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Influencing Juries in Litigation "Hot Spots"

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INFLUENCING JURIES IN LITIGATION “HOT SPOTS”

MEGAN M. LA BELLE*

This Article considers how corporations are using image advertising in litigation “hot spots” as a means of influencing litigation outcomes. It describes how Samsung and other companies advertised in the Eastern District of Texas—a patent litigation “hot spot”—to curry favor with the people who live there, including by sponsoring an ice rink located directly outside the courthouse. To be sure, image advertisements are constitutionally protected speech and might even warrant the highest level of protection under the First Amendment when they are not purely commercial in nature. Still, the Article argues, courts should be able to prohibit such advertisements altogether, or at the very least limit their impact through voir dire and discovery, because they threaten the right to an impartial jury guaranteed by the Seventh Amendment.

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INTRODUCTION

Corporate image advertising is ubiquitous these days. From Burger King’s net neutrality video,¹ to Stella Artois’s Super Bowl ad promoting clean water,² to Coca-Cola’s sponsorship of the 2018 Olympic Games,³ advertising looks and feels very different than it did in the past. There are, of course, benefits to image advertisements. They increase awareness and raise money for important social causes, make people feel better about supporting and working for particular companies, and are often more interesting and educational than their traditional counterparts.⁴

Yet, companies have also used image advertising as a means of influencing the outcome of litigation.⁵ The idea is that such ads will instill in the public—that is, potential jurors—a favorable perception of the company that will persist if and when that company is involved in a lawsuit. This tactic, which interferes with the constitutionally guaranteed right to an impartial jury,⁶ has been used in criminal and civil cases alike.⁷ In two cases in California, for example, *Bowoto*⁸ and *Northrop*,⁹ defendants in a civil and criminal case, respectively, were both accused of launching

1. Burger King, *Whopper Neutrality*, YOUTUBE (Jan. 24, 2018), <https://www.youtube.com/watch?v=ltzy5vRmN8Q> [<https://perma.cc/P5RT-LHL9>].

2. Funny Commercials, *Stella Artois Super Bowl Commercial 2018 Matt Damon*, YOUTUBE (Jan. 16, 2018), https://www.youtube.com/watch?v=_R2N9TJJfcA [<https://perma.cc/P2F7-YEC5>]; see also Jeffrey Denny, *Pay Me for This Piece and I’ll Donate 1% to Writers Without Enough Income*, MEDIUM (Feb. 6, 2018) <https://medium.com/@jeffreydenny77/pay-me-to-read-this-and-ill-donate-10-to-writers-without-income-bd4ef0916d6d> [<https://perma.cc/4ZHX-EUXY>] (discussing cause-marketing ads during Super Bowl).

3. The Int’l Olympic Comm., *The Coca-Cola Company Maintains the Longest Continuous Relationship with the Olympic Movement.*, OLYMPIC.ORG, <https://www.olympic.org/sponsors/coca-cola> [<https://perma.cc/XY8U-WUDJ>].

4. See *infra* Section III.B.

5. See Robert Trager, Sandra Moriarty & Tom Duncan, *Selling Influence: Using Advertising to Prejudice the Jury Pool*, 83 NEB. L. REV. 685, 712 (2005); see also Lauren H. Cohen & Umit G. Gurun, *Buying the Verdict* (Nat’l Bureau of Econ. Research, Working Paper No. 24542, 2018), <https://ssrn.com/abstract=3167056> [<https://perma.cc/ZD93-HSH7>].

6. U.S. CONST. amends. VI, VII.

7. See *infra* Section II.C.

8. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

9. *United States v. Northrop Corp.*, No. CR 89-303 PAR, 1990 WL 71352 (C.D. Cal. Feb. 15, 1990).

image advertising campaigns just before jury selection began in high-profile cases against the companies.¹⁰

The risk that image advertising will be used to influence potential jurors is especially pronounced in litigation “hot spots.” Litigation “hot spots” develop in state or federal trial courts when plaintiffs file a disproportionate number of certain types of cases there. Often, the parties involved are repeat players and the litigation has little or no connection to the venue.¹¹ The stories of why courts become “hot spots,” a few of which are detailed in this Article, are based on a combination of historical, sociological, and procedural factors.¹² Good examples include the U.S. District Court for the Eastern District of Texas (“E.D. Texas”) for patent cases, the Circuit Court in Madison County, Illinois for asbestos cases, and the Court of Common Pleas in Philadelphia for pharmaceutical product cases.¹³

For many years, Samsung undertook extensive marketing efforts in E.D. Texas—specifically, in the small town of Marshall—where a large percentage of patent cases were filed.¹⁴ The company sponsored local festivals, donated expensive electronic equipment to the high school, awarded college scholarships, and, most significantly, sponsored an ice rink located right outside the courthouse.¹⁵ Samsung, as one news story put it, had “become Marshall’s benefactor.”¹⁶ While Samsung and other companies engaging in this type of behavior might claim they simply are being altruistic, the clear objective is to impact litigation outcomes. Even if true, however, courts cannot simply ban all image advertising in litigation “hot spots” because it’s protected speech under the First Amendment.

The Supreme Court first determined that advertising, or commercial speech, deserved some protection from government regulation in the 1970s.¹⁷ The primary test for evaluating commercial speech was established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, which provides that restrictions on nonmisleading and lawful commercial speech will only be upheld if they “directly advance[] [a substantial] governmental interest” and are “not more extensive than is necessary to serve that interest.”¹⁸ Since *Central Hudson*, however, the commercial speech doctrine has continued to evolve and less and less speech is characterized as commercial.¹⁹

10. See *infra* Section II.C.

11. See *infra* Section IV.A.

12. See *infra* Section IV.A.

13. See *infra* Section IV.A.

14. See, e.g., Owen Byrd, *2016 Fourth Quarter Litigation Update*, LEX MACHINA (Jan. 12, 2017), <https://lexmachina.com/q4-litigation-update> [<https://perma.cc/D53U-HEEV>] (indicating that 36.4% of all patent suits in the United States were filed in E.D. Texas in 2016).

15. See *infra* Section IV.B.

16. Editorial, *Some Good News to Ponder Before Thanksgiving*, MARSHALL NEWS MESSENGER (Nov. 20, 2012), https://www.marshallnewsmessenger.com/opinion/editorials/some-good-news-to-ponder-before-thanksgiving/article_9c2c6eb8-4871-53b5-a66e-0ce1c0b281a7.html [<https://perma.cc/25XM-REFH>].

17. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

18. 447 U.S. 557, 566 (1980).

19. See *infra* Section III.A.

Image advertising lies somewhere in the gray area between commercial and noncommercial speech. Sometimes these advertisements closely resemble core political speech—Burger King’s net neutrality ad serving as a great example—yet they are nonetheless advertising for the company and no doubt profit motivated.²⁰ A decade ago, it looked like the Supreme Court would address the First Amendment status of image advertising in *Nike, Inc. v. Kasky*.²¹ In that case, a sharply divided California Supreme Court held that Nike’s ads responding to “sweatshop allegations” lodged against the company in the 1990s were commercial speech.²² The U.S. Supreme Court granted review but ultimately dismissed the case deciding that certiorari was improvidently granted.²³ Consequently, questions remain about whether image advertising is commercial speech and what level of First Amendment protection applies.

This Article is the first to explore the relationship between image advertising and litigation “hot spots.” Though recognizing image advertisements are constitutionally guarded—and perhaps even warrant the highest level of protection under the First Amendment—the Article argues that courts must be able to curb this type of speech to ensure impartial juries as the Constitution promises.²⁴ As the Supreme Court itself has acknowledged, “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.”²⁵

There are five Parts to this Article. Part I provides background information on the constitutional right to an impartial jury.²⁶ Part II addresses the various ways members of the jury pool can be influenced by extrajudicial conduct of litigants and their attorneys, including through advertising.²⁷ Part III explores the relationship between the First Amendment and advertising, focusing particularly on image advertising.²⁸ Part IV argues that, although image advertising generally doesn’t pose a risk to juror impartiality, it can create real problems in litigation “hot spots” like E.D. Texas, Madison County, and the Philadelphia Court of Common Pleas.²⁹ Part V then proposes that courts prohibit such advertisements altogether where the attempt to influence jurors is blatant and limit the impact of image ads through voir dire and discovery in less extreme situations.³⁰

20. Megan La Belle, *Burger King, Net Neutrality, and Commercial Speech*, PRAWFSBLAWG (Jan. 31, 2018, 3:03 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2018/01/burger-king-net-neutrality-and-commercial-speech.html> [https://perma.cc/ST36-L7E7].

21. 539 U.S. 654 (2003) (per curiam).

22. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

23. *Kasky*, 539 U.S. at 654–55.

24. See *infra* Part V.

25. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

26. See *infra* Part I.

27. See *infra* Part II.

28. See *infra* Part III.

29. See *infra* Part IV.

30. See *infra* Part V.

I. THE RIGHT TO AN IMPARTIAL JURY

Trials have become the exception rather than the norm in the United States.³¹ This is true for both criminal and civil cases, in state and federal courts.³² When that rare case does proceed to trial, however, the parties are entitled to an impartial jury.³³ The right to an impartial jury has deep roots in English common law and was deemed “sacred” by our nation’s founding fathers.³⁴ Still, centuries after this right was first recognized by the drafters of the U.S. Constitution, important questions remain about what makes a jury impartial.

A. The Right to Jury Trial in Early America

The right to an impartial jury is a fundamental feature of the U.S. justice system.³⁵ Indeed, as the Declaration of Independence reflects, the restriction of this right was one of the aggravating factors that led to the American Revolution.³⁶ Juries, of course, help to ensure fair trials. But in revolutionary America, they were believed to play a more significant role in a democratic society.³⁷ Alexander Hamilton referred to trial by jury alternatively as “a valuable safeguard to liberty” and “the very palladium of free government,”³⁸ while Thomas Jefferson said that jury trials were “the only anchor ever yet imagined by man, by which government can be held to the principles of its constitution.”³⁹

31. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Stanley Marcus, “*Wither the Jury Trial*,” 21 ST. THOMAS L. REV. 27, 28–29 (2008).

32. Marcus, *supra* note 31, at 28–29.

33. See U.S. CONST. amends. VI, VII. While trials in this country are much rarer than they used to be, it has been estimated that ninety-five percent of all trials in the world occur in the United States. See ABA COMM’N ON THE AM. JURY, JUROR APPRECIATION KIT, https://www.americanbar.org/content/dam/aba/administrative/american_jury/juror_appreciation_kit.authcheckdam.pdf [<https://perma.cc/268T-729R>].

34. See PA. CONST. of 1776, ch. 1, cl. 11.

35. See Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHIL. 391, 395 (2014) (explaining how “deeply important the right to jury trial is” in the United States); George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 161 (“The civil jury is an institution of distinctive importance in American society.”).

36. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) (“For depriving us in many cases, of the benefits of Trial by Jury.”); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting) (“[T]he right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.”).

37. See, e.g., *Parklane*, 439 U.S. at 343 (1979) (Rehnquist, J., dissenting) (“The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”).

38. THE FEDERALIST No. 83, at 533 (Alexander Hamilton) (Robert Scigliano ed., 2000).

39. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON 71 (H.A. Washington ed., 1853).

The founding fathers remained steadfast in their commitment to the jury system in post-revolutionary America. When the Constitution was adopted in 1789, it guaranteed the right to jury trial in criminal cases.⁴⁰ Conspicuously absent from the original Constitution, however, was any reference to civil juries. The Anti-Federalists, who opposed ratification, argued that this effectively abolished all jury rights in civil cases.⁴¹ Federalists countered that the Constitution's silence on the point simply meant that Congress had discretion to decide whether to provide for civil juries.⁴²

Congress opted to exercise this discretion during its first session by adopting the Bill of Rights, including the Sixth and Seventh Amendments. The Sixth Amendment—which applies to criminal cases—goes further than the original Constitution in expounding the right to jury trial. It provides, among other things, that criminal defendants are entitled to a “speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”⁴³

With respect to civil juries, on the other hand, the Seventh Amendment's guarantee is somewhat narrower: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .”⁴⁴ Because the framers used the word “preserved,” the Supreme Court has held that civil litigants are entitled to a jury only if such right existed under English common law at the time the Seventh Amendment was adopted.⁴⁵ The Court applies a “historical test,” in other words, whereby it determines if the cause of action “was tried at law at the time of the founding” of our nation—and therefore should be heard by a jury—“or is at least analogous to [a cause of action] that was.”⁴⁶ The bottom line is that the Seventh Amendment ensures trial by jury in most, but certainly not all, civil disputes.

B. Jury Rights in Criminal vs. Civil Suits

While the Constitution sets forth a right to jury trial in both criminal and civil cases, questions about the scope of those rights have naturally arisen over the years. Over the past century, for example, the Supreme Court has had to decide whether the Fourteenth Amendment incorporates the Bill of Rights against state governments.⁴⁷

40. U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”).

41. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295–98 (1966).

42. THE FEDERALIST NO. 83, *supra* note 38, at 532 (“The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation of employing the same mode in civil causes, but does not abridge *the power* of the legislature to appoint that mode if it should be thought proper.”).

43. U.S. CONST. amend. VI.

44. *Id.* amend. VII.

45. *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

46. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996); see also Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

47. See, e.g., Louis Henkin, “*Selective Incorporation*” in *the Fourteenth Amendment*, 73

The Court has selectively incorporated a majority of the Bill of Rights,⁴⁸ including the Sixth Amendment almost in its entirety.⁴⁹ This means that criminal defendants are guaranteed an impartial jury whether they are tried in federal or state court.

The Seventh Amendment, however, is one of the few Bill of Rights that has not been incorporated against state action.⁵⁰ Though jurists and scholars have questioned this disparate treatment of the Seventh Amendment,⁵¹ the Supreme Court has not been asked to reconsider its position in recent history. Perhaps this is because the vast majority of state constitutions independently guarantee civil litigants the right to trial by jury.⁵² In point of fact, some state constitutions are more protective of civil litigants' jury rights than the Seventh Amendment.⁵³ Only two states—Colorado and Louisiana—lack any constitutional right to jury trial in civil cases.⁵⁴

Another difference between criminal and civil cases is that the Sixth Amendment explicitly provides for an impartial jury, while the Seventh Amendment is notably silent on this point. Despite there being no mention of it in the Seventh Amendment, the Supreme Court made clear in *Thiel v. Southern Pacific Co.* that the impartiality requirement applied equally to civil cases.⁵⁵ In the Court's view, when a jury is provided (even if not mandatory in the first place), that jury *must* be impartial.⁵⁶ Anything less would undermine the legitimacy of jury verdicts and the justice system as a whole.⁵⁷

YALE L.J. 74 (1963).

48. *McDonald v. City of Chi.*, 561 U.S. 742, 763 (2010) (“[T]he Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.”).

49. *See* *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (incorporating right to an impartial jury). *But see* *Johnson v. Louisiana*, 406 U.S. 356, 371, 375 (1972) (Powell, J., concurring) (refusing to incorporate right to a unanimous verdict).

50. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (stating that it is “settled law” that the Seventh Amendment does not apply to suits brought in state court).

51. *See, e.g.*, Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995); Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 204 (2012) (“[I]t is an appropriate time for the Court to incorporate these remaining rights, and in doing so, the Court’s jurisprudence on incorporation itself will be more justifiable.”).

52. Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235, 245 (2016); Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1895 n.8 (2016).

53. *See* Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855–58 (2013); Sanders, *supra* note 52, at 245.

54. Sanders, *supra* note 52, at 245. Wyoming grants an inviolate right to jury trial with respect to criminal, but not civil cases. *Id.* at 245 n.55. Puerto Rico’s constitution also does not guarantee the right to jury trial in civil cases. In 2014, a district judge held that the Seventh Amendment right to jury trial applied to both the states and Puerto Rico, but the First Circuit reversed. *See* *González-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015) (per curiam).

55. 328 U.S. 217, 220 (1946).

56. *Id.*

57. *See, e.g.*, William N. Eskridge, Jr., *The Relationship Between Obligations and Rights*

Of course, measuring the constitutionality of juries by impartiality raises a whole host of questions. What does it mean for a jury to be impartial? How does a court ensure impartiality? Is a jury made up of impartial individuals sufficient? Or does the Constitution demand something more?

C. Jury Impartiality

Because the Constitution tells us that juries must be impartial, but doesn't explain what that means, courts have attempted to fill that void. Specifically, the Supreme Court has said that juries are impartial if they are indifferent to the outcome of the case, and they base verdicts on the evidence presented and the trial court's instructions.⁵⁸ Simply put, jurors are not impartial—or are biased—if their decisions are likely to be influenced by self-interest, prejudice, or information obtained extrajudicially.⁵⁹

The common law recognizes two types of juror bias: general and specific. General bias, also referred to as “interpretive bias,”⁶⁰ results from an individual's affiliation with certain groups based on factors like race, national origin, gender, religion, age, education, sexual orientation, socioeconomic status, etc.⁶¹ The idea behind general bias is that, even without exposure to the particular case, jurors come to court with different life experiences and viewpoints that may influence their decision-making.⁶²

To guard against general bias, juries are supposed to represent a cross section of the community in which the case is pending.⁶³ This prerequisite recognizes that individuals from various subsections of the community likely have different opinions and viewpoints, and so their presence on the jury may affect the outcome of the case.⁶⁴ The Supreme Court has held, for example, that in a tort action brought against a railroad company, a jury from which all daily wage earners were excluded was not impartial.⁶⁵ This cross-section requirement is closely tied to the notion of the jury as “above all a political institution” whose purpose is to check government power.⁶⁶

of Citizens, 69 *FORDHAM L. REV.* 1721, 1730 (2001) (explaining that representative and impartial juries “preserve the legitimacy of the jury system”).

58. See, e.g., *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Buchanan v. Kentucky*, 483 U.S. 402, 417 (1987); *Turner v. Murray*, 476 U.S. 28, 40 (1986) (Brennan, J., concurring in part and dissenting in part).

59. See, e.g., *United States v. Cornell*, 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868); Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 *NOTRE DAME L. REV.* 1173, 1183 (1995).

60. Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 *MD. L. REV.* 107, 121–23 (1994).

61. Meiring de Villiers, *The Impartiality Doctrine: Constitutional Meaning and Judicial Impact*, 34 *AM. J. TRIAL ADVOC.* 71, 72 (2010).

62. Brown, *supra* note 60, at 121.

63. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 *CORNELL J.L. & PUB. POL'Y* 523, 531 (2000).

64. See Brown, *supra* note 60, at 121.

65. *Thiel*, 328 U.S. 217.

66. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Francis Bowen ed., Henry Reeve trans., 1993) (“It would be a very narrow view to look upon a jury as a mere judicial

Juries that reflect a cross section of the community are impartial in the political sense.⁶⁷ They achieve “symbolically what cannot be achieved practically—the presence of the entire populace at every trial.”⁶⁸

Specific bias, by contrast, is “particular to the case at hand.”⁶⁹ Jurors with specific biases are predisposed to decide a case in a certain way based on outside knowledge.⁷⁰ Examples include jurors who have a financial interest in the outcome of the case, or jurors who have personal relationships with one of the parties or attorneys.⁷¹ However, the most common type of specific bias is caused by pretrial publicity.⁷²

The primary mechanism for combatting specific bias is voir dire—the process through which potential jurors are questioned to determine their fitness to serve.⁷³ Depending on the jurisdiction and type of case, voir dire may be conducted by the attorneys, judge, or both.⁷⁴ Through voir dire, prospective jurors with specific biases are supposed to be exposed and then removed from the venire.⁷⁵ In some situations, however, voir dire is inadequate, and the result may be a biased jury and an unconstitutional trial.

II. PARTY-INITIATED ATTEMPTS TO PERSUADE JURORS

When it comes to jury bias, pretrial publicity is the prime culprit.⁷⁶ In criminal and civil cases alike, parties argue about whether a fair trial is possible when a case has received significant attention from the press.⁷⁷ In the O.J. Simpson murder trial,

institution The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.”)

67. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 52 & n.258 (1995).

