BOUWMAN, *THE MENTAL WORLD OF BRANDS* 101-05 (2001); Cees Goossens, *Visual Persuasion: Mental Imagery Processing and Emotional Experiences*, in PERSUASIVE IMAGERY: A CONSUMER RESPONSE PERSPECTIVE 129, 135 (Linda Scott & Rajeev Batra eds., 2003) [hereinafter PERSUASIVE IMAGERY].

45. See BARRY, *supra* note 36, at 21-22; Christie L. Nordhielm, *A Levels-of-Processing Model of Advertising Repetition Effects*, in PERSUASIVE IMAGERY 98, *supra* note

thermore, if consumers were asked about such associations, they might not even be able to verbalize the connections that were created. This is because the connections are independent of cognitive, rational awareness, and because association works at the subconscious level. For these reasons, traditional survey research and the voir dire processes are inadequate to determine the effect on a jury pool of issue-related pretrial advertising.

In Preston's association model of advertising, the end result of effective advertising is impression formation, or what he calls an "integrated perception."⁴⁶ Impression formation is formally defined as how people integrate and combine information.⁴⁷ The most common example of an integrated perception is the brand image created for Marlboro and embodied in the figure of the rugged, independent cowboy.⁴⁸ If advertising successfully creates an impression such as this, its effectiveness would need to be measured by image studies, not recall or attitude change. The reality, however, is that advertising often is mixed with other marketing communication, as well as personal experiences and word-of-mouth communication. Therefore, the message impact does not come together to create Preston's "integrated perception" until the consumer is in a store making a product-buying decision, or in a voting booth, or in some other situation that stimulates the consumer's response.

2. *Networks of Associations*

This untidy "deep structure" of associations must be evaluated to determine whether pretrial advertising can effectively contaminate a jury pool. People's minds are a messy stew of feelings, ideas, memories, opinions, emotions, and facts. All these fragments come together at some point to create an impression and, perhaps, a judgment. This happens through a process known as "spreading activation," in which any cue from within the set of associations can activate the entire network.⁴⁹ Thinking of McDonald's, for example, may create a network of associations including inexpensive but dependable quality food, children's playgrounds, fast food ordering counters, drive-through windows, hamburgers, and the Ronald McDonald House, among other thoughts. Various combinations of these associations may lead to an impression of McDonald's as cheap food, a place for families, or a good

44; Piotr Winkielman et al., *Cognitive and Affective Consequences of Visual Fluency: When Seeing Is Easy on the Mind*, in *PERSUASIVE IMAGERY* 80, *supra* note 44.

46. Preston, *supra* note 43, at 4, 6.

47. Michael S. Nmulvey & Carmen Medina, *Invoking the Rhetorical Power of Character to Create Identifications*, in *PERSUASIVE IMAGERY* 225, *supra* note 44.

48. See MARIEKE DE MOOLJ, *ADVERTISING WORLDWIDE* 94, 233 (2d ed. 1994).

49. John R. Anderson, *A Spreading Activation Theory of Memory*, 22 *J. VERBAL LEARNING & VERBAL BEHAV.* 261, 261 (1983).

corporate citizen. The way thoughts spread from one to another of these associations happens largely without any conscious effort.

In the example of the Ludlow Massacre, the story line in the advertisements used the familiar "good guy/bad guy" schema,⁵⁰ with the workers being the "good guys" and the large corporation being the "bad guys." The historical workers are clearly and sympathetically depicted in the commercials, but the unnamed company is only represented by the troops firing their guns on the workers, along with the phrase "corporate capital." (In fact, the unnamed big business in the Ludlow Massacre incident was John D. Rockefeller, Jr.'s Colorado Fuel and Iron Company.⁵¹) Because the commercials provided a strong association of attorneys Azar and Barclay with the Ludlow Massacre and the present day plight of workers in the "good guys/bad guys" dichotomy, these associations likely could exist as links within viewers' memory networks.

Advertising researchers, particularly account planners who use a variety of qualitative probing research methods, are able to sort through this mental stew to derive insight about the association networks and use these insights in the development of advertising strategies.⁵² Such methods are qualitative, imprecise, and rarely supported with numerically-based facts, so judges might be uncomfortable admitting such conclusions into a court of law. Unfortunately, that association network is where the impact of advertising lies, and it must be assessed with some tool more informative than a survey, as surveys merely scratch the surface of the knowledge structure, but fail to assess the associations, emotions, and impressions.

3. *Framing and Schemas*

The implied pairing through association of corporate capital ("bad guys") and striking workers ("good guys") also set up the frame, or performed semantic pattern of response,⁵³ to be used in the class action against Wal-Mart, *i.e.*, having jurors unconsciously associating the company defendant as the "bad guy" and the workers as the "good guys." It is an easy association to make and calls for the Trinidad viewers of the commercials to start filling in the blanks in the "good guys/bad guys" schema when given appropriate cues by the plaintiff's

50. Schemas are a shortcut form of information processing that rely on previously understood patterns as prototypes or generalized knowledge structures. See FRANZEN & BOUWMAN, *supra* note 44, at 95-99; Goossens, *supra* note 44, at 132.

51. Cf. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 1015 (1997).

52. For an instructive guide on how to develop successful advertising through various customer research methods, see LISA FORTINI-CAMPBELL, *HITTING THE SWEET SPOT* (1992).

53. See generally Lawrence W. Barsalou, *Context-Independent and Context-Dependent Information in Concepts*, 10 MEMORY & COGNITION 82 (1982).

attorney. In other words, after something has made an impression (*i.e.*, it achieved a level of awareness) and is stored in memory, there is an increased probability that it and associated thoughts and feelings will come to mind when an appropriate cue is presented. In the Wal-Mart situation, the framing of the message could lead the viewers of the commercials to think of attorneys Azar and Barclay as protectors of workers' rights—the “good guys” battling the evils of corporate capital.

4. *The Cueing Process*

The effect of advertising framing and priming, then, is not necessarily to spur recall or attitude change, results likely from exposure to news stories. Rather, framing and priming create a cueing process that brings associations and feelings to the mind's surface and creates impressions.⁵⁴ Cues spur a thought or advance an argument by creating memory links to pre-set associations. This mental filling-in is a routine perceptual process, not a sign that we are all automatons. One scholar has stated: “Our minds become engaged by a calculated suggestiveness . . . [and] we respond to the invitation to complete a train of thought.”⁵⁵

That is what happens as the phrase “corporate capital,” with all its associated meanings and implications, moves from the original unnamed big business in the historical Ludlow Massacre (the Colorado Coal and Steel Company) to Wal-Mart. The phrase is a trigger that carries a set of emotionally loaded associations. But the phrase also is deliberately framed as an open marker in order to make it easier for jurors to fill in the blank without having to first unload the Rockefeller company, with all its baggage, from the syllogism.

In other words, pretrial issue-related advertising seeks to frame the issue so that the message response is largely below the level of awareness and located in a network of associations. The associations can be designed to frame an issue in such a way that, during the trial, the jurors are pre-set to fill in the blanks when given the appropriate cues.

5. *Priming and Closure*

Advertising uses other indirect means of communication that lead to the fill-in-the-blank response. Similar to framing, priming means that one thought ignites a related thought; it serves as a trigger.⁵⁶

54. See TIJS TIMMERMAN, RESEARCHING BRAND IMAGES: THE NATURE AND ACTIVATION OF BRAND REPRESENTATION IN MEMORY 89–90 (2001).

55. PAUL MESSARIS, VISUAL PERSUASION: THE ROLE OF IMAGES IN ADVERTISING 168 (1997).

56. See generally Leonard Berkowitz & Karen Heimer Rogers, *A Priming Effect Analysis of Media Influences*, in PERSPECTIVES ON MEDIA EFFECTS 57 (Jennings Bryant

For example, the word "McDonald's" is a trigger that leads to thoughts about hamburgers and French fries, because advertising and personal experience tie together these products. Consider that while eating hamburgers and French fries in a McDonald's an earthquake tremor rumbles through the building. Very likely, and for a long time after, whenever thinking about hamburgers and French fries, or about McDonald's, an earthquake will also come to mind. Similarly, whenever thinking about an earthquake, McDonald's will come to mind. These conditioned associations have been given relevance through personal experience. In the same way, when Trinidad residents who saw the Ludlow Massacre commercials see the attorneys in the courtroom and hear references to fair pay, they will have been primed to think of workers as victims of big companies and of the attorneys as defenders of the worker-victims.

Filling in the blanks is also referred to as "closure,"⁵⁷ which means people have a tendency to complete a thought. A classic advertising campaign for Salem cigarettes demonstrates how this principle is used in advertising. The campaign jingle said: "You can take Salem out of the country, but you can't take the country out of Salem." After hearing this line many times, the jingle closes with: "You can take Salem out of the country, but . . ." Listeners were invited to finish the thought.⁵⁸ In the case of the Ludlow Massacre commercials, closure was being used to help jurors make the connection between the unnamed big company, the "bad guys" in the metaphor, and the pharmacists' case against Wal-Mart. Wal-Mart is not mentioned in the commercials, but the phrase "corporate capital" is a blank marker and its use in the trial would invite jurors to complete the thought—to fill in the blank—by making the obvious link to Wal-Mart.

6. *Elaboration*

But can advertising set up such an unstated link? An example of how this indirect communication works comes from a commercial idea tested for Bar S Bacon. Viewers were shown a simple commercial with bacon frying in an iron skillet. When viewers were asked to "play back" the commercial in their own words, they added cowboys, horses, boots, light flickering on faces, eagles, mountains, and streams. None of these images were in the commercial being tested, but the viewers built the rest of the story from the simple cue of bacon frying in a

& Dolf Zillmann eds., 1986); Nordhielm, *supra* note 45, at 97; Winkielman et. al., *supra* note 45, at 84.

57. MICHAEL R. SOLOMON, CONSUMER BEHAVIOR 55-57 (1992).

58. The commercial is described in Sandra E. Moriarty & Shay Sayre, Visual Semiotics and the Production of Meaning in Advertising, Presentation at Association for Journalism & Mass Communication (Aug. 12, 1995) (available in the Schmid Law Library at the University of Nebraska College of Law).

skillet over a campfire.⁵⁹ This concept of elaboration is part of the theory derived from the Elaboration Likelihood Model⁶⁰ and is used to help explain how personal involvement extends the persuasive power of peripheral processing.

Another example of making a link from an unstated comparison is the classic "1984" commercial used to launch the Apple Macintosh computer, and, at the same time, negatively reposition its competitor IBM. The commercial, based on George Orwell's novel, *1984*,⁶¹ was largely nonverbal with only an oblique tag line at the end: "On January 24, 1984 won't be like 1984."⁶² The central message was the launch of a new user-friendly computer, but the peripheral message was that Apple was a liberator and IBM was Big Brother representing a rigid, unfriendly system. An analysis of the intended and perceived messages in this commercial found that forty-four percent of viewers got the competitive message even though it was delivered nonverbally through a complex metaphoric narrative.⁶³

It would not be unexpected, then, to find that the framing of the Ludlow Massacre commercials might lead viewers to make the associational leap from the unnamed "corporate capital," the bad guys in the historical event, to Wal-Mart, the biggest company in the world. Such communication shortcuts are common in advertising.

