ARTICLES

A Map Out of the Personal Jurisdiction Labyrinth

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INTRODUCTION

The Supreme Court of the United States has held that the personal jurisdiction of state courts is limited by the Due Process Clause of the Fourteenth Amendment.[1] This should have freed state courts to exercise jurisdiction over nonresidents within the broad boundaries of civilized reasonableness.[2] Instead, as Justice Black protested against in his separate opinion in *International Shoe*,[3] the Supreme Court has added layer upon layer of complexity to the due process test for personal jurisdiction and has acted as though travel and communication have become more, rather than less, difficult.[4] As a result, the threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts,[5] and deference to the con-

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[1] *See infra* Part I; U.S. CONST. amend. XIV, § 1.

[2] *See* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 609 (1993) (stating that "jurisdictional limits based only on the rational basis test would be very minimal").

[3] International Shoe Co. v. Washington, 326 U.S. 310, 323 (1945) (opinion of Black, J.) (objecting that majority opinion "introduced uncertain elements . . . tending to curtail the exercise of State powers to an extent not justified by the Constitution").

[4] *See infra* Part I.

[5] On February 22, 1995, the following search of the ALLCASES database of Westlaw

venience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states.[6]

There are two ways to stem the flood of jurisdictional litigation. One solution is to dismantle the many barriers to personal jurisdiction erected under the supposed aegis of the Constitution and interfere only in the unlikely event that a state court has offended basic concepts of fairness to absent defendants.[7] The other way is to aim low, by legislating limits on jurisdiction that, although they require some local plaintiffs to seek nonresident defendants in distant forums, provide reasonable protection to forum residents and unquestionably meet constitutional standards.[8] Unfortunately, even this second strategy is not available without fundamental changes in Supreme Court doctrine. A good example of such legislation is the following long-arm tort provision of the Uniform Interstate and International Procedure Act:

> A court may exercise personal jurisdiction over a person . . . as to a cause of action . . . arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .[9]

Under this statute, even if there is blood on the ground caused by a product shipped into the forum[10] by the defendant seller,

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produced 2,321 cases decided since January 1, 1990: "minimum contacts" /p "jurisdiction" & date (after 1/1/90).

[6] *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 90 (1990) (stating that "many assertions of jurisdiction that are sensible and 'rational' do not pass muster under the minimum contacts test"); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 847 (1991) (stating that Court's notions of federalism, "instead of protecting the powers of the states, very often hamper states' attempts to effectuate their legitimate needs and interests in the modern era").

[7] *See infra* Part III (A).

[8] *See infra* Part III (B).

[9] UNIF. INTERSTATE AND INT'L PROC. ACT § 1.03(a)(4), 13 U.L.A. 361-62 (1962). This Act has been adopted in Arkansas, Massachusetts, Michigan, the District of Columbia and the Virgin Islands. *Id.* at 360-61. Pennsylvania adopted a broader version. *Id.*, Supp. 1994, at 82-83.

[10] The section does not require that the act or omission outside the state foreseeably cause tortious injury in the state, and this is one of its flaws.

that state eschews bringing the defendant to account unless one of the additional statutory requirements is met. What could be more reasonable?

Nevertheless, even a statute thus limited in scope might not pass constitutional muster. Indeed, "derives substantial revenue from goods used or consumed or services rendered, in this state" describes the Japanese component part maker in *Asahi Metal Industry v. Superior Court.*[11] This, however, was not enough for four members of the Court who would require that Asahi not only be able to foresee that its product would be sold in California in large numbers, but also that Asahi perform some "act purposefully directed toward the forum [s]tate."[12] This reduction of the "stream of commerce"[13] to a pathetic dribble has split the federal circuits, some following it as a "plurality" opinion,[14] some rejecting it as undesirable and not authoritative.[15]

The long-arm tort provision of the Uniform Act was the statutory text in issue in *World-Wide Volkswagen Corp. v. Woodson,*[16] but the statute's modest scope did not prevent the Supreme Court from holding its application unconstitutional. The Supreme Court of Oklahoma had found the statute's requirements

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[11] 480 U.S. 102, 107 (1987) (stating that informal survey of one cycle store in Solano County, where user's injury and death occurred and where suit was filed, found Asahi's trademark on 21 of 97 valve stems).

[12] *Id.* at 112 (O'Connor, J., joined by Rehnquist C.J., Powell and Scalia JJ.).

[13] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (dictum) (stating that "the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the steam of commerce with the expectation that they will be purchased by consumers in the forum State").

[14] *See, e.g.*, Boit v. Gar-Tec Prod., Inc., 967 F.2d 671, 683 (1st Cir. 1992) (citing cases from Eigth and Eleventh Circuits and holding that mere awareness that product may end up in forum state does not establish personal jurisdiction). *But see infra* note 15 for an Eight Circuit case rejecting the "plurality" opinion.

[15] *See* Ham v. La Cienga Music Co., 4 F.3d 413 (5th Cir. 1993) (noting that Fifth Circuit will continue to follow pre-*Asahi* cases absent rejection by Supreme Court majority); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 614 (8th Cir.) (regarding Justice O'Connor's opinion as minority view), *cert. denied*, 115 S. Ct. 359 (1994). A number of state courts have also rejected Justice O'Connor's view. *See* Showa Denko K.K. v. Pangle, 414 S.E.2d 658 (Ga. Ct. App. 1991), *cert. denied* (Ga. 1992); Cox v. Hozelock, Ltd., 411 S.E.2d 640 (N.C. Ct. App.), *review denied*, 414 S.E.2d 752 (N.C.), *cert. denied*, 113 S. Ct. 78 (1992); Hill v. Showa Denko K.K., 425 S.E.2d 609 (W. Va. 1992), *cert. denied*, 113 S. Ct. 2338 (1993).

[16] 444 U.S. 286, 290 n.7 (1980).

met on the ground that it was reasonable to infer, given the automobile's retail value, that the New York dealer and Northeast distributor derive substantial income from automobiles that are used in Oklahoma.[17] The majority in *Volkswagen* labeled this inference "less than compelling"[18] and in any event insufficient, because "financial benefits accruing to the defendant from a collateral relation to the forum [s]tate will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that [s]tate."[19]

The purpose of this Article is to map a path out of the personal jurisdictional labyrinth that the Supreme Court has constructed. Part I sketches the major doctrinal developments that added layer upon layer of complexity to personal jurisdiction jurisprudence.[20] Part II then discusses some frequently litigated fact patterns to illustrate the current chaos resulting from the Court's efforts.[21] Finally, Part III maps two paths for reducing the volume of litigation of the threshold issue of personal jurisdiction.[22] The shorter, but more hazardous, way obliterates state lines and focuses directly on fairness to the defendant.[23] The more conservative route suggests doctrinal changes to accommodate forum and plaintiff interests, while providing fairness to the defendant and reducing litigation of jurisdictional issues.[24]

I. CONSTRUCTING THE LABYRINTH

International Shoe Co. v. Washington[25] combined both boldness and caution in providing a substitute for a theory of personal jurisdiction that depended on physical power over the defendant.[26] Fumbling attempts to justify jurisdiction by fictions of

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[17] *Id.* at 290.