68. PAULA DiPERNA, JURIES ON TRIAL 21 (1984).

69. de Villiers, *supra* note 61, at 72.

70. *People v. Wheeler*, 583 P.2d 748, 760 (Cal. 1978), *modified*, *People v. Willis*, 43 P.3d 130 (Cal. 2002).

71. *See, e.g.*, *United States v. Polichemi*, 219 F.3d 698 (7th Cir. 2000); *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996).

72. *See Brown*, *supra* note 60, at 121; *Howe*, *supra* note 59, at 1183–84.

73. *Turner v. Murray*, 476 U.S. 28, 40 (1986) (Brennan, J., concurring in part and dissenting in part) (“This right to exclude incompetent jurors cannot be exercised meaningfully or effectively unless counsel has sufficient information with which to evaluate members of the venire.”).

74. *See, e.g.*, FED. R. CRIM. P. 24 (“The court may examine prospective jurors or may permit the attorneys for the parties to do so.”); FED. R. CIV. P. 47 (“The court may permit the parties or their attorneys to examine prospective jurors or may itself do so.”).

75. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.”).

76. Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1101 (1993) (“Prior to jury selection, the press—vigorously exercising its First Amendment rights—often saturates the public with news and opinions about every facet of a case involving issues, events, or people of public interest.”).

77. *See, e.g.*, Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL’Y & L. 428, 430 (1997).

for example, jury selection took more than two months,⁷⁸ in part because of the “media circus” surrounding the case. Indeed, courts sometimes find it necessary to move trials to different venues or to sequester juries to avoid the problems caused by extensive media coverage.⁷⁹

Yet, pretrial publicity caused by a third party—namely, the media—is not the only means for improperly influencing juries. Potential jurors can also be swayed by the parties themselves through commentary, direct communications, and various forms of advertising.⁸⁰ Some of these party-initiated attempts to persuade jurors are blatant, while others are subtler and thus potentially more dangerous.

A. Public Commentary by Attorneys

The public gives little to no attention to most trials that occur in this country. But when a case is in the public eye, the parties—or more often their lawyers—are given the opportunity to make public statements through the press.⁸¹ Depending on the nature and timing of such commentary, it could influence potential jurors and interfere with a litigant’s constitutional right to an impartial jury.

There are numerous examples of lawyer commentary influencing prospective jurors, particularly in the criminal context. To be sure, Justice Frankfurter stated in the early 1960s that “[n]ot a Term passes without this Court being importuned to review convictions . . . in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts.”⁸² Perhaps the best known case is *Sheppard v. Maxwell*, in which the Supreme Court held that collaboration between lawyers and the press denied defendant’s right to an impartial jury.⁸³ In reversing Dr. Sam Sheppard’s murder conviction, the Court emphasized that the judiciary must protect its processes from prejudicial outside influences, and that “[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.”⁸⁴

The American Bar Association (ABA) responded to *Sheppard* by promulgating model rules of professional conduct addressing fair trials and extrajudicial commentary by attorneys.⁸⁵ The current rule, ABA Model Rule 3.6, applies to both criminal and civil cases and provides the following:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the

78. Andrea Ford & Jim Newton, *Jury Selection in Simpson Trial Ends After 11 Weeks*, L.A. TIMES, Dec. 9, 1994, at A1.

79. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 553 (1976) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362–63 (1966)).

80. Trager, Moriarty & Duncan, *supra* note 5, at 712.

81. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1030 (1991).

82. *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring).

83. 384 U.S. at 363.

84. *Id.*

85. Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 97–98 (2004).

lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.⁸⁶

The rule goes on to explicitly permit lawyers to comment on certain aspects of the case, including, but not limited to, the nature of the claims, the scheduling or result of any step of litigation, and that an investigation of the matter is ongoing.⁸⁷ Finally, Model Rule 3.6 includes a “fair reply” provision, which permits lawyers to “make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.”⁸⁸

Today, most jurisdictions have adopted Model Rule 3.6 or something substantially similar.⁸⁹ While such rules attempt to mitigate the danger of unfair prejudice,⁹⁰ they also implicate important First Amendment concerns. In *Gentile v. State Bar of Nevada*, for example, a criminal defense attorney held a pretrial press conference to respond to various allegations that had been made against his client publicly.⁹¹ After the defendant was acquitted, his lawyer (Gentile) was disciplined for violating Nevada Supreme Court Rule 177, which mirrored Model Rule 3.6.⁹² On appeal to the U.S. Supreme Court, Gentile argued that Rule 177 suppressed speech and thus violated the First Amendment.⁹³ A plurality of the Court disagreed, finding that the restraint on speech was narrowly tailored to achieve a legitimate government objective.⁹⁴ In the Court’s words, “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.”⁹⁵ Thus, despite free speech implications, the government limits what attorneys can say to the public when a trial is on the horizon.

B. Private Communications with Potential Jurors

Another way litigants have attempted to influence prospective jurors is by communicating with them privately. As with pretrial commentary by attorneys, ethical rules govern these types of communications.⁹⁶ Still, potential jury members are contacted by litigants or their counsel from time to time.

86. MODEL RULES OF PROF’L CONDUCT r. 3.6(a) (AM. BAR ASS’N 2018).

87. *Id.* r. 3.6(b).

88. *Id.* r. 3.6(c).

89. Richard E. Myers II, *Who Watches the Watchers in Public Corruption Cases?*, 2012 U. CHI. LEGAL F. 13, 19.

90. *Id.* at 18.

91. 501 U.S. 1030, 1030 (1991).

92. *Id.* at 1033.

93. *See id.* at 1034.

94. *Id.* at 1075–76. The plurality did, however, strike down Rule 177 as void for vagueness. *Id.* at 1048–49.

95. *Id.* at 1075.

96. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT r. 3.5 (AM. BAR ASS’N 2018) (“A lawyer shall not . . . seek to influence a judge, juror, prospective juror or other official by means prohibited by law.”).

An extreme example comes from the *Arenazas v. BP Amoco Polymers, Inc.* case in which British Petroleum (BP) was sued over an oil refinery explosion in Texas City, Texas that killed fifteen workers and injured almost two hundred more.⁹⁷ Just days before the trial was to begin, BP sent hundreds of letters to potential jurors containing information about the incident giving rise to the lawsuit.⁹⁸ The letter stated, among other things, that BP “has accepted responsibility for the explosion and fire,” agrees that it was a “preventable tragedy,” and “is deeply sorry for what occurred.”⁹⁹

Judge Susan Criss, who presided over the *Arenazas* case, believed the letter was a “private conversation with . . . potential juror[s].”¹⁰⁰ She said BP was “far out of line” in sending out these letters and repeatedly referred to it as a “stunt.”¹⁰¹ In Judge Criss’s view, “it would take an absolute idiot not to figure . . . out” that BP sent out these letters to influence the impending trial.¹⁰² Judge Criss explained that such private communications are substantially more dangerous than public efforts to influence jurors—for example, through media commentary, websites, or an advertising campaign—because opposing counsel may never know about them and, therefore, cannot respond.¹⁰³ Luckily, in the *Arenazas* case, plaintiffs’ counsel and the court did learn about the letters before voir dire began.¹⁰⁴ Thus, the court was able to make appropriate accommodations, such as summoning a larger jury pool, the cost of which BP was forced to bear.¹⁰⁵

Another Texas lawsuit, *Haltom v. Bayer Corp.*,¹⁰⁶ provides an additional example of litigants privately communicating with members of the jury pool. In that case, Bayer was sued in Corpus Christi, Texas over its anticholesterol drug, Baycol, which had been linked to a potentially fatal muscle disorder.¹⁰⁷ Before the trial, Bayer’s

97. See *Arenazas v. BP Amoco Chem. Co.*, No. 05-CV-0337 (Dist. Ct. Galveston County, Tex. filed Mar. 24, 2005).

98. Aaron Mehta, *BP’s Iris Cross Starred in Two Disaster PR Campaigns*, CTR. FOR PUB. INTEGRITY (Apr. 20, 2011), <https://www.publicintegrity.org/2011/04/20/4269/bps-iris-cross-starred-two-disaster-pr-campaigns> [<https://perma.cc/3XV5-7Q3B>] (last updated May 19, 2014, 12:19 PM).

99. Letter from Iris Cross, Dir. Cmty. Relations, Galveston Cty. & Tex. City, BP Am., to BP Retiree (Oct. 31, 2006), <https://www.documentcloud.org/documents/85730-iris-cross-letter-to-retiree-with-fact-sheet.html> [<https://perma.cc/7SAB-A2FC>].

100. Transcript of Hearing at 36, *Arenazas v. BP Amoco Polymers, Inc.*, No. 05-CV-0637 (Dist. Ct. Galveston County, Tex. Nov. 6, 2006), <https://www.documentcloud.org/documents/85729-hearing-transcript-miguel-arenazas-and-elizabeth.html> [<https://perma.cc/N46W-4L32>] [hereinafter *Arenazas* Transcript].

101. *Id.* at 40, 42.

102. *Id.* at 40.

103. *Id.* at 40–41. For example, when Martha Stewart was indicted on conspiracy, obstruction of justice, and securities fraud charges, she wrote a similar letter claiming her innocence and promising to clear her name. See, e.g., Constance L. Hays, *Martha Stewart Uses Web to Tell Her Side of Story*, N.Y. TIMES, June 6, 2003, at C1. Unlike BP, however, Stewart posted the letter on her website for anyone to read. *Id.*

104. *Arenazas* Transcript, *supra* note 100, at 40–41.

105. *Id.* at 40–42.

106. No. 02-60165-00-0-4 (Nueces County Law Ct. No. 4 filed Jan. 21, 2002).

107. Melody Petersen, *Judge Criticizes Letter from Bayer*, N.Y. TIMES, Feb. 22, 2003, at C14.

public relations executives mailed letters to thousands of prospective jurors urging them to “keep an open mind,” stating that Bayer had tried to reach a “fair settlement” with the plaintiff, and reminding them of the “tremendous contributions that [Bayer] has and continues to make to the health and welfare of millions of people worldwide.”¹⁰⁸ The trial judge said Bayer’s conduct was “outlandish,” and that he “cannot let this sort of thing occur.”¹⁰⁹ Nevertheless, since none of the seated jurors received the letter, the judge allowed the trial to continue.¹¹⁰ The judge indicated, however, that sanctions against Bayer would be considered.¹¹¹

Though cases like *Arenazas* and *Bayer* are rare, questions about lawyers privately communicating with potential jurors have arisen in recent years with the emergence of the internet and social media. It is commonplace in the digital age for attorneys to use the internet to research jurors and potential jurors.¹¹² In fact, some courts not only tolerate such research but expect lawyers to do it.¹¹³ Yet, the line between researching potential jurors and communicating with them is fine, especially when it comes to social media sites.¹¹⁴ Accordingly, bar associations and courts that have weighed in on the use of social media to investigate potential jurors and have attempted to strike the right balance.

There is widespread agreement among bar associations and courts that “passive” research is permissible, meaning attorneys may view jurors’ publicly available websites, including social media sites.¹¹⁵ On the flip side, attorneys are uniformly prohibited from accessing jurors’ nonpublic sites, for instance by making “friend” requests on Facebook, “follow” requests on Twitter or Instagram, or “connection” requests on LinkedIn.¹¹⁶ There are divergent opinions, however, on whether an attorney “communicates” with a prospective juror when the juror can determine who passively viewed her social media site.¹¹⁷ In other words, if a potential juror knows that the defense lawyer viewed her LinkedIn profile, could that compromise the juror’s impartiality? Though a subtler form of influence, it’s possible.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See, e.g.,* Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935 (2016); David Hricik, *Bringing a World of Light to Technology and Judicial Ethics*, 27 REGENT U. L. REV. 1 (2014).

113. *See, e.g.,* Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc) (explaining that “advances in technology allow[] greater access to information,” which places a “greater burden” on parties to bring potential juror issues to the court’s attention); Candy Waghoff Dale, *Researching Jurors’ Internet Presence*, 57 ADVOC., Nov.–Dec. 2014, at 37, 38 (2014) (noting that there is a “growing consensus that trial lawyers have a responsibility to use social media to research and investigate the potential jurors”).

114. Dale, *supra* note 113, at 38.

115. *E.g.,* D. IDAHO LOC. CIV. R. 47.2; ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (2014).

116. D. IDAHO LOC. CIV. R. 47.2; ABA, *supra* note 115, at 4 & n.6.

117. *See* Dale, *supra* note 113, at 38–39.

C. Advertising to Potential Jurors

Most relevant to this Article is that litigants and attorneys sometimes use advertising to improperly sway the jury pool.¹¹⁸ While there are some examples of such advertising campaigns in the criminal context,¹¹⁹ including cases against Martha Stewart and the Northrop Corporation, it appears to be more common in civil litigation. Perhaps this is because civil trials are subject to less scrutiny than criminal cases or because the stakes simply aren't as high.¹²⁰ Whatever the reason, civil litigants have engaged in conduct that looks a lot like jury tampering. The question, then, is what courts have done—or should do—about such behavior. Let's consider the following examples.

In 2002, a group of pharmacists brought a class action employment suit against Wal-Mart in Trinidad, Colorado.¹²¹ Plaintiffs claimed that Wal-Mart had breached the terms of their employment contracts by failing to pay for overtime.¹²² In the months leading up to trial, plaintiffs' counsel ran two thirty-second television commercials comparing their clients' situation to striking mine workers who had been killed during the Ludlow Massacre—a historical event that occurred in the area decades earlier.¹²³ The advertisement included a plea to Trinidad residents to “never forget” their civil responsibility to protect workers who are fighting for fair pay.¹²⁴ Wal-Mart responded by seeking a change of venue, arguing that the jury pool in Trinidad was tainted by the advertising campaign.¹²⁵ The judge agreed, concluding that the potential for prejudice was too great to rely on voir dire alone and therefore granted Wal-Mart's transfer motion.¹²⁶

The question of advertising to potential jurors came up again in *Bowoto v. Chevron Corp.*,¹²⁷ a case filed the same year as *Wal-Mart*. Chevron was sued under the Alien Tort Claims Act by a group of Nigerian villagers alleging that Chevron acted in concert with the Nigerian military in committing various human rights violations.¹²⁸ Chevron responded by launching its “Power of Human Energy” advertising campaign, which showed the “level of commitment, ingenuity and responsibility Chevron employees practice every day to bring energy supplies to global markets.”¹²⁹ In the month before trial, Chevron spent \$15 million on the

118. See Trager, Moriarty & Duncan, *supra* note 5, at 712.

119. See, e.g., *United States v. Northrop Corp.*, No CR. 89–303 PAR, 1990 WL 71352 (C.D. Cal. Feb. 15, 1990) (granting restraining order prohibiting Northrop from running image advertisements in Los Angeles a week before jury selection was scheduled to start in criminal case); Hays, *supra* note 103 (explaining that Martha Stewart paid for a full-page advertisement in *USA Today* claiming she was innocent of the criminal charges that had been asserted against her).

120. See Trager, Moriarty & Duncan, *supra* note 5, at 712.

121. *Id.* at 687.

122. *Id.*

123. Trager, Moriarty & Duncan, *supra* note 5, at 687–88.

124. *Id.* at 689.

125. *Id.* at 687.

126. *Id.*

127. *Bowoto v. Chevron Corp.*, No. C 99-2506 (N.D. Cal. filed May 27, 1999).

128. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

129. Press Release, Chevron, Chevron Announces New Global ‘Human Energy’

campaign, placing advertisements in the newspaper, on billboards, at bus stops, and on coffee cup sleeves in San Francisco where the trial was held.¹³⁰

Plaintiffs argued that the “Power of Human Energy” campaign was an improper attempt to influence jurors that could cause “grave prejudice.”¹³¹ Plaintiffs asked the court to bring in a new venire and to preclude Chevron from undertaking these types of image advertising campaigns in San Francisco for the duration of the trial.¹³² The court refused because there was insufficient evidence to show that this advertising campaign was connected to the lawsuit or that Chevron was targeting consumers in San Francisco more than other parts of the country.¹³³

The court reacted differently, however, to plaintiffs’ other complaint—that Chevron purchased an online advertisement that linked to a Chevron-created website whenever “Bowoto,” “Bowoto Chevron,” or “Bowoto lawsuit” was searched.¹³⁴ Similar to the “Power of Human Energy” campaign, plaintiffs claimed that Chevron was trying to “pollute th[e] jury pool” by having this link put up “the day after the jury pool here learned of the names of the parties.”¹³⁵ The court agreed that the link was problematic and ordered Chevron to have it taken down immediately because it’s the “same thing as giving statements to the press.”¹³⁶

A final example involves the tobacco industry, which suffered major losses in tort actions brought by smokers in California in the early 2000s. R.J. Reynolds and Phillip Morris claimed that California juries were biased against them because of the state’s aggressive antismoking advertising campaign.¹³⁷ The tobacco companies sought venue changes because they believed California was intentionally running the ads close in time and place to lawsuits in an attempt to influence prospective jurors.¹³⁸ When courts refused to change venue, the tobacco industry went on the offensive and filed a federal action seeking to enjoin California from running any further antismoking ads.¹³⁹ Although the tobacco companies made some creative First

Advertising Campaign (Sept. 28, 2007), <https://www.chevron.com/stories/chevron-announces-new-global-human-energy-advertising-campaign> [<https://perma.cc/4MPG-2NTZ>].

130. Transcript of Proceedings: Pretrial Conference & Voir Dire Examination at 9–11, *Bowoto v. Chevron Corp.*, No. C 99-2506 (SI) (N.D. Cal. Oct. 27, 2008) [hereinafter *Bowoto* Transcript].

131. *Id.* at 11–12.

132. *Id.* at 13–14.

133. *Id.* at 9–11, 17.

134. *Id.* at 10–12; Kirk Hartley, *Federal Judge Bars Corporate Defendant from Using Paid Google Link Related to Online Search for Information on Events Related to Ongoing Trial*, GLOBALTORT (Oct. 28, 2008), <http://www.globaltort.com/2008/10/federal-judge-bars-corporate-defendant-from-using-paid-google-link-related-to-online-search-for-information-on-events-related-to-ongoing-trial> [<https://perma.cc/V6VL-F3R3>].

135. *Bowoto* Transcript, *supra* note 130, at 10.

136. *Id.* at 14–15.

137. Gordon Fairclough, *Cigarette Makers Say Ad Tactics in California Bias State’s Juries*, WALL ST. J. (Sept. 12, 2002, 12:01 AM), <https://www.wsj.com/articles/SB1031770536568481195> [<https://perma.cc/5R6R-X3CG>].

138. *Id.*

139. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085 (E.D. Cal. 2003); *see also* Gregg Jones, *Tobacco Firms Sue State over Ads*, L.A. TIMES (Apr. 3, 2003),

Amendment arguments, the federal court ultimately rejected them and held in favor of California.¹⁴⁰

These are a few examples of how parties have attempted to use advertising to impact the outcome of litigation. In recent years, the strategies for influencing consumers have become more sophisticated, the line between advertising and other speech has blurred, and advertising—particularly image ads—have become ubiquitous.¹⁴¹ Consequently, there is a real risk that corporations will use advertisements, under the guise of the First Amendment, to improperly influence litigation outcomes.

III. THE FIRST AMENDMENT AND ADVERTISING

Using advertisements to influence potential jurors could impinge one's constitutional right to an impartial jury.¹⁴² But the government can't simply ban such advertisements, which constitute commercial—and sometimes even noncommercial—speech protected by the First Amendment.¹⁴³ When such situations arise, as they did in *Bowoto* and *Wal-Mart*, courts are faced with a clash of constitutional rights, which makes finding a solution particularly challenging.

A. Regulation of Commercial Speech

The First Amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech,”¹⁴⁴ has always protected so-called core speech, meaning speech of a political or social nature.¹⁴⁵ Because core speech promotes a productive debate on matters of public interest,¹⁴⁶ government efforts to regulate it are tightly constrained.¹⁴⁷ More pointedly, content-based restrictions of core speech are subject to strict scrutiny, meaning they must be narrowly tailored to further a compelling government interest.¹⁴⁸ Under certain circumstances, however, the government may impose content-neutral restrictions on the “time, place, and manner” of core speech.¹⁴⁹

<http://articles.latimes.com/2003/apr/03/local/me-mean3> [<https://perma.cc/XFN6-RK3N>].