7. *Emotion and Memory*

Another aspect of advertising that is different from most news stories is its deliberate use of emotion as a message strategy to engage the audience and anchor the communication in memory. In advertising, strategists speak of finding the "hot buttons" that add an emotional loading to a message. For example, the Ludlow Massacre commercials vividly presented the horror of the shooting of the miners and the deaths of their families who were killed when the troops set fire to their tents. The historical part of the commercials was designed to create a high level of emotional response in viewers.

In addition to the potency of emotional messages, this affective dimension is powerful, because emotionally loaded cues drive the retrieval of previously stored impressions. Studies have found that emotional commercials are more likely to be recalled than neutral

59. *See supra* note 58.

60. For a general framework of the Elaboration Likelihood Model of persuasion, see John T. Cacioppo et al., *Processes of Social Influence: The Elaboration Likelihood Model of Persuasion*, in 4 *ADVANCES IN COGNITIVE BEHAVIORAL RESEARCH AND THERAPY* 215 (Philip C. Kendall ed., 1985).

61. GEORGE ORWELL, *1984* (1948).

62. *See* Moriarty & Sayre, *supra* note 58.

63. *Id.*

ones, and they activate emotionally charged memories.⁶⁴ Esther Thorson's memory model of advertising posits that commercials are stored in memory as episodic traces that contain key elements of the commercial as well as background elements, such as the feelings elicited by the commercial.⁶⁵ The way memory for advertising works, according to this model, is that any one of these elements, including the feelings elicited by the advertisement, can serve as a cue to reactivate the entire message and its meaning. That is what allows viewers "to remember" the advertisement.

Thorson also has determined that when people are involved in making judgments as part of the processing of the advertisement, they are more likely to retrieve the judgment than to recall the information.⁶⁶ In the case of the Ludlow Massacre advertisements, viewers were engaged in making the "good guy/bad guy" judgment as they watched the commercials. That adds an additional emotional loading to their association network beyond just the horrible events depicted in the historical parts of the commercials. According to Thorson's research, the Ludlow Massacre viewers very well may retrieve the judgment—"good guys" equal workers, "bad guys" equal big companies—detached from the specific commercials that encoded the judgments. That is another problem for attorneys and judges in *voir dire*: Are potential jurors being dishonest when saying they can set aside exposure to pretrial issue-related advertising, or do they simply not know the many ways such advertising has affected their views of the case?

8. *The Relevance Factor*

Another dimension of an individual's memory of an advertisement is relevance. Something that connects on a personal level with a viewer has resonance—it strikes a chord—and that serves as an anchor in memory.⁶⁷ The "good guy/bad guy" metaphor is a familiar narrative technique. However, in the Ludlow Massacre commercials it was given even more emotional loading through the local connection to the historical event. The town of Trinidad still has descendants of the workers living in the community and continues to memorialize the

64. For a discussion of the benefits of using emotion in news and advertising, see Maxwell McCombs & Sheldon Gilbert, *News Influence on Our Pictures of the World*, in *PERSPECTIVES ON MEDIA EFFECTS* 1, *supra* note 56; Ronald W. Pimentel & Susan E. Heckler, *Changes in Logo Designs: Chasing the Elusive Butterfly Curve*, in *PERSUASIVE IMAGERY* 105, *supra* note 44, at 106–07.

65. See Page, Jr. et al., *supra* note 42, at 256.

66. See *id.*

67. See generally Punam Anand & Brian Sternthal, *Strategies for Designing Persuasive Messages: Deductions from the Resource Matching Hypothesis*, in *COGNITIVE AND AFFECTIVE RESPONSES TO ADVERTISING*, *supra* note 6 (providing both a detailed analysis of the importance of relevance to advertising and various strategies for the use of relevance to create more effective advertisements).

event, not just with the Ludlow Massacre memorial, but also with community events.

In the case of the Ludlow Massacre commercials, the mix of emotions includes horror over the shooting and the unfairness of the actions against workers and their families, plus a good/bad judgment about the participants. All of that is enhanced by a personally relevant tradition within the local community. These commercials were a mix designed to ignite feelings.

B. Assessing the Impact of Peripherally Processed Advertisements

Will it be effective for a judge simply to ask potential jurors if they remember the advertisements?⁶⁸ The problem with advertising impact is that it is not just about recall. Recipients of advertising messages may be able to recall seeing the commercials, but the impact of the viewing on their association network and judgments may be beyond their ability to verbalize. Indeed, it is possible for a judge to ask potential jurors if they saw certain advertisements and find that the viewers are unable to recall seeing the advertisements—even when, in fact, they did. Advertising tends to “wash over” people with little effect at the level of awareness, although the peripheral processing may leave behind any number of fragmented impressions.⁶⁹ Because most people have defenses against advertising, they may not wish to recall advertisements that they actually have seen and noted but put out of their minds.⁷⁰

Would it be effective for the judge to instruct potential jurors to set aside their impressions formed by the advertisements and make decisions based only on what they see and hear in the courtroom? Unfortunately, a judge’s statement may only start the retrieval process. Those who say they saw the advertisements may not remember the full story, but bits and pieces may come back during the trial, particu-

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68. The Supreme Court has ruled that a trial judge *may* ask jurors questions about specific media materials to which they have been exposed, but that there is no constitutional requirement that a judge do so. See *Mu’Min v. Virginia*, 500 U.S. 415 (1991).
 69. Stewart Shapiro et al., *Measuring and Assessing the Impact of Preattentive Processing on Ad and Brand Attitudes*, in *MEASURING ADVERTISING EFFECTIVENESS* 27 (William D. Wells ed., 1997).
 70. For a description of various studies revealing television commercial avoidance measures utilized by television viewers, see, for example, Avery M. Abernethy, *Physical and Mechanical Avoidance of Television Commercials*, in *PROCEEDINGS OF THE 1991 CONFERENCE OF THE AMERICAN ACADEMY OF ADVERTISING* 223 (Rebecca Holman ed., 1991); Sandra Moriarty & Shu-Ling Everett, *Commercial Breaks: A Viewing Behavior Study*, 71 *JOURNALISM Q.* 346 (1994); Paul S. Speck & Michael T. Elliott, *Predictors of Advertising Avoidance in Print and Broadcast Media*, 26 *J. ADVERTISING* 61 (1997).

larly if there are key phrases and images that cue emotional responses and judgments being used during the trial. The judge's admonition may be only the first step in a complex retrieval process—and so charging the jury could contribute in its own way to priming the responses of potential jurors.

C. Advertising's Dependence on Context

Impressions gleaned from an advertisement may be difficult to articulate, because they are largely unformed until a situation and a cue provide the impetus for further impression formation. Most advertising is designed to trigger a response or behavior at some point in the future when a consumer is making a product or service choice. In other words, the impact of advertising is context-based and the motivation to make a purchase stimulates the impression formation process. Likewise, pretrial issue-related advertising may come together at some later time (*e.g.*, during the trial) when the appropriate triggers are used.

With pretrial issue-related advertising, the situation is likely to be the courtroom, but the cues will vary with the issue and the skill of the attorney in framing the case. Researchers investigating contamination must ask what the cues are that might trigger an impression and bring it to the surface. In the Ludlow Massacre example, the cues were references to the historical massacre, but also to fair pay and workers' rights, issues at the heart of the contemporary message being delivered by the attorneys in their "never forget" call to action. In this instance, it would be impossible to try the case without referring to workers' rights and fair pay, so the cues are deeply entrenched in the courtroom argument. Another cue would be the courtroom itself, since the courthouse played a prominent role in the closing of one of the advertisements.

Finally, and most importantly, the two lawyers who were featured in the advertisements are themselves cues when they take on their role as the plaintiffs' advocates. The impression created by the Ludlow Massacre advertisements, through their associational structure, frames the attorneys as defenders of workers' rights and on the side of the "good guys," the defenseless workers being victimized by the big company. By implication, and without saying a word about the defendant, Wal-Mart becomes the "bad guy" in this scenario. Messaris refers to this aspect of advertising as "showing the unspoken."⁷¹ The association is nearly inescapable as the jurors find it difficult to avoid filling in the blank in the "good guy/bad guy" syllogism. The presence of the two attorneys brings the "good guy/bad guy" story back to the

71. MESSARIS, *supra* note 55, at 223–24.

surface of the jurors' minds, but not until the jurors are already part of the trial process and the attorneys start to use the cue words.

The foregoing analysis is supported by the work of British cultural studies scholar Judith Williamson. In analyzing the effects of advertising, Williamson notes that the syntax of visuals—how they are linked—can make the connection between two unrelated entities appear natural, something that viewers may take for granted without questioning too deeply. She observes that “[t]he use of visual syntax to lessen the obtrusiveness of controversial claims is a convention with a long history in U.S. advertising.”⁷²

III. DEFINING JUROR BIAS

A. Fair Juror Standards in Criminal Trials

The concern about attorney-placed advertising relating to cases in which the attorney represents a client is based upon the constitutional requirement of having a fair jury. A fair juror is the goal in criminal and civil trials—a juror who decides based on what she or he sees and hears in court, not on media reports and gossip.⁷³ Justice Holmes wrote in the case of *Patterson v. Colorado*, “the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”⁷⁴ In *Patterson*, the Court upheld a trial judge’s right to impose contempt citations on media whose coverage tended to interfere with a fair trial.⁷⁵

The United States has been struggling for nearly 200 years with the question of what constitutes a “fair” juror.⁷⁶ The question has largely focused on criminal trials, and the issue emerges anew with

72. *Id.* at 224 (quoting JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING* (1978)).

73. Justice William O. Douglas was prescient forty years ago in stating: “Imagine what could happen if the latent local passions were aroused through channels provided by radio and television. Then there might be no place to which the trial could be transferred to protect the accused.” Justice William O. Douglas, *The Public Trial and the Free Press*, 33 *ROCKY MOUNTAIN L. REV.* 1, 9 (1960), quoted in John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court’s Totality of Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 *DENV. U. L. REV.* 549, 549 (1998).

74. 205 U.S. 454, 462 (1907).

75. *Id.* at 463. See also *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 421 (1918), overruled by *Nye v. United States*, 313 U.S. 33, 52 (1941). In *Toledo Newspaper*, the Court affirmed a trial judge’s ability to hold a newspaper in contempt on grounds that the newspaper’s coverage of the case had a “reasonable tendency” to cause an unfair trial.

76. See Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 *AM. U. L. REV.* 631, 639 (“Beginning in the early days of the republic, . . . American courts began to struggle with the issue of whether exposure to media coverage biases potential jurors.”).

each "crime of the century." The United States has experienced many trials of defendants accused of heinous crimes⁷⁷—from Aaron Burr's treason trial in 1807,⁷⁸ to Harry Thaw's murder trials in the first decade of the twentieth century,⁷⁹ through O.J. Simpson's murder trial,⁸⁰ and beyond.