[18] *Id.* at 298.

[19] *Id.* at 299.

[20] *See infra* Part I.

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] *See infra* Part III(A).

[24] *See infra* Part III(B).

[25] 326 U.S. 310 (1945).

[26] *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1878) (stating that valid personal judgment could be rendered against nonresident by state court only if defendant is "brought within its jurisdiction by service of process within the State, or his voluntary appearance").

"presence" or "consent" were repudiated[27] and replaced by a new approach based on the requirement that the defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[28] The Court shied away, however, from stating that forum contacts were sufficient for jurisdiction whenever the cause of action arose out of those contacts. Instead, the Court said "so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, *in most instances*, hardly be said to be undue."[29] Thus, exceptions might exist. Further, jurisdiction over the shoe company to recover delinquent contributions to the state's unemployment compensation fund was justified not only by the fact that defendant's obligations "arose out of" the company's forum contacts, but also by the "systematic and continuous" nature of those contacts.[30]

McGee v. International Life Insurance,[31] the high-water mark of personal jurisdiction, permitted a California court to exercise jurisdiction over a Texas insurer in a suit on the only policy that the defendant had ever issued or solicited in California. The Court noted a development it has since frequently overlooked — improvements in transportation and communication that "have made it much less burdensome for a party sued to defend himself in a [s]tate where he engages in economic activity."[32]

Only a year later, in *Hanson v. Denckla*,[33] the tide began to ebb. The Court held that Florida did not have jurisdiction over a Delaware trustee who had received and acted on instructions mailed from Florida by the settlor of the trust and who had remitted trust income to the settlor in Florida. Jurisdiction could not be based on the "unilateral activity" of the plaintiff but must result from "some act by which the defendant purposefully avails

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[27] *See International Shoe*, 326 U.S. at 316-18 (rejecting presence and consent tests for jurisdiction over corporations).

[28] *Id.* at 316.

[29] *Id.* at 319 (emphasis added).

[30] *Id.* at 320.

[31] 355 U.S. 220 (1957).

[32] *Id.* at 223.

[33] 357 U.S. 235 (1958).

itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its law."[34] *Hanson* also proclaimed a proposition that defied common sense — that a contact with a state sufficient to make it reasonable for that state to apply its law to the defendant was not necessarily sufficient to permit exercise of personal jurisdiction over the defendant.[35] In future decisions, repetition of this concept invariably signaled the least cogent passage in the opinion.[36]

World-Wide Volkswagen Corp. v. Woodson[37] contained elements that both aided and impeded the reasonable exercise of jurisdiction over nonresidents. On the plus side, the opinion approved of a "stream of commerce" basis for jurisdiction over those in the chain of product distribution if they could expect that chain to stretch to the forum.[38] An important impediment to jurisdictional reform was Justice White's emphasis on the states' "status as coequal sovereigns in a federal system"[39] as a reason for requiring "'minimum contacts' between the defendant and the forum State."[40] According to Justice White, jurisdictional doctrine had to be constructed not only to assure fairness to defendants, but also to serve considerations of federalism.[41] Thus, state lines were invisible but formidable barriers to basic change.

The United States Supreme Court has alternately embraced and rejected this notion that states' rights play a significant role in interstate jurisdiction to adjudicate.[42] Ironically, two and a

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[34] *Id.* at 253.

[35] *Id.*

[36] *See* Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977); Kulko v. Superior Ct., 436 U.S. 84, 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980); Rush v. Savchuk, 444 U.S. 320, 325 n.8 (1980); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984).

[37] 444 U.S. 286 (1980).

[38] *Id.* at 297-98.

[39] *Id.* at 292.

[40] *Id.* at 291.

[41] *Id.* at 293.

[42] *See* Borchers, *supra* note 6, at 78; Richman, *supra* note 2, at 610. Professor Borchers lists Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-15 (1987) as a final acceptance of sovereignty concerns, but Professor Richman omits this from his list. The cited passage in *Asahi* extols the virtues of systemic efficiency and the desirability of avoiding offense to foreign countries by the exercise of jurisdiction over their citizens that would be condemned as exorbitant. The Court further states that "the interests of the 'several States'" as well as of foreign countries "are affected by the assertion of jurisdiction by" a state court. *Asahi*, 480 U.S. at 115. Whichever view is taken of this passage, it is a milder

half years after *Volkswagen*, Justice White moderated his own statement concerning federalism. He wrote for the Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[43] which held it proper to shift the burden of proof on jurisdiction to the defendant as a sanction for refusal to obey discovery orders related to that issue.[44] Justice White quoted from *Volkswagen* his own paean to federalism, but then stated that any restrictions on judicial jurisdiction "must be seen as ultimately a function of the individual liberty interest [because] if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement"[45] as the defendant had waived its right to have plaintiff bear the burden of proof on jurisdiction.

Helicopteros Nacionales de Colombia, S.A. v. Hall[46] imposes substantial limitations on the exercise of general jurisdiction.[47] The majority held that although the defendant, over a period of eight years, had purchased eighty percent of its helicopter fleet in Texas and had conducted other commercial transactions in Texas, these transactions did not "constitute the kind of continuous and systematic general business contacts"[48] necessary for exercise of jurisdiction in a suit for wrongful death caused by a crash in Peru. Following the lead of an amicus brief submitted by the Solicitor General, Justice Blackmun resurrected and found controlling *Rosenberg Bros. & Co. v. Curtis Brown Co.*[49]

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expression of federalism concerns than the explicit passage in *Volkswagen*.

[43] 456 U.S. 694 (1982).

[44] *Id.* at 708.

[45] *Id.* at 702 n.10.

[46] 466 U.S. 408 (1984).

[47] "General jurisdiction" refers to jurisdiction "over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9. "Specific jurisdiction" refers to "jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.8.

[48] *Id.* at 416.

[49] 260 U.S. 516 (1923). The United States, as amicus curiae, urged the court to follow *Rosenberg Bros.* Brief for the United States as Amicus Curiae at 5-6, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (No. 82-1127). The brief also argued that exercising general jurisdiction over foreign companies based on their purchase of equipment and training in the use of the equipment would discourage trade with United States sellers. *Id.* at 6.

The Court decided *Rosenberg Bros.* twenty-two years before *International Shoe* and denied jurisdiction because the defendant, who was being sued to recover the price of goods ordered in person from the seller in the forum,[50] was not "present" in the forum.[51] As a further indication of how useless *Rosenberg Bros.* is as a modern precedent, that opinion concludes: "as [defendant] was not found there, the fact that the alleged cause of action arose in New York is immaterial."[52] Justice Blackmun states that *International Shoe* acknowledged and did not repudiate the holding in *Rosenberg*.[53] On the contrary, *International Shoe* cites *Rosenberg* as an example of the confusion resulting from the "presence" and "consent" fictions, forges a new paradigm for determining jurisdiction, and then makes the following statement directly contradicting the concluding sentence in *Rosenberg*: "so far as . . . obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[54]

Burger King Corp. v. Rudzewicz[55] upheld specific jurisdiction at the principal place of business of the franchiser in a suit seeking injunctive and monetary relief against a terminated Michigan franchisee. In the course of his opinion for the Court, Justice Brennan inserts a fateful dictum. Quoting from Justice White's opinion in *Volkswagen*, Justice Brennan recites the five factors[56] that provide the basis for the holding in *Asahi Metal Industry v. Superior Court*.[57] He indicates that these factors may push the constitutional determination of jurisdiction either way in close cases. They "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than

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[50] Brief for Plaintiff in Error at 2-3, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

[51] *Rosenberg Bros.*, 260 U.S. at 517.