140. *Bonta*, 272 F. Supp. 2d at 1085.

141. Amanda Rose Martin & Richik Sarkar, *Developments in Advertising and Consumer Protection in Cyberspace*, 73 BUS. LAW. 295, 295 (2018) (explaining that the internet has caused consumers to be “barraged with new forms of advertising”).

142. U.S. CONST. amends. VI, VII.

143. *Id.* amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

144. *Id.*

145. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting). Core speech is also referred to as “traditional” speech and “political” speech.

146. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255; *see also* Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 16 (1999) (“The First Amendment first protects the robust public debate, and as a result must also allow and even facilitate individual self-expression.”).

147. *See Sorrell*, 564 U.S. at 582.

148. *See, e.g., Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

149. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Although core speech lies at the heart of the First Amendment, it's not the only type of constitutionally guarded speech. Beginning in the 1970s, the Supreme Court determined that commercial speech—or advertising—also deserved some protection from government regulation.¹⁵⁰ The rationale for protecting commercial speech, derived from the “marketplace of ideas” theory,¹⁵¹ is that advertising provides consumers with useful information and facilitates informed decision-making.¹⁵² Yet, when speech occurs in the form of commercial advertising, it is unlikely to be met with a sufficient level of “counter” or “corrective” speech because consumers and competitors are unable or disinclined to challenge inaccurate advertisements.¹⁵³ As a result of this information asymmetry between speaker and listener, commercial speech is afforded less protection under the First Amendment than core speech.¹⁵⁴

For the past four decades, courts have struggled to strike the right balance with respect to commercial speech rights. Early on, the Supreme Court defined commercial speech as speech that “propose[s] a commercial transaction.”¹⁵⁵ That definition proved too restrictive, however, so the Court restructured the commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁵⁶ Under *Central Hudson*, commercial speech could be “speech proposing a commercial transaction” or “expression related solely to the economic interests of the speaker.”¹⁵⁷ The Court then set out a multi-pronged test for evaluating the constitutionality of commercial speech regulations.¹⁵⁸ The first part of the test asks whether the commercial speech is “misleading” or “related to unlawful

150. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976).

151. See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). According to the marketplace of ideas theory, “truth is served by a free and full competition of ideas within the community, rather than by paternalistic state-sponsored efforts to protect citizens from the ill effects of bad ideas.” Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 914.

152. See *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (“The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”); see also Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 779 (1999) (explaining that advertisements “perform[] an indispensable role in the allocation of resources in a free enterprise system”).

153. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154, 1167–68 (2012).

154. *Id.* at 1167–68; EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 257–59 (5th ed. 2014) (“‘Commercial speech’—more properly called commercial advertising—is less protected than other kinds of speech[.]” (emphasis in original)); Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2022 (2017) (“[I]t is the interests of the consumer-listeners that the [commercial speech] doctrine is meant to protect.”).

155. *Va. Citizens*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

156. 447 U.S. 557 (1980).

157. *Id.* at 561–62.

158. *Id.* at 563–64.

activity.”¹⁵⁹ If so, the regulation is constitutional. If not, the restrictions will be upheld only if they (1) “directly advance[] a substantial governmental interest” and (2) are properly “drawn to achieve that interest.”¹⁶⁰

The *Central Hudson* test, in many ways, resembles the “time, place, and manner” test applied to noncommercial speech.¹⁶¹ Courts will uphold a law regulating the time, place, and manner of speech if it (i) is “narrowly tailored to serve a significant governmental interest” and (ii) “leave[s] open ample alternative channels for communication of the information.”¹⁶² One major difference between the tests—at least as initially conceived—was that time, place, and manner restrictions had to be content neutral to pass constitutional muster,¹⁶³ whereas commercial speech regulations did not.¹⁶⁴ In *Bolger v. Youngs Drug Products Corp.*,¹⁶⁵ for example, the Court acknowledged that “content-based restrictions on commercial speech may be permissible,”¹⁶⁶ and went on to find that the speech in question was commercial because it was an advertisement that referred to a specific product and was motivated by a desire to profit.¹⁶⁷ In *Lorillard Tobacco Co. v. Reilly*,¹⁶⁸ moreover, the Court considered a Massachusetts law that restricted advertising of tobacco products. Although the Court struck down certain provisions of the statute, it was not because they were content based (which they clearly were), but because they were not narrowly tailored to serve the government’s interest.¹⁶⁹

However, the Supreme Court’s more recent decision in *Sorrell v. IMS Health Inc.* has blurred this distinction between commercial and noncommercial speech.¹⁷⁰ In

159. *Id.* at 564.

160. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (citing *Cent. Hudson*, 447 U.S. at 566); Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 458 (2017).

161. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (describing *Central Hudson* test as “‘substantially similar’ to the test for time, place, and manner restrictions” (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989))).

162. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 781–83 (1989).

163. *See, e.g., Ward*, 491 U.S. at 803 (holding that a municipal regulation requiring musical performers to use a sound system and sound technician provided by the city did not violate the First Amendment because it was a “reasonable regulation of the place and manner of expression”).

164. *Cent. Hudson*, 447 U.S. at 564 n.6 (“Two features of commercial speech permit regulation of its content.”).

165. 463 U.S. 60 (1983).

166. *Id.* at 65.

167. *Id.* at 66–68.

168. 533 U.S. 525 (2001).

169. *Id.* at 562 (“In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations . . . do not demonstrate a careful calculation of the speech interests involved.”).

170. 564 U.S. 552 (2011); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 148 (arguing that the line between commercial and noncommercial speech is beginning to disappear as the Court’s conservatives “embrace the First Amendment as a deregulatory tool”); Wu, *supra* note 154, at 2022 (“[T]he distinction between commercial and noncommercial speech may be disappearing.”).

considering the constitutionality of a Vermont statute that restricted the sale, disclosure, and use of records disclosing the prescribing practices of individual doctors, the *Sorrell* Court stated that heightened scrutiny is required whenever regulations are content based and that “[c]ommercial speech is no exception.”¹⁷¹ Though it flirted with the idea of applying strict scrutiny, the Court stopped short of overruling *Central Hudson* because the regulation was unconstitutional under either standard.¹⁷² Still, *Sorrell* indicates that content-based restrictions on commercial speech will be subject to a more demanding level of scrutiny than previously understood.¹⁷³

In addition to wavering on content neutrality, the Supreme Court has sent contradictory messages about what constitutes commercial speech in the first place. In some instances, the Court has recognized that where commercial and noncommercial aspects of speech are “inextricably intertwined,” the speech must be characterized as noncommercial.¹⁷⁴ Under this doctrine, anything other than pure commercial speech would be subject to strict scrutiny.¹⁷⁵ On the other hand, the Court has held that advertising should not be characterized as noncommercial speech simply because it “links a product to a current public debate” since “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.”¹⁷⁶ As a result of these inconsistencies, the status of some types of mixed speech, including corporate image advertising, is uncertain.

B. Corporate Image Advertising

Corporate image advertising, broadly speaking, refers to ads that “describe[] the corporation itself, its activities or its views, but do[] not explicitly describe any

171. 564 U.S. at 566.

172. *Id.* at 571.

173. *Id.* at 577 (warning the government that it cannot pursue “policy objectives through the indirect means of restraining certain speech by certain speakers”); Suzanna Sherry, *Selective Judicial Activism: Defending* *Caroline Products*, 14 *GEO. J.L. & PUB. POL’Y* 559, 560 (2016) (“[R]estrictions on commercial speech are subject to intermediate scrutiny”); Ned Snow, *Free Speech & Disparaging Trademarks*, 57 *B.C. L. REV.* 1639, 1661 (2016) (“[T]he [*Sorrell*] Court indicated that content-based restrictions of commercial speech must be analyzed under ‘heightened judicial scrutiny.’” (quoting *Sorrell*, 564 U.S. at 557)).

174. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (explaining that speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech”); see also *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989) (acknowledging the holding of *Riley*, but concluding that the commercial speech at issue here was not “inextricably intertwined” with the noncommercial speech); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 887 (2008) (explaining that the Supreme Court has made it increasingly difficult to overcome a First Amendment challenge by “classifying less and less speech as commercial in the first place”).

175. See *Riley*, 487 U.S. at 798 (“We believe, therefore, that North Carolina’s content-based regulation is subject to exacting First Amendment scrutiny.”).

176. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980).

products or services sold by the corporation.”¹⁷⁷ Corporations undertake image campaigns for various reasons—for example, to inform the public of its beneficial activities; rebut criticism and correct misconceptions; address political issues affecting the company; sponsor public service messages and reduce hostility; and increase public awareness about certain matters.¹⁷⁸ At bottom, the purpose of image advertising is to instill in the public a favorable perception of the company.¹⁷⁹

Chevron’s “Power of Human Energy” campaign is a paradigm of corporate image advertising.¹⁸⁰ More recent examples include Johnson & Johnson’s multimillion dollar image campaign, “For All You Love,” launched in 2013 on the heels of quality problems, product recalls, and a string of lawsuits;¹⁸¹ British Petroleum’s apology campaign in the wake of the 2010 Deepwater Horizon oil spill;¹⁸² and Qualcomm’s 2015 “Why Wait?” campaign aimed at promoting the company’s profile and capabilities beyond the smartphone technology space.¹⁸³ Yet, image advertising comes in many other forms, including corporate sponsorship and cause marketing.

Corporate sponsorship—whereby a company provides support (monetary or in-kind) in exchange for the right to associate its brand name with some activity, entity, individual, or institution—is a type of image advertising.¹⁸⁴ The idea behind sponsorship is to “treat[] the company as if it were a product” and to “differentiate the image of the sponsor” from its competitors.¹⁸⁵ Sponsorship also helps companies

177. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING 1156 (Comm. Print 1978).

178. C.C. Laura Lin, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459, 463–67 (1988); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 390 (2006); *Corporate Advertising*, ADAGE (Sept. 15, 2003), <http://adage.com/article/adage-encyclopedia/corporate-advertising/98600> [<https://perma.cc/5U7E-VCC7>].

179. Piety, *supra* note 178, at 390.

180. *See supra* Section II.C.

181. Jenny Rooney, *Johnson & Johnson Unveils New Corporate Branding Campaign*, FORBES (Apr. 25, 2013, 5:37 PM), <https://www.forbes.com/sites/jenniferrooney/2013/04/25/johnson-johnson-unveils-new-corporate-branding-campaign/#26fef6f13f26> [<https://perma.cc/2YWJ-QSBB>].

182. Steve Olenski, *Nearly Four Years After Deepwater Horizon, Has BP’s Brand Image Recovered?*, FORBES (Jan. 24, 2014 12:54 PM), <https://www.forbes.com/sites/steveolenski/2014/01/24/nearly-four-years-after-deepwater-horizon-has-bps-brand-image-recovered/#3023bccb61f6> [<https://perma.cc/R49T-G6L2>]; CNN Wire Staff, *BP Apology Campaign Begins Airing*, CNN (June 3, 2010 10:05 AM), <http://www.cnn.com/2010/US/06/02/oil.spill.bp.apology/index.html> [<https://perma.cc/22E7-ZSBB>].

183. Mike Freeman, *Qualcomm’s New Ad Campaign Asks ‘Why Wait?’*, SAN DIEGO UNION TRIB. (May 1, 2015 4:30 PM), <http://www.sandiegouniontribune.com/business/technology/sdut-Qualcomm-Samsung-Snapdragon-Why-Wait-2015may01-story.html> [<https://perma.cc/5YC2-MHYR>].

184. *See, e.g.*, Ann Kuzma & John Kuzma, *Corporate Sponsorship in the Marketing Curriculum: A Preliminary Investigation*, 1 J. INSTRUCTIONAL PEDAGOGIES, Sept. 2009, at 1, 2.

185. ROBERT L. HEATH & RICHARD ALAN NELSON, ISSUES MANAGEMENT: CORPORATE PUBLIC POLICYMAKING IN AN INFORMATION SOCIETY 30–31 (1986); *see also Giving: Corporate Sponsorships*, SMITHSONIAN, <https://www.si.edu/giving/corporate-support/sponsorships> [<https://perma.cc/6UBU-Q6E6>] (soliciting sponsors for various

reach wider audiences and improve brand awareness.¹⁸⁶ While corporate sponsorship is not a new marketing tool, its use has rapidly expanded.¹⁸⁷ In 2008, for example, U.S. and Canadian companies spent \$16.61 billion on corporate sponsorship, an increase of 11.4% from the previous year.¹⁸⁸ In 2016, North American companies spent \$22.3 billion on sponsorships, and that figure is expected to continue to rise.¹⁸⁹

Cause-related marketing is similar to corporate sponsorship, but with important distinguishing characteristics. Cause-related marketing refers to situations where for-profit entities partner with charitable organizations to promote their image and products.¹⁹⁰ More pointedly, the for-profit company promises that the charity will receive a portion of any proceeds received on specified sales.¹⁹¹ One of the earliest examples of cause-related marketing was when American Express raised \$1.7 million to restore the Statue of Liberty and Ellis Island by donating a portion of its profits every time customers used their charge cards.¹⁹² Because consumers want to buy from—and employees want to work for—socially responsible companies, these arrangements are good for a corporation’s bottom line.¹⁹³ What is more, these arrangements benefit the charities involved because they raise funds and, perhaps more importantly, increase exposure for the cause.¹⁹⁴

Smithsonian exhibits and projects).

186. Lori Manns, *The Top Four Benefits of Corporate Sponsorship*, FORBES (Aug. 30, 2017, 8:30 AM), <https://www.forbes.com/sites/forbescoachescouncil/2017/08/30/the-top-four-benefits-of-corporate-sponsorship/#49cc5d373504> [<https://perma.cc/7PXC-P69A>]; *Corporate Sponsorship - Why Sponsorships Are Beneficial for Businesses*, TNT, https://web.archive.org/web/20170713181341/https://www.tnt.com/express/en_gb/site/home/international_business_advice/managing-your-business/corporate-sponsorships.html [<https://perma.cc/FR5G-5ZAN>].

187. Kuzma & Kuzma, *supra* note 184, at 4.

188. *Id.* at 2.

189. Manns, *supra* note 186.

190. Terri Lynn Helge, *The Taxation of Cause-Related Marketing*, 85 CHI.-KENT L. REV. 883, 885–86 (2010); Darren B. Moore, *Commercial Activities and Subsidiaries—Issues and Choices in Planning*, 28 TAX’N EXEMPTS 12, 19 (2017).

191. Helge, *supra* note 190, at 885–86.

192. *Corporate Responsibility: Initiatives*, AM. EXPRESS, <https://web.archive.org/web/20180210101346/http://about.americanexpress.com/csr/pip.aspx> [<https://perma.cc/ZJ64-MVC4>]; Jerry C. Welsh, *Good Cause, Good Business*, HARV. BUS. REV., Sept.–Oct. 1999, at 21.

193. Helge, *supra* note 190, at 886 (stating that cause-related marketing capitalizes on the “public’s desire to leverage their dollars: consumers can buy a product and support a good cause at the same time”); *see also* Jeffrey Hayzlett, *4 Ways Employers Are Using Corporate Social Responsibility to Recruit Millennials*, ENTREPRENEUR (Nov. 25, 2016), <https://www.entrepreneur.com/article/285587> [<https://perma.cc/9QAD-L5P2>] (“[M]illennial employees prefer to work for leaders whom they admire and who exemplify good [corporate social responsibility] practices.”).

194. Not everyone sings the praises of cause-related marketing, however. One critic believes that it “distracts its participants from collective solutions to collective problems,” “disadvantage[s] less attractive but nonetheless worthy causes,” and potentially “desensitize[s] the public to social ills while decreasing other forms of philanthropic action.” Angela M. Eikenberry, *The Hidden Costs of Cause Marketing*, STAN. SOC. INNOVATION REV., Summer 2009, at 51, 52–53. Image advertising can also lead to backlash, as Italian clothing company

Corporate image advertising, in its various iterations, has become commonplace in today's market. These advertising techniques allow corporations to relate to, connect with, and influence consumers in a different way than traditional advertising.¹⁹⁵ Moreover, from a First Amendment perspective, image advertising is more complicated than traditional advertising. On the one hand, these communications are advertisements initiated by for-profit companies, thus indicating that they should be treated like other commercial speech. But the flip side is that image ads often include political or social messages making them look closer to core speech.¹⁹⁶ Thus, image ads arguably should be subject to stricter First Amendment scrutiny than typical commercial speech.¹⁹⁷

C. Regulating Image Advertising

Though corporate image advertising has gained traction over the past several decades, it is not a new phenomenon. Indeed, in the early 1900s, American Telephone & Telegraph Co. (AT&T) and a number of life insurance companies turned to advertising campaigns in an attempt to improve their images.¹⁹⁸ DuPont also relied on image advertising in the 1930s to combat negative perceptions of the company based on its conduct during World War I.¹⁹⁹ And during the energy crisis of the 1970s, Mobil launched an advertising campaign that, among other things, promoted the use of mass transit—a position that seemingly undermined the company's business objectives but curried favor with the public and adversaries of the oil industry.²⁰⁰

Despite this longevity, courts have yet to resolve the question of how corporate image advertising should be treated under the First Amendment. More precisely, when corporate image advertisements resemble political speech more than commercial speech, as they often do, should restrictions on them be analyzed under strict scrutiny like for core speech, or should the *Central Hudson* framework apply to all types of advertising?²⁰¹ It appeared that we would finally have an answer to that question when, a decade ago, the U.S. Supreme Court granted certiorari in *Kasky v. Nike* to review a decision of California's highest court regarding the

Benneton experienced when it ran a campaign about twenty years ago profiling death row inmates. See Paddy Agnew, *Toscani's 'Death Row' Ads Put Benneton US Interests at Risk*, IRISH TIMES (May 3, 2000), <https://www.irishtimes.com/news/toscani-s-death-row-ads-put-benneton-us-interests-at-risk-1.266699> [<https://perma.cc/DH4B-HG5G>].

195. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 520 (7th Cir. 2014) (explaining that image advertising “features appealing images and subtle messages alongside the advertiser’s brand name or logo with the aim of linking the advertiser to a particular person, value, or idea in order to build goodwill for the brand”); Peter Adams, *Study: Ads Showcasing Diversity Connect More with Young Consumers*, MARKETING DIVE (Feb. 8, 2017), <https://www.marketingdive.com/news/study-ads-showcasing-diversity-connect-more-with-young-consumers/435674> [<https://perma.cc/R2KQ-AUF7>].

196. See *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

197. See Piety, *supra* note 178, at 370.

198. *Corporate Advertising*, *supra* note 178.

199. *Id.*

200. *Id.*

201. See Piety, *supra* note 178, at 370.

constitutionality of one of Nike's corporate image campaigns.²⁰² As discussed below, however, that never came to pass, and we're left still seeking a resolution to this constitutional conundrum.

1. *Kasky v. Nike*

Nike came under fire in the 1990s due to reports of poor working conditions and inhumane labor practices at a number of its Asian factories.²⁰³ The "sweatshop allegations" included charges of physical and sexual abuse, as well as violations of minimum wage, overtime, child labor, and pollution laws.²⁰⁴ By way of example, an article published in *Harper's Magazine* profiled an Indonesian woman who earned only \$1.03 per day, which was less than the Indonesian minimum wage, making Nike shoes that sold for \$80 a pair in the U.S.²⁰⁵ This was at a time when Nike had earned close to \$300 million in annual profits and had signed Michael Jordan to a \$20 million advertising contract.²⁰⁶ Similarly, an Ernst & Young report regarding Nike's working conditions in Vietnam—leaked to the press by a disgruntled employee—detailed violations of labor laws and found that many workers were exposed to carcinogens and suffered from respiratory problems due to poor air quality at Nike's factories.²⁰⁷

To counteract the intense public scrutiny, Nike hired Andrew Young, a former U.S. Ambassador to the United Nations, to conduct an investigation.²⁰⁸ Young's report was generally favorable to Nike, concluding that the company was doing a "good job"²⁰⁹ and that the condition in Nike's factories "certainly did not appear to be what most Americans would call sweatshops."²¹⁰ Nike then undertook a large-scale public relations campaign in an attempt to resuscitate its image.²¹¹ For starters, the company took out full-page advertisements and wrote editorials in leading newspapers broadcasting Young's favorable findings and highlighting the economic benefits its factories brought to foreign countries.²¹² Nike also wrote letters to university presidents and athletic directors responding to critical news reports in

202. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

203. *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002); Jeffrey Ballinger, *The New Free-Trade Heel*, *HARPER'S MAG.*, Aug. 1992, at 46.