England, from which this country took much of its law, had a clear definition of "fair juror"—a person who knew the parties and was familiar with the issues.⁸¹ For example, twelve hundred years ago in a case involving a disagreement over land, thirty-six people—one-half being friends of one party, the other half being friends of the opposing party—were asked to make a ruling.⁸² Several centuries later, the Magna Carta entrenched the belief that people should be judged by their peers: "No free man shall be taken or imprisoned or . . . outlawed or exiled or in any way ruined . . . except by lawful judgment of his peers or by the law of the land."⁸³

Rather than seeking jurors who were well conversant with the facts and knew the parties in a case, as did early English courts,⁸⁴ American judges recognized that exposure to information could create biased jurors.⁸⁵ However, American courts also held that mere knowledge was not tantamount to bias.⁸⁶ This view was expressed in the

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77. See generally Laurie L. Levenson, *Cases of the Century*, 33 LOY. L.A. L. REV. 585 (2000) (describing high-profile twentieth-century American cases and their effect on society).
78. See John C. Yoo, *The First Claim: The Burr Trial*, United States v. Nixon, and *Presidential Power*, 83 MINN. L. REV. 1435, 1439 ("If the O.J. Simpson trial was the trial of this [twentieth] century, then the Aaron Burr case was the trial of the last [nineteenth century].").
79. See Levenson, *supra* note 77, at 588–89.
80. See Fisher, *supra* note 19 (reviewing eight books about the O.J. Simpson murder trial).
81. For background on the development of the jury system in England, see Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 34–40 (1994).
82. Minow & Cate, *supra* note 76, at 638 (citing WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 59–60 (2d ed. 1971)). In this case, Alfnoth claimed he owned land on which a monastery stood. The thirty-six panel members sided with the monks, and also ordered Alfnoth to cede his land to the King in compensation for Alfnoth's false claim. *Id.*
83. MAGNA CARTA § 39 (1215), quoted in David A. Salansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1234 (2002) (citing J.C. HOLT, *MAGNA CARTA* 326–27 (J.C. Holt trans., 1965)).
84. See LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 39 (1973) ("If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed.")
85. Currently, state trial judges are instructed not to seat jurors who acknowledge having personal knowledge about the case, the particular issues in dispute, or the parties involved. NAT'L CONFERENCE OF STATE TRIAL JUDGES, AM. BAR ASS'N & NAT'L JUDICIAL COLL., *THE JUDGE'S BOOK* 210–11 (2d ed. 1994).
86. Mark Twain had a somewhat different view of a fair juror: "We have a criminal jury system which is superior to any in the world; and its efficiency is only

1807 Aaron Burr treason trial.⁸⁷ Chief Justice John Marshall, sitting as trial judge in the *Burr* case and aware of President Thomas Jefferson's publicized declaration of Burr's guilt, wrote that it would be best to have jurors with "perfect freedom from previous impression."⁸⁸ But realizing the impracticability of that test, Marshall, rejecting Burr's contention that only people who knew nothing about the case could fairly judge him,⁸⁹ said that fair jurors are those "who will fairly hear the testimony which may be offered to them."⁹⁰

Confirming this standard, the U.S. Supreme Court in 1878 said that "a juror who has formed an opinion [based on media exposure before trial] cannot be impartial."⁹¹ In that case, however, the Court held that the presence on a jury of a juror who thought he might have a pre-formed opinion that he did not believe would influence his decision was not enough to make the trial unfair. The Court said there must be actual evidence that a juror is biased; otherwise, the trial judge properly may consider the jury to be fair.⁹²

Intense media coverage of notorious cases and famous people continued in the twentieth century despite threats to fair trials. Outlandish newspaper reports surrounded the trial of a labor leader represented by Clarence Darrow.⁹³ The 1935 trial of Bruno Hauptmann, accused of kidnapping and killing Charles and Anne Lindbergh's son, was a media circus.⁹⁴ Finally, in 1959 the Supreme

marred by the difficulty of finding twelve men every day who don't know anything and can't read." MARK TWAIN AND THE GOVERNMENT 55 (Svend Petersen ed., 1960).

87. See *United States v. Burr*, 25 F. Cas. 201 (Va. Cir. Ct. 1807).
88. See Leslie Renee Berger, Note, *Can the First and Sixth Amendments Co-Exist in a Media Saturated Society?*, 15 N.Y.L. SCH. J. HUM. RTS. 141, 144 (1998) (citing J. EDWARD GERALD, *NEWS OF CRIME* 71 (1983)).
89. See Jill Simeone, Note, *Mu'Min v. Virginia—Content Questioning for Media Bias in Jury Selection: Ask Them No Questions, They'll Tell You No Lies*, 20 HASTINGS CONST. L.Q. 439, 443–44 (1993). See generally BUCKNER F. MELTON, *AARON BURR: CONSPIRACY TO TREASON* (2001) (relating Burr's actions leading to the treason trial at which Burr was acquitted).
90. *United States v. Burr*, 25 F. Cas. 49, 50 (Va. Cir. Ct. 1807). Chief Justice Marshall said requiring jurors with no opinions about the case at all "would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony." *Id.* at 51.
91. *Reynolds v. United States*, 98 U.S. 145, 155 (1878).
92. The *Reynolds* Court noted that some prospective jurors might feign bias to be removed from the jury. The Court said a judge should consider mannerisms and other indicia in determining whether the prospective juror in fact is biased. *Id.* at 156–57.
93. See GEOFFREY COWAN, *THE PEOPLE v. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER* (1993) (discussing Darrow's defense of J.J. McNamara and Darrow's subsequent acquittal on charges of bribing jurors).
94. See, e.g., JIM FISHER, *THE LINDBERGH CASE* 272 (1987) ("On . . . the first day of the Hauptmann trial, the Hunterdon County Courthouse was packed with 150 prospective jurors, 100 reporters, 50 cameramen, 25 communications technicians,

Court for the first time reversed a conviction because news reports disclosed prejudicial evidence not admitted at trial.⁹⁵

Two years later, in *Irvin v. Dowd*,⁹⁶ the Court said that either a voir dire showing individual jurors were biased, or evidence of a community so poisoned with prejudicial publicity that an unbiased juror could not be found, would show a fair trial would not be possible.⁹⁷ In *Irvin*, the Court overturned a murder decision in the face of eight of twelve jurors who said during voir dire that they could be impartial, but, according to the Supreme Court, gave answers indicating that they thought the defendant was guilty.⁹⁸ Indeed, 370 of the 430 members of the jury pool said during voir dire that they believed the defendant was guilty.⁹⁹ The community from which the jury was chosen had been subjected to a barrage of prejudicial news reports, including stories reporting the defendant's prior criminal record¹⁰⁰ and police disclosures that the defendant confessed to six murders in a rural southern Indiana area.¹⁰¹ The trial court granted a change of venue to an adjacent county, the only change of venue permitted under state law.¹⁰²

Once again, the Supreme Court said a juror can be fair even if the juror is not completely unaware of the facts or individuals involved in

prosecution and defense lawyers, dozens of Lindbergh case investigators, 30 miscellaneous police and court officials, and 300 or so spectators who had fought their way into the courtroom."); see also H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507, 515 (1998) (describing the chaos surrounding the Bruno Hauptmann trial).

95. *Marshall v. United States*, 360 U.S. 310 (1959). The Court said, "prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence." *Id.* at 312-13. See Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 52 (1996) (In the *Marshall* decision, for the first time, "the court hinted that a trial might be unfair when a juror is exposed merely to possibly prejudicial publicity."). Seven years earlier than *Marshall*, the Supreme Court held that a prosecutor's releasing a confession not admitted at trial combined with prejudicial press stories did not necessarily amount to a poisoned community from which a fair jury could not be drawn. *Stroble v. California*, 343 U.S. 181, 194-95 (1952).
96. 366 U.S. 717 (1961).
97. See *Harris v. Pulley*, 885 F.2d 1354, 1361, 1363 (9th Cir. 1988) (defining the two prongs as follows: for provable juror bias, "actual partiality or hostility that could not be laid aside," and for poisoned community, a record that "demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.") (citing *Irvin*, 366 U.S. 717).
98. 366 U.S. at 727.
99. *Id.* at 727.
100. *Id.* at 725.
101. *Id.* at 720.
102. *Id.*

a case.¹⁰³ A juror only must “lay aside his impression or opinion and render a verdict based on the evidence presented in court.”¹⁰⁴ In *Irvin*, the Court said, the pretrial publicity “fostered a strong prejudice” among the entire community,¹⁰⁵ creating a “pattern of deep and bitter prejudice.”¹⁰⁶ Further, the Court noted with concern that “almost 90% of those examined on the point . . . entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty.”¹⁰⁷ Additionally, the Court said that eight of the twelve sitting jurors thought before the trial that the defendant was guilty.¹⁰⁸ The *Irvin* Court, then, said a criminal trial will violate a defendant’s constitutional right to a fair trial if there is “clear and convincing”¹⁰⁹ evidence that the community from which the jury is drawn is contaminated with prejudice or if voir dire reveals that one or more jurors made up their minds regarding guilt prior to hearing the evidence in court.¹¹⁰ Although the Supreme Court did not explicitly use a “totality of the circumstances” test, it examined the media stories published prior to jury selection, considered the community size, reviewed the voir dire record, and concluded that the level of juror impartiality did not meet constitutional standards.¹¹¹

In *Rideau v. Louisiana*,¹¹² the Court, “impatient with permissive trial judges and an exploitative media,”¹¹³ did not require actual evidence of a biased juror.¹¹⁴ Rather, the Court applied the “presumption of prejudice” concept in overturning a murder conviction after the region had been “pervasively exposed” to the defendant’s filmed confession taken by the sheriff without counsel in the defendant’s jail

103. *Id.* at 722.

104. *Id.* at 723.

105. *Id.* at 726.

106. *Id.* at 727.

107. *Id.*

108. *Id.*

109. *Id.* at 725.

110. See Charles H. Whitebread & Darrel W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicized Trial by Applying the Sheppard–Mu’Min Remedy*, 69 S. CAL. L. REV. 1587, 1601 (1996) (discussing the Court’s test for evaluating jury bias described in *Irvin*).

111. See Walton, *supra* note 73, at 562.

112. 373 U.S. 723 (1963).

113. Hardaway & Tumminello, *supra* note 95, at 53 (citing *Rideau*, 373 U.S. at 726–27).

114. *Rideau*, 373 U.S. at 726–27. Similarly, in *Estes v. Texas*, 381 U.S. 532 (1965), the Court did not demand clear evidence of juror bias. *Id.* at 612 (stating that the presence of intrusive television equipment in the courtroom, and the act of televising the trial, made a fair trial impossible). However, in *Chandler v. Florida*, 449 U.S. 560 (1981), the Court held that merely televising a trial does not, without more, require a finding of an unfair trial. *Id.* at 586. See also Karla G. Sanchez, *Barring the Media from the Courtroom in Child Abuse Cases: Who Should Prevail?*, 46 BUFF. L. REV. 217 (1998) (contrasting the Supreme Court’s holdings in *Estes* and *Chandler*).

cell.¹¹⁵ The Court found that the trial court denied the defendant's due process rights by refusing to change venue despite the confession being televised for three days in the area from which jurors would be chosen.¹¹⁶ The Court's conclusion was based on a Fourteenth Amendment due process analysis, presuming unconstitutional jury bias from a community tainted by prejudicial media reports.¹¹⁷

*Sheppard v. Maxwell*¹¹⁸ may be the most celebrated free press-fair trial case—at least prior to the O.J. Simpson trial.¹¹⁹ In *Sheppard*, the Supreme Court followed *Rideau* in holding that evidence was not required that one or more jurors were biased to find a trial unfair, at least in the context of blatantly prejudicial pretrial press coverage and a “carnival atmosphere” the press created and the judge allowed during trial.¹²⁰ The Supreme Court, in overturning the jury's verdict that Sam Sheppard was guilty of murdering his wife, focused on the trial judge's lack of control over the courtroom. However, the Court also discussed the immense amount of pretrial and during-trial publicity. Press coverage included a newspaper editorial demanding a coroner's inquest—and a televised inquest then was held;¹²¹ a newspaper headline asking why Sheppard was not yet in jail—after which Sheppard was arrested;¹²² and stories listing the names and addresses of prospective jurors.¹²³ The Court considered the totality of the circumstances,¹²⁴ including “the inherently prejudicial publicity which

115. *Rideau*, 373 U.S. at 726.