[52] *Id.* at 518.

[53] *Helicopteros*, 466 U.S. at 418.

[54] International Shoe Co. V. Washington, 326 U.S. 310, 319 (1945).

[55] 471 U.S. 462 (1985).

[56] *Id.* at 477.

[57] *See infra* note 63 and accompanying text (setting forth five *Asahi* factors).

would otherwise be required,"[58] but they also "may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."[59]

Justice Brennan's prophecy was fulfilled in *Asahi Metal Industry v. Superior Court*.[60] In *Asahi*, the Court held a Japanese component part maker immune from jurisdiction in California where a defect in the part had put blood upon the ground and where the manufacturer of the finished product had settled the resulting claims for injury and death and was seeking indemnity and contribution. Eight Justices joined in that part of Justice O'Connor's opinion holding that even if Asahi's ability to foresee that its defective part might reach and cause injury in California established Asahi's "minimum contacts"[61] there, the five factors that Justice Brennan had quoted made the exercise of jurisdiction over Asahi "unreasonable and unfair."[62] The now famous *Asahi* factors are: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.[63] Thus, concepts usually associated with the discretionary doctrine of forum non conveniens[64] were elevated to constitutional status. In his concurrence, Justice Brennan agreed that this was "one of those rare cases"[65] in which the five factors trumped minimum contacts. Far from rare, however, the *Asahi* list will come to be examined in stupefying detail in almost all future lower court cases determining

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[58] *Burger King*, 471 U.S. at 477.

[59] *Id.* at 478.

[60] 480 U.S. 102 (1987).

[61] *Id.* at 114.

[62] *Id.* at 116.

[63] *Id.* at 113. The case also produced four votes to restrict the stream-of-commerce basis for establishing minimum contacts so that even the injured California users could not have gotten jurisdiction over Asahi. *See supra* notes 12-15 and accompanying text (discussing *Asahi*'s impact on stream-of-commerce basis).

[64] Under the doctrine of forum non conveniens, a court may decline to exercise its jurisdiction if the court finds that it is a seriously inconvenient forum and that the interests of the parties, or of the public, or both, will be best served by remitting the plaintiff to another, more convenient, forum that is available. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[65] *Asahi*, 480 U.S. at 116.

jurisdiction to adjudicate. The cost in time, money, and trees, has been enormous.[66]

Thus the scene is set for examining what these decisions have wrought. A typical distillation of their effect produces a tri-partite test for specific jurisdiction: (1) the defendant must purposefully avail itself of the privilege of conducting activities in the forum; (2) the cause of action must arise out of these activities; and (3) the exercise of jurisdiction must also be reasonable under the *Asahi* factors.[67] It is a commonplace that the results of this analysis are fact driven; minor changes in circumstances can change the result.[68] That alone would make prediction in a particular case difficult, but the task is even more formidable because courts cannot agree on which facts matter. A court surveying decisions on a specific recurring jurisdictional issue is likely to find "the case law in a muddle."[69] The following section will illustrate this.

II. GROPING IN THE LABYRINTH

This Part focuses on three common fact patterns to illustrate the chaotic state of adjudicating personal jurisdiction: suits between merchant buyers and merchant sellers; suits by injured vacationers against hotels and resorts; and defamation by telephone. Many other recurring patterns could have been chosen.[70]

A. Suits Between Merchant Buyers and Merchant Sellers

In *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*,[71] the Seventh Circuit held that the fabricator of steel struc-

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[66] *See infra* part II.

[67] *See, e.g.*, Payne v. Motorists' Mut. Ins. Co., 4 F.3d 452, 455 (6th Cir. 1993) (setting forth three-part test for personal jurisdiction in absence of continuous contact between defendant and forum).

[68] *See* Madara v. Hall, 916 F.2d 1510, 1515 (11th Cir. 1990) (stating that satisfaction of a long-arm statute's requirements will not necessarily satisfy due process "because each case will depend upon the facts").

[69] Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 208 (1st Cir. 1994).

[70] *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 173-74 n. 61 (3d ed. 1986); *id.* at 46-47 (Supp. 1991) (suits against doctors, hospitals, educational institutions, and lawyers).

[71] 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

tural assemblies could not obtain jurisdiction in its home state to sue the buyer for the unpaid purchase price. When the United States Supreme Court denied certiorari, Justice White, joined by Justice Powell, took the unusual step of publishing a dissent from the denial:

> [T]he question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. Cases arguably in conflict with the decision below include [full-page string citation omitted]. The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different [s]tates. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. This disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question.[72]

Amen, and the situation has not gotten any better.

For example, a lawyer who is familiar with the cases in the area will, if representing a seller, ask his client a series of questions. "Were the goods a catalogue item or custom made?"[73] "Did a representative of the buyer come here to negotiate the contract or supervise manufacture?"[74] "Did you solicit the sale or did the buyer contact you first?"[75] "Did the contract require manufacture in this state"?[76] "Has the buyer purchased from you before?"[77] Then, in the light of the conflicting treatment

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[72] 445 U.S. at 909-11.

[73] *See* Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981), *cert. denied*, 455 U.S. 994 (1982) (upholding jurisdiction over buyer who ordered customized printing and binding). *But see* Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984) (denying jurisdiction over buyer of custom-made product).

[74] *See* Dahlberg Co. v. Western Hearing Aid Ctr., 107 N.W.2d 381 (Minn.), *cert. denied*, 366 U.S. 961 (1961) (asserting jurisdiction over buyer who came to forum to negotiate and sign sales contract).

[75] *See* Al-Jon, Inc. v. Garden St. Iron & Metal, Inc., 301 N.W.2d 709 (Iowa 1981) (holding no jurisdiction over buyer solicited by seller).

[76] *Cf.* Premier Corp. v. Newsom, 620 F.2d 219 (10th Cir. 1980) (holding no jurisdiction in suit for payment for tax-shelter services performed in forum when contract did not require performance there).

[77] *See* Mississippi Interstate Express v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982) (upholding jurisdiction when there has been sustained relationship between parties). *But see* Dent-Air, Inc. v. Beech Mountain Air Serv., 332 N.W.2d 904 (Minn. 1983) (denying jurisdiction in suit by lessor for breach of plane rental agreements although three leases

these elements have received in the cases, the best the lawyer can do will be to give his client a rough estimate of the probability of success in obtaining jurisdiction.[78]

B. Injuries at Hotels and Resorts

Vacationer, a resident of F, attracted by local advertisements for a distant vacation paradise, makes reservations for accommodations. The reservations are either made directly by Vacationer or by Vacationer's travel agent. The holiday turns into a nightmare when Vacationer is injured because of the negligence of the company providing the accommodations. Home and mending, Vacationer's thoughts turn to compensation. Do the courts in Vacationer's home state have jurisdiction over the hotel, resort, or cruise line?