204. *Kasky*, 45 P.3d at 248; NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* 366 (1999) ("Nike's sweatshop scandals have been the subject of over 1,500 news articles and opinion columns.").

205. Ballinger, *supra* note 203.

206. *Id.*

207. Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*, *N.Y. TIMES*, Nov. 8, 1997, at A1.

208. *Id.*

209. *Id.*; Dana Canedy, *Nike's Asian Factories Pass Young's Muster*, *N.Y. TIMES*, June 25, 1997, at D2.

210. Caryle Murphy, *Nike Pulls Shoes that Irked Muslims*, *WASH. POST* (June 25, 1997), https://www.washingtonpost.com/archive/business/1997/06/25/nike-pulls-shoes-that-irked-muslims/b02211fb-c120-4780-9ce4-4c01225c8e92/?utm_term=.13325e0f79bd [https://perma.cc/P9YA-AGG8].

211. *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002); Greenhouse, *supra* note 207.

212. *Kasky*, 45 P.3d at 248.

hopes of continuing relationships with these institutions that used Nike products.²¹³ Finally, Nike issued a series of press releases and held press conferences that stressed the company's code of conduct and broadly denied the claims that it exploited workers.²¹⁴ In fact, one Nike spokesperson went so far as to say that "[t]here's a growing body of documentation that indicates that Nike workers earn superior wages and manufacture product under superior conditions."²¹⁵

In 1998, Marc Kasky brought a private attorney general action in California state court,²¹⁶ alleging that Nike made numerous misrepresentations during its image campaign about its labor practices in violation of California statutes restricting false advertising and unfair business practices.²¹⁷ Kasky sought an order requiring Nike to disgorge profits made from those practices and to engage in a public information campaign to remedy the misinformation it had spread.²¹⁸ Nike demurred to the complaint arguing, *inter alia*, that its advertisements were constitutionally protected speech.²¹⁹ After conducting a hearing on the matter, the trial court agreed, sustained Nike's demurrer, and dismissed the case.²²⁰ Kasky appealed.

On appeal, Kasky argued that the trial court erred by treating Nike's speech as noncommercial and therefore granting it more protection than deserved.²²¹ To decide whether Nike's speech was commercial or not, the Court of Appeals relied on *Bolger*, where, as noted earlier, the Supreme Court found that the speech in question was commercial because it (1) was an advertisement, (2) referred to a specific product, and (3) was motivated by a desire to profit.²²² As an initial matter, the court acknowledged that *Bolger* did not hold that speech must include all three of these characteristics to be commercial.²²³ That said, the court proceeded to distinguish *Bolger* on the grounds that Nike's speech was neither a traditional advertisement, nor did it refer to a specific product.²²⁴ The purpose of Nike's speech, instead, was "to

213. *Id.*

214. *Id.* at 247–48.

215. Greenhouse, *supra* note 207.

216. CAL. BUS. & PROF. CODE §§ 17200–210, 17500–509 (West 2017).

217. First Amended Complaint for Statutory Equitable and Injunctive Relief Based upon Violation of Cal. Bus. & Prof. Code §17200 et seq., *Kasky v. Nike, Inc.*, No. 994446 (Cal. Super. Ct., S.F. County July 2, 1998). Kasky also sued several individual defendants including Nike CEO Philip Knight. *Id.*

218. *Kasky*, 45 P.3d at 248.

219. *Id.* Nike argued that its speech was protected under both the U.S. and California Constitutions, but this discussion will focus only on the federal constitutional questions.

220. *Id.* at 248–49.

221. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854 (Cal. Ct. App. 2000), *rev'd*, 45 P.3d 243.

222. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

223. *Kasky*, 93 Cal. Rptr. 2d at 860.

224. *Id.* Notably, some of the speech at issue did in fact include traditional advertisements, but the court disregarded that for whatever reason. See First Amended Complaint, *supra* note 217, ¶ 56 (alleging that Nike "took out full-page advertisements in major newspapers"). Likewise, there's a good argument that Nike's speech also satisfied the second *Bolger* factor—reference to specific products—since it addressed the conditions under which Nike's products were made, as opposed to statements about the apparel industry more generally. Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1148–49 (2004).

promote a favorable corporate image . . . so as to induce consumers to buy its products.”²²⁵ Thus, only the third *Bolger* characteristic—the speech was motivated by profit—was satisfied.²²⁶ The court further determined that Nike’s speech consisted of “public dialogue on a matter of public concern,” the type of core speech the First Amendment is designed to protect.²²⁷ The fact that Nike was economically motivated, the court reasoned, does not transform noncommercial speech into commercial speech or impact the significance of the speech to listeners.²²⁸ Accordingly, the court concluded that Nike’s speech was noncommercial, applied strict scrutiny, and affirmed the lower court’s judgment sustaining the demurrer.²²⁹ Kasky filed a petition for certiorari, which the California Supreme Court granted and reversed in a sharply divided four to three decision.²³⁰

Like the lower courts, the California Supreme Court believed the case turned on whether Nike’s speech was commercial. The majority began its analysis with the *Central Hudson* test, and emphasized that only nonmisleading commercial speech is entitled to any type of First Amendment protection.²³¹ It then turned to *Bolger* and said that, although the three factors (advertising format, product references, and profit motive) supported a finding of commercial speech in that case, speech can still be characterized as commercial even in the absence of one or more of those factors.²³² Finally, the court fashioned what it called a “limited purpose test” for deciding the commerciality of speech in certain circumstances. The new test, which applies when courts must decide whether speech “may be subjected to laws aimed at preventing false advertising or other forms of commercial deception,” considers the speaker, the intended audience, and the content of the message.²³³ More specifically, speech will typically be deemed commercial if: (1) the speaker is a person or entity engaged in commerce;²³⁴ (2) the intended audience is the actual or potential consumer of the speaker’s product;²³⁵ and (3) the content of the message is commercial in nature.²³⁶

225. *Kasky*, 93 Cal. Rptr. 2d at 860 (“[W]e think that a public relations campaign focusing on corporate image, such as that at issue here, calls for a different analysis than that applying to product advertisement.”).

226. *Id.*

227. *Id.* As the Court explained: “Nike exemplifies the perceived evils or benefits of labor practices associated with the processes of economic globalization. . . . Information about the labor practices at Nike’s overseas plants thus constitutes data relevant to a controversy of great public interest in our times.” *Id.* at 861.

228. *Id.* at 862–63.

229. *Id.* at 863.

230. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

231. *Id.* at 251.

232. *Id.* at 254 (“[T]he [*Bolger*] court . . . declined to hold that all of these factors in combination, or any one of them individually, is necessary to support a commercial speech characterization.” (emphasis omitted)).

233. *Id.* at 256 (emphasis omitted).

234. *Id.* Engaging in commerce means producing, distributing, or selling goods or services, or acting on behalf of someone who does any of those things. *Id.*

235. *Id.* The intended audience also includes those likely to repeat the message to influence consumers, like reporters. *Id.*

236. *Id.* This includes representations of fact about “the business operations, products, or services of the speaker . . . made for the purpose of promoting sales of, or other commercial

Applying this test, the majority held that Nike was a commercial speaker because it was engaged in commerce by manufacturing, distributing, and selling athletic gear, that the intended audience was commercial because the letters and press releases were intended to influence actual or potential consumers, and that the content of the speech was sufficiently commercial because Nike was making purportedly factual statements about its own business operations.²³⁷ In so doing, the court explained that “[t]o the extent Nike’s press releases and letters discuss policy questions,” such speech would be noncommercial and protected under the First Amendment.²³⁸ But because the alleged misrepresentations in question dealt with the description of actual conditions and practices at Nike’s overseas factories, the speech was commercial and could be regulated.²³⁹ Consequently, the court reversed the California Court of Appeal’s judgment and remanded for further proceedings.²⁴⁰

Nike filed a petition for a writ of certiorari with the U.S. Supreme Court, which was initially granted. Ultimately, however, the Court dismissed the writ as improvidently granted because there was no Article III standing (Kasky did not suffer the requisite injury), nor was there a final judgment by the state courts.²⁴¹ The case subsequently settled,²⁴² allowing the California Supreme Court’s decision to stand.

2. Image Advertising Post-*Kasky*

The Supreme Court’s decision to dismiss the writ of certiorari in *Nike v. Kasky* may very well have been appropriate under the circumstances. Yet, it left unresolved important questions about the constitutional status of corporate image advertising.²⁴³ In the wake of *Kasky*, the U.S. Court of Appeals for the Seventh Circuit held in *Jordan v. Jewel Food Stores, Inc.*—a high profile case involving basketball legend Michael Jordan—that image advertising constitutes commercial speech.²⁴⁴ Just recently, however, the Supreme Court issued a decision in *Matal v. Tam* that casts doubt on *Jewel*.

i. *Jordan v. Jewel Food Stores, Inc.*

Michael Jordan, former star of the Chicago Bulls, was inducted into the Hall of Fame in 2009. Time, Inc., the publisher of *Sports Illustrated*, commemorated the event with a special issue devoted exclusively to Jordan’s career.²⁴⁵ Jewel Food

transactions in, the speaker’s products or services.” *Id.*

237. *Id.* at 258–59.

238. *Id.* at 260.

239. *Id.* at 260–61.

240. The three dissenting justices concluded that Nike’s speech was protected by the First Amendment because the commercial and noncommercial elements of the speech were “inextricably intertwined.” *Id.* at 266.

241. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

242. Chemerinsky & Fisk, *supra* note 224, at 1145.

243. See, e.g., David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004).

244. 743 F.3d 509 (7th Cir. 2014).

245. *Id.* at 511.

Stores, Inc. (“Jewel”), the operator of close to 200 supermarkets in the Chicago area, earned free advertising space in the issue in exchange for stocking the magazines in its stores.²⁴⁶ Jewel ran a full-page ad that featured a pair of sneakers with #23 (Jordan’s number) on them, a message congratulating Jordan, and the Jewel-Osco logo and slogan, “Good things are just around the corner.”²⁴⁷

Soon after the commemorative issue hit the stands, Jordan sued Jewel in Illinois state court alleging violations of trademark, right of publicity, and unfair competition laws.²⁴⁸ Jordan claimed, at bottom, that Jewel had misappropriated Jordan’s identity for its commercial benefit.²⁴⁹ After removing the case to federal court and conducting discovery, Jewel moved for summary judgment. Jewel argued that its advertisement was noncommercial speech, and thus fully protected by the First Amendment.²⁵⁰ The district court agreed with Jewel, granted summary judgment in its favor, and Jordan appealed.²⁵¹

The primary question on appeal was how to classify Jewel’s advertisement. Jewel argued—as it had in the lower court—that the ad was noncommercial speech because it did not propose a commercial transaction but instead celebrated Jordan’s career and accomplishments.²⁵² While the Seventh Circuit agreed that the literal text of the ad may be noncommercial, it explained that ads like Jewel’s must be considered in context.²⁵³ Here, the ad in question had a clear commercial function: enhancing the Jewel brand in consumers’ minds.²⁵⁴ Such an advertisement, the court reasoned, “is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service.”²⁵⁵ Hence, Jewel’s ad constituted commercial speech.

This conclusion, the court went on to say, was bolstered by *Bolger*, which provides a framework for analyzing speech like this with both commercial and noncommercial elements.²⁵⁶ In the court’s opinion, all of the *Bolger* factors—(1) an advertisement; (2) that referred to a specific product; and (3) was motivated by a desire to profit—were satisfied. First, the tribute to Jordan qualified as advertising because it promoted Jewel supermarkets to potential consumers.²⁵⁷ Second, despite no specific product being offered, the court deemed the second requirement met

246. *Id.*

247. *Id.* at 512. More specifically, the ad said:

A Shoe In! After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan’s elevation into the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes # 23 on his many accomplishments as we honor a fellow Chicagoan who was ‘just around the corner’ for so many years.

Id.

248. *Id.* at 513.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 517.

253. *Id.* at 517–18.

254. *Id.* at 518.

255. *Id.*

256. *Id.* at 519.

257. *Id.*

because the ad encouraged patronage at Jewel stores.²⁵⁸ Finally, the third factor was satisfied as Jewel was hoping to profit by attracting customers to its stores with the ad.²⁵⁹ Accordingly, the *Jordan* court held, Jewel's speech was commercial and therefore subject to intermediate scrutiny under *Central Hudson*.²⁶⁰ The case was remanded, and then ultimately settled.²⁶¹

ii. *Matal v. Tam*

The question whether corporate image advertising constitutes commercial speech was also at issue in the recent case, *Matal v. Tam*,²⁶² albeit indirectly. *Tam* involved an Asian rock band's application for trademark registration of its name, "The Slants," which was denied pursuant to a provision of the federal trademark law that prohibits the registration of marks that may "disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."²⁶³ Simon Tam, the leader of the band, contested the denial by arguing, first, that trademarks are noncommercial speech and, second, that the disparagement clause fails constitutional muster.²⁶⁴ When the Patent and Trademark Office (PTO) rejected the challenge, Tam appealed to the Federal Circuit. Sitting en banc, the court agreed with Tam that trademarks are noncommercial speech, applied strict scrutiny, and found the disparagement clause facially unconstitutional under the First Amendment.²⁶⁵ The PTO filed a petition for a writ of certiorari, which the Supreme Court granted.

Before turning to whether the disparagement clause was unconstitutional, the Supreme Court addressed the predicate question: are trademarks commercial speech?²⁶⁶ The government took the position that all trademarks are commercial

258. *Id.*

259. *Id.* at 519–20 (citing Jewel's marketing representative who said "having your logo in any location where people see it is going to help your company").

260. *Id.* at 522.

261. Tony Briscoe, *Michael Jordan Reaches Settlement with Jewel, Dominick's*, CHI. TRIB. (Nov. 23, 2015, 7:00 AM), <http://www.chicagotribune.com/news/local/breaking/ct-michael-jordan-jewel-dominicks-settlement-met-20151122-story.html> [<https://perma.cc/3HT8-KWPB>].

262. 137 S. Ct. 1744 (2017).

263. 15 U.S.C. § 1052(a) (2012). Simon Tam, the lead singer of "The Slants," chose this name as a way to "'reclaim' and 'take ownership' of stereotypes about people of Asian ethnicity." *Tam*, 137 S. Ct. at 1754.

264. *Tam*, 137 S. Ct. at 1754.

265. *In re Tam*, 808 F.3d 1321, 1338 (Fed. Cir. 2015). The Federal Circuit's opinion was highly fractured. While nine of the twelve judges concluded that trademarks were noncommercial speech, Judge Dyk wrote a concurrence arguing that some trademarks are purely commercial, and thus should be treated as such. *Id.* at 1364 (Dyk, J., concurring in part and dissenting in part) ("[U]nlike the majority, I do not think that the government must support, or society tolerate, disparaging trademarks in the name of commercial speech."). Judge Lourie went further in his dissent saying "it is not entirely clear that a trademark, even an expressive trademark, is protected commercial speech." *Id.* at 1375 (Lourie, J., dissenting). Finally, Judge Reyna dissented because he believed that "[t]rademarks are commercial speech" plain and simple. *Id.* at 1376 (Reyna, J., dissenting).

266. *Tam*, 137 S. Ct. at 1763–64.

speech because their central purpose is to facilitate interstate commerce.²⁶⁷ Tam, on the other hand, argued that trademarks also have an expressive component, meaning they do more than identify the source of a product.²⁶⁸ Plainly speaking, trademarks often say something more about the product, the mark owner, or some broader issue.²⁶⁹ “The Slants,” for instance, not only identifies Tam’s band but expresses a view on important social matters.²⁷⁰

In the end, the Court concluded that it was unnecessary to resolve the commercial/noncommercial debate because the disparagement clause was unconstitutional even under the less demanding *Central Hudson* standard.²⁷¹ *Central Hudson* requires restrictions on speech to serve “a substantial interest” and be “narrowly drawn,” and the *Tam* Court believed the disparagement clause failed on both counts.²⁷² The government argued that it had a substantial interest in preventing underrepresented groups from being “bombarded with demeaning messages in commercial advertising.”²⁷³ The Court interpreted this as the government attempting to prevent offensive speech, an idea that “strikes at the heart of the First Amendment.”²⁷⁴ As for the other substantial interest put forth by the government—protecting the orderly flow of commerce by prohibiting discriminatory trademarks—the Court held that the disparagement clause was not narrowly tailored because it extends to trademarks like “Down with racists.”²⁷⁵ The disparagement clause, in the Court’s words, is not an antidiscrimination provision but a “happy-talk clause.”²⁷⁶ Accordingly, it fails the *Central Hudson* test and is unconstitutional.²⁷⁷

The question whether image advertising, corporate sponsorship, and trademarks constitute commercial or core speech remains an open one. Yet, in light of the Supreme Court’s recent decisions in *Sorrell* and *Tam*, there is good reason to believe that such speech will sometimes be treated as noncommercial and thus subject to strict scrutiny. But even if that’s true, there may be circumstances where restricting image advertising nevertheless is appropriate, for example, when it interferes with the constitutionally protected right to a fair and impartial jury.²⁷⁸

IV. IMAGE ADVERTISING IN LITIGATION “HOT SPOTS”

The few cases that have addressed the question of advertising to potential jurors teach some important lessons. Communicating with members of the jury pool specifically about the case at hand is problematic whether this is accomplished

267. *Id.* at 1764.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–65 (1980)).

273. *Id.*

274. *Id.*

275. *Id.* at 1765.

276. *Id.*

277. *Id.*

278. *See infra* Section V.A.

through a letter-writing campaign,²⁷⁹ television advertisements,²⁸⁰ or online ads.²⁸¹ But what about using image advertising that sends messages to the public about the company itself, rather than the particular litigation? Once a lawsuit is filed, it may be too late for a defendant to launch an image campaign in time to influence prospective jurors. In some situations, however, litigants find themselves litigating in the same forum time and again. Good examples include the U.S. District Court for the Eastern District of Texas for patent cases,²⁸² the Circuit Court in Madison County, Illinois for asbestos cases,²⁸³ and the Philadelphia Court of Common Pleas for mass tort actions involving pharmaceutical products.²⁸⁴ These litigation “hot spots,” as they’ve been called,²⁸⁵ develop in state or federal trial courts when plaintiffs file a disproportionate number of certain types of cases there and, typically speaking, the litigation has little or no connection to the venue.

A. Litigation “Hot Spots”

Courts become litigation “hot spots” for different reasons. Sometimes courts adopt general procedural rules, such as a “fast track” to trial, that happen to attract certain types of cases.²⁸⁶ Other times, courts intentionally adopt new rules or procedures in hopes of growing the court’s “business”—a practice that has been discussed at some length in recent legal scholarship.²⁸⁷ Plaintiffs might also choose a particular venue because they perceive the judges and juries in the district as sympathetic.²⁸⁸ Finally, a court may become a “hot spot” because past plaintiffs have won big verdicts, thereby attracting additional plaintiffs with similar claims.

279. See *Arenazas v. BP Amoco Chem. Co.*, No. 05-CV-0337 (Dist. Ct. Galveston County, Tex. filed Mar. 24, 2005); *Haltom v. Bayer Corp.*, No. 02-60165-00-0-4 (Nueces County Law Ct. No. 4 filed Jan. 21, 2002).