116. *Id.* at 724, 726.

117. See *Whitebread & Contreras*, *supra* note 110, at 1601. In *Estes*, the Supreme Court found that televising a criminal trial abridged a defendant's Fourteenth Amendment due process rights, in part because the equipment used in the courtroom was cumbersome and noisy, detracting from the trial itself. 381 U.S. at 565.

118. 384 U.S. 333 (1966). The *Sheppard* case spawned a popular television show and a theatrical movie, both titled *The Fugitive*. See Lawrence M. Friedman, *Lex-itation: Legal Process as Theater*, 50 DEPAUL L. REV. 539, 548 n.33 (2000). Sheppard's son, Sam Reese Sheppard, lost a civil suit attempting to clear his father's name. See Fox Butterfield, *Jury Rejects Innocence of Sheppard in '54 Murder*, N.Y. TIMES, Apr. 13, 2000, at A20. Sheppard's son also wrote a book about the case. See CYNTHIA L. COOPER & SAM REESE SHEPPARD, *MOCKERY OF JUSTICE: THE TRUE STORY OF THE SHEPPARD MURDER CASE* (1995). For further reading about the Sam Sheppard Murder Case, see JAMES NEFF, *THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE* (2001) and JACK POLLACK, *DR. SAM: AN AMERICAN TRAGEDY* (1972).

119. See *Fisher*, *supra* note 19, at 1017.

120. *Sheppard*, 384 U.S. at 358.

121. *Id.* at 338.

122. *Id.* at 341.

123. *Id.* at 342.

124. *Id.* at 352. Justice Scalia has criticized the Supreme Court's use of the “totality of the circumstances” test. He said that if one views judicial decisionmaking as a “dichotomy between ‘general rule of law’ and ‘personal discretion to do justice,’” the “totality of the circumstances” test falls into the latter category. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–79

saturated the community” and the “disruptive influences in the courtroom,” and concluded that the trial court had abridged Sheppard’s Fourteenth Amendment due process rights.¹²⁵

The Court appeared to reverse course after *Sheppard*, reluctant to assume that pretrial publicity, without more, could bias jurors and result in an unfair trial. Instead, in *Murphy v. Florida*,¹²⁶ the Court used a totality of the circumstances test to hold that the defendant received a fair trial. The Court said the voir dire, although indicating that some jurors knew of the defendant, did not show that jurors were hostile to the defendant.¹²⁷ The Court also said that most news stories about the case were published seven months before the trial, and even those were primarily factual.¹²⁸ The Court concluded that there were insufficient “indications in the totality of circumstances that petitioner’s trial was not fundamentally fair.”¹²⁹ The Court said *Murphy* differed from *Irvin*¹³⁰ in that there was no evidence in *Murphy* that jurors actually were biased,¹³¹ and that it differed from *Rideau*, because *Murphy* did not involve a community poisoned from prejudicial publicity.¹³² The Court said that mere exposure to information about a defendant’s previous criminal life or to stories about the crime for which the defendant is being tried did not make a juror biased, without more evidence—the “totality of the circumstances”—to support such a claim.¹³³

As it did in *Murphy*, the Court in *Patton v. Yount*¹³⁴ continued to foreshadow its current approach to jury bias. In *Patton*, the Court effectively discarded the “presumption of prejudice” approach. The Court rejected contentions that pervasive coverage of a crime and jurors’ knowledge of the offense and the defendant ineluctably creates an unfair trial.¹³⁵ The case involved a defendant convicted of raping and murdering the victim. Because the defendant’s confession was impermissibly introduced at trial, the conviction was overturned. A second trial in the same community again resulted in a conviction.

(1989). The test, he said, allows each court to decide for itself what the circumstances are and what effect they have on the case before the court. *Id.* This “is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.” *Id.* at 1179.

125. *Sheppard*, 384 U.S. at 363.

126. 421 U.S. 794 (1975).

127. *Id.* at 801.

128. *Id.* at 802.

129. *Id.* at 799, 803.

130. 366 U.S. 717 (1961).

131. *Murphy*, 421 U.S. at 803.

132. *Id.* at 799.

133. *Id.* at 799, 800–01. See also Minow & Cate, *supra* note 76, at 644 (discussing the *Murphy* decision).

134. 467 U.S. 1025 (1984).

135. *Id.* at 1035.

News reports before the second trial discussed matters not introduced in court, including the defendant's confession, his conviction in the first trial, and his temporary insanity plea in the first trial.¹³⁶ The Supreme Court noted that all but two of 163 members of the venire said they had heard about the case and that seventy-seven percent said they had their minds made up, a percentage higher than in *Irvin*.¹³⁷ Despite this, the Court said prejudicial publicity for the second trial was "greatly diminished and community sentiment had softened."¹³⁸ The Court determined that the important question is not jurors' recalling the case, but whether the jurors "had such fixed opinions that they could not judge impartially the guilt of the defendant."¹³⁹ The Court concluded that the trial judge was correct in determining that voir dire allowed for a fair jury to be seated.

By 1991, the "totality of the circumstances" took on a lesser role. In *Mu'Min v. Virginia*,¹⁴⁰ the Court said that voir dire is a sufficient means for a judge and the lawyers in a criminal trial to determine juror prejudice.¹⁴¹ Unless there is a set of circumstances precluding a fair trial, jurors' statements that they can be fair will be sufficient, according to the Supreme Court. The Court said there is no constitutional requirement that potential jurors be asked specifically to which news reports they were exposed. The *Mu'Min* case involved a defendant who escaped from imprisonment for murder. While fleeing, he killed a store clerk during a robbery. Considerable press coverage preceded the second murder trial, including reports about the defendant's prior criminal record, . . . the fact that he had been rejected for parole six times, . . . accounts of alleged prison infractions, . . . details about the prior murder for which [the defendant] was serving his sentence at the time of this murder, . . . a comment that the death penalty had not been available when [the defendant] was convicted for this earlier murder, . . . and indications that [the defendant] had confessed to killing [the store clerk].¹⁴²

Despite this coverage, which Justice Marshall, in dissent, termed "exceptionally prejudicial,"¹⁴³ the Court found that the stories, and the total circumstances, did not create a community poisoned with prejudice. In particular, the Court said the region exposed to the publicity was more heavily populated than the community in the *Irvin* case and there were many more murders committed.¹⁴⁴ Further, the Court said the news articles in the two cases differed markedly. The reports in *Irvin* "included details of the defendant's confessions to

136. *Id.* at 1029.

137. *Id.* at 1029 n.3.

138. *Id.* at 1032.

139. *Id.* at 1035.

140. 500 U.S. 415 (1991).

141. *Id.* at 431-32.

142. *Id.* at 418 (citations omitted).

143. *Id.* at 434 (Marshall, J., dissenting).

144. *Id.* at 429.

twenty-four burglaries and six murders, including the one for which he was tried, as well as his unaccepted offer to plead guilty in order to avoid the death sentence. They contained numerous opinions as to his guilt, as well as opinions about the appropriate punishment."¹⁴⁵ In *Mu'Min*, the media reports "were not favorable, [but] they did not contain the same sort of damaging information," the Court said.¹⁴⁶

B. Fair Juror Standards in Civil Trials

By their terms or by court interpretation, the Sixth¹⁴⁷ and Fourteenth Amendments¹⁴⁸ ensure fair criminal trials.¹⁴⁹ The Seventh Amendment addresses civil trials, and its primary purpose is to determine when a civil dispute must be decided at trial.¹⁵⁰ Although the Seventh Amendment does not explicitly guarantee a fair hearing, the Supreme Court has interpreted it as doing so.¹⁵¹

Civil trials less often are compromised by prejudicial publicity than are criminal cases. Simply, they draw less public attention than criminal trials, being "on the whole, pale and bloodless in comparison" to

145. *Id.*

146. *Id.*

147. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .").

148. *Id.* amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). See also *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the Sixth Amendment's guarantee into the Fourteenth Amendment, thus applying the Sixth Amendment to states).

149. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process [under the Fourteenth Amendment].").

150. The Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. See discussions of the Seventh Amendment's adoption in, for example, Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966), and Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

151. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."). See also *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (stating that fair civil trial requires voir dire to ensure impartial jury); Robert P. Burns, *The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205, 231 n.119 (2001) ("The Seventh Amendment has yet to be incorporated into the Fourteenth Amendment, but similar state constitutional provisions provide a right to trial by jury in many civil cases.").

felony cases.¹⁵² Even among legal scholars, civil cases largely tend to be ignored.¹⁵³ Legal historian Lawrence Friedman says “there is no full scale history of the American jury,” and “what there is—and the literature is not large—deals mostly with criminal cases.”¹⁵⁴ Because civil trials often fly under the radar, and because in some civil cases a jury’s decision cannot be overturned on appeal,¹⁵⁵ it is likely that an attorney would believe that airing advertisements favoring his or her client would be more effective in a civil case than in a criminal case. Also, civil trials do not put a defendant’s freedom or life at risk. Therefore, a judge in a civil case might be less likely to find that such advertisements contribute to an unfair trial than if advertisements referred to a criminal trial.

That certainly is not to suggest civil trial jurors cannot be unduly influenced by prejudicial communications, including advertisements related to a pending civil case. In analyzing civil trial jurors’ behaviors in forming opinions, one group of scholars posited three models of juror decisionmaking.¹⁵⁶ In the Legal Model, jurors listen as “opposing attorneys present evidence in the light most favorable to their client in a highly stylized and formal manner.”¹⁵⁷ Then the juror “determines the facts based on the most persuasive presentation by the attorneys and applies the governing law to arrive at a legally en-

152. Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 201 (1998).

153. A recent book on juries, JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (2000), focuses exclusively on criminal juries. A landmark book, HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966), does the same. See also Friedman, *supra* note 152, at 201 (noting that historical jury studies focus mainly on criminal juries).

154. Friedman, *supra* note 152, at 201.

155. See U.S. CONST. amend. VII (“In suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”). Although the Supreme Court recently has “denigrated the right to jury by allowing judicial intervention that was not found at common law,” including permitting appellate court review of jury verdicts in civil trials, Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 271 (2002), the “reexamination clause” nonetheless prevents appellate review of some civil juries’ findings of fact. See *Cooper Indus., Inc. v. Leatherman Tools Group, Inc.*, 532 U.S. 424, 437 (2001) (“Because the jury’s award of punitive damages does not constitute a finding of ‘fact,’ appellate review of the District Court’s determination that an award is consistent with due process does not implicate . . . Seventh Amendment concerns . . .”). For a summary of events leading to adoption of the Seventh Amendment, see Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1862–71 (2001).

156. Paula L. Hannaford et al., *Communicating with Juries: The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627 (2000).

157. *Id.* at 629.

forceable decision.”¹⁵⁸ The Story Model “assumes that jurors bring preconceptions and knowledge of the world to their task, that they actively construct narratives or stories from trial evidence, and that they fill in missing details to increase the story’s internal consistency and convergence with their world knowledge.”¹⁵⁹ The authors noted that many studies “using mock jurors have documented the extent to which jurors . . . filter evidence through preexisting schema, sometimes in inappropriate ways.”¹⁶⁰ What the authors called the Schema-Tailored Model is a variation on the Story Model; it suggests that jurors in fact supplement their preconceptions not with evidence presented at trial, but primarily with attorneys’ opening statements.¹⁶¹

Based on data gathered from jurors in civil trials, these scholars concluded that the “Story Model continues to be the most credible model.”¹⁶² Both the Story Model and the Schema-Tailored Model assume jurors bring to court preconceptions that influence their final decisions.¹⁶³ If so, the influence of case-specific advertisements on potential or actual jurors may be an important—and unacceptable—element in juror decisionmaking.