This issue is repeatedly litigated in our courts. The vacation cases illustrate as well as any other group the uncertainty and confusion that are the legacy of the Supreme Court's jurisdiction decisions. One would expect that a study of cases from different states narrowly focused on the same issue and fact pattern would yield sure guides to predicting the outcome of a jurisdictional challenge. Instead the cases reveal conflicting results and analyses.

A major issue on which the cases differ is whether the negligent injury at the distant vacation spot "arises out of" the local promotional activities that induced the victim's visit. This was one of the issues in *Carnival Cruise Lines, Inc. v. Shute*[79] that the Court did not reach when it held that the tort suit in the

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were executed between parties and although choice-of-law clause in leases chose forum law).

[78] Five years after certiorari was denied to its decision in *Lakeside Bridge*, *see supra* notes 71-72 and accompanying text, the Seventh Circuit expressed its own frustration with the issue:

> Now, one would think that in a rational system . . . experienced lawyers could simply and with conviction unanimously answer [the merchant buyer's question whether it can get jurisdiction over its merchant seller]. But alas we know, to our embarrassment, that the only honest answer the lawyer can probably give is "Gee, I can't say for sure."

Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 216 (7th Cir. 1985).

[79] 499 U.S. 585 (1991).

vacationers' forum was barred by a forum selection clause.[80] Below, the Ninth Circuit found the forum selection clause "unenforceable"[81] and thus the jurisdictional issue was dispositive. The circuit court held that the Washington couple could obtain jurisdiction over the cruise line at home because "a tort can arise from prior business solicitation in the forum state"[82] and approved of decisions that "apply a 'but for' test of causality in this type of situation."[83] In other words, the plaintiffs would not have gone on the cruise, and Mrs. Shute would not have slipped on a deck mat "but for" the defendant's solicitations of business from Washington residents. The court rejected opinions from the First, Second, and Eighth Circuits that had held that negligent injuries elsewhere did not "arise out of" solicitation of forum vacationers.[84] Decisions in state courts have reflected this split in the federal circuits concerning the "but for, arising out of" argument.[85]

Some of the resort cases have based their jurisdictional findings on other issues. A Texas federal district court held that a suit against a New Mexico ski resort for a fall on hotel stairs did not arise out of the defendant's Texas activities, which included solicitation of business,[86] but then pushed the general jurisdiction envelope and found that the solicitations plus other contacts with Texas were sufficiently "continuous and systematic" to exercise jurisdiction.[87] A Seventh Circuit court upheld jurisdic-

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[80] *See id.* at 595.

[81] Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 499 U.S. 585 (1991).

[82] 897 F.2d at 384.

[83] *Id.*

[84] *See id.* at 383 (rejecting "stringent standard of causation").

[85] *See* Tatro v. Manor Care, Inc., 625 N.E.2d 549, 554 (Mass. 1994) (accepting "but for" test in suit against hotel); Munley v. Second Judicial Dist. Ct., 761 P.2d 414, 415 (Nev. 1988) (holding no jurisdiction over ski resort because injury there did not "arise out of" forum solicitations); State *ex rel.* Circus Circus Reno, Inc. v. Pope, 854 P.2d 461, 466 (Or. 1993) (rejecting Ninth Circuit's "but for" test and finding no jurisdiction over resort). For an argument that a "but for" test would have provided specific jurisdiction in *Helicopteros*, see David E. Seidelson, *Recasting* World-Wide Volkswagen *As a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 27 n.105 (1983).

[86] Kervin v. Red River Ski Area, Inc., 711 F. Supp. 1383, 1389-90 (E.D. Tex. 1989).

[87] *Id.* at 1392. The other Texas contacts were that four of defendant's five shareholders resided in Texas; defendant was originally incorporated in Texas before dissolving and reincorporating in New Mexico; recruiting ski instructors from Texas; having its brochures printed in Texas; employing a Texas accountant, and; drawing approximately 47% of its

tion over a Cayman Island hotel without reaching the "arising out of" issue, perhaps assisted by the fact that the complaint pleaded not only negligence, but also breach of express and implied warranties, and breach of contract.[88]

C. Defamation Over the Telephone

Reporter from a newspaper in F telephones Bigmouth, who lives in another state, to solicit information about Victim, an F resident. Bigmouth makes statements that defame Victim and appear in Reporter's article published in the newspaper in F. Victim sues Bigmouth in F for defamation and Bigmouth contests jurisdiction. What result?

Ticketmaster-New York, Inc. v. Alioto[89] recently surveyed the case law and predictably found it "in a muddle."[90] The cases seemed to be reasonably consistent in holding that when "the source of an allegedly defamatory remark did not initiate the pivotal contact, and the in-forum injury is not reasonably foreseeable, jurisdiction may not be asserted."[91] Jurisdiction usually was available in the converse situation, when the defendant initiated the contact with the reporter and caused foreseeable injury in the forum.[92] The case before the court, however, fell "between the stools"[93] — the reporter made the call and the defendant's response caused foreseeable injury in the forum.

In similar cases, the court found the results conflicting, some courts taking jurisdiction, some not, some treating the fact that the defendant did not initiate the contact as dispositive, some not even discussing this element.[94] *Ticketmaster* held that jurisdiction could not be asserted and, significantly, found the *Asahi*

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clientele from Texas. *Id.* at 1388. At the opposite extreme, the Michigan Supreme Court has held that an advertisement in an American Automobile Association guidebook "does not by itself, constitute 'purposeful availment' of the forum state." Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 445 (Mich. 1987) (concluding that ruling otherwise would subject every advertiser to jurisdiction in each state where advertisement appeared).

[88] Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1241, 1244 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

[89] 26 F.3d 201 (1st Cir. 1994).

[90] *Id.* at 208.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

reasonableness factors[95] controlling, stating that these factors should be used not rarely, but frequently, to defeat jurisdiction.[96] Such a holding guarantees that in these telephone-defamation cases in which the defendant does not initiate the contact, the result will remain unpredictable, turning on the circumstances of each case. In *Ticketmaster*, the court was influenced by its suspicion that suit was brought in Massachusetts to harass Alioto, a California lawyer who was bringing a class action there against a company affiliated with the plaintiff.[97]

III. A MAP OUT OF THE LABYRINTH

As illustrated in Part II, the issue of the due process limits of state-court jurisdiction not only is one of the most frequently litigated issues on the civil side of the docket, but also repeated litigation of the same fact pattern does not increase predictability. Courts cannot agree on how specific facts should influence the result. This Part suggests two methods for reducing the volume of jurisdictional decisions and for increasing predictability.