280. See, e.g., Trager, Moriarty & Duncan, *supra* note 5, at 687–90 (discussing *Culver v. Wal-Mart*).

281. See, e.g., *Bowoto v. Chevron Corp.*, No. C 99-2506 (N.D. Cal. filed May 27, 1999).

282. Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), <https://www.nytimes.com/2006/09/24/business/24ward.html> [<https://perma.cc/EVX2-S5Q5>].

283. Rachel Lippmann, *It’s Called a “Hellhole.” But Madison County Defense Attorneys Say Better the Devil You Know*, ST. LOUIS PUB. RADIO (Jan. 15, 2014), <http://news.stpublicradio.org/post/its-called-hellhole-madison-county-defense-attorneys-say-better-devil-you-know#stream/0> [<https://perma.cc/6JCE-U6R4>].

284. See *infra* Section IV.A.3.

285. See, e.g., Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1870 (2002).

286. John B. Pegram, *Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC’Y 765, 792 (2000).

287. See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 668 (2015); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 250 (2016).

288. See Anderson, *supra* note 287, at 639, 668, 670.

1. Patent Cases in E.D. Texas

For more than a decade, the Eastern District of Texas (“E.D. Texas”) was the ultimate “hot spot” for patent litigation. In 2015 and 2016, for example, between 35–40% of all patent suits filed nationwide were in E.D. Texas.²⁸⁹ E.D. Texas includes the following six divisions: Beaumont, Lufkin, Marshall, Sherman, Texarkana, and Tyler.²⁹⁰ Three cities within the Eastern District—Plano, McKinney, and Frisco—are among the top twenty most populous cities in Texas.²⁹¹ They are all part of the Dallas-Fort Worth metroplex and fall within the Sherman Division of E.D. Texas. Yet, the vast majority of patent cases in E.D. Texas are filed in the small town of Marshall, whose population is only around 25,000.²⁹² In fact, in 2015, a single judge in Marshall handled more than 1600 patent cases alone.²⁹³ So, why did the E.D. of Texas—and Marshall in particular—become so popular with plaintiffs in the first place?

The story of patent litigation in E.D. Texas began with Texas Instruments (TI), a major patent owner that picked up its enforcement activities in the late 1980s.²⁹⁴ Historically, TI filed patent infringement suits in the Northern District of Texas, where its Dallas headquarters is located.²⁹⁵ But TI was experiencing major delays because of the Northern District’s large criminal docket.²⁹⁶ Thus, in the early 1990s, TI began looking for alternative forums nearby and turned to E.D. Texas and Marshall specifically, where far fewer criminal cases were brought.²⁹⁷ Without the

289. See Byrd, *supra* note 14 (36.4% of all suits filed in E.D. Texas in 2016); Owen Byrd, *Announcing the Patent Litigation Year in Review 2015*, LEX MACHINA (Mar. 16, 2016), <https://lexmachina.com/14318> [<https://perma.cc/426W-YY8X>] (43.7% of all suits filed in E.D. Texas in 2015).

290. *Locations*, U.S. DISTRICT CT.: E. DISTRICT TEX., <http://www.txed.uscourts.gov/?q=directory/court-locations> [<https://perma.cc/KE2Y-BVDD>].

291. *Court Information*, U.S. DISTRICT CT.: E. DISTRICT TEX., <http://www.txed.uscourts.gov/?q=court-info> [<https://perma.cc/8YWF-AA3V>].

292. Creswell, *supra* note 282.

293. Ryan Davis, *Judge Gilstrap Kills Website-Labeling Patents Under Alice*, LAW360 (Apr. 28, 2016, 8:59 PM), <https://www.law360.com/articles/790218/judge-gilstrap-kills-website-labeling-patents-under-alice> [<https://perma.cc/HCZ5-5LNN>].

294. Joe Nocera, *The Town that Trolls Built*, BLOOMBERG OPINION (May 25, 2017, 2:41 PM), <https://www.bloomberg.com/view/articles/2017-05-25/the-texas-town-that-patent-trolls-built-j34rlmjc> [<https://perma.cc/8T3J-ZSQP>]; Melissa Repko, *How Patent Suits Shaped a Small East Texas Town Before Supreme Court’s Ruling*, DALL. NEWS (May 24, 2017), <https://www.dallasnews.com/business/technology/2017/05/24/east-texas-supreme-court-ruling-setback-towns-final-verdict-locals-say> [<https://perma.cc/C7ML-23KP>]; Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation’s Patent Cases*, MOTHERBOARD (May 5, 2016, 9:00 AM), https://motherboard.vice.com/en_us/article/aek3pp/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases [<https://perma.cc/WDH9-2RER>]; see also Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 123 (2008) (explaining that TI’s former general counsel is “generally credited for the creation of the EDTX as the patent trial court”).

295. Rogers, *supra* note 294.

296. *Id.*

297. *Id.* One reason there are fewer criminal cases in Marshall is because there’s not a jail

criminal matters, which take precedence over civil suits,²⁹⁸ TI's patent infringement cases could proceed to trial quickly, something that patent owners like TI generally favor.²⁹⁹

The light criminal docket in Marshall no doubt made it an attractive venue for patent plaintiffs in the early 1990s. But the judge in the district at the time, T. John Ward, also played a major part in the evolution of the court.³⁰⁰ When Ward served as local counsel on a TI patent case, the lead lawyers from San Francisco lamented the fact that E.D. Texas didn't have local patent rules like the Northern District of California.³⁰¹ So when he was elevated to the bench in 1999 and started hearing patent cases, Judge Ward decided to adopt patent rules for his courtroom too.³⁰² Ward's rules, which were similar in many ways to the Northern District of California's, required parties to exchange certain information, curtailed discovery, limited page numbers in briefs, established strict timelines for pretrial matters, and set firm trial dates.³⁰³ What is more, Ward ran a very tight ship in court. He limited the amount of time attorneys were permitted to speak,³⁰⁴ and let litigants know in no uncertain terms that he expected them to comply with the patent rules.³⁰⁵ Soon, other judges followed Ward's lead, and by 2005 his rules were adopted by the entire district.³⁰⁶ In short, Judge Ward was extremely influential in turning E.D. Texas into a "rocket docket" for patent cases.

Finally, the jury pool in East Texas encouraged patent plaintiffs to file a disproportionate number of cases there.³⁰⁷ Early on, plaintiffs enjoyed close to 100%

located in the town. *Id.*

298. Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (2012).

299. Repko, *supra* note 294.

300. Anderson, *supra* note 287, at 651 (“[I]t is nearly universally accepted that the [E.D. Texas’s] preeminent place in patent litigation today is largely due to the efforts of one man: Judge T. John Ward.”).

301. Rogers, *supra* note 294; *see also* Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 86–87 (2015) (providing a history of the Northern District of California’s local patent rules).

302. Rogers, *supra* note 294.

303. Ryan Davis, *Icon of IP: Former U.S. District Judge T. John Ward*, LAW360 (July 8, 2016, 8:13 PM), <https://www.law360.com/articles/814679/icon-of-ip-former-u-s-district-judge-t-john-ward> [<https://perma.cc/BUZ4-QHUX>]; Nocera, *supra* note 294; Repko, *supra* note 294. Notably, E.D. Texas has a long history of judges who actively control their dockets by setting firm trial dates and streamlining discovery. *See* Michael C. Smith, *Rocket Docket: Marshall Court Leads Nation in Hearing Patent Cases*, 69 TEX. B.J. 1045, 1046 (2006). In some ways, Judge Ward’s rules favored patents owners more than the Northern District of California’s. For example, while the Northern District’s allowed for eighteen months of discovery, Ward’s only allowed for nine. Anderson, *supra* note 287, at 652.

304. Creswell, *supra* note 282; Nocera, *supra* note 294.

305. Creswell, *supra* note 282 (describing Ward as a “no-nonsense judge who charms people with his folksy demeanor but who also has a reputation for a fiery temper in the courtroom”).

306. *Appendix B: Patent Rules*, U.S. DISTRICT CT.: E. DISTRICT TEX., <http://www.txed.uscourts.gov/?q=patent-rules> [<https://perma.cc/XFR4-SQCH>].

307. *See* Anderson, *supra* note 287, at 653; Smith, *supra* note 303, at 1048–49.

success rates and were awarded big verdicts.³⁰⁸ The \$133 and \$74 million verdicts in *Z4 Technologies, Inc. v. Microsoft Corp.*³⁰⁹ and *Tivo, Inc. v. Echostar Communications Corp.*,³¹⁰ respectively, provide prime examples. There were also perceptions—right or wrong—that jurors in East Texas tended to be plaintiff friendly, less technologically savvy than, say, jurors in the Northern District of California, and more protective of property rights in general.³¹¹

These are a few of the factors that facilitated E.D. Texas's evolution into a patent litigation "hot spot," but the full story is more complicated and beyond the scope of this Article. Suffice it to say that, for more than a decade, E.D. Texas dominated the patent litigation landscape in terms of number of cases filed there and influence on patent doctrine and policy. While other courts have been "hot spots" for patent cases in the past—namely, the Eastern District of Virginia in the mid-1990s—E.D. Texas's reign lasted longer and was more impactful than anything before.³¹²

But things have started to change over the past couple of years as a result of the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC* restricting venue in patent cases.³¹³ Almost immediately after the Court issued its opinion in *TC Heartland*, patent filings in E.D. Texas began to decline dramatically.³¹⁴ Comparing the 90 days before and after the decision, the number of patent cases filed in E.D. Texas went from 377 to 129, a 20% drop.³¹⁵ The decline in E.D. Texas corresponds closely to the increase in patent filings in the District of Delaware, which witnessed a 13% increase in patent cases between the 90 days before and after *TC Heartland*.³¹⁶ Perhaps E.D. Texas's days as a "hot spot" for patent litigation are numbered. History tells us, though, that a new hot spot will likely emerge sooner or later; only time will tell if it will remain Delaware or become some other district.³¹⁷

308. Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 211 tbl.7, 213 fig.2 (2007) (cataloging damages awards in E.D. Texas patent cases).

309. 507 F.3d 1340, 1346 (Fed. Cir. 2007).

310. 516 F.3d 1290, 1294 (Fed. Cir. 2008).

311. Smith, *supra* note 303, at 1048; *see also* Repko, *supra* note 294 (stating that only 20% of Marshall's population has a bachelor's degree or higher and that the median household income in Marshall is approximately \$36,000). *But see* Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941 (2006) (arguing that criticism of juries in rural areas is frequently based on "ruralism," meaning bias against people simply because they live in rural areas).

312. Nguyen, *supra* note 294, at 114.

313. 137 S. Ct. 1514 (2017).

314. Owen Byrd, *Patent Litigation Trends in the Three Months After T.C. Heartland*, LEX MACHINA (Oct. 18, 2017), <https://lexmachina.com/patent-litigation-trends-in-the-three-months-after-t-c-heartland> [<https://perma.cc/EA7E-97RL>].

315. *Id.* at fig.2.

316. *Id.*; *see also* Leslie A. Pappas, *The Road More Traveled: Patent Attorneys Head to Delaware*, BLOOMBERG L.: BIG L. BUS. (Jan. 29, 2018), <https://biglawbusiness.com/the-road-more-traveled-patent-attorneys-head-to-delaware> [<https://perma.cc/YJ67-RQVC>].

317. Soon after Alan Albright was appointed to the federal bench last fall, speculation arose that the Western District of Texas—and particularly Waco, Texas where Judge Albright sits—would become the next patent litigation "hot spot." *See* Michelle Casady, *Waco's New*

2. Asbestos Cases in Madison County, Illinois

Like E.D. Texas, Madison County, Illinois has been a litigation hot spot for more than a decade, but with respect to asbestos, rather than patent, cases. Madison, a mostly rural county in Southwest Illinois, has a total population of about 270,000, and its largest city, Granite City, has only 30,000 people.³¹⁸ Yet, Madison County handles about 25% of all asbestos-related cases in the United States, and almost 50% of the nation's cases dealing with mesothelioma—the most serious asbestos illness.³¹⁹ Of the more than 1200 asbestos suits filed in Madison County in 2015, however, only 6% were by Illinois residents, and only 1% by residents of Madison County.³²⁰ Over the years, Madison County has been labeled an “asbestos mecca,”³²¹ a “magic jurisdiction,”³²² and a “judicial hellhole.”³²³

A number of historical, sociological, and procedural factors led to Madison County's rise as a hotbed for asbestos litigation. Sitting adjacent to St. Louis, Missouri and bordering the Mississippi River along its entire western edge, the county became an industrial powerhouse in the late nineteenth and early twentieth centuries.³²⁴ Madison County was home to granite factories, steel mills, glass companies, and oil refineries, just to name a few.³²⁵ For example, Owens-Illinois

Judge Primes District for Patent Growth, LAW360 (Feb. 12, 2019, 7:26 PM), <https://www.law360.com/articles/1128078/waco-s-new-judge-primers-district-for-patent-growth> [<https://perma.cc/698G-UAJ9>]; David Lisch & David Henry, *The Newest Patent 'Rocket Docket': Waco, Texas*, IPWATCHDOG (Feb. 18, 2019), <https://www.ipwatchdog.com/2019/02/18/newest-patent-rocket-docket-waco-texas/id=106453> [<https://perma.cc/F7HN-WTG6>].

318. U.S. CENSUS BUREAU, 2010 CENSUS POPULATION COMPARED TO 2000: ILLINOIS COUNTIES 1, https://www.illinois.gov/census/Documents/2010%20Data/2000%202010_IL%20Counties_Rank%20by%202010%20Pop.pdf [<https://perma.cc/VDZ8-M5CL>].

319. Matthew Davis, *Madison County, IL Leads Nation in Asbestos Filings*, MESOWATCH (Nov. 29, 2016), <https://mesowatch.com/madison-county-leads-nation-asbestos-lawsuit-filings> [<https://perma.cc/5PBF-D5TJ>]; KCIC, ASBESTOS LITIGATION: 2016 YEAR IN REVIEW 5 (2017), <https://www.kcic.com/asset/pdf/KCIC-2016-AsbestosReport.pdf> [<https://perma.cc/DW7B-RV5R>].

320. Heather Isringhausen Gvillo, *Asbestos Attorney Napoli Expects Decline in Madison County Case Filings*, MADISON-ST. CLAIRRECORD (Mar. 30, 2016), <https://madisonrecord.com/stories/510704583-asbestos-attorney-napoli-expects-decline-in-madison-county-case-filings> [<https://perma.cc/A3ZH-ZDEH>].

321. Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sandner, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 243 (2004).

322. Klerman & Reilly, *supra* note 287, at 286.

323. ATR FOUND., JUDICIAL HELLHOLES 2017–2018, at 2, 37–40 (2017), <http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf> [<https://perma.cc/75JV-RUG4>]; *Madison County Named a "Judicial Hellhole" Once Again*, ILL. NEWS NETWORK (Dec. 22, 2016), https://www.ilnews.org/news/justice/madison-county-named-a-judicial-hellhole-once-again/article_cf7bd67d-9a41-5ba6-b094-68746874ad27.html [<https://perma.cc/C7Y3-BYSB>].

324. Ellen Nore, *Madison County (1812-2012): Reflecting Illinois and National History*, MADISON HIST. (Feb. 20, 2019), <https://madison-historical.siu.edu/encyclopedia/madison-county-1812-2012-reflecting-illinois-and-national-history> [<https://perma.cc/S49J-C26V>].

325. *Id.*; Chris Coates, *Tracing Madison County History Through Teapots and Kettles*, ST.

Glass Works, located in Madison County, was the largest glass factory in the world.³²⁶ One long-term result of this industrial boom is that Madison County suffers from some of the worst air quality in the country.³²⁷

Another consequence of industrialization is that Madison County became a stronghold for labor unions during the first half of the twentieth century.³²⁸ In the late 1980s, those unions began providing cancer screenings to industrial workers in Madison County, as was happening across the county.³²⁹ The screenings revealed possible asbestos-related illnesses for countless industrial workers in Madison County.³³⁰ As a result, thousands of asbestos cases were filed in Madison County against local industries at effectively the same time because of a two-year statute of limitations.³³¹ Accordingly, the Madison County Circuit Court—located in the county seat in Edwardsville—implemented various procedures to make the caseload more manageable, and to ensure a more efficient process for obtaining relief.

In 1995, the Madison County Circuit Court issued a Standing Case Management Order (“Standing Order”) that created an asbestos “rocket docket.”³³² Although this Standing Order has been amended over the past two decades, including most recently

LOUIS POST-DISPATCH (May 18, 2010), https://www.stltoday.com/suburban-journals/illinois/news/tracing-madison-county-history-through-teapots-and-kettles/article_606420eb-26e8-5965-863b-2a6462c97a0d.html [<https://perma.cc/46QF-D8DA>]; *Brief History of Madison County, Illinois*, MADISON COUNTY ILGENWEB, <http://madison.illinoisgenweb.org/index.html> [<https://perma.cc/WH6D-TCUX>]; “*It’s All About Southwestern Madison County*,” SW. MADISON COUNTY CHAMBER COM., <http://www.chamberswmadisoncounty.com> [<https://perma.cc/9XU5-Q2W9>].

326. Nore, *supra* note 324.

327. Kim McGuire & Kevin Crowe, *Granite City Ranks High for Cancer Risk from Bad Air 2nd in the Nation • Coke Ovens at U.S. Steel Believed to Be the Culprit, but Some Defend Plant.*, ST. LOUIS POST-DISPATCH (June 25, 2009), https://www.stltoday.com/news/granite-city-ranks-high-for-cancer-risk-from-bad-air/article_fc2bde1-fee0-5db5-b635-5349b805acf8.html [<https://perma.cc/S3SJ-MFLW>]; *Madison County’s Air Quality Gets Failing Grade*, TELEGRAPH (Apr. 30, 2013, 12:00 AM), <https://www.thetelegraph.com/news/article/Madison-County-s-air-quality-gets-failing-grade-12659989.php> [<https://perma.cc/TE4R-H367>].

328. Associated Press, *Edwardsville Does Booming Business in Asbestos Lawsuits*, ST. LOUIS POST-DISPATCH (May 3, 2015), https://www.stltoday.com/news/local/crime-and-courts/edwardsville-does-booming-business-in-asbestos-lawsuits/article_e1019c29-e41f-58c1-9a29-3756e9d1f26b.html [<https://perma.cc/5PUK-9CE7>].

329. Mesothelioma Cancer All., *Unions and Asbestos*, MESOTHELIOMA.COM, <https://web.archive.org/web/20180815181947/https://www.mesothelioma.com/asbestos-exposure/unions> [<https://perma.cc/8T3L-9WLG>].

330. Heather Isringhausen Gvillo, *Asbestos Defendants Succeeding in Rare Madison County Trials*, LEGAL NEWSLINE (Mar. 19, 2014), <https://legalnewsline.com/stories/510517228-asbestos-defendants-succeeding-in-rare-madison-county-trials> [<https://perma.cc/3LEZ-KNRC>].

331. *Id.*

332. Standing Case Management Order for All Asbestos Personal Injury Cases, *In re: All Asbestos Litigation Filed in Madison County* (Madison County Cir. Ct. filed Aug. 19, 2016), http://www.co.madison.il.us/document_center/CircuitClerk/Asbestos%20Standing%20Case%20Management%20Order.pdf [<https://perma.cc/4CNF-ZJCU>] [hereinafter Standing Order].

in 2016, the important provisions have remained largely unchanged.³³³ Without going into all the details of the approximately seventy-five-page order, a few are worth highlighting. First, a single judge, called the “Chief Asbestos Judge,” oversees the entire asbestos docket and has the power to modify the Standing Order.³³⁴ Second, trial schedules in asbestos cases are expedited, and the court prioritizes cases for terminally ill and elderly plaintiffs, so they can be tried much faster than in other jurisdictions.³³⁵ Specifically, any plaintiff who is seventy years or older, has been diagnosed with mesothelioma, or has a very limited life expectancy may be entitled to get to trial on an expedited basis.³³⁶ Last but not least, the Standing Order includes detailed discovery guidelines including firm deadlines,³³⁷ specific rules on how depositions will proceed,³³⁸ and provisions regarding the use of repositories that make certain types of documents and other materials available to litigants as a way of streamlining discovery.³³⁹

In addition to these specialized procedures, the Madison County court’s approach to personal jurisdiction and venue have facilitated the forum’s rise as a hot spot for asbestos litigation.³⁴⁰ Liberal interpretations of personal jurisdiction doctrine have allowed some cases to proceed despite the defendant having only attenuated contacts with Illinois,³⁴¹ or based on a doctrine known as “pendent personal jurisdiction.”³⁴² Moreover, venue is usually easy to satisfy because the relevant Illinois statute permits plaintiffs to bring claims against out-of-state corporate defendants in any

333. Heather Isringhausen Gvillo, *Updated Asbestos Standing Order Sets Max Trial Settings and Moves Cases Not Ready for Trial Into ‘Special Closed’ Docket*, MADISON-ST. CLAIRRECORD (Sept. 7, 2016), <https://madisonrecord.com/stories/511006956-updated-asbestos-standing-order-sets-max-trial-settings-and-moves-cases-not-ready-for-trial-into-special-closed-docket> [<https://perma.cc/UW9S-X8B2>].

