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## Personal Jurisdiction over Nonresident Publishers and Authors: What Contracts are Needed after *Keeton v. Hustler Magazine, Inc.*, and *Calder v. Jones*

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**PERSONAL JURISDICTION OVER  
NONRESIDENT PUBLISHERS AND  
AUTHORS: WHAT CONTACTS  
ARE NEEDED AFTER  
*KEETON v. HUSTLER MAGAZINE, INC.,  
AND CALDER v. JONES***

Historically, plaintiffs seeking to litigate defamation<sup>1</sup> claims against magazine and newspaper publishers have had difficulty obtaining personal jurisdiction<sup>2</sup> over them outside their states of incorporation or principal place of business. Traditional tests for jurisdiction developed under the due process clause of the fourteenth amendment<sup>3</sup> were too narrow to allow suit.<sup>4</sup> These tests required a corporation to be present and doing business in the forum state before a court could assert jurisdiction.<sup>5</sup> Most publishers transacted little business outside their home states, having consigned delivery and sale of their publications to independent contractors.<sup>6</sup> Similarly, plaintiffs were unable to obtain jurisdiction over authors outside their states of domicile, unless they were present in the forum state or had consented to suit there.<sup>7</sup>

In *International Shoe Co. v. Washington*,<sup>8</sup> the United States Supreme Court relaxed due process requirements to allow jurisdiction over a defendant who had "minimum contacts" with the forum state. Jurisdiction under this new test was to depend not on the defendant's presence in the forum

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1. Defamation, as used in this Note, refers to all causes of action for injury to reputation, including libel, slander, and invasion of privacy. For a comprehensive discussion of these torts, see W. PROSSER & W. KEETON, *THE LAW OF TORTS*, §§ 111-117 (5th ed. 1984). See also R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* (1980).

2. For a judgment of a court to be given full faith and credit by other courts, the adjudicating court must have jurisdiction over the person of the defendant. For a general discussion of the requirements for obtaining personal jurisdiction, see 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE*, §§ 1065-1069 (1969 & Supp. 1985). See also *Developments in the Law, State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

3. U.S. CONST. amend. XIV.

4. See Comment, *Long-Arm Jurisdiction over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967).

5. See generally Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345 (1959).

6. See *infra* notes 107-15 and accompanying text.

7. See *infra* note 256 and accompanying text.

8. 326 U.S. 310 (1945).

state, but on the "quality and nature of the [defendant's] activity"<sup>9</sup> and the fairness of requiring the defendant to stand trial there.<sup>10</sup> Despite the more flexible minimum contacts standard, state and lower federal courts remained reluctant to hear cases against nonresident publishers and authors because of their limited in-state activity.<sup>11</sup> At the same time, courts began to assert jurisdiction over other types of businesses formerly outside their purview, most notably product manufacturers.<sup>12</sup> Like publishers, many product manufacturers marketed their products through independent middlemen. Courts holding them subject to suit reasoned that suit was fair because the manufacturer had "elect[ed] to sell its products for ultimate use" in the forum state.<sup>13</sup> This rationale became known as the stream of commerce theory.<sup>14</sup> Eventually courts began to use the stream of commerce theory to assert jurisdiction over nonresident publishers.<sup>15</sup> The focus thus shifted from a publisher's business activity to its circulation in the forum state.

With the shift in focus, the question arose at what point a publisher's circulation would be too insignificant for jurisdiction. The United States Court of Appeals for the Fifth Circuit concluded that a greater showing of contacts was necessary for publishers than for other types of businesses because of first amendment considerations.<sup>16</sup> Other courts rejected this argument.<sup>17</sup> They chose to consider the effect the publisher had caused in the forum state, focusing on the foreseeability of injury.<sup>18</sup>

For the first time, the United States Supreme Court recently considered what contacts are required for personal jurisdiction over nonresident publishers and authors.<sup>19</sup> In *Keeton v. Hustler Magazine, Inc.*,<sup>20</sup> the Supreme

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9. *Id.* at 319.

10. *Id.* at 315, 319.

11. See *infra* notes 124-26, 134-39, 148-55 and accompanying text.

12. See, e.g., *Elkhart Eng'g Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

13. See *Gray*, 22 Ill. 2d at 442, 176 N.E.2d at 766.

14. See generally *Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction for Illinois*, 1963 U. ILL. L.F. 533; Comment, *The Long-Arm Reach of the Courts Under the Effect Test After Kulko v. Superior Court*, 65 VA. L. REV. 175 (1979).