A. Fairness Without Contacts

In suits by United States plaintiffs against United States defendants, the best way to stem the flood of litigation over personal jurisdiction is to regard due process as requiring only that the forum have some rational basis for wishing to decide the case — either because the plaintiff resides in the forum state or because the defendant acted or caused consequences there, or both. Provision also should be made for easy transfer to a more appropriate forum if the defendant makes a cogent showing of unfairness in plaintiff's chosen forum. This has been the system in another federal nation, Australia, since 1987.[98]

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[95] *See supra* note 63 and accompanying text (setting forth five *Asahi* factors).

[96] *Ticketmaster*, 26 F.3d at 209-10.

[97] *Id.* at 211 (noting that reporter and newspaper were not sued and that Massachusetts forum does not permit recovery of punitive damages).

[98] *See* AUSTL. ACTS P., Jurisdiction of Courts (Cross-Vesting) Act 1987 (No. 24):

> WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable . . . to establish a system of cross-vesting of jurisdiction

The two factors most likely to make suit in an interested forum unfair to the defendant are the forum's choice-of-law rule and serious inconvenience to the defendant. If the forum's sole nexus is the plaintiff's residence, it would be unfair to the defendant to allow suit there if this would result in choosing law less favorable to the defendant than would be chosen in all states that have contacts with both the parties and the transaction.[99] The defendant should be protected against lunatic choice-of-law rules, such as the now abrogated Mississippi rule that regarded its tort statute of limitations, longest in the nation, as "procedural."[100] It might be thought preferable to attack fairness in choice of law directly by constitutional rules ad-

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between those courts . . . and . . . if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court.

BE IT THEREFORE ENACTED . . .

§ 4(2): Where (a) the Supreme Court of a Territory has jurisdiction with respect to a civil matter . . . and (b) . . . the Supreme Court of a State or of another Territory would not, apart from this section, have jurisdiction with respect to that matter, jurisdiction is conferred on the court . . . .

§ 5(2): Where (a) a proceeding . . . is pending in the Supreme Court of a State or Territory . . . and (b) it appears . . . that . . . (iii) it is otherwise in the interests of justice that the . . . proceeding be determined by the Supreme Court of another State or Territory, the . . . court shall transfer the . . . proceeding to that other Supreme Court.

Cf. UNIF. TRANSFER OF LITIG. ACT § 103, 14 U.L.A. 115 (Supp. 1994) (providing for transfer from state court that lacks personal jurisdiction to court of another state that has jurisdiction).

[99] For the view that jurisdiction should depend upon the propriety of the forum's applying its own law, see Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There is No Law But Forum Law*, 28 VAL. U. L. REV. 1, 8 (1993); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 256 (1991). For disapproval of adding choice of law to the jurisdictional calculus, see Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 589 (1991) (stating that "the complexity of comparing the relative choice-of-law analyses of the competing courts undermines the very reason for a nationwide rule in the first place").

[100] Mississippi was a target forum because it had a six-year tort limitations period and regarded limitations as procedural, so that the Mississippi period applied to any suit brought in Mississippi, even though the injury occurred in a state with a shorter period that had run before suit in Mississippi. *See* Ferens v. John Deere Co., 494 U.S. 516 (1990). Mississippi has shortened its tort limitations to three years, MISS. CODE ANN. § 15-1-49 (Supp. 1994), and has passed a "borrowing" statute that applies the shorter statute of limitations of the place where the cause of action "accrued" if the plaintiff is not a Mississippi resident, MISS. CODE ANN. § 15-1-65 (Supp. 1994).

dressed to that issue. But do we really want the folks who have made such a mess of jurisdiction, which is easy, to try their hand at choice of law, which is hard? It is probably just as well that the Supreme Court allows states to do pretty much what they will with choice of law, so long as they do not do it in the street and scare the horses.[101] If only the Court would take the same view of jurisdiction.

As for inconvenience to the defendant, this attack on jurisdiction would be reserved primarily for individuals or mom and pop operations that do not customarily engage in interstate transactions and who are the real parties in interest, not nominal parties defended and indemnified by an interstate insurer. Inconvenience to a defendant might consist of distance that she must travel, difficulties of proof that will not be encountered in another available forum, or factors, such as physical handicap or employment, that make especially onerous the additional time and travel necessary to litigate at a distance from the defendant's home.

With regard to all aspects of the fairness attack on jurisdiction, it should be made clear that, with the exception of individuals and small enterprises, the burden on the defendant will be heavy. Unless a compelling showing is made, jurisdiction exists in an interested forum. We must avoid a "mini-trial" on the jurisdictional issue.[102]

For defendants residing or headquartered abroad, a decent respect for friendly foreign countries requires that the defendant have some contact with the United States, not with any individual state, that makes it reasonable under the circumstances to order the foreigner to appear and defend here. The idea of focusing on nationwide contacts has received limited and halting recognition in Federal Rule of Civil Procedure 4(k)(2),[103]

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[101] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

[102] *See* Bruce Posnak, *The Court Doesn't Know Its* Asahi *from Its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 896 (1990) (stating that considering such matters as the forum's interest, choice of law, and convenience to the defendant "would often consume more time and resources than the trial on the merits").

[103] FED R. CIV. P. 4(k)(2) provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective,

which took effect on December 1, 1993. For federal law claims, that rule permits accumulating national contacts, but does it in a bizarre manner. As a condition precedent, the defendant must "not [be] subject to the jurisdiction of the courts of general jurisdiction of any state."[104] Thus the plaintiff is in the position of contending that it could not get jurisdiction over the defendant in a state court, and the defendant is in the posture of saying "yes you could." This role reversal apparently results from following Justice Blackmun's drafting advice in *Omni Capital International v. Rudolf Wolff & Co.*[105]

The suggestion that plaintiffs be given greatly expanded rights to sue in their home forums is intended for simple one-on-one suits. Mass litigation raises different problems. Even with current limits on jurisdiction to adjudicate there is plenty of evidence of skillful plaintiffs' attorneys compelling defendants to litigate against hordes of nonresident plaintiffs in distant and hostile forums. A classic example is the securities fraud case now pending in one of the least populated Texas counties.[106] Venue there is based on the residence of only one of the more than 2,000 plaintiffs from all over the country.[107] As one of the judges on the San Antonio Court of Appeals wrote while helplessly concurring in the denial of the defendants' petition for mandamus: "Allowing these cases to proceed will make foreign litigation a growth industry in South Texas. We will preside over a prime forum of choice for major litigation with national impact, but with little connection to our region. Searching for a South Texas victim will become *de rigueur*."[108]

In order to accomplish such a thoroughgoing change in jurisdictional doctrine, we will have to reject once and for all the

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with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

[104] *Id.*

[105] 484 U.S. 97, 111 (1987) (suggesting "[a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute . . . .").

[106] *See* Polaris Inv. Management Corp. v. Abascal, 890 S.W.2d 486 (Tex. Ct. App. 1994); *see also* Polaris Inv. Management Corp. v. Abascal, 1995 WL 64106 (Tex. 1995) (denying writ of mandamus).

[107] *Polaris*, 890 S.W.2d at 488.