C. Social Scientists’ Analysis of Jury Bias

Does pretrial (or during-trial, if the jury is not sequestered) publicity cause jurors to be biased? Social scientists have conducted research about media-caused bias for nearly forty years.¹⁶⁴ Although

158. *Id.*

159. *Id.* at 630.

160. *Id.* at 632 (citing, for example, Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 *PSYCHOL. REV.* 687 (1996)).

161. Hannaford et al., *supra* note 156, at 632–33 (citing DONALD E. VINSON & DAVID S. DAVIS, *JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES* 199 (3d ed. 1996)).

162. Hannaford et al., *supra* note 156, at 652.

163. The Legal Model is based “on the idealized role of the factfinder within the context of an adversarial process.” *Id.* at 629. However:

In practice, the American justice system often departs from the ideals of adversary procedure, including the notion that jurors are capable of suspending all judgment until all the evidence has been presented. Indeed, much of contemporary social science research rejects the Legal Model as, at best, wishful thinking on the part of judges and lawyers and, at worst, a complete legal fiction.

Id. at 629–30 (citations omitted).

164. An early study using university students found that one of four mock juries considered a fictional defendant’s past criminal record, reported in a news story, despite a judge’s order not to do so. F. Gerald Kline & Paul H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 *JOURNALISM Q.* 113 (1966). See also Christina A. Studebaker & Stephen D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 *PSYCHOL. PUB. POL. & L.* 428, 438 (1997) (describing several similar studies).

the results of such research have been questioned,¹⁶⁵ these studies have generally found that potential jurors exposed to pretrial publicity shortly before a legal proceeding are more likely to find defendants guilty than potential jurors who have not seen news reports about the case.¹⁶⁶

Jury-bias research commonly uses one of two methods. First, experimental studies attempt to determine what forms of and content in pretrial publicity cause prejudiced jurors. Experimental researchers show to mock juries fabricated news stories that do or do not contain prejudicial information. Second, field studies are intended to determine whether potential jurors have been swayed by publicity about a real case. In field studies, subjects reveal the real-case media information to which they have been exposed and what verdict they would reach as a juror in that case.¹⁶⁷ Two commentators reviewing a number of jury-bias studies conclude that "field surveys and experimental studies both consistently reveal an effect of pretrial publicity on people's attitudes about a publicized case."¹⁶⁸

Field studies generally show that people exposed to pretrial news stories are more disposed to believe the defendant guilty than those who did not read, see, or hear pretrial reports.¹⁶⁹ For example, one study surveyed 604 potential jurors in one case and 100 in a second case, inquiring how much they knew about the case, their opinions about guilt, and their attitudes about crime.¹⁷⁰ Those who knew more about the case from news reports were more likely to say the defendant probably was guilty. Also, respondents who knew more about a case were disproportionately more prone to assume the defendant's guilt. Despite this, respondents who knew much about a case and those who knew little about a case both said they could be fair as jurors.

Researchers using experimental approaches are able to manipulate the news stories given to groups of mock jurors, allowing determinations of the extent to which the reports bias the subjects.¹⁷¹

165. See, e.g., Steven Helle, *Publicity Does Not Equal Prejudice*, 85 ILL. B.J. 16, 16 (1997) (downplaying the prejudicial effect of media coverage on criminal proceedings).

166. See, e.g., Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991) (finding that exposure to certain prejudicial pretrial publicity biased mock jury verdicts).

167. See Studebaker & Penrod, *supra* note 164, at 433.

168. *Id.* at 438. But see, e.g., Helle, *supra* note 165, at 16 ("The link between publicity and harmful prejudice has become ingrained in several generations of legal professionals, but it defies the evidence and sober reflection.")

169. See Studebaker & Penrod, *supra* note 164, at 433-35.

170. Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCHOL. 345 (1991).

171. See Studebaker & Penrod, *supra* note 164, at 435.

Scholars have examined the effects of a variety of information, such as inadmissible evidence, including past criminal histories and confessions,¹⁷² and inflammatory statements by prosecutors.¹⁷³ For instance, one study used an actual case but created a variety of news stories relating to the case.¹⁷⁴ The college student subjects recorded their determination of guilt or innocence, then viewed a videotape of the actual trial, and again gave their assessment of guilt. The pretrial publicity markedly affected the students' decisions, particularly negative stories about the defendant's character.

Although most studies about jury bias have focused on criminal defendants, a few researchers have looked at publicity's effects on civil cases. One study had college students read a variety of fictional articles about parties in an actual tort case involving an automobile-pedestrian accident.¹⁷⁵ The subjects then saw a videotape of the trial. The researchers concluded that the pretrial publicity affected students' assessment of liability. A related study found that "pretrial publicity influenced not only the judgments of negligence, but also impressions of the parties, memory, and inferences from the trial."¹⁷⁶

Jury-bias researchers Christina Studebaker and Stephen Penrod's review of jury-bias research concluded that studies "demonstrate that pretrial publicity can affect participants' judgments of the negligence of the parties in a civil trial. These effects were reflected not only in the participants' verdicts, but also in verdict confidence, evaluations of the parties, memory for trial evidence, and inferences from the trial evidence."¹⁷⁷

A more recent analysis disagreed. Jon Bruschke and William Loges stated that "current reviews have vastly overstated the case for a pretrial publicity effect."¹⁷⁸ Bruschke and Loges concluded that numerous jury-bias studies show no pretrial publicity effect sufficiently

172. See, e.g., Alice Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 123 (Rita J. Simon ed., 1975) (conducting a study to determine how various types of media effect mock juries).

173. See, e.g., Mary Tans & Steven H. Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 *JOURNALISM Q.* 647 (1966).

174. Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 *L. & HUM. BEHAV.* 18 (1994).

175. See Studebaker & Penrod, *supra* note 164, at 438 (citing Amy Otto et al., *The Influence of Pretrial Publicity on Juror Judgments in a Civil Case* (1990) (unpublished manuscript)).

176. *Id.*

177. Studebaker & Penrod, *supra* note 164, at 438. See also Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 *LAW & HUM. BEHAV.* 219 (1999) (conducting a meta-analysis of forty-four studies and finding a moderate positive relationship ($r=.16$) between prejudicial pre-trial information and negative assessment of defendants).

178. JON BRUSCHKE & WILLIAM E. LOGES, *FREE PRESS VS. FAIR TRIALS: EXAMINING PUBLICITY'S ROLE IN TRIAL OUTCOMES* 134-35 (2004).

strong to overcome the panoply of remedies available to trial judges.¹⁷⁹ Evidently, social science research has not developed a consensus about the effects of pretrial prejudicial publicity.

IV. POSSIBLE REMEDIES FOR ADVERTISING-INDUCED JUROR BIAS

The Ludlow Massacre advertisements appearing on the Trinidad, Colorado cable system do not stand alone as examples of exposing potential jurors to advertisements and public relations communications about pending trials.

Bayer's public relations executives sent letters to 2,100 people in the Corpus Christi, Texas area before a jury was chosen to hear a lawsuit involving Baycol, Bayer's anticholesterol drug.¹⁸⁰ The letter said people should "keep an open mind" about the pharmaceutical company.¹⁸¹ Nueces, Texas County Court Judge James B. Klager asked the county district attorney to investigate Bayer's sending the letter, which the company said was a mistake and for which it apologized. Despite the judge's belief that sending the letter was "outlandish,"¹⁸² the judge proceeded with the trial, at which the jury exonerated Bayer.¹⁸³

After being criminally indicted on conspiracy, obstruction of justice, and securities fraud charges, Martha Stewart placed a full-page advertisement in a nationally distributed newspaper, began a website, and hired a public relations firm.¹⁸⁴ The website included a letter from Ms. Stewart stating facts related to the charges as she saw them and proclaiming her innocence.

Tobacco companies have complained about an advertising campaign by the State of California Health Department that "bashes cigarettes and the people who make them."¹⁸⁵ In a lawsuit filed by a

179. *Id.* at 136.

180. See Melody Petersen, *Judge Criticizes Letter From Bayer*, N.Y. TIMES, Feb. 22, 2003, at C14. Bayer took Baycol off the market because the drug had been linked to a muscle disorder that can be fatal. As of February 22, 2003, more than 10,000 lawsuits had been filed against Bayer based on the drug. *Id.*

181. *Id.*

182. *Id.*

183. See Melody Petersen, *Bayer Cleared of Liability in a Lawsuit over a Drug*, N.Y. TIMES, Mar. 19, 2003, at C1.

184. See Constance L. Hays, *Martha Stewart Uses Web to Tell Her Side of Story*, N.Y. TIMES, June 6, 2003, at C1 (quoting a former federal prosecutor as saying, "It's interesting because [Martha Stewart's website] is arguably an attempt to influence the jury pool.").

185. Gordon Fairclough, *Cigarette Makers Say California's Ad Tactics Bias Juries*, WALL ST. J., Sept. 12, 2002, at B1. In one advertisement, "a fictional tobacco executive explains: 'If you get a customer while they're young enough, they're yours for life.' In a convenience store, he points to cigarette ads hanging at child's-eye level by the candy counter. 'Perfect placement,' he says." *Id.* A to-

smoker against R.J. Reynolds Tobacco Holdings, a company filing said that “the state’s self-proclaimed ‘propaganda’ campaign has had devastating effects on cigarette companies’ right to a fair trial within California.”¹⁸⁶ Reynolds asked the state court judge to dismiss the suit or grant a change of venue.

The judge in the Wal-Mart case concluded that advertising and public relations campaigns could prejudice jurors.¹⁸⁷ His solution was to grant a requested change of venue.¹⁸⁸ That procedural remedy may be sufficient in some cases, but not in others.

A. Using the Commercial Speech Doctrine to Suppress Pretrial Advertising Campaigns

A trial judge may be tempted to use the Supreme Court’s commercial speech doctrine to limit pretrial advertising campaigns about pending cases.¹⁸⁹ Commercial speech is more easily regulated than news content. After once ruling that commercial speech had no First Amendment protection,¹⁹⁰ the Court now holds that commercial speech is less protected than most other forms of expression.¹⁹¹ If commercial speech is false or misleading, the government is free to regulate it.¹⁹² However, to regulate commercial speech that is neither false nor misleading, the government must meet a three-part test. First, the government must show a substantial interest that justifies the regulation.¹⁹³ Second, the regulation must directly advance the government’s interest.¹⁹⁴ Finally, the regulation must be no more extensive than necessary to serve the government’s interest.¹⁹⁵

Although as many as five current Supreme Court justices have questioned whether the commercial speech doctrine is acceptable

bacco company attorney said, “It’s clear that their interest is to influence litigation.” *Id.*

186. *Id.*

187. *Culver v. Wal-Mart Stores, Inc.*, No. 99CV161 (Dist. Ct. Las Animas County, Colo. filed Dec. 22, 1999).

188. *Id.*

189. See generally Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. Rev.* 1 (2000) (discussing the commercial speech doctrine).

190. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

191. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980).

192. *Id.* at 563.

193. *Id.* at 564.