334. Standing Order, *supra* note 332, at 12–13.

335. *Id.* at 13–15, 23–24; *see also* Davis, *supra* note 319 (“[A]n expedited docket for terminally ill victims, allows cases to be tried in six months following filing.”); Schwartz, Behrens & Sandner, *supra* note 321, at 253. The claims of individuals who cannot meet the criteria are suspended, meaning the statute of limitations on the claim is tolled, allowing these plaintiffs’ claims to be revived should they develop asbestos-related disease or symptoms in the future. Schwartz, Behrens & Sandner, *supra* note 321, at 253.

336. Standing Order, *supra* note 332, at 23–24.

337. *Id.* at 28–32.

338. *Id.* at 32–45.

339. *Id.* at 20–21.

340. Schwartz, Behrens & Sandner, *supra* note 321, at 245–47.

341. Davis, *supra* note 319 (discussing recent case in Madison County in which judge found that defendant had consented to personal jurisdiction in Illinois by registering to do business, appointing an agent for service of process, and engaging in previous litigation in Illinois).

342. Klerman & Reilly, *supra* note 287, at 287. Under pendant personal jurisdiction, a court with specific personal jurisdiction over one claim also exercises jurisdiction over closely related claims even if there would be no jurisdiction over the related claims standing on their own. *Id.*; *see also* Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 243–44 (2014). After *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), in which the Supreme Court rejected California’s exercise of pendant personal jurisdiction over the out-of-state plaintiffs’ claims, this practice in Madison County and elsewhere may change.

county in which the defendant “has its registered office or other office or is doing business” if the defendant is “authorized to transact business in this State.”³⁴³ Finally, Madison County judges are generally reluctant to grant motions to transfer asbestos cases to venues that are more convenient for defendants.³⁴⁴

Together, these factors created fertile conditions for Madison County to become the center of asbestos litigation it is today. Since 1985, close to twenty thousand asbestos lawsuits have been filed in Madison County.³⁴⁵ Between 1996 and 2003, thousands of asbestos cases were set for trial, but only four were resolved via jury verdict.³⁴⁶ And although there have been sizable jury verdicts, including a \$250 million award in 2003,³⁴⁷ only nine asbestos cases have gone to trial in Madison County since 2005, and all have resulted in defense verdicts.³⁴⁸ So while the allure of mega-verdicts may attract some plaintiffs to Madison County, that certainly doesn’t tell the full story of this jurisdiction.

Theories abound as to why Madison County’s asbestos docket remains so vast year after year. Perhaps the judges presiding over the asbestos docket, and the procedures they use—particularly quick trial dates—are considered proplaintiff.³⁴⁹ Or maybe there are lingering sympathies for plaintiffs stemming from Madison County’s “union roots.”³⁵⁰ Others have suggested that litigants are choosing Madison County simply because it is a uniquely efficient and predictable forum in a generally complex area of litigation.³⁵¹ As one plaintiff’s attorney remarked, instead of “reinventing the wheel every time” in a new jurisdiction, plaintiffs know what they will get in Madison County—judges with experience in asbestos cases, and “a process to get cases moving orderly at [a] low cost.”³⁵² Indeed, even some defense

343. 735 ILL. COMP. STAT. ANN. § 5/2-102(a) (West 1993).

344. Schwartz, Behrens & Sandner, *supra* note 321, at 245–46.

345. *Id.* at 243 (stating that 8000 asbestos suits were filed in Madison County between 1985–2002); Heather Isringhausen Gvillo, *Madison County Asbestos Filings Total 1,224; Only 6 Percent Filed on Behalf of Illinois Residents*, MADISON-ST. CLAIRRECORD (Mar. 23, 2016), <https://madisonrecord.com/stories/510703276-madison-county-asbestos-filings-total-1-224-only-6-percent-filed-on-behalf-of-illinois-residents> [<https://perma.cc/9ZLN-DP43>] (indicating that there were 325 asbestos cases filed in Madison County in 2006; 455 cases in 2007; 659 cases in 2008; 814 in 2009; 752 in 2010; 953 in 2011; 1563 in 2012; 1678 in 2013; 1300 in 2014; and 1224 in 2015); KCIC, *supra* note 319, at 8 (indicating that there were 1215 asbestos filings in 2014; 1170 in 2015; and 1299 in 2016).

346. Schwartz, Behrens & Sandner, *supra* note 321, at 251.

347. Alex Berenson, *2 Large Verdicts in New Asbestos Cases*, N.Y. TIMES (Apr. 1, 2003), <https://www.nytimes.com/2003/04/01/business/2-large-verdicts-in-new-asbestos-cases.html> [<https://perma.cc/2XU3-CBGU>]. In two other cases, juries awarded \$16 million and \$34 million to plaintiffs. Schwartz, Behrens & Sandners, *supra* note 321, at 251–52.

348. Gvillo, *supra* note 330.

349. *See, e.g.*, Schwartz, Behrens & Sandners, *supra* note 321, at 240 (arguing that plaintiffs find Madison County appealing because “the judges will certify a class without looking too closely at the merits of the case”); Lippmann, *supra* note 283 (suggesting that quick trial dates in Madison County are the main attraction).

350. Associated Press, *supra* note 328.

351. *See* Gvillo, *supra* note 330.

352. *Id.*

lawyers have come to accept Madison County as a jurisdiction where asbestos cases are handled in an efficient, cost-effective, and fair way.³⁵³

Whatever the explanation for Madison County's rise, it's hard to know what the future holds for the jurisdiction. The current Chief Asbestos Judge, Stephen Stobbs, made some potentially significant amendments to the Standing Order that became effective in January 2017.³⁵⁴ The most important modifications relate to trial setting. For the first time, the court is capping the number of asbestos cases that can be set for trial each year to 780.³⁵⁵ What is more, plaintiffs must now present proof of asbestos-related illness before they can request a trial date,³⁵⁶ and cases that aren't ready when their trial date approaches will be placed on an inactive docket.³⁵⁷ Besides these changes to the Standing Order, recent developments in personal jurisdiction law are making it more difficult for out-of-state defendants to be sued in Illinois.³⁵⁸ Madison County's days as a hot spot for asbestos litigation may be numbered, but only time will tell.

3. Mass Torts in the Philadelphia Court of Common Pleas

The Philadelphia Court of Common Pleas (CCP), or, more specifically, the Complex Litigation Center (CLC) within that court, provides another example of a litigation hot spot—this time for mass tort cases. When the CLC opened its doors in 1992, it was the first courthouse in the United States “designed exclusively” for complex, multifiled mass tort litigation.³⁵⁹ Early on, there was a major influx of asbestos cases, much like in Madison County but to a lesser degree.³⁶⁰ Beginning in

353. Lippmann, *supra* note 283 (quoting defense lawyer Jeff Hebrank saying that his clients “have always gotten a fair shake in Madison County”).

354. Standing Order, *supra* note 332, at 14; Gvillo, *supra* note 333.

355. Standing Order, *supra* note 332, at 14.

356. *Id.* at 25–26 (requiring that diagnosis report or expert opinion must, *inter alia*, indicate that exposure to asbestos was substantial cause of plaintiff's diagnosis).

357. *Id.* at 24–26.

358. The Supreme Court's decisions in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which restricts general personal jurisdiction for corporations, and *Bristol-Myers Squibb*, see *supra* note 342, which restricts specific personal jurisdiction, are making it more difficult for plaintiffs to sue non-Illinois corporations in Madison County. See Alison Frankel, *New Illinois Supreme Court Ruling Should Make 'Judicial Hellhole' Less Fiery*, REUTERS (Sept. 25, 2017, 2:32 PM), <https://www.reuters.com/article/legal-us-otc-illinois/new-illinois-supreme-court-ruling-should-make-judicial-hellhole-less-fiery-idUSKCN1C02OC> [<https://perma.cc/J25E-YH2Q>] (discussing the impact of *Daimler* on cases in Madison County); David E. Rutkowski, *Personal Jurisdiction Challenges Growing in Madison County; May Lead to Fewer Asbestos Filings*, GOLDBERG SEGALLA (Oct. 16, 2017), <http://asbestoscasetracker.com/personal-jurisdiction-challenges-growing-in-madison-county-may-lead-to-fewer-asbestos-filings> [<https://perma.cc/4BF5-WBUL>] (same).

359. *Court of Common Pleas, Trial Division – Civil: Complex Litigation Center*, PHILA COURTS.US, <http://www.courts.phila.gov/common-pleas/trial/civil> [<https://perma.cc/U33Y-CVUF>] (follow “Complex Litigation Center” hyperlink) [hereinafter *Complex Litigation Center*].

360. JOSHUA D. WRIGHT, INT'L CTR. FOR LAW & ECON., ARE PLAINTIFFS DRAWN TO PHILADELPHIA'S CIVIL COURTS? AN EMPIRICAL EXAMINATION 9 (2011).

the late 1990s, there was a shift in the types of suits filed in the CLC to tort cases involving pharmaceutical products.³⁶¹ Today, the court's docket is dominated by Risperdal³⁶² and Xarelto³⁶³ litigation, but those certainly are not the only types of mass tort cases handled by the CLC.³⁶⁴

The Philadelphia CLC has been a magnet for tort litigation for a whole host of reasons. Because the court is designed specifically to handle mass tort litigation, procedures have been put in place to streamline and standardize pretrial matters to move cases along efficiently and predictably.³⁶⁵ For each mass tort program (e.g., Risperdal, Xarelto, etc.), there is a (i) coordinating judge and (ii) liaison counsel who

361. *Id.* at 9–10. Even today, a substantial number of asbestos cases continue to be filed in the Philadelphia CPC. *See* KCIC, *supra* note 319, at 4–5 (indicating that the CPC was a top jurisdiction for asbestos filings from 2014–2016).

362. *Complex Litigation Center Mass Tort Program Case List: Risperdal*, PHILA COURTS.US, <http://www.philacourts.us/apps/cvclc/caselist/default.aspx?search=Risperdal> [<https://perma.cc/F9ZX-WPMR>] (indicating that there are currently more than 6700 Risperdal filings); *see also* Nicholas Malfitano, *Philadelphia Flooded with New Risperdal Lawsuits; Trials Split but Include Massive Verdict*, FORBES (Apr. 10, 2017, 3:07 PM), <https://www.forbes.com/sites/legalnewslines/2017/04/10/philadelphia-flooded-with-new-risperdal-lawsuits-trials-split-but-include-massive-verdict/#58eb11636318> [<https://perma.cc/YY77-4QDQ>] (noting that more than 3000 new Risperdal cases were filed in the Philadelphia CLC in the first three months of 2017). Risperdal is an antipsychotic drug used to treat psychiatric disorders that allegedly causes young men to grow breast tissue. *See, e.g.*, Nick Valencia, *Men to Sue Over Drug that Made Them Grow Breasts*, CNN (Dec. 14, 2016, 1:47 PM), <https://www.cnn.com/2016/12/14/health/risperdal-lawsuit/index.html> [<https://perma.cc/P74U-3MZD>].

363. *Complex Litigation Center Mass Tort Program Case List: Xarelto*, PHILA COURTS.US, <http://www.philacourts.us/apps/cvclc/caselist/default.aspx?search=Xarelto> [<https://perma.cc/4NQR-XKL3>] (indicating that there are currently more than 1900 Xarelto filings). Xarelto is a blood thinner that allegedly presents increased risks for cranial and gastrointestinal bleeding. *See, e.g.*, Tina Bellon, *Jury Orders Bayer, J&J to Pay \$28 Million in Xarelto Lawsuit*, REUTERS (Dec. 5, 2017, 1:00 PM), <https://www.reuters.com/article/bayer-xarelto/corrected-jury-orders-bayer-jj-to-pay-28-million-in-xarelto-lawsuit-idUSL1N1O51JX> [<https://perma.cc/R6C7-7L3T>].

364. There are also over 85 Reglan suits, over 500 vena cava filter suits, and more than 80 pelvic mesh suits currently pending in the Philadelphia CLC. *Complex Litigation Center, supra* note 359 (follow “Complex Litigation Center” hyperlink; then follow “Mass Tort Programs” hyperlink to access the case lists for Reglan, vena cava filter, and pelvic mesh). The number of Reglan lawsuits used to exceed 2000, but that litigation settled in 2017, so the number of Reglan cases has shrunk dramatically recently. Max Mitchell, *Phila. Mass Torts Inventory Could Soon Be on Decline, Judge Says*, LEGAL INTELLIGENCER (Feb. 7, 2018, 5:07 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/02/07/phila-mass-torts-inventory-could-soon-be-on-decline-judge-says> [<https://perma.cc/K9GU-3W9M>].

365. *Complex Litigation Center, supra* note 359; DAVID C. STEELMAN & RICHARD VAN DUIZEND, NAT'L CTR. FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS, at x (2004) (“The attention given to [mass tort] cases and the process that has been developed for considering them – providing both certainty and firm trial dates – are major reasons why Philadelphia has become a center for mass tort filings from all over the country.”).

is selected by the Bar and approved by the coordinating judge.³⁶⁶ Liaison counsel manages and facilitates service, discovery, and various scheduling matters.³⁶⁷ There is also a case management order entered for every mass tort program that governs when and how cases are filed, sets out the parameters for motion and discovery practice, and provides firm deadlines for discovery, settlement conferences, and trial.³⁶⁸

Along with these standardized procedures, other features of the CLC made it appealing to plaintiffs. For one, cases were set for trial relatively quickly—within eighteen to twenty-four months of filing to be precise—and those trial dates were firm.³⁶⁹ Generally speaking, plaintiffs prefer courts with short times to trial because it puts pressure on defendants and allows for faster recovery.³⁷⁰ Another draw for plaintiffs was that, for a period of time, CLC judges would “reverse bifurcate” trials, meaning damages would be considered before liability.³⁷¹ This practice—which began in asbestos cases as a way to protect *defendants* from having their liability stories exposed—spread to other types of mass tort actions and ultimately came to be seen as advantageous for plaintiffs.³⁷² One reason reverse bifurcation may favor plaintiffs is because evidence of the plaintiff’s pain and suffering would be presented first, thereby influencing the jury’s subsequent decision about liability.³⁷³ And in cases involving punitive damages, some have argued, reverse bifurcation is particularly prejudicial because defendants are portrayed as “bad actors” before it’s been decided that they are legally responsible for plaintiff’s injuries.³⁷⁴

For a number of years, these procedural oddities attracted a steady stream of cases to the Philadelphia CCP. Then, in 2009, a change in leadership at the court really shook things up when the new administration “invited” plaintiffs from other

366. *Complex Litigation Center*, *supra* note 359.

367. *See, e.g.*, Case Management Order No. 1: Governing All Reglan®/Metoclopramide Cases at 6–9, *In re Reglan®/Metoclopramide Litig.* (Feb. 16, 2010).

368. *See, e.g., id.*; *see also* WRIGHT, *supra* note 360, at 7.

369. WRIGHT, *supra* note 360, at 7; STEELMAN & VAN DUZEND, *supra* note 365.

370. *See, e.g.*, Steven Croley, E. Paul Gibson & Stephanie A. Nye, *South Carolina’s Fast Track Jury Trial: An Inventive and Inexpensive Way to Resolve Cases*, 21 S.C. LAW., July 2009, at 14, 16 (2009); Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 13 (2017).

371. WRIGHT, *supra* note 360, at 3; Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 235 (2006) (noting that reverse bifurcation has been concentrated in the Philadelphia CLC).

372. *See, e.g.*, *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 32 (E.D.N.Y. 2001) (stating that reverse bifurcation “is useful where the parties have excellent information about the likelihood of success on the issue of liability and the real sticking points are the individual issues of causation and damages”); Stevenson, *supra* note 371, at 238 n.84 (explaining how defendants initially favored reverse bifurcation while plaintiffs opposed it, but then those preferences switched).

373. Stevenson, *supra* note 371, at 223; Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a “Reverse Bifurcation” Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 385 (2008) (arguing that reverse bifurcation “predispose[s] juries to the idea of liability” and increases plaintiffs’ chances of winning).

374. Schwartz & Appel, *supra* note 373, at 398.

jurisdictions to sue in the Philadelphia CCP.³⁷⁵ Plaintiffs gladly accepted that invitation over the next few years—especially in cases involving pharmaceutical products—and filings skyrocketed with the backlog growing from 2600 cases in 2008 to more than 6000 in 2012.³⁷⁶ As a result, the time to trial in CLC cases lengthened significantly, and the court was no longer resolving cases within two years as it had in the past.³⁷⁷ Notably, more than 40% of the cases filed in the CLC during this period were by out-of-state plaintiffs.³⁷⁸ It's no surprise, then, that the Philadelphia CCP was ranked as the number one “judicial hellhole” from 2010–2012.³⁷⁹

To address these problems plaguing the asbestos and mass tort programs, the CCP issued an order in 2012 effecting several important procedural changes.³⁸⁰ Perhaps most significantly, the order sounded the death knell for reverse bifurcation of trials without consent of all the parties.³⁸¹ The order also put restrictions on consolidation of cases, deferred punitive damages claims, limited pro hac vice counsel to two trials per year, generally precluded cases from being expedited due to exigent medical circumstances, urged mediation, and appointed a new judge to coordinate the mass torts program.³⁸² These modifications were made, the order explained, to address criticism of the CCP and to help resolve the court's backlog.³⁸³

Defense lawyers welcomed this new era with open arms, and for a while it seemed that things really had changed at the Philadelphia CCP. The court went from the

375. When Judge Moss replaced Judge Tereshko as coordinating judge of the mass tort docket, she announced that it was a “new day” at the CLC. WRIGHT, *supra* note 360, at 10. Judge Dembe, who was the CPC President, told a group of lawyers that the leadership hoped to “tak[e] business away from other courts.” Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LEGAL INTELLIGENCER (Mar. 16, 2009, 12:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202429078888/for-mass-torts-a-new-judge-and-a-very-public-campaign> [<https://perma.cc/N5WB-4UXP>].

376. Ashby Jones, *Philly Regrets Flood of Cases*, WALL ST. J. (Sept. 23, 2012, 7:23 PM), <https://www.wsj.com/articles/SB10000872396390444083304578014400849363158> [<https://perma.cc/Q7RA-Z6Z4>]; *see also* WRIGHT, *supra* note 360, at 10 (noting the large influx of hormone replacement therapy cases starting in 2009).

377. *See supra* text accompanying note 369; *see also* General Court Regulation No. 2012-01 at 1–2, *In re: Mass Tort and Asbestos Programs* (Phila. County Ct. Com. Pl. Feb. 15, 2012), <https://www.courts.phila.gov/pdf/regs/2012/cpajgcr2012-01.pdf> [<https://perma.cc/QU4C-GZ48>] [hereinafter General Court Regulation] (stating that 82.2% of asbestos cases were disposed of between 31–36 months between 2007–2011, and the court failed to meet ABA suggested disposition standards in several other mass tort programs as well).

378. General Court Regulation, *supra* note 377, at 1–2.

379. *See* ATR FOUND., JUDICIAL HELLHOLES 2011|2012 (2011), <http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf> [<https://perma.cc/65ZP-8MJD>]; ATR FOUND., JUDICIAL HELLHOLES 2010|2011, at 3 (2010), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf> [<https://perma.cc/WW5J-EFWX>].