[108] *Id.* at 489 (Rickhoff, J.).

notion that state sovereignty and state lines are important constants in the due process calculus.[109] This will be a wrench, and reasonable people differ as to whether it is desirable or feasible.[110]

Phillips Petroleum Co. v. Shutts[111] held that nonresident class members, although without forum contacts, may be bound if they receive mailed notice of the action and do not elect to opt out. The Court concluded that, in the light of the protection of nonresident plaintiffs' interest by the forum court and by the named plaintiffs,[112] and in consideration of the ability to opt out,[113] or "sit back and allow the litigation to run its course,"[114] "[s]tates place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, [and therefore] the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter."[115] Ah, but what about those state lines? If they can be ignored in one context in which there is a cogent argument that there is no unfairness to the affected party, can they be ignored in others?[116]

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[109] *See supra* notes 42-45 and accompanying text (discussing role of states' rights in jurisdictional calculus).

[110] *See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 269 (1990) (stating that the key to state court jurisdiction to adjudicate is "the meaning of interstate federalism"); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18-19 (1989) (stating that whether or not it is wise to permit concepts of state sovereignty to control jurisdictional doctrine, its "recognition is mandated by history and can be refused only if the concept of a nation of states is abrogated by constitutional amendment"); James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 60 (1992) (stating that "since states are territorially defined, the measure of the legitimacy of a state's assertion of authority over an individual should reflect this territoriality").

[111] 472 U.S. 797 (1985).

[112] *Id.* at 809.

[113] *Id.* at 810.

[114] *Id.*

[115] *Id.* at 811.

[116] *See* Mark C. Weber, *Purposeful Availment*, 39 S. CAL. L. REV. 815, 864 (1988) (stating that "the *Shutts* opinion does not seem to have had much impact" on other contexts of territorial jurisdiction).

B. Modest Proposals

If we are not able to adopt a system of nationwide jurisdiction for interstate cases, the second-best method of stemming the flood of litigation over jurisdiction is to modify existing doctrine sufficiently to eliminate major points of contention while preserving fairness to defendants. After appraising the European Union Convention on Jurisdiction and Enforcement of Judgments[117] (Brussels Convention) as a possible model for reform, the discussion below makes recommendations on the major issues that have to be confronted in any attempt at reform.

1. The Brussels Convention

Leading United States scholars have examined the Brussels Convention as a possible model for reform of United States jurisdictional doctrine.[118] Certainly it would be foolhardy not to profit from the counsel of our European friends. If the Convention had been in place here, some of the most adversely criticized jurisdictional decisions of the United States Supreme Court would have come out differently.

Asahi[119] is probably the most notable example. The Brussels Convention permits jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred."[120] "Where the harmful event occurred" has been construed by the Court of Justice of the European Communities as referring to either "the place where the damages occurred or . . . the place of the event which gives rise to and is at the origin of that damage."[121] Article 6(2) permits impleading "a

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[117] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 33 Official J. E.C. 189, July 28, 1990, 1-34, *reprinted in* 29 I.L.M. 1413 [hereafter Convention].

[118] *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 17-18 (1993).

[119] Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987); *see supra* notes 11-15, 60-66 and accompanying text (discussing *Asahi*).

[120] Convention, *supra* note 117, art. 5(3).

[121] *See* Handelskwekerij G.J Bier v. Mines de Potasse d' Alsace, [1977] 1 C.M.L.R. 284, [1976] E. Comm. Ct. J. Rep. 1735 (holding that Netherlands horticultural company could bring suit in Netherlands for damages to its seedbeds there caused by defendant's alleged

third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing [the third-party defendant] from the jurisdiction of the court which would be competent in [the third-party defendant's] case."[122] Thus there would be no doubt that Asahi could have been sued in California for injury and death caused by its product and that Cheng Shin could implead it there for contribution and indemnity.

Carnival Cruise Lines[123] enforced a forum selection clause inserted as the eighth of twenty-five "terms and conditions" on a ticket. The Brussels Convention provides wide scope for the parties to an agreement to select an exclusive forum for litigation of disputes that may arise between them.[124] Our brethren abroad have more sense, however, than to extend this freedom to consumer contracts. Section 4 of that same Convention protects the consumer of goods or services from bargaining away her right to sue at home[125] when "in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to [her] or by advertising."[126] It might be argued that the result in *Carnival Cruise Lines* would survive the Convention because the Convention's consumer provisions do "not apply to contracts of transport."[127] On the other hand, it could be contended that the contract in *Carnival Cruise Lines* was not one of transport, but of entertainment. No one would choose a cruise ship if their major purpose was transportation to a particular Mexican port.

Burnham v. Superior Court[128] held that service on a defendant transiently present in the forum is constitutionally sufficient to confer personal jurisdiction. Justice Scalia announced the judgment of a unanimous court, although only Chief Justice

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discharge of pollutants into Rhine River in France).

[122] Convention, *supra* note 117, art. 6(2).

[123] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); *see supra* notes 79-85 and accompanying text (discussing *Carnival Cruise Lines*).

[124] *See* Convention, *supra* note 117, art. 17.

[125] *See id.* arts. 13-15.

[126] *Id.* art. 13(3)(a).

[127] *Id.* art. 13, para. 3.

[128] 495 U.S. 604 (1990).

Rehnquist and Justice Kennedy concurred in his reasoning.[129] Justice Scalia said that presence as a basis for jurisdiction did not violate due process, because, if long and continued use was not a sufficient basis for determining what was constitutional, the only substitute would be "each Justice's subjective assessment of what is fair and just."[130] Article 3 of the Brussels Convention might have provided an objective indication that tag jurisdiction over transiently present defendants was beyond the pale of civilized conduct. This Article lists the exorbitant bases for jurisdiction that exist in the various European Union countries and declares these bases unavailable in suits against "[p]ersons domiciled in a Contracting State."[131] When Ireland and the United Kingdom signed on, they had to promise to stop using tag jurisdiction against European Union defendants.[132]

Kulko v. Superior Court[133] held that California courts did not have jurisdiction over a New York father to increase the child support payments for his daughters, who had moved from New York to California to live with their mother. Article 5(2) of the Brussels Convention permits suit "in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident."[134]

The best feature of the Brussels Convention is that it is not written on constitutional tablets and can be amended as experience with its provisions indicates the need.[135] The Convention, however, is not perfect[136] and its jurisdictional sections should not be slavishly copied. Long-arm jurisdiction in suits based on

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[129] *Id.* at 607, 628.

[130] *Id.* at 623.

[131] Convention, *supra* note 117, art. 3, paras. 1, 2.

[132] *Id.* paras. 8, 13(a).

[133] 436 U.S. 84 (1978).

[134] Convention, *supra* note 117, art. (5)(2). On June 21, 1994, Senator Moynihan introduced a bill that provided long-arm jurisdiction in child support cases based on the residence of the child. The bill also provided for a direct appeal to the Supreme Court of the United States from any ruling by a United States district court upon the constitutionality of the provision. *See* S. 2244, 103d Cong., 2d Sess. (1994); 140 CONG. REC. S7242 (bill introduced and referred to Committee on Finance); 140 CONG. REC. S7269, S7298 (S. 2224 § 635(a)(14)(C) (long-arm jurisdiction based on the residence of the child), (b) (expedited appeal of constitutional challenge).