194. *Id.*

195. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (“[O]ur decisions require . . . a fit that is not necessarily perfect, but reasonable.”). The *Central Hudson* test had required the regulation to be the least drastic means of achieving the government’s goal. 447 U.S. at 564.

under the First Amendment,¹⁹⁶ it remains in place. That the doctrine provides less First Amendment protection to commercial speech than to other types of speech might support a trial judge's order forbidding advertisements discussing a pending or ongoing trial.

However, the Supreme Court has differentiated between advertisements proposing a monetary transaction¹⁹⁷ and those used for other forms of expression, such as communicating political positions. For example, the *New York Times Co. v. Sullivan*¹⁹⁸ libel case focused on an advertisement placed in the *Times* by several Southern clergy. The clergy's assertions—political in nature—did not receive diminished First Amendment protection, because they appeared in the form of a newspaper advertisement.¹⁹⁹ Nor did the Court's finding that the advertisement contained several incorrect or exaggerated accusations of police harassment lessen the advertisement's protection in the absence of deliberate lies or reckless disregard of the truth.²⁰⁰

However, courts may choose not to categorize advertisements that could sway potential or sitting jurors as political rather than commercial speech. For example, Northrop Corporation initiated a television commercial campaign one week prior to scheduled jury selection in a case in which the company and several of its former employees faced charges of conspiracy to defraud the federal government.²⁰¹ The commercials ran on television stations in Los Angeles, where the trial was to take place.²⁰² The trial judge granted the government's request for a restraining order requiring Northrop to stop running the advertisements until after a verdict had been returned in the criminal case.²⁰³

196. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571–72 (2001) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509–14 (1996) (joint opinion of Ginsburg, Kennedy & Stevens, JJ.); *id.* at 517–18 (Scalia, J., concurring).

197. See *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973) (stating that the commercial speech doctrine applies to an expression proposing a commercial transaction).

198. 376 U.S. 254 (1964). See generally ANTHONY LEWIS, *MAKE NO LAW* (1991) (providing a historical account of the events leading up to the *Sullivan* decision and the decision itself).

199. *Sullivan*, 376 U.S. at 266.

200. *Id.* at 271–73.

201. *United States v. Northrop Corp.*, No. CR 89-303 PAR, 1990 WL 71352 (C.D. Cal. Feb. 15, 1990). The charges were based on accusations of “supplying untested and out-of-specification flight stabilization and control packages” and making “false and fraudulent statements to the United States.” *Id.* at *1.

202. The commercials were placed in “heavily watched programs,” including Los Angeles Laker basketball games. *Id.* at *1.

203. Specifically, the court ordered Northrop not to run commercials about (1) the character, credibility or reputation of Northrop or its employees; (2) the identity of a witness or the expected testimony of a party or witness; (3) the contents of any pretrial confession, admission, or statement given by a defendant or that person's refusal or failure to make a statement; (4) the identity or nature of physical evidence ex-

The court described the commercials as featuring the well-known test pilot Chuck Yeager:

[Yeager] says to listen to how Northrop people think, and there follows a cameo by a Northrop employee, saying such things as we try to get things optimized and that can take years and years of development and simulation and testing to come up with a design so we can get it just right before it goes in the aircraft; . . . we want to make sure we make aircraft safe for the pilots who fly them; we've got to be right; we come up with the right design, and build a model, and test it . . . ; we produce the best—if someone's life depends on it we'll do the best we can; and it's very important to do it right and not miss something. Yeager closes off the spot with the tag line "Now that's the way Northrop people think . . ."204

The trial judge said that the advertising campaign "seriously threatened" the "fair and impartial administration of justice."²⁰⁵ The judge noted the "calculated but subliminal influence on prospective or impaneled jurors' perception of the character, reputation and state of mind of Northrop and its employees, as well as the public's perception of the fairness of the Northrop trial and the impartiality of the trial proceedings."²⁰⁶

The court rejected arguments that the advertisements were not commercial in nature, and therefore any prior restraint against Northrop should be based on the *Nebraska Press*²⁰⁷ test. The court found the Northrop advertisements to be commercial speech, not a form of political expression or reporting. Thus, *Nebraska Press* did not apply, because that decision involved a prior restraint on the press's reporting function.²⁰⁸ The court said that "even though the advertisements are not designed to induce consumers to purchase a specific product or service, they fall within the definition of commercial speech," because, as Northrop itself argued, the commercials help recruit high-caliber employees and maintain good relationships with suppliers, "both economic benefits."²⁰⁹

The court, then, applied the commercial speech line of cases, particularly *Central Hudson*.²¹⁰ The court stated that the government

pected to be presented or the absence of such physical evidence; (5) the strengths or weaknesses of the case of either party; and (6) any other information Northrop's lawyers know or reasonably show know is likely to be inadmissible as evidence and would create a substantial risk of prejudice if disclosed.

Id. at *1-2 (citing *Levine v. U.S. Dist. Court*, 764 F.2d 590, 599 (9th Cir. 1985)).

204. *Id.* at *1.

205. *Id.* at *2.

206. *Id.*

207. *Neb. Press Assoc. v. Stuart*, 427 U.S. 539 (1976) (discussing whether adequate alternative measures existed in lieu of a prior restraint on publication of statements by the defendant).

208. *Northrop*, 1990 WL 71352, at *3.

209. *Id.* at *3.

210. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

had a substantial interest in ensuring a fair trial,²¹¹ that forbidding broadcast of the commercials until after a decision was reached would directly advance the government's interest, and that the restraining order was not more extensive than necessary to accomplish its purpose.²¹² As to the last point, because the commercials dealt with "central issues in the trial,"²¹³ the judge said that no alternative to a prior restraint—"voir dire, instructions to the jury, sequestration, continuing the trial, [or] change of venue"—could ameliorate the problems the commercials would cause.²¹⁴

What, then, was the advertisement Martha Stewart placed in a national newspaper—commercial speech or an advertisement used to express ideas the First Amendment fully protects?²¹⁵ What were the advertisements carried on the cable system in the small town of Trinidad, Colorado?²¹⁶ The Trinidad advertisements did not propose a commercial transaction—they did not list prescription drug prices²¹⁷ or urge beer purchases.²¹⁸ Rather, both the Stewart advertisement and the Ludlow Massacre commercials proclaimed a person's innocence or suggested the correctness of one side in a civil dispute. If these utterances were made outside the context of newspaper advertisements or television commercials, the First Amendment would protect them.²¹⁹

However, the context is not merely advertisements contrasted with, for example, newspaper articles. The more pertinent context is a pending criminal or civil trial. The *Northrop* court quoted with approval the Ninth Circuit's conclusion: "Even if an impartial jury could be selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences."²²⁰ As the *Northrop* court found, advertising is a particularly

211. *Northrop*, 1990 WL 71352, at *4 ("The fact that these commercials do not make direct and specific statements about the case does not negate their effect on potential jurors or on the perceived or actual impartiality of the process.").

212. *Id.* at *4-7.

213. *Id.* at *2.

214. *Id.*

215. See text accompanying note 168.

216. See text accompanying notes 9-12.

217. See *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that advertisements providing prescription drug prices were entitled to First Amendment protection).

218. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (holding that a complete statutory ban on advertisements containing liquor prices violated the First Amendment).

219. See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (stating that the First Amendment prevents the city from banning signs with political messages placed on residents' lawns).

220. *United States v. Northrop Corp.*, No. CR 89-303 PAR, 1990 WL 71352, at *5 (C.D. Cal. Feb. 15, 1990) (quoting *Levine v. United States Dist. Court*, 764 F.2d 590, 598 (9th Cir. 1985)).

intense and prejudicial form of communication. A court should have power to limit “a major advertising campaign [that is] specifically targeted to the market from which the jury would be selected” and that deals with “central issues” in the case the jury is to hear.²²¹

B. Using Procedural Remedies to Eliminate Juror Bias

If advertisements related to pending trials are published, is it possible to ensure that jurors are not influenced by the messages or to identify potential jurors who have become biased due to such advertisements? The Supreme Court’s position is that a carefully conducted voir dire can ensure that biased jurors are not seated.²²²

Voir dire is the process by which the venire is winnowed to sitting jurors and alternates. Although in fact it occurs before the trial begins, it may be the most important part of the trial. It often is said that the trial is won or lost during voir dire, since the jury selected will determine the case’s outcome.²²³

The Supreme Court has emphasized that voir dire is an important tool for trial judges and attorneys to use in attempting to ensure a fair jury. The Court gives considerable discretion to trial judges in both civil and criminal cases in conducting, or allowing attorneys to conduct,²²⁴ the voir dire.²²⁵ For example, judges are permitted to conduct

221. *Northrop*, 1990 WL 71352, at *5, *2.

222. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976). The Court said:

In particular, the trial judge should employ the voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant’s guilt.

Id. at 602. In *Mu’Min v. Virginia*, the Supreme Court also said that a voir dire examination normally will suffice to eliminate potential jurors biased by prejudicial pretrial publicity. 500 U.S. 415, 431 (1991).

223. *See, e.g.*, 45 AM. JUR. TRIALS *Voir Dire, In General* § 144 (1992) (“Experienced trial lawyers agree that a case can often be won or lost in voir dire.”); *see also* John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1209–10 n.1 (2001) (citing numerous sources supporting notion that trials are won or lost during jury selection).

224. The Federal Rules of Civil Procedure permit the judge, the attorneys, or both to conduct voir dire. FED. R. CIV. P. 47(a). Federal judges conduct voir dire alone in about seventy percent of cases. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 292 (1999) (citing JURY TRIAL INNOVATIONS 54 (G. Thomas Munsterman et al. eds., 1997)). When judges alone conduct voir dire, according to one commentator, jury bias rarely is uncovered. *Id.* However, some courts frown on a judge excluding attorneys from participating in voir dire. *See, e.g.*, *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) (“[W]e must acknowledge that voir dire in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties.”), *cert. denied*, 434 U.S. 902 (1997). Taken to the extreme in some states, a judge may not even be present during an attorney-conducted voir dire in a civil trial. *See* Landsman, *supra*, at 219.

the voir dire with individual jurors or to question jurors in groups.²²⁶ In no instance, however, may the voir dire be superficial or so carelessly conducted that the defendant's or civil party's due process rights are abridged.²²⁷ The Supreme Court has ruled that there is no constitutional requirement that jurors be examined individually²²⁸ or that they be asked about the specific pretrial publicity to which they have been exposed.²²⁹

It remains unclear how effective voir dire is in preventing unfair trials.²³⁰ Some courts have held that a well-conducted voir dire is sufficient to confirm that jurors who say they can be fair, despite being exposed to news stories about the case, indeed are telling the truth.²³¹ Social science research may indicate the contrary. Several studies show that mock jurors shown prejudicial stories did not set aside their preconceptions, although they claimed they could do so²³² and this

225. See *Connors v. United States*, 158 U.S. 408, 413 (1895) (stating that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases."), cited in *Mu'Min*, 500 U.S. at 422.

226. *Mu'Min*, 500 U.S. at 430-31 (upholding a trial court's decision to conduct voir dire in four juror panels).

227. See, e.g., *Cummings v. Dugger*, 862 F.2d 1504, 1507 (11th Cir. 1989) ("The standard [of review] is whether [voir dire] 'created a reasonable assurance that prejudice of the jurors would be discovered if present.'") (quoting *United States v. Holman*, 680 F.2d 1340, 1344 (11th Cir. 1982)).

228. The American Bar Association recommends that jurors be questioned individually in certain circumstances:

If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. . . . The questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude. . . .

AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS Standard 8-3.5(a) (3d ed. 1991). One law review article says research confirms that questioning jurors individually is more effective in determining bias than conducting voir dire in groups. Blume et al., *supra* note 223, at 1250 (citing Debora A. Cancado, Note, *The Inadequacy of the Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 96-97 (2000)); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 503, 511, 528; see also David Suggs & Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 259-60 (1981).

229. *Mu'Min*, 500 U.S. at 431. The Court does not require questioning of individual jurors even when issues of racial bias are raised. *Id.*

230. See, e.g., Blume et al., *supra* note 223, at 1231-47 (contending that voir dire fails to ensure fair trials in death penalty cases).

231. See, e.g., *United States v. Stevens*, 83 F.3d 60, 66 (2d Cir. 1996) (concluding that trial judge's properly-conducted voir dire ensured impartial jury, despite jurors admitting that they knew of the case through media stories).

232. See Studebaker & Penrod, *supra* note 164, at 440-41 (citing Kerr et al., *supra* note 166; Stanley Sue et al., *Authoritarianism, Pretrial Publicity and Awareness*

problem is exacerbated by the noncognitive impact of advertising. Studies also indicate that even an extensive voir dire may be ineffective in ameliorating the results of prejudicial publicity²³³ or in identifying biased jurors.²³⁴ Some legal scholars agree that voir dire is not an effective way to determine bias. Specifically, a potential juror may parrot back what a judge or attorney—authority figures in the courtroom atmosphere unfamiliar to prospective jurors—seem to want to hear.²³⁵ In some instances, a judge may severely limit an attorney's questioning during voir dire, preventing the attorney from eliciting information showing bias.²³⁶ On the other hand, an attorney simply may conduct an incompetent voir dire, no matter how much leeway a judge permits,²³⁷ although this may be because the jurors do not understand an attorney's language.²³⁸

In addition to voir dire, the Supreme Court has suggested a number of procedural steps judges could take to ensure a fair trial. For example, after excoriating the trial judge in *Sheppard v. Maxwell* for not having control over his courtroom or trial participants, the Court adamantly said that courts could insulate witnesses, control the release of extrajudicial prejudicial information by police officers and witnesses, continue a case, change venue, sequester the jury, or order a new trial.²³⁹ Indeed, the Court has ruled that before a trial judge may

of Bias in Simulated Jurors, 37 PSYCHOL. REP. 1299 (1975)); see also Hardaway & Tumminello, *supra* note 95, at 64 ("Jurors who may believe themselves to be unaffected by pretrial publicity may be mistaken. Although the empirical research still is limited, it appears that jurors who are exposed to factual pretrial publicity are significantly more likely to convict a defendant than those not exposed when there has been no delay between the exposure and the trial.").

233. See, e.g., Hedy Red Dexter, et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. APPLIED SOC. PSYCHOL. 819, 828 (1992) (finding a fifteen percent higher conviction rate among mock jurors exposed to prejudicial pretrial publicity compared with subjects not exposed to publicity, and a fifteen percent higher conviction rate among subjects experiencing extensive voir dire compared with those experiencing minimal voir dire, regardless of being exposed to publicity or not).
234. For example, in one study, mock jurors were videotaped as they were subject to voir dire. Kerr et al., *supra* note 166. The tapes and information about pretrial publicity were sent to judges, defense attorneys, and prosecutors, who were asked to identify the jurors they would challenge for bias. *Id.* The study found that seated jurors and challenged jurors were equally likely to convict, whether members of either group had or had not been subject to pretrial publicity. *Id.*
235. See Blume et al., *supra* note 223, at 1233-34.
236. See *id.* at 1240.
237. See *id.* at 1243-44. In part, this may be because "[e]ven experienced trial lawyers typically have little formal training in voir dire for any type of case (civil or criminal)." *Id.* at 1245-46.
238. See *id.* at 1245.
239. *Sheppard v. Maxwell*, 384 U.S. 333, 357-63 (1966). See also *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976) (noting alternatives to prior restraint orders directed to the press).

issue a constitutionally valid restrictive order against the press, the judge must explain why no other procedural remedies, individually or in combination, would ensure a fair trial.²⁴⁰ However, these suggested procedural approaches to avoiding biased jurors have been proposed in the context of prejudicial news stories. As explained above, advertisements have different impacts—effects more difficult to discern and eliminate—than journalistic reports.

C. Gagging Lawyers to Prevent Pretrial Advertising Campaigns

It may be, then, that a judge must consider barring attorneys from using advertising to discuss pending cases.²⁴¹ Although such a ban implicates First Amendment concerns, the Supreme Court has held that limiting attorneys' speech is an acceptable means of ensuring a fair trial.²⁴²

Attorneys' use of the media to publicize their side of legal issues is not new, nor is the recognition that doing so could jeopardize the fair administration of justice.²⁴³ As long ago as 1908, the bar adopted an ethical standard stating: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial . . . and otherwise prejudice the due administration of justice. Generally they

240. *Neb. Press*, 427 U.S. at 562–64.

241. This does not suggest that a judge may actually prevent attorneys from advertising for themselves, short of including material pertinent to pending cases. The Supreme Court has held that states may not prevent attorneys from advertising their services, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), although they may impose limits on attorneys' soliciting of specific clients, *Florida Bar v. Went For It*, 515 U.S. 618 (1995). See also MODEL RULES OF PROF'L CONDUCT R. 7.1 (2003) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."). Rule 7.1 has been adopted in a majority of the states. See Bernadette Miraglia, Note, *First Amendment: The Special Treatment of Legal Advertising*, 1990 ANN. SURV. AM. L. 597, 602 n.44 (1991).

242. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1036 (1991) (stating that a rule prohibiting attorneys from disclosing any information with a substantial likelihood of materially prejudicing judicial proceedings is "not necessarily flawed").

243. A comment to the current model ethical standard recognizes the importance of balancing attorneys' free speech rights against the constitutional requirements of a fair trial:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.

MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2003).

are to be condemned.”²⁴⁴ Without more clarity,²⁴⁵ this proscription could not be applied.²⁴⁶

More recently, after the publicity regarding Lee Harvey Oswald and President Kennedy’s assassination, as well as the Supreme Court’s 1966 decision in *Sheppard v. Maxwell*,²⁴⁷ in which the Court overturned a conviction in a trial held in a “carnival atmosphere”²⁴⁸ created by the media, several reports issued by judicial and bar groups suggested ways to prevent media-created jury bias. The best known of these, the Reardon Report, recommended using courts’ contempt powers to enforce prior restraints on the press,²⁴⁹ a method the Supreme Court essentially rejected in *Nebraska Press Association v. Stuart*.²⁵⁰ Other reports focused on restraining out-of-court comments by attorneys, other officers of the court, and law enforcement officials.²⁵¹ Su-

244. CANONS OF PROFESSIONAL ETHICS, Canon 20 (1908).

245. See *Hirschkop v. Snead*, 594 F.2d 356, 365 (4th Cir. 1979) (“The trouble [with Canon 20] was that the standards were so general and vague that they were exceedingly difficult to apply and did little to forewarn speakers for publication about what was proscribed and what was permitted.”).

246. See Suzanne F. Day, Note, *The Supreme Court’s Attack on Attorneys’ Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1366 (1993) (observing that Canon 20 “was rarely enforced since it arguably lacks a clear standard for guidance”).

247. 384 U.S. 333 (1966).

248. *Id.* at 358.

249. A committee of judges and attorneys, chaired by Supreme Judicial Court of Massachusetts Chief Justice Paul C. Reardon, issued a report suggesting that restricting attorneys’ and other court officers’ interviews with the press would limit prejudicial publicity. But the Reardon Report also noted that in situations where this would not be completely effective, trial judges should impose restrictive orders on the press and enforce such orders by using the judges’ contempt powers. See ADVISORY COMM. ON FAIR TRIAL & FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 150 (1968).

250. 427 U.S. 539 (1976). The Court held that a restraining order on the press amounted to prior restraint that was not justified, because the trial judge failed to show that: (1) there was or would be prejudicial pretrial publicity, (2) the publicity’s effects could not be ameliorated by any means other than a restraining order, (3) the restraining order would be effective, and (4) any restraining order issued was not vague or unconstitutionally overbroad. *Id.* at 562–70.

251. For example, a committee of the Association of the Bar of the City of New York, chaired by Judge Harold Medina, rejected restraining orders on the press, considering them First Amendment violations, preferring judges to limit trial participants’ and law enforcement officers’ public comments. SPECIAL COMM. ON RADIO, TELEVISION, & THE ADMIN. OF JUSTICE OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL 6 (1967). Similarly, a report by a committee of the U.S. Judicial Conference, chaired by Judge Irving R. Kaufman, advised prohibiting extrajudicial comments by attorneys, other court officers, and law enforcement officials rather than imposing prior restraints on the press. Report of the Comm. on the Operation of the Jury Sys. on the “Free Press–Fair Trial” Issue, 45 F.R.D. 391, 393–94 (1968), *revised*, 87 F.R.D. 519, 525–528 (1980).

preme Court decisions indicate these “gag” orders—on anyone connected with a trial except the press—may be constitutional.²⁵²

During the same time period, the American Bar Association (“ABA”) attempted to provide more precision to an ethics rule limiting prejudicial attorney comments.²⁵³ In 1969, the ABA adopted DR 7-107 of the *Model Code of Professional Responsibility*, prohibiting attorneys’ out-of-court statements “reasonably likely to interfere with a fair trial.”²⁵⁴ In 1983, DR 7-107 was replaced with Rule 3.6 of the *Model Rules of Professional Conduct*, proscribing any “extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”²⁵⁵ Rule 3.6, then, changed the “reasonably likely” language of DR 7-107.²⁵⁶

The Supreme Court stepped into this eight-decade-old debate by deciding *Gentile v. State Bar of Nevada*.²⁵⁷ But the Court’s decision failed to clarify the issue. The case arose when a Las Vegas attorney, representing an individual the attorney thought would be indicted for theft, said at a press conference that his client was innocent and had been made a “scapegoat” by a dishonest State and “crooked” police.²⁵⁸ The attorney also suggested another person was the actual culprit.²⁵⁹ A state bar disciplinary board sanctioned the attorney, an action upheld by the Nevada Supreme Court.²⁶⁰

The United States Supreme Court divided into two groups of four, with Justice O’Connor providing the fifth vote for each of the groups.²⁶¹ Chief Justice Rehnquist’s opinion found the Nevada standard for limiting attorney speech to be acceptable under the First Amendment.²⁶² Justice O’Connor agreed.²⁶³ Justice Kennedy’s opinion found a “safe harbor” in the Nevada rule to be void for vagueness.²⁶⁴ Justice O’Connor agreed.²⁶⁵

252. See *Sheppard*, 384 U.S. at 361 (stating that a trial judge may limit lawyers’ and other trial participants’ communication with press).

253. See generally *id.*

254. CODE OF PROF’L RESPONSIBILITY & CANONS OF JUDICIAL ETHICS DR 7-107(D) (1969).

255. MODEL RULES OF PROF’L CONDUCT R. 3.6 (1983).

256. Rule 3.6, however, did not adopt the “clear and present danger” language then used in Standard 8-3.1 of the *Standards for Criminal Justice*.

257. 501 U.S. 1030 (1991).

258. *Id.* at 1034.

259. *Id.* at 1045.

260. *Id.* at 1033.

261. *Id.*

262. *Id.* at 1074–76 (Rehnquist, C.J., dissenting).