380. General Court Regulation, *supra* note 377, at 1–2.

381. *Id.* at 2 (“There shall be no reverse bifurcation of any mass tort case, including asbestos, unless agreed upon by all counsel involved.”).

382. *Id.* at 2–5.

383. *Id.* at 1–2.

number one “judicial hellhole” in 2012 to not making the list at all over the next several years.³⁸⁴ That said, Philadelphia remained a popular destination for tort plaintiffs, especially those asserting claims related to pharmaceutical products like Risperdal and Xarelto.³⁸⁵ Beginning in 2015, some of the Risperdal cases proceeded to trial and resulted in large verdicts, including a \$70 million verdict in 2016 for a young boy from Tennessee who claimed the drug caused him to develop breasts when he was five.³⁸⁶ More recently, verdicts of \$57 and \$28 million were awarded in a pelvic mesh and Xarelto case, respectively.³⁸⁷ These blockbuster verdicts are likely the reason that the CCP once again is experiencing a spike in filings and finds itself back on the “judicial hellhole” list for 2017–2018.³⁸⁸

Yet, the future of the Philadelphia CLC as a “hot spot” remains uncertain. Shortly after the jury awarded the \$27 million verdict in a Xarelto case, the judge reversed it and entered judgment in favor of defendant.³⁸⁹ Similar to Madison County, there’s also the question whether recent developments in Supreme Court personal jurisdiction jurisprudence—namely, *Bristol-Myers Squibb Co. v. Superior Court*³⁹⁰—will impact the ability of out-of-state plaintiffs to sue in the Philadelphia

384. More pointedly, the CCP was included only on the hellhole “watchlist” in the five years after the Mass Tort Program was revised. See ATR FOUND., *supra* note 323, at 30 (indicating that Philadelphia CCP was merely on the watchlist in the 2012–2013, 2013–2014, 2014–2015, 2015–2016, and 2016–2017 reports).

385. See *supra* notes 362–363.

386. Brendan Pierson, *J&J’s Janssen Hit With \$70 Million Verdict in Risperdal Trial*, REUTERS (July 1, 2016, 3:55 PM), <https://www.reuters.com/article/us-health-johnson-andjohnson-verdict-idUSKCN0ZH5UL> [<https://perma.cc/WCN3-8WSA>].

387. Nicholas Malfitano, *A Whopping Xarelto Verdict Landed the Same Day Philadelphia Was Called a ‘Judicial Hellhole,’* FORBES: LEGAL NEWSLINE (Dec. 6, 2017, 10:16 AM), <https://www.forbes.com/sites/legalnewsline/2017/12/06/a-whopping-xarelto-verdict-landed-the-same-day-philadelphia-was-called-a-judicial-hellhole/#6ce5cff35f57> [<https://perma.cc/E3T6-8ZT2>] (stating that jury awarded plaintiff \$2 million in compensatory damages and \$26 million in punitive damages regarding claims that defendant’s drug caused gastrointestinal bleeding); Max Mitchell, *Jury Hits J&J with Record \$57.1M Verdict in Pelvic Mesh Case*, LEGAL INTELLIGENCER (Sept. 7, 2017, 3:25 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/09/07/jury-hits-jj-with-record-57-1m-verdict-in-pelvic-mesh-case> [<https://perma.cc/L9DU-8JXQ>] (stating that jury awarded \$7.1 million in compensatory damages and \$50 million in punitive damages regarding claims that defendant’s transvaginal mesh product was defective).

388. See Amanda Bronstad, *California Ranked No. 2 in Tort Reformers’ Judicial Hellholes Report*, RECORDER (Dec. 5, 2017, 7:55 PM), <https://www.law.com/therecorder/sites/therecorder/2017/12/05/florida-ranked-no-1-in-judicial-hellholes-report> [<https://perma.cc/WF63-Q9BF>] (“The Philadelphia Court of Common Pleas ranked No. 5 due to a surge of new lawsuits and big verdicts particularly involving pelvic mesh . . . and blood thinner Xarelto.”); Malfitano, *supra* note 387 (discussing how the Risperdal verdicts “have led to a flood of cases from out-of-state plaintiffs”).

389. See, e.g., Nicholas Malfitano, *Judge Reverses Plaintiffs’ \$27.8M Xarelto Jury Verdict in Philadelphia Court*, PENNRECORD (Jan. 11, 2018), <https://pennrecord.com/stories/511313279-judge-reverses-plaintiffs-27-8m-xarelto-jury-verdict-in-philadelphia-court> [<https://perma.cc/BJC7-5Z96>].

390. 137 S. Ct. 1773 (2017).

CCP.³⁹¹ It's true that one Philadelphia CCP judge largely rejected a personal jurisdiction challenge based on *Bristol-Myers* in a pelvic mesh case where the vast majority of mesh used in defendant's products was manufactured by a Pennsylvania company.³⁹² But the result in another case where defendant's contacts with Pennsylvania are more tenuous might well be different.

B. Influencing Jurors in Litigation "Hot Spots"

The problem of improper jury influence is not a new one. For the most part, however, the concern has been about how news reports and media attention might sway prospective jurors.³⁹³ Far less attention has been paid to the impact of advertising, though it has come up from time to time as discussed above in Part II.³⁹⁴ Advertising to a jury pool about the particulars of a lawsuit is often difficult to accomplish logistically (i.e., because launching an advertising campaign may take too long to be effective), and is more likely to raise eyebrows. This was the situation in *Culver v. Wal-Mart* when plaintiffs ran a television ad comparing their clients to striking mine workers who had been killed during the Ludlow Massacre—a historical event that occurred decades earlier in the area in Colorado where the trial was proceeding.³⁹⁵

But what about parties that know they are going to be litigating multiple cases in a particular court, say E.D. Texas, Madison County, or the Philadelphia CCP? One possibility is for repeat litigants—or counsel who litigate in the jurisdiction frequently—to attempt to use various forms of image advertising to ingratiate themselves with the people who live in these hot spots in hopes of achieving better litigation outcomes going forward. This is exactly what the *Bowoto* plaintiffs accused Chevron of doing with its "Power of Human Energy Campaign."³⁹⁶ Yet, the court refused to prohibit it because there was no evidence that the ads were running more frequently in San Francisco than other parts of the country.³⁹⁷ But what if it was clear that a party was targeting a particular jurisdiction with image advertising in hopes of

391. Nicholas Malfitano, *Will SCOTUS Ruling Affect Philadelphia Court, Where 94% of New Plaintiffs Are from Out of State?*, FORBES: LEGAL NEWSLINE (Aug. 17, 2017, 3:51 PM), <https://www.forbes.com/sites/legalnewsline/2017/08/17/will-scotus-ruling-affect-philadelphia-court-where-94-of-new-plaintiffs-are-from-out-of-state/#25f8564199cb> [<https://perma.cc/PXC3-AAQD>] (exploring potential impact of *Bristol Myers Squibb* decision on personal jurisdiction).

392. Max Mitchell, *J&J Loses Bid to Shrink Phila.'s Pelvic Mesh Mass Tort*, LEGAL INTELLIGENCER (Dec. 6, 2017, 5:53 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/12/06/jj-loses-bid-to-shrink-philas-pelvic-mesh-mass-tort> [<https://perma.cc/P86B-UPX2>]. In this case, the mesh used in almost all of defendant's products was manufactured by Secant, a Pennsylvania company. *Id.* Thus, the court rejected defendant's claims that it lacked the necessary "case-related" contacts with Pennsylvania to subject it to personal jurisdiction there. *Id.*

393. Trager, Moriarty & Duncan, *supra* note 5, at 729.

394. *See supra* Section II.C.

395. *See supra* notes 121–126 and accompanying text.

396. *See supra* notes 127–136 and accompanying text.

397. *See supra* notes 127–136 and accompanying text.

influencing potential jurors? This scenario may sound a bit farfetched, but it is precisely what has happened in E.D. Texas and other litigation hot spots.³⁹⁸

Over the past several years, corporations involved in patent litigation in E.D. Texas invested in substantial image advertising in Marshall, particularly through corporate sponsorship. Samsung, a company that has been sued repeatedly in the Eastern District, was the leader of this effort. The technology company sponsored local festivals and celebrations, including the “Wonderland of Lights” festival, Marshall’s biggest annual holiday event.³⁹⁹ Samsung also sponsored a booth at the town’s annual Fire Ant Festival where it gave out high-end electronics as prizes.⁴⁰⁰ Moreover, Samsung has granted college scholarships to students from Marshall and nearby Tyler,⁴⁰¹ sponsored Marshall’s high school football team,⁴⁰² donated television monitors and MP3 players to local schools,⁴⁰³ and supported local organizations including the East Texas Food Bank, Boys and Girls Club of East Texas, and the Marshall Public Library to name just a few.⁴⁰⁴ Finally, but perhaps most importantly, Samsung sponsored the annual ice skating rink located right in front of the Marshall courthouse prominently displaying the company’s logo.⁴⁰⁵

Samsung is not the only corporation that tried to curry favor with the residents of Marshall. Back in 2006, TiVo and Dish Networks (then EchoStar) were litigating a major patent case in Marshall.⁴⁰⁶ During the trial, TiVo executives decided to

398. Lauren Cohen and Umit Gurun have conducted an empirical study demonstrating that firms systematically increase targeted advertising in locations where lawsuits have been filed. *See* Cohen & Gurun, *supra* note 5. Because these spikes in advertising are concentrated in smaller markets where trials are primarily heard by juries rather than judges, Cohen and Gurun conclude that the purpose of the increased advertising is to influence trial outcomes. *Id.* at 4–5.

399. Joe Mullin, *Patent Troll Claims to Own Bluetooth, Scores \$15.7M Verdict Against Samsung*, ARS TECHNICA (Feb. 17, 2015, 7:48 PM), <http://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung> [<https://perma.cc/R37M-KHEW>]; Repko, *supra* note 294.

400. Repko, *supra* note 294.

401. Mullin, *supra* note 399; *7 East Texans Awarded More than \$50,000 [sic] from Samsung*, MARSHALL NEWS MESSENGER (May 16, 2014), <https://www.marshallnews-messenger.com/news/2014/may/16/7-east-texans-awarded-more-than-50000-from-samsun> [<https://perma.cc/RQ2C-C48W>].

402. Repko, *supra* note 294.

403. *Id.*

404. *See, e.g.*, Hannah DeClerk, *Boys and Girls Club Students Learn About Technology*, MARSHALL NEWS MESSENGER (Nov. 25, 2011), https://www.marshallnews-messenger.com/news/boys-and-girls-club-students-learn-about-technology/article_fd57df91-cdfc-5309-bbaa-3a156c052e64.html [<https://perma.cc/4MJR-L5NS>]; Mullin, *supra* note 399; Repko, *supra* note 294; Anthony Zurcher, *Why a Small Town in Texas Had Samsung’s Ear*, BBC NEWS (May 27, 2017), <https://www.bbc.com/news/world-us-canada-40021491> [<https://perma.cc/H4JG-ZRSB>].

405. *See, e.g.*, Mullin, *supra* note 399 (“There’s no mistaking who sponsors Marshall’s winter festival—Samsung has its corporate logo plastered all over the town’s ice-skating rink, which gets set up each year in the same downtown square as the federal courthouse.”).

406. Zusha Elinson, *IP Trial Strategy: Buying Tivo’s Bull*, RECORDER (June 25, 2009, 12:00 AM), https://www.law.com/therecorder/almID/1202431746710&IP_Trial_Strategy_Buying_Tivos_Bull [<https://perma.cc/8LKM-46K4>].

purchase the Grand Champion Steer at a local festival called Farm City Week.⁴⁰⁷ TiVo paid a record-breaking \$10,000 to purchase the bull, which it then named “TiVo.” Two weeks later, the jury determined that TiVo’s patent was infringed and awarded the company \$74 million in damages.⁴⁰⁸ After the trial was over, TiVo took out an advertisement in the local Marshall newspaper thanking the residents and telling anyone who hadn’t already heard about its purchase of the bull.⁴⁰⁹

It was not just the litigants who became Marshall’s benefactors,⁴¹⁰ but the lawyers too. Patent lawyers in Marshall have become civic leaders, sponsored local festivals, and invested in the town in tangible ways.⁴¹¹ One patent attorney, for example, has purchased and restored two historic buildings in Marshall: the old Coca-Cola bottling plant, which had become a “dilapidated mosquito breeding ground,”⁴¹² and the Ginocchio Hotel, which is more than 120 years old and drew visits in its heyday from Presidents Harding, Taft, and Wilson.⁴¹³

Similar to Marshall, the town of Edwardsville—the location of the Madison County courthouse—has benefitted from its status as a litigation “hot spot.”⁴¹⁴ Though many of the surrounding towns have been hit hard economically in recent years due to a lagging manufacturing industry, Edwardsville has thrived as a result of the asbestos litigation boom.⁴¹⁵ Asbestos lawyers, in particular, have been increasingly engaged in the Edwardsville community and have used image advertising arguably to win over potential jurors.⁴¹⁶ The baseball stadium at Southern Illinois University’s Edwardsville campus is named for a prominent plaintiff’s attorney.⁴¹⁷ That same attorney, John Simmons, has donated generously to cancer research centers throughout Illinois.⁴¹⁸ Asbestos law firms support local Edwardsville organizations and festivals and make that fact known to anyone visiting their website.⁴¹⁹ This all being said, the efforts to influence in Madison County—where very few cases are actually tried to a jury—seem to be less about potential jurors and more about elected judges.⁴²⁰

407. *Id.*

408. *Id.*

409. *Id.*

410. *Some Good News to Ponder Before Thanksgiving*, *supra* note 16 (stating that Samsung has “fortunately become Marshall’s benefactor”).

411. Repko, *supra* note 294 (discussing the contributions of patent lawyers like Sam Baxter and Alan Loudermilk to Marshall).

412. *Id.*

413. *Id.*

414. *See, e.g.*, Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 553 (2007) (“There was an element of local boosterism . . . a sense that attracting litigation to Madison County was a contribution to the local economy.”).

415. Associated Press, *supra* note 328. Between 2005 and 2015, asbestos lawsuits alone generated a \$14 million surplus for the town. *Id.*

416. *See id.*

417. *Id.*

418. *Id.*

419. *See, e.g.*, *Community Sponsorships*, GORI JULIAN & ASSOCIATES, <https://www.gorijulianlaw.com/About-Us/Community-Sponsorships.shtml> [<https://perma.cc/G6TW-5UZC>].

420. *See, e.g.*, Associated Press, *supra* note 328 (noting the “historically cozy relationship

V. ENSURING IMPARTIAL JURIES IN LITIGATION HOT SPOTS

At the height of E.D. Texas's reign, there was a segment on *Last Week Tonight with John Oliver* about Marshall's status as a "hot spot" for patent litigation.⁴²¹ In it, Oliver quipped "that big companies are having to go to absurd lengths to pander to the people" of East Texas, including sponsoring the ice rink in front of the courthouse.⁴²² In typical fashion, Oliver used humor to raise awareness about a serious problem—namely, how certain patent owners were exploiting overly broad patents to coerce settlements from accused infringers. Yet, Oliver missed the mark when discussing how Samsung and others have responded to the situation. Oliver thought it was "insane" that defendants were forced to curry favor with the people of E.D. Texas⁴²³ but appeared indifferent to the fact that these companies were using image advertising to influence potential jurors.

One way to address this problem is to eliminate litigation "hot spots." Since the Supreme Court decided *TC Heartland* in 2017, there has been a precipitous drop in the number of patent suits filed in E.D. Texas.⁴²⁴ Not coincidentally, Samsung is no longer sponsoring the ice rink outside the Marshall courthouse.⁴²⁵ But doing away with hot spots is not easy. First, the popularity of a jurisdiction ebbs and flows over time—take the Philadelphia CCP, for instance.⁴²⁶ In other words, it's too soon to know whether E.D. Texas's days as a patent hot spot are actually over, or whether the venue is simply on hiatus. Second, when one hot spot cools off, it is often replaced with another, which is what appears to be happening now with the District of Delaware and patent cases.⁴²⁷ Finally, hot spots provide important benefits—namely

between elected judges and law firms that helped fund their campaigns"). While this Article focuses on influencing juries, I am currently working on a follow-up piece (tentatively titled *(Im)Partial Judges*) that explores questions of bias among federal, state, and administrative judges.

421. LastWeekTonight, *Patents: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA [<https://perma.cc/535Q-CFYW>]. This is not the only example of the situation in E.D. Texas finding its way into popular media. In an episode of *Bull* from 2016, the title character is forced to defend against a patent case in the fictional town of Callisto, Texas "where everyone knows everyone and residents favor the clients of local lawyers." Emily Surpless, 'Bull' Recap: Dr. Bull and His Team Face Off Against a Texas Town that Favors Local Lawyers, BUDDYTV (Oct. 18, 2016), <https://web.archive.org/web/20161228071903/http://www.buddytv.com/articles/bull/bull-recap-dr-bull-and-his-tea-61728.aspx> [<https://perma.cc/MM8P-G9WQ>].

422. LastWeekTonight, *supra* note 421.

423. *Id.*

424. *See supra* text accompanying note 314 (discussing decline in patent suits post-*TC Heartland*).

425. *See* Chuck Smith, *Marshall, TX Christmas Wonderland of Lights 31st Year*, RED RIVER RADIO (Dec. 22, 2017), <http://redriverradio.org/post/marshall-tx-christmas-wonderland-lights-31st-year> [<https://perma.cc/T77A-B3YV>] (including current photo of ice rink that shows it is now sponsored by the Marshall Ford/Lincoln car dealership, rather than Samsung).

426. *See supra* Section IV.A.3 (discussing the evolution of the Philadelphia CCP).

427. *See supra* text accompanying notes 316–317 (discussing the rise of the District of Delaware as a hot spot for patent litigation post-*TC Heartland*).

expertise, predictability, and efficiency—so eliminating them isn't always the best answer.⁴²⁸ If hot spots are likely to persist, what can be done to prevent litigants from using image advertising to tamper with the jury pool?

A. Blatant Attempts to Influence Jurors Should Be Prohibited

It is axiomatic that companies like Samsung have a constitutionally protected right to free speech.⁴²⁹ It is equally true, however, that this right is not unfettered. When litigants blatantly attempt to influence jurors through image advertising—for example, by sponsoring an ice rink directly outside the courthouse—the First Amendment right to speak should give way to the Seventh Amendment's guarantee of an impartial jury.⁴³⁰ This is not only the case when the speech at issue is commercial, but sometimes the balance should tip in favor of protecting Seventh Amendment rights even when the speech is noncommercial.

Let's begin by considering Samsung's sponsorship of the ice rink outside the Marshall courthouse, and assume, for the sake of argument, that a court would treat this as commercial speech.⁴³¹ Samsung has been sued for patent infringement in E.D. Texas many times. Let's say that in one of those cases the plaintiff sought to enjoin Samsung from continuing to sponsor the ice rink because of the potential impact on prospective jurors, and Samsung objected on First Amendment grounds. How should the court rule?

Under *Central Hudson*, because Samsung's speech is not misleading or unlawful, the injunction should be granted only if it (1) "directly advances a substantial governmental interest" and (2) is narrowly "drawn to achieve that interest."⁴³² Starting with the first requirement, there is no doubt that the government has a substantial interest in safeguarding the right to an impartial jury. As the Supreme Court has held, when the Seventh Amendment guarantees a jury trial, that jury *must* be impartial.⁴³³ Since the founding of the nation, the right to an impartial jury has been considered fundamental to the justice system.⁴³⁴ Thus, the "substantial governmental interest" prong of the *Central Hudson* test is easily met.

428. See, e.g., Nguyen, *supra* note 294, at 111 (arguing that E.D. Texas is an "accessible and knowledgeable court with strong expertise in solving patent disputes").

429. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 748 (1976).