[135] *See* Borchers, *supra* note 118, at 157 (stating that the ability to amend the Convention is one of its desirable aspects).

[136] *See id.*

contract is limited to "the courts of the place of performance of the obligation in question."[137] Each part of this phrase, "place of performance" and "the obligation in question" has presented problems of interpretation that have had to be litigated.[138]

Article 16 of the Convention gives designated courts exclusive jurisdiction over some matters.[139] Article 16(1) originally provided for exclusive jurisdiction of "proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property [in] the courts of the Contracting State in which the property is situated."[140] Here the Europeans could have profited from our struggle to establish the sensible proposition that a court may exercise its *in personam* power over parties before it to affect their interests in realty situated elsewhere.[141] In one case, for example, a German citizen leased his holiday house in Italy to another German for three weeks.[142] The lessor then sued the lessee in Germany for breach of the lease and for a balance due. The Court of Justice of the European Communities ruled that article 16(1) was clear and that suit had to be brought in Italy.[143] The Convention was then amended to provide that disputes over leases of six months or less could be brought at the defendant's domicile if the landlord and tenant are natural persons domiciled in the same Contracting State.[144]

Recently, the Court of Justice of the European Communities held that article 16(1) did not require suit at the situs of land for a declaration that the defendant holds the property in trust

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[137] Convention, *supra* note 117, art. 5(1).

[138] *See* Borchers, *supra* note 118, at 141.

[139] Convention, *supra* note 117, art. 16.

[140] *See* Convention, *supra* note 117, as amended on the accession of Denmark, Ireland, and the United Kingdom, Oct. 9, 1978, 1978 O.J. (L 304) 77. For an English translation of the original Brussels Convention of September 27, 1968, see 8 I.L.M. 229.

[141] *See* Clarke v. Clarke, 178 U.S. 186 (1900) (holding that courts of one state that had personal jurisdiction over all parties in interest did not have jurisdiction to construe will of deceased domiciliary disposing of land in another state); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 55 cmt. a (1969) (stating that "it is common practice for a court of one state to order a defendant who is subject to its jurisdiction to give plaintiff a deed to land in another state").

[142] Case 214/83, Rösler v. Rottwinkel, [1985] 1 E.C.R. 99.

[143] *Id.* The court did hold that a portion of the claim, for the landlord's loss of enjoyment of his vacation while occupying the property at the same time as the tenant, could be brought in Germany. *Id.* at 128.

[144] *See* Convention, *supra* note 117, art. 16(1)(b).

for the plaintiff and for an order directing the defendant to execute documents to vest legal ownership in the plaintiff.[145] The Court held that the action was not "*in rem*."[146]

This is fine (and the result most United States courts would reach today), but the separate provision concerning leases cannot be avoided in this manner. Suits between lessor and lessee can be brought away from the situs only if the facts fit the amendment, which was narrowly tailored to the facts of the *Rösler* case.[147] If the purpose of the provision concerning leases is to protect residential tenants who are likely to be in an inferior bargaining position,[148] this could have been accomplished by special provisions concerning consumer tenants, just as there are protections for consumer buyers of goods and services.[149] Furthermore, the provision should have made it clear from the outset that it applied only to a court exercising its power over property, not to a court with jurisdiction over the persons whose interests in the property it was affecting *inter se*.

The Brussels Convention is a valuable comparative source that we would be foolish to ignore, but it is not a model to be adopted without thoughtful analysis of its strengths and weaknesses. Concerning the recommendations for reform in the rest of this Part, the Convention supports remarks concerning stream of commerce,[150] but is inconsistent with the proposal for general jurisdiction.[151]

2. Stream of Commerce

The suggestion by four Justices in *Asahi* for drastic restriction of the stream-of-commerce basis for jurisdiction over distant manufacturers[152] should be discarded once and for all. That suggestion, and the citing with approval by Justice O'Connor of

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[145] Case C-294/92, Webb v. Webb, [1994] 5 E.C.R. 1717.

[146] *Id.* at 1740.

[147] *See supra* notes 142-143 and accompanying text (discussing facts of *Rösler* case).

[148] *See Rösler*, [1985] 1 E.C.R. at 124.

[149] *See* Convention, *supra* note 117, § 4.

[150] *See infra* notes 152-57 and accompanying text (proposing reform of stream of commerce rationale).

[151] *See infra* notes 158-67 and accompanying text (discussing general jurisdiction).

[152] *See supra* notes 11-15 and accompanying text (discussing *Asahi* and stream of commerce).

a case in which layers of independent distributors shielded the foreign defendant from jurisdiction,[153] have already produced a parade of horribles in which injured United States users have been unable to obtain jurisdiction over foreign[154] and even United States[155] manufacturers. A defendant that releases a product for sale should be subject to jurisdiction in any state where the product causes harm if the product comes there either in the normal course of commercial distribution or is brought into that state by someone using the product as it is intended to be used.[156] Otherwise we turn the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.[157]

3. General Jurisdiction

Is it desirable to retain a concept of general jurisdiction when the action does not arise out of and is not related to anything done or caused in the forum? The Brussels Convention limits general jurisdiction to a defendant's domicile,[158] which, in the case of a corporation, is its "seat."[159] When general jurisdiction

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[153] *Asahi*, 480 U.S. 102, 111-12 (1987) (citing Hutson v. Fehr Bros., 584 F.2d 833 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978)).

[154] *See, e.g.*, Parry v. Ernst Home Ctr., 779 P.2d 659 (Utah 1989); Wiles v. Morita Iron Works Co., 530 N.E.2d 1382 (Ill. 1988).

[155] *See, e.g.*, Lesnick v. Hollingsworth & Vose, 35 F.3d 939 (4th Cir. 1994) (component part maker, asbestos cigarette filter); Boit v. Gar-Tec Products, Inc., 967 F.2d 671 (1st Cir. 1992).

[156] *But see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding no jurisdiction at crash site over automobile's seller or distributor); Kevin V. Kennedy, *Stretching the Long-Arm in* Asahi Metal Industry Co., Ltd. v. Superior Court*: Worldwide Jurisdiction after* World-Wide Volkswagen?, 4 B.U. INT'L L.J. 327, 343 (1986) (stating that foreign manufacturer should not be subject to jurisdiction in United States forum unless forum state could constitutionally require manufacturer to obtain license to do business in state); Stewart, *supra* note 110, at 37-38 (stating that even in interstate suits, state sovereignty requires defendant's intentional affiliation with state before jurisdiction is exercised).

[157] *See* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954) (stating that the inability of an injured user to get jurisdiction over the manufacturer gives the forum an interest in permitting a direct action against the manufacturer's liability insurer).

[158] Convention, *supra* note 117, art. 2.