263. *Id.*

264. *Id.* at 1048–51.

265. *Id.*

Chief Justice Rehnquist's opinion said that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press" in the *Nebraska Press* case.²⁶⁶ Rehnquist justified this on several bases.²⁶⁷ He noted that attorneys' ethics codes have long restricted certain extrajudicial statements²⁶⁸ and that the majority of states' ethics codes follow this standard.²⁶⁹ Also, attorneys' statements in court are circumscribed,²⁷⁰ and even attorneys' advertising is not completely free of restrictions.²⁷¹ Rehnquist, then, did find the "substantial likelihood of material prejudice" standard of Rule 3.6 (and the similar Nevada ethics rule) acceptable, but rejected any notion of a "clear and present danger" test.²⁷² The Court's opinion said: "We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."²⁷³

The Kennedy opinion argued that attorneys' speech should be protected by the same standard as political speech, since, according to Kennedy, that is what speech about legal proceedings is.²⁷⁴ However, Kennedy could gain a majority only to agree with the Nevada Supreme Court²⁷⁵ that the rule's "safe harbor" provision—allowing an attorney to state "the general nature of the . . . defense," notwithstanding the rest of the rule—was unconstitutionally vague.²⁷⁶

266. *Gentile*, 501 U.S. at 1074.

267. See Lester Porter, Jr., Note, *Leaving Your Speech Rights at the Bar*, 67 WASH. L. REV. 733, 743 (1992).

268. *Gentile*, 501 U.S. at 1067.

269. *Id.* at 1068.

270. *Id.* at 1071.

271. *Id.* at 1073.

272. *Id.* at 1063, 1074 (explaining that its decisions in *In re Sawyer*, 360 U.S. 622 (1959), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), "rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press" in *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976)).

273. *Gentile*, 501 U.S. at 1075.

274. *Id.* at 1034 ("[T]his case involves punishment of pure speech in the political forum.").

275. *Gentile v. State Bar of Nevada*, 787 P.2d 386 (Nev. 1990).

276. *Gentile*, 501 U.S. at 1048. This ruling overturned the state bar's sanctions against attorney Dominic Gentile. *Id.* at 1057.

Despite rejecting a portion of Nevada's rule as written, after *Gentile*, the Supreme Court and the Second,²⁷⁷ Fourth,²⁷⁸ Fifth,²⁷⁹ Sixth,²⁸⁰ Seventh,²⁸¹ Ninth,²⁸² and Tenth²⁸³ Circuits have held that trial judges may limit the speech of attorneys about pending trials. The only question is what limiting test constitutionally balances fair trial guarantees against an attorney's First Amendment right of free speech.

The *Gentile* Court did not adopt the "substantial likelihood" test as a standard.²⁸⁴ Rather, it "merely approved" Nevada's test.²⁸⁵ That leaves the circuits fractured in choosing a test to apply when a trial judge limits attorneys' speech about pending trials. It is likely that the Sixth,²⁸⁶ Seventh,²⁸⁷ and Ninth²⁸⁸ Circuits' decisions to use a clear and present danger standard no longer are viable after *Gentile*. The Supreme Court made clear that the test for restrictive orders on

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277. See *United States v. Cutler*, 58 F.3d 825, 828-29 (2d Cir. 1995) (upholding contempt conviction of criminal defense attorney for violating an order limiting extrajudicial communications under a rule that used a "reasonable likelihood" test); see also *In re Dow Jones*, 842 F.2d 603, 609 (2d Cir. 1988) (finding "reasonable likelihood" that an order restricting trial participants from speaking to the press is constitutionally justifiable).
278. See *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999) (noting that *Gentile* makes a "reasonable likelihood" test constitutionally acceptable).
279. See *United States v. Brown*, 218 F.3d 415, 426-28 (5th Cir. 2000) (not choosing between "reasonable likelihood" and "substantial likelihood" tests, but rejecting a "clear and present danger" test).
280. See *United States v. Ford*, 830 F.2d 596, 600-02 (6th Cir. 1987) (applying a "clear and present danger" standard).
281. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied sub nom. *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976) (using a "serious and imminent threat" standard).
282. See *Levine v. United States Dist. Court*, 764 F.2d 590, 596 (9th Cir. 1985) (applying a "clear and present danger" standard).
283. See *United States v. Tjerina*, 412 F.2d 661, 666-67 (10th Cir. 1969) (using a "reasonable likelihood" test).
284. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). After *Gentile*, the American Bar Association revised Model Rule 3.6 to comport with the decision. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (1995); see also Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837 (1996) (discussing the history of rules regarding attorneys' extrajudicial statements, and criticizing revised Rule 3.6). The ABA also revised Model Rule 3.8, relating to limits on prosecutors' extrajudicial statements. See MODEL RULES OF PROF'L CONDUCT R. 3.8(c), (d) (1995).
285. *Gentile*, 501 U.S. at 1075; see *United States v. Brown*, 218 F.3d 415, 426 (5th Cir. 2000).
286. *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987).
287. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied sub nom. *Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).
288. *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1985).

trial participants, including attorneys, cannot be more stringent than "a substantial likelihood of material prejudice" to judicial proceedings.²⁸⁹ In cases decided after *Gentile*, the Second²⁹⁰ and Fourth²⁹¹ Circuits adopted the "reasonable likelihood" test. The Tenth Circuit had done so before *Gentile*.²⁹² The Fifth Circuit recognized that a "clear and present danger" test could not be used, but has not yet decided whether it should adopt the "substantial likelihood" or "reasonable likelihood" standard.²⁹³

Although it is difficult to know if the Rehnquist portion of the *Gentile* decision has increased the number of attorneys sanctioned for speaking publicly about their cases,²⁹⁴ since disciplinary hearings are confidential,²⁹⁵ there are examples of courts applying the "substantial likelihood of material prejudice" standard to punish lawyers for extrajudicial statements.²⁹⁶

V. CONCLUSION

While granting Timothy McVeigh and Terry Nichols' motion for a change of venue in the Oklahoma Federal Building bombing case, federal district court Chief Judge Richard Match wrote that jurors may harbor prejudices they do not know they have:

The existence of such a prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impair-

289. *Gentile*, 501 U.S. at 1075.

290. *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995).

291. *In re Morrissey*, 168 F.3d 134 (4th Cir. 1999).

292. *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969).

293. *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

294. The Supreme Court upheld the portion of the Nevada rule permitting attorneys to make comments about matters already on the "public record." Attorneys are skilled at using information, including "public record" information, to make statements favorable to their side and detrimental to their opponents' positions. See *Hardaway & Tumminello*, *supra* note 95.

An indictment, which is a public record, need not be limited to bare facts. In it, the prosecution may tell a story by describing the alleged crime and what unindicted co-conspirators might have said or done, and so forth. Likewise, the defense counsel may file pleadings and other papers with the court that tell the story from the defendant's perspective. These detailed stories, allegations, and explanations become part of the public record that an attorney may reveal.

Id. at 80.

295. Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 498 n.31 (1993) (noting also that disciplinary proceedings "for violations of trial publicity rules . . . become public knowledge only through the media, or when the cases are appealed to a district court").

296. See, e.g., *Delaware v. Grossberg*, 705 A.2d 608 (Del. Super. Ct. 1997) (revoking attorney's admission *pro hoc vice* for violating court order prohibiting attorneys' public comments about case).

ment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.²⁹⁷

As this Article has argued, advertisements are designed to cause people to internalize preferences without knowing they have done so. There are few extrajudicial communications more prejudicial than advertisements relating to a pending legal case.²⁹⁸ In part, this is because advertisements differ from news stories.²⁹⁹ Instead of making factual statements that a recipient may accept or reject, advertisements suggest or imply information or gently coerce recipients into being open to believing certain assertions. It is more difficult for a reader, listener, or viewer to reject this kind of communication, than it is to ignore a news story.

An additional reason that advertising as pretrial publicity could engender a prejudiced jury is that the advertisements may resemble business-building advertising or public service advertisements ("PSAs"). Since these would not relate to a pending case in an obvious way, it would be more difficult for a judge to justify issuing a restraining order prohibiting an attorney or an attorney's client from running these kinds of advertisements.³⁰⁰ For this reason, attorneys wanting to use advertising to influence a jury would not create advertisements that blatantly appeal to potential jurors' biases. That was a factor in analyzing the impact of the Ludlow Massacre commercials. Azar and Barkley claimed their advertisements were PSAs on behalf of a local historical event.³⁰¹ The format of the commercials was similar to PSAs that promote good causes. The quasi-PSA Ludlow commercials exploited typical PSA characteristics, making it more difficult to identify the actual objective of the advertisements, which was presumed by the defendant's attorneys and ultimately held by the judge to establish the "good guy/bad guy" association network.³⁰² Business-building advertisements are easier to identify, because they end with what advertisers call a "call to action"—usually a "call me" invitation or phone number. The question arises, however, whether a judge's restraining order would include all advertising by a firm or just trial-oriented messages, and, if the latter, how business-building and PSAs could be separated from trial-biasing messages.

297. *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996).

298. *See supra* text accompanying notes 36–63.

299. *See supra* text accompanying notes 34–35.

300. The problem would be convincing a judge that a business-building advertisement or PSA would meet *Gentile's* "substantial likelihood of material prejudice" standard. *Gentile*, 501 U.S. at 1075.

301. Record at 499–500, *Culver v. Wal-Mart Stores, Inc.* (Dist. Ct. Las Animas County, Colo. filed Dec. 22, 1999) (No. 99CV161).

302. *Id.* at 478, 505.

The problem with issue-related advertising preceding a trial is that it works on emotions and associations that are deeply buried in people's minds, which makes it impossible to assess the extent of the impact using conventional attitude and survey research. That is why the issue of pretrial advertising is not about recall, but rather about impression formation and retrieval, which is more complicated than simple memory. The triggering process is a subconscious response and most people are not aware of how it works and how their thoughts are cued and linked. For these reasons, it is difficult to elicit this information through questioning. An association net can lie deep within the subconscious and not surface unless cued. And when the network of associations is retrieved, it may come back surrounded by emotions and judgments that are only relevant in a certain context.

The impact of such advertising is therefore below the level of awareness; most people would have a hard time not only recalling the advertisements, but also articulating the impact the advertisements had on them. These concerns illustrate why advertising should not be allowed to become part of a trial. They are also the reasons Judge Quinn, a former Colorado Supreme Court justice who heard the change of venue motion, decided to find on behalf of Wal-Mart.

For these reasons, it is probable that extrajudicial communications about pending cases made through advertising present a "substantial likelihood of material prejudice" to the judicial process. Therefore, restraining such communications would comport with the *Gentile* standards.

In *Sheppard*, the Supreme Court repeatedly stated that the trial judge should have "control[led] the release of leads, information, and gossip to the press by . . . the counsel for both sides."³⁰³ Thus, twenty-five years before *Gentile*³⁰⁴ the Court was urging judges to limit attorneys' out-of-court prejudicial comments as one means of ensuring a fair trial. Indeed, in response to extrajudicial communications with the persuasive power of advertising, restraints limiting attorneys'—and parties'—case-related advertising before and during trials seems to be the most efficacious way of preventing juror bias.

303. *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966); *see also id.* at 360 ("[T]he judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel . . ."); *id.* at 361 ("[T]he trial court might well have proscribed extrajudicial statements by any lawyer . . . which divulged prejudicial matters.").

304. *Gentile*, 501 U.S. 1030.