430. See *infra* text accompanying note 433.

431. See, e.g., Transp. Alts., Inc. v. City of New York, 218 F. Supp. 2d 423, 436–439 (S.D.N.Y. 2002) (concluding that the use of corporate trademarks to sponsor a nonprofit event was commercial speech). Of course, as *Tam* recognized, the use of trademarks may constitute noncommercial speech in some circumstances. See *supra* Section III.C.2.ii. Arguably, by sponsoring the ice rink, Samsung is not merely proposing a commercial transaction but is expressing its support for the Wonderland of Lights Festival and the Marshall community more generally.

432. Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011) (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

433. Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946).

434. See Baradaran, *supra* note 35, at 395.

That leads us to the next question—whether the injunction would be narrowly drawn to achieve that interest.⁴³⁵ The injunction would prevent Samsung from sponsoring the ice rink located right outside the courthouse. Samsung’s advertisement is a blatant attempt to influence decisions not just about purchases but about lawsuits too, since current or prospective jurors would see these ads as they come and go from court each day.⁴³⁶ This is completely antithetical to the Seventh Amendment’s guarantee of an impartial jury⁴³⁷ and contradicts the fundamental principle—and the usual jury instruction—that verdicts are to be based exclusively on the evidence presented at trial.⁴³⁸ Importantly, the injunction is not a blanket ban on speech but allows Samsung to advertise elsewhere in Marshall and sponsor other activities or events.⁴³⁹ The injunction, therefore, is likely to pass constitutional muster.

Now consider a second, more difficult hypothetical. In 2013, Johnson & Johnson (J&J) launched its “For All You Love” advertising campaign in order to redeem its reputation, which had taken a hit in recent years due to a slew of recalls and product liability lawsuits.⁴⁴⁰ J&J’s campaign was described in the *New York Times* as follows:

The cornerstone of the campaign, a 60-second black and white video, begins with a shot of a sleeping baby about to get a gentle kiss from its mother. In the background, a softer, almost childlike version of the Guns N’ Roses song, “Sweet Child O’ Mine” plays. “Love,” says a woman’s voice. “It’s the most powerful thing on the planet.” Happy clips from everyday life — a father bathing with his baby, a grandfather playing piano with his granddaughter and a teacher playing with her students — are seen during the spot, as is the occasional Johnson & Johnson product like Band-Aids and baby shampoo. “Love is family,” says the voice-over. “Love is the reason you care for the tiny and the fragile.”⁴⁴¹

435. *Central Hudson*, 447 U.S. at 564–65.

436. *See* Trager, Moriarty & Duncan, *supra* note 5, at 690 (“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.”).

437. *See Thiel*, 328 U.S. at 220.

438. *See, e.g.*, NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS: FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 47 (2017 ed.) (last updated June 2018) (“Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves.”).

439. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497–501 (1996) (explaining that the Court is much more suspicious of complete bans on commercial speech because “they all but foreclose alternative means of disseminating certain information”).

440. Rooney, *supra* note 181; Tanzina Vega, *Trying to Burnish Its Image, J.&J. Turns to Emotions*, N.Y. TIMES (Apr. 24, 2013), <https://www.nytimes.com/2013/04/25/business/media/trying-to-burnish-its-image-johnson-johnson-turns-to-emotions.html> [<https://perma.cc/RL5E-QGF2>].

441. Vega, *supra* note 440.

In short, the advertising campaign was a “manifesto about love” whose purpose was to tap into consumers’ emotions and “reconnect with all of the people who come into contact with J.&J. in their daily lives.”⁴⁴²

Assume, for purposes of discussion only, that J&J purchased extra advertising time and space in Philadelphia in order to saturate the city with the “For All You Love” campaign. The reason J&J stepped up efforts in Philadelphia was because thousands of Xarelto, Risperdal, and pelvic mesh cases had been filed against it in the CCP, and J&J hoped a large-scale image campaign would improve prospective jurors’ perceptions of the company.⁴⁴³ If, similar to the *Bowoto* case,⁴⁴⁴ plaintiffs asked the court to enjoin J&J from continuing its image campaign in Philadelphia because of possible jury bias, how should the court respond?

As an initial matter, the court would have to decide if “For All You Love” is commercial or noncommercial speech. Though image advertisements were deemed commercial by the California Supreme Court in *Kasky v. Nike, Inc.* and the Seventh Circuit in *Jordan v. Jewel Food Stores, Inc.*,⁴⁴⁵ the U.S. Supreme Court’s grant of certiorari in *Kasky* as well as its recent decision in *Tam* indicate that J&J’s speech might very well be treated as noncommercial.⁴⁴⁶ To be sure, some image advertisements are hard to differentiate from core political speech—Burger King’s recent net neutrality ad being an obvious example.⁴⁴⁷ Therefore, proceeding from the presumption that J&J’s speech is noncommercial, any restrictions will have to survive strict scrutiny, meaning they must be narrowly tailored to further a compelling government interest.⁴⁴⁸

The government’s interest in ensuring impartial juries is certainly substantial (as discussed above), and likely compelling as well.⁴⁴⁹ In every trial, the government’s interest is “to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner.”⁴⁵⁰ In our hypothetical tort case, for instance, the plaintiff and the government *both* have a compelling interest in empanelling impartial jurors free from undue influence by J&J’s extrajudicial speech.⁴⁵¹ As the Supreme Court

442. *Id.*

443. See Jef Feeley & Margaret Cronin Fisk, *J&J, Bayer Ordered to Pay \$28 Million in First Xarelto Loss*, BLOOMBERG (Dec. 5, 2017, 1:53 PM), <https://www.bloomberg.com/news/articles/2017-12-05/j-j-bayer-ordered-to-pay-29-million-in-first-loss-over-xarelto> [<https://perma.cc/NS5N-NL2Z>]; Mitchell, *supra* note 387; Katie Thomas, *J.&J. to Pay \$2.2 Billion in Risperdal Settlement*, N.Y. TIMES (Nov. 4, 2013), <https://www.nytimes.com/2013/11/05/business/johnson-johnson-to-settle-risperdal-improper-marketing-case.html> [<https://perma.cc/3AND-YGQA>].

444. *Bowoto* Transcript, *supra* note 130, at 13–14.

445. See *supra* Section III.C.

446. See *supra* Section III.C.

447. See Katie Reilly, *Allow Burger King’s New Ad to Explain Net Neutrality to You*, TIME (Jan. 25, 2018), <http://time.com/5117628/burger-king-whopper-net-neutrality-ad> [<https://perma.cc/YK9L-3J8F>].

448. See, e.g., *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

449. See *Batson v. Kentucky*, 476 U.S. 79, 125 (1986) (Burger, J., dissenting) (noting that the government’s interest in an impartial trial “has historically been regarded by this Court as substantial, if not compelling”); see also cases cited *supra* notes 432–433.

450. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 137 n.8 (1994).

451. *Id.*; *Georgia v. McCollum*, 505 U.S. 42, 56 (1992) (“Surely, a State suffers a similar

has said, “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.”⁴⁵² Simply put, J&J’s constitutionally protected right to free speech is counterbalanced by the equally, or perhaps more, important right to trial by impartial jury.⁴⁵³

Turning to the narrowly tailored prong of the test, the general rule is that the government must use the least restrictive means when regulating noncommercial speech based on content.⁴⁵⁴ Here, a restriction of J&J’s advertising campaign would arguably be content based because it’s directed to a particular speaker.⁴⁵⁵ In an attempt to meet the “least restrictive means” requirement, the court could issue an injunction narrow in geographic scope (e.g., only the area where prospective jurors were concentrated) and duration (e.g., only for a reasonable time before and during the trial). That said, content-based restrictions rarely withstand First Amendment scrutiny.⁴⁵⁶

Yet, there are two exceptions to the strict scrutiny requirement that may well permit the court to restrain J&J’s advertisement. First, there’s a good chance an injunction against J&J would not be treated as content based. In *Madsen v. Women’s Health Center, Inc.*,⁴⁵⁷ the Supreme Court held that an injunction is not content based simply because it targets a specific speaker.⁴⁵⁸ Instead, the Court adopted an intermediate-type test whereby an otherwise content-neutral injunction survives First Amendment scrutiny as long as it “burden[s] no more speech than necessary” to

injury [to that suffered by a defendant] when the fairness and integrity of its own judicial process is undermined.”); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 981 (1998) (identifying the government’s right to an impartial jury as a potentially compelling interest).

452. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

453. U.S. CONST. amend. VII.

454. Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1192 (2013) (“In order to protect against government discrimination among different messages, courts apply strict scrutiny to content-based laws” (footnote omitted)); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) (“A law is not narrowly tailored if there are less speech-restrictive means available that would serve the interest essentially as well as would the speech restriction.”).

455. *See Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 101 (1972) (“Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.”); Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1446 (2005) (“[S]crutiny tightens ‘with the extent to which a challenged provision relies on the identity of the speaker or the content of the covered speech.’”).

456. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”); Rienzi & Buck, *supra* note 454, at 1193 (stating that strict scrutiny test is “nearly impossible to satisfy”); James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 511–12 (1996) (“[T]he Court has made clear that the strict scrutiny test is longhand for an irrebuttable presumption against the constitutionality of the statute.”).

457. 512 U.S. 753 (1994).

458. *Id.* at 762–63.

protect the government interest.⁴⁵⁹ Applying that test, the *Madsen* Court upheld those portions of the disputed injunction that were appropriately tailored to achieve the government interest.⁴⁶⁰ In a similar vein, a court should be able to fashion an injunction against J&J that would satisfy the *Madsen* intermediate scrutiny test.

The second exception, which is less well-defined but has been recognized by Justices Kennedy and Breyer, allows for content-based restrictions when the government is trying to protect another constitutional right.⁴⁶¹ In Justice Kennedy's words, "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right."⁴⁶² Where another constitutional right is at stake, courts balance the competing interests instead of simply presuming the content-based restriction is unconstitutional.⁴⁶³ Following that approach here, the court would balance J&J's First Amendment speech rights against the Seventh Amendment right to an impartial jury and likely uphold a narrowly tailored injunction.

In some circumstances, however, courts may be unwilling to prohibit a party's speech due to First Amendment concerns. Thus, courts will have to look for alternative ways to curb attempts to influence potential jurors through image advertising. Allowing the issue to be explored through voir dire and pretrial discovery are two possibilities.

B. Voir Dire Regarding Attempts to Influence Jurors

Voir dire is the ordinary mechanism used to weed out biased jurors.⁴⁶⁴ Either the lawyers or the judge (or both) question prospective jurors to expose biases, thereby allowing peremptory challenges to be appropriately exercised.⁴⁶⁵ Theoretically, then, prospective jurors could be asked whether they knew Samsung sponsored the town's ice rink, or whether they had seen J&J's "For All You Love" advertisements. If the

459. *Id.* at 765; see also Daniel A. Farber, *Playing Favorites? Justice Scalia, Abortion Protests, and Judicial Impartiality*, 101 MINN. L. REV. HEADNOTES 23, 30 (2016); Weinstein, *supra* note 456, at 511–12.

460. *Madsen*, 512 U.S. at 768 (examining each provision of the injunction "to see if it burdens more speech than necessary to accomplish its goal").

461. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); *Burson v. Freeman*, 504 U.S. 191, 213–14 (1992) (Kennedy, J., concurring); see also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (recognizing that First Amendment analysis is more complicated because it involves "an impairment of some other constitutional right").

462. *Burson*, 504 U.S. at 213.

463. *Nixon*, 528 U.S. at 402; see also Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests – Section II*, 29 U.C. DAVIS L. REV. 1163, 1215 (1996) ("When the Court evaluates the constitutionality of restrictions on expression in the area surrounding medical clinics providing abortion services, it should take into account the fact that there are two rights at issue in these cases.").

464. See *supra* notes 73–75 and accompanying text.

465. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Turner v. Murray*, 476 U.S. 28, 40 (1986) (Brennan, J., concurring in part and dissenting in part).

answer is yes, then the lawyers would probe deeper to uncover any undue influence the image advertising may have had on those individuals.⁴⁶⁶

Conducting this type of voir dire is certainly better than doing nothing about image advertising in litigation “hot spots.” Still, there are significant shortcomings in relying exclusively on this approach to detect bias. Despite the key role voir dire is supposed to play in securing impartial juries, courts dedicate minimal time to it because of their busy dockets.⁴⁶⁷ In a Texas medical malpractice case, for example, plaintiffs unsuccessfully challenged the trial court’s decision to limit voir dire to one hour on the grounds that it “left them with insufficient time to develop the information necessary to insure a fair and impartial jury.”⁴⁶⁸ With so little time, and a lot of ground to cover, the impact of advertisements may simply not be a high priority.

The effectiveness of voir dire is not only limited by time constraints but process as well.⁴⁶⁹ Voir dire is regularly conducted by asking all members of the venire some general questions and then, based on responses, following up only with certain individuals. What researchers have discovered, however, is that group voir dire is often ineffective in getting potential jurors to tell their complete stories.⁴⁷⁰ While some people may intentionally withhold or misrepresent information, generally the explanation is more innocuous.⁴⁷¹ Perhaps the question was complicated or confusing, or maybe the panelist was reluctant to answer because she was embarrassed or concerned about privacy.⁴⁷² Whatever the explanation, voir dire often fails to elicit the type of information necessary to ensure impartiality.

Even assuming the court allots sufficient time for voir dire and puts robust procedures in place to allow for in depth probing of the panelists, it would be a real challenge to ferret out bias caused by advertising. Advertisements are designed to subconsciously persuade and generate a delayed response—that is, the advertiser hopes the listener/viewer will buy a product, vote for a candidate, or favor a party in a lawsuit at some later point in time.⁴⁷³ Yet the impact of advertising is purposefully subtle. Potential jurors may not be conscious of the fact that they saw Samsung’s logo at the ice rink or J&J’s image campaign on television; even if they do remember, chances are slim that they understand and appreciate the long-term effects of such ads.

466. See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003).

467. Jeffrey Bellin, *An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who “Refuses to Deliberate” Under Federal Rule of Criminal Procedure 23(b)(3)*, 36 U. MEM. L. REV. 631, 632 n.3 (2006).

468. *Odom v. Clark*, 215 S.W.3d 571, 574–75 (Tex. App. 2007).

469. Hans & Jehle, *supra* note 466, at 1182 (“[T]he structure of the voir dire does not facilitate the full disclosure of relevant information.”).

470. *Id.* at 1182–83.

471. *Id.* at 1182.

472. *Id.* at 1192–96.

473. Trager, Moriarty & Duncan, *supra* note 5, at 693.

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. 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.⁴⁷⁴

Yet advertising strategies and technologies have become much more sophisticated in recent years. Not only are advertising messages subtler than ever,⁴⁷⁵ targeted ads are delivered to consumers privately through social media, websites, and email.⁴⁷⁶ This makes it increasingly unlikely that voir dire will fully expose biases caused by advertising. Courts, therefore, must look for alternative ways to protect the constitutional right to an impartial jury.

C. Discovery Regarding Attempts to Influence Jurors

When a party suspects the opponent used image advertising to influence potential jurors, the court could allow discovery into the topic.⁴⁷⁷ In a case against Samsung in E.D. Texas, for example, the plaintiff might seek production of marketing materials and other communications concerning the company’s decision to sponsor the ice rink, grant scholarships to high school students, give out expensive prizes at local festivals, and other similar activities in Marshall.⁴⁷⁸ Although prospective jurors may not appreciate the impact of advertising,⁴⁷⁹ there is little doubt that the companies footing the bill for these expensive campaigns are well aware of the effect—or at least the desired effect—such advertisements will have on the audience.

Discovery into a party’s motive is commonplace in litigation. Sometimes, motive is an essential element of plaintiff’s claim, so discovery would obviously be appropriate in those situations.⁴⁸⁰ But even when motive is not an element of a claim or defense, it may still be subject to discovery—for instance, to show that a party

474. *Id.* at 701 (footnote omitted).

475. Eric N. Lindblom, *Effectively Regulating E-Cigarettes and Their Advertising—and the First Amendment*, 70 *FOOD & DRUG L.J.* 55, 88 (2015).

476. Christopher W. Savage, *Managing the Ambient Trust Commons: The Economics of Online Consumer Information Privacy*, 22 *STAN. TECH. L. REV.* 95, 150–51 (2019) (discussing how targeted advertising manipulates consumers). Because demographic markers predict who is more likely to serve on juries, *see, e.g.*, Jeremy W. Bock, *Does the Presumption of Validity Matter? An Experimental Assessment*, 49 *UNIV. RICH. L. REV.* 417, 432–33 (2015), the possibility that litigants will use targeted ads to influence potential jurors is real and worthy of further study.

477. *FED. R. CIV. P.* 26(b)(1) (broadly defining the scope of discovery to “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”).

478. *See supra* Section IV.B; *see also* Cohen & Guron, *supra* note 5, at 25–27 (arguing that the timing—i.e., immediately following the initiation of litigation—and nature—i.e., targeting individuals who are most likely to serve as jurors—of advertising efforts can influence litigation).

479. *See supra* Section V.B.

480. Title VII employment cases and civil rights actions under 42 U.S.C. § 1983 provide two examples of claims that include motive as an element.

acted in bad faith when filing a lawsuit or somehow tried to improperly influence the decision-maker.⁴⁸¹ Thus, plaintiffs in E.D. Texas should be able to prove that Samsung's motive behind its image advertisements is relevant for discovery purposes.

To be discoverable, however, information must also be unprivileged.⁴⁸² Would a party like Samsung claim that this type of marketing information was prepared "in anticipation of litigation" and is therefore protected by the work product doctrine?⁴⁸³ Probably not. Invoking the work product privilege in this situation would, for all intents and purposes, prove plaintiff's point: Samsung's marketing campaign was motivated by, and designed to influence, litigation outcomes. And even if Samsung claimed work product protection, a court would likely reject it. In point of fact, a very similar issue arose in *Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc.*, a toxic tort case in Madison County of all places.⁴⁸⁴ The defendant in that case retained a public relations firm that produced a report recommending, among other things, that the Madison County judicial system be characterized as a "judicial hellhole" that delivers "jackpot justice."⁴⁸⁵ During discovery, defendant refused to produce the report on grounds that it was protected work product. After an in camera review, the judge rejected defendant's claim and ordered production, concluding that the report "has nothing to do with trial strategy or the preparation of this case for trial . . . but much to do with fostering a negative public perception of our judicial system."⁴⁸⁶ Like the public relations report in *Syngenta*, materials regarding Samsung's marketing strategy in E.D. Texas would probably be subject to discovery.

CONCLUSION

The right to trial by a fair and impartial jury is a bedrock principle of our nation's justice system.⁴⁸⁷ The Constitution promises all litigants—including those in

481. See, e.g., Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYUL REV. 1, 8 (2001) (arguing that President Clinton had grounds for seeking discovery into the motives behind the Paula Jones lawsuit); Major Shields, *USALSA Report*, ARMY LAW., Mar. 2000, 35, 36 ("[T]he court may allow additional discovery if the opposing party proffers sufficient evidence to show bad faith [or] improper influence on the decision-maker.").

482. FED. R. CIV. P. 26(b)(1).

483. *Id.* 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . .").

484. See Renee Choy Ohlendorf, *Court Orders Production of "Judicial Hellhole" Public Relations Proposal*, ABA (June 28, 2011), http://apps.americanbar.org/litigation/litigationnews/top_stories/062811-public-relations-privilege-ethics.html [<https://perma.cc/3JKZ-PQHV>]; *Madison County Judge Discloses Syngenta PR Campaign to Create Negative Image of Courts as Defense Strategy*, BUSINESSWIRE (Apr. 20, 2011, 7:02 PM), <https://www.businesswire.com/news/home/20110420007183/en/Madison-County-Judge-Discloses-Syngenta-PR-Campaign> [<https://perma.cc/TP7E-WGEG>].

485. Ohlendorf, *supra* note 484.

486. *Id.*

487. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

litigation “hot spots”—that juries will decide cases based exclusively on the evidence presented at trial, not image advertisements whose purpose is to influence litigation outcomes. Any attempt to undermine that promise, even through constitutionally guarded speech, must be met with careful skepticism, tailored prevention, and appropriate procedural safeguards.