[159] *Id.* art. 53. The United Kingdom has provided that a corporation has its seat in the U.K. for purposes of the Convention if it was formed under the law of a part of the U.K. and has its registered office or other official address in the U.K., or has its chief executive

is utilized, the forum is unlikely to be able to apply its own law and this guarantees an excursion into the choice-of-law jungle.[160]

If the suggestions concerning stream of commerce as a basis for jurisdiction[161] were followed, there would be little need for general jurisdiction. The argument that the plaintiff should be guaranteed a forum somewhere would then ring hollow under modern long-arm theory. The case that might then tug at the heartstrings would be one in which the plaintiff is horrendously injured abroad[162] by a product manufactured by a company that has sufficient continuous and systematic contacts with plaintiff's home that jurisdiction might be obtained over the defendant there even after *Helicopteros.*[163] If the suggestion concerning nationwide jurisdiction for interstate suits[164] were followed, the issue of general jurisdiction in such cases would become moot. Then only general jurisdiction over foreign companies would be in issue and it might be well, in the interest of comity, to adjust our views to international standards, which are inconsistent with an expansive view of general jurisdiction.[165]

On the other hand, travel and communications have become easy, especially for multinational enterprises. I would prefer exercising jurisdiction over such enterprises where they have continuous and systematic contacts and permitting them to object on the basis of demonstrated unfairness, particularly with regard to difficulties in obtaining evidence.[166] If, as is likely in

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office there. Civil Jurisdiction and Judgments Act 1982 § 42(3).

[160] *See* Maier & McCoy, *supra* note 99, at 256 (stating that forum that does not have sufficient contacts to apply its own law should not be able to exercise judicial jurisdiction); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 571 (1991) (stating that "[t]here is no reason why a state that is insufficiently connected to a case to apply its law should be allowed to apply its 'interpretation' of law").

[161] *See supra* part III(B)(2) (suggesting expansion of stream of commerce basis for jurisdiction).

[162] *See* Miller v. Honda Motor Co., 779 F.2d 769 (1st Cir. 1985) (involving plaintiff who was made quadriplegic by a moped accident in Bermuda, but who could not obtain general jurisdiction over Honda in Massachusetts, though unable to travel to Bermuda).

[163] *See* Roethlisberger v. Tokyo Aircraft Instrument Co. (TKK) of Japan, 1991 WL 347671 (W.D. Mich. May 8, 1991) (declining to follow Bearry v. Beech Aircraft Corp., 818 F.2d 370 (5th Cir. 1987)).

[164] *See supra* part III(A).

[165] *See supra* notes 158-160 and accompanying text (noting Convention approach to general jurisdiction).

[166] *See* Gonzalez v. Naviera Neptuno A.A., 832 F.2d 876, 888 (5th Cir. 1987) (reversing

such cases, foreign law were applied, the defendant would also have to be protected against the choice-of-law doctrine that permits an American jury to assess damages under foreign heads of damages in an amount that far exceeds what would have been awarded in the foreign forum.[167] This aberration can be corrected by allowing the trial judge to be informed of typical recoveries in the foreign forum and giving her the power to order remittitur if the jury award is clearly excessive under foreign standards.

4. Piercing the Corporate Veil

Discussion of what contacts with a forum are sufficient for specific or general jurisdiction should include a focus on when actions of one member of a corporate family can be ascribed to another. Analysis in this area has been confused by ignoring the differences between holding a parent company liable for its subsidiary's torts and holding that the subsidiary's forum contacts can be ascribed to the parent for jurisdictional purposes when the parent is liable for its own conduct.[168] When the issue is vicarious liability for the torts of a subsidiary, a standard is appropriate that focuses on the amount of control the parent

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denial of forum non conveniens motion after trial and verdict because foreign defendant had shown prejudice resulting from "difficulties associated with obtaining foreign witnesses or their deposition testimony").

[167] *See* Cunningham v. Quaker Oats Co., 107 F.R.D. 66 (W.D.N.Y. 1985) (holding applicable, as equivalent of statutory cap on recovery, declaration of Canadian Supreme Court that $100,000 is the "upper limit" of recovery for one element of damages, but holding general level of Canadian recoveries not applicable to another element of damages); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 cmt. f (1969) (stating that a forum follows "its own local practices in determining whether the damages awarded by a jury are excessive").

[168] *See* Miller v. Honda Motor Co., 779 F.2d 769, 772-73 (1st Cir. 1985). The *Miller* court refused to "pierce the corporate veil" to exercise general jurisdiction over Honda based on the continuous and systematic forum contacts of its United States wholly-owned subsidiary. *Id.* The court quoted the applicable standard from a forum decision, My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748 (Mass. 1968), in which the issue was vicarious liability for a subsidiary's conversion; PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 116-17 (1993) (stating that justification for treating multicorporate enterprise as single entity varies with issue); Murray E. Knudsen, *Jurisdiction over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 919 (1988) (stating that jurisdiction over an out-of-state corporation based on acts of an in-state corporation should not be determined by the more exacting standard for determining vicarious liability).

exercises over the subsidiary.[169] When the issue is jurisdiction, we should attribute to the parent any act of the subsidiary that, but for delegation to the subsidiary, the parent itself would have to perform in the business that has given rise to the parent's liability. For specific jurisdiction, under a proper application of stream-of-commerce theory, it should be unnecessary to struggle with piercing the corporate veil.[170] If the subsidiary's acts in the forum in the process of selling the parent's product are sufficiently continuous and systematic for general jurisdiction over the subsidiary, they should also accord general jurisdiction over the parent.

CONCLUSION

It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated. Worse, litigating the same situations over and over does not increase predictability. Not only is the determination fact driven, but we cannot agree on what facts are relevant.

I have suggested two paths out of the labyrinth in which we are trapped like the Minotaur,[171] devouring not human sacrifices but thousands of pages of case reports. The preferable way is to permit suit to be brought against a United States defendant in any forum that has a reasonable interest in adjudicating the case: the plaintiff's residence, the place of injury, defendant's residence or principal place of business. A defendant without "minimum contacts" with that forum could then contest jurisdiction, but would have the burden of demonstrating why suit there would be unfair to the defendant. In most cases, such contentions by United States defendants that are frequently engaged in interstate transactions should be summarily dis-

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[169] *See* My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748, 752 (Mass. 1968).

[170] *See* BLUMBERG, *supra* note 168, at 117 (stating that "the 'stream of commerce' doctrine has . . . made the debate over enterprise and entity essentially irrelevant").

[171] The myth is that Daedalus constructed a labyrinth on Crete in which the Minotaur, a creature with the body of a bull and a human head, was imprisoned. For a short account, see 8 ENCYCLOPEDIA BRITANNICA, *Minotaur* 171 (15th ed. 1985).

missed. Foreign defendants would not be subject to suit in the United States unless their cumulated national contacts made this reasonable.

The second path mapped herein proposes not-so-minor tinkering with the current system. We could greatly reduce litigation of the jurisdictional issue by making it clear that commercial buyers and sellers who deal with one another can bring suit in their home forums in disputes arising out of the sale; that any defendant who deals with a product in the chain of distribution is subject to suit where the product causes injury if the product has reached that forum either in the usual course of commercial distribution or is brought there by someone using the product as it was intended to be used.

The windmills, however, show no sign of weakening. Well into the next century, if not beyond, attorneys who are expert at operating under current doctrine can profitably fill their calendars by litigating the threshold issue of jurisdiction to adjudicate. And we wonder why folks tell such cruel lawyer jokes.