15. See *infra* notes 170-81 and accompanying text.

16. See *New York Times v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966).

17. See, e.g., *Anselmi v. Denver Post*, 552 F.2d 316 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Appleyard v. Transamerican Press*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

18. This jurisdictional theory is called the effects test. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 37 (1971). Section 37 provides that:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

19. The Court had granted certiorari on the issue once before, in *Polizzi v. Cowles Maga-*

Court reversed the United States Court of Appeals for the First Circuit, to hold that Hustler's regular circulation of its magazine in New Hampshire was sufficient for jurisdiction, even though neither the plaintiff nor the defendant resided there.<sup>21</sup> Complicating the matter was the fact that the action was a suit for nationwide damages under the single publication rule.<sup>22</sup> The Court concluded that Hustler's contacts, coupled with the state's interest in redressing torts occurring within its borders and in cooperating with other states through the single publication rule, were sufficient to support the multistate suit.<sup>23</sup>

In *Calder v. Jones*,<sup>24</sup> decided along with *Keeton*, the Court held that California could assert jurisdiction over a Florida author and editor solely on the grounds that they had intentionally written and edited an article that they knew would injure the plaintiff in California.<sup>25</sup> The Court based its holding on the defendants' intentional conduct expressly aimed at California.<sup>26</sup> It did not require a showing of presence in California for jurisdiction.<sup>27</sup> The Court also rejected the need for a greater showing of contacts for first amendment considerations, reasoning that the first amendment was better considered during trial on the merits.<sup>28</sup>

This Note will trace the Supreme Court's development of due process standards for personal jurisdiction and will discuss how state and lower federal courts have applied these standards to nonresident publishers and authors. Next it will examine the *Keeton* and *Calder* opinions. Finally it will discuss the implications of these decisions for determining personal jurisdiction over nonresident publishers and authors.

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zine, Inc., 345 U.S. 663 (1953), but had decided the case on other grounds. In dissent, Justice Black argued that the Court should have decided the minimum contacts issue. *Id.* at 671 (Black, J., dissenting).

20. 104 S. Ct. 1473 (1984).

21. *Id.* at 1478.

22. The single publication rule allows a plaintiff to recover all damages from the publication of a single issue of a magazine, book, or newspaper in one suit. See RESTATEMENT (SECOND) OF TORTS § 577A (1977). Ordinarily, each copy circulated would give rise to a separate cause of action for defamation. The single publication rule is, thus, an exception to the general rule. It has now been accepted in a majority of states. RESTATEMENT (SECOND) OF TORTS § 577A reporter's note. For a discussion of the historical background of the rule, see Buckley v. New York Post Corp., 373 F.2d 175, 179-80 (2d Cir. 1967) (Friendly, J.). For a discussion of how the single publication rule has been used by courts, see Leflar, *The Single Publication Rule*, 25 ROCKY MTN. L. REV. 263 (1953). For a discussion of some of the choice of law problems that may arise, see Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953).

23. *Keeton*, 104 S. Ct. at 1481-82.

24. 104 S. Ct. 1482 (1984).

25. *Id.* at 1488.

26. *Id.* at 1487.

27. *Id.* at 1486 n.6.

28. *Id.* at 1487-88.

## I. PERSONAL JURISDICTION UNDER THE DUE PROCESS CLAUSE

### A. *The Early Statutes*

At common law, personal jurisdiction over a defendant could be achieved only with his consent to suit or by his domicile or presence within the boundaries of the state.<sup>29</sup> These jurisdictional bases worked well enough in a localized society, but as travel and commerce between the states began to grow, more was needed to facilitate adjudication of disputes where they arose. In the mid-nineteenth century, states began to enact statutes extending their jurisdictional powers. The Supreme Court upheld these statutes,<sup>30</sup> but declared that they, like the traditional bases for jurisdiction, must not offend the due process clause of the fourteenth amendment.<sup>31</sup>

Under the early statutes, jurisdiction over a nonresident corporation depended on whether it carried on business within the state's borders.<sup>32</sup> "Doing business" was shown by the activities of the corporation's agents within the forum state. For a state's exercise of jurisdiction to meet due process, the activities of the agents not only had to be substantial, they also had to show consummation of a business transaction.<sup>33</sup> Thus, a corporation that solicited business in the state, even a considerable amount of business, but did nothing more, was held not to be doing business, only engaging in "mere solicitation."<sup>34</sup> However, when a corporation not only solicited orders but also made deliveries and received partial payment in the state, the Supreme

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29. See *Developments in the Law*, *supra* note 2, at 915-16. The United States Supreme Court has held these traditional bases satisfy due process. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1878) (presence); *Milliken v. Meyer*, 311 U.S. 457 (1940) (domicile); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (consent).

30. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856).

31. *St. Clair v. Cox*, 106 U.S. 350, 356 (1882).

32. Initially a corporation was thought to have legal existence only in its state of incorporation. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1838) (dictum). The first statutes authorizing jurisdiction over nonresident corporations, therefore, were based on a theory of implied consent; in exchange for the privilege of transacting business within the state's borders, the corporation was deemed to have consented to the jurisdiction of its courts. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856). After holding in *Pennoyer v. Neff*, 95 U.S. 714 (1878), that a nonresident individual must be physically present in the forum state for valid service of process, the Court then reconsidered the dictum in *Bank of Augusta*. In *St. Clair v. Cox*, 106 U.S. 350 (1882), the Court effectively overruled the notion that a corporation could not be present outside its chartering state. Recognizing that a corporation acts only through its agents, the Court stated that a corporation is present in a state when its agents conduct its business there. *Id.* at 355. Thus, under both the consent and presence theories, jurisdiction over a corporation depended on its doing business in the state.

33. *St. Clair v. Cox*, 106 U.S. at 355.

34. *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530 (1907) (no jurisdiction in Pennsylvania over a railroad company whose only in-state activity was to solicit passengers and freight for its lines in other states).

Court found a "continuous course of business" sufficient for jurisdiction.<sup>35</sup> This rule became known as "solicitation plus."<sup>36</sup> The Court also held that a parent company could not be subjected to jurisdiction for the activities of a subsidiary in the forum state; the two were separate legal entities.<sup>37</sup> Similarly, a corporation could not be brought within the ambit of the state's courts by the activities of other companies marketing its services.<sup>38</sup> To do so would be to base jurisdiction on constructive presence and could render a large multistate corporation subject to suit in all states.<sup>39</sup>

The common law bases of jurisdiction also proved too limited for individuals in a mobile society. Although for the most part nonresident individuals were not subject to the doing business statutes,<sup>40</sup> they could be sued for torts they committed while driving in the forum state. In *Hess v. Pawloski*<sup>41</sup> the Court approved "nonresident motorist statutes" on the grounds that the defendant had given implied consent to suit by using the state's highways and that driving is a dangerous activity that the state has the right to regulate.

These jurisdictional tests produced conceptual and practical difficulties. The underlying rationales of presence and implied consent were clearly only fictions.<sup>42</sup> The doing business test itself became a mechanical exercise in which jurisdiction depended more on the similarity of facts with decided cases than with the reasonableness or fairness of requiring the defendant to appear.<sup>43</sup> National businesses deliberately organized their activities along the lines of these tests to avoid jurisdiction. At one point the Supreme Court

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35. See *International Harvester Co. of America v. Kentucky*, 234 U.S. 579, 585 (1914); See also *St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218 (1913) (jurisdiction allowed in New York over a railroad company that maintained an office there to solicit business and to process claims for damages).

36. Very little additional business was necessary to meet the "solicitation plus" standard. See Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345, 352 (1959).

37. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925); *Peterson v. Chicago Rock Island & Pac. Ry.*, 205 U.S. 364, 393 (1907). See also *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 84 (1918).

38. *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264, 268 (1917). See *Bank of Am. v. Whitney Cent. Nat'l Bank*, 261 U.S. 171, 173 (1923).

39. *McKibbin*, 243 U.S. at 268.

40. See *Flexner v. Farson*, 248 U.S. 289, 293 (1919). But see *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 628 (1935).

41. 274 U.S. 352 (1927).

42. See *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 140-41 (1930) (L. Hand, J.) (calling presence essentially "an estimate of the inconveniences" of standing trial); *Smolik v. Philadelphia & Reading Co.*, 222 F. 148, 151 (1915) (L. Hand, J.) (calling consent a legal fiction).

43. See Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 NW. U.L. REV. 599 (1955); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810-12 (1935).

turned to the commerce clause to decide a line of cases,<sup>44</sup> but eventually it realized that a comprehensive test with more flexibility than the doing business test was needed.

*B. International Shoe Co. v. Washington and the Minimum Contacts Test*

The Court announced such a test in *International Shoe Co. v. Washington*.<sup>45</sup> In *International Shoe*, the State of Washington sued the International Shoe Company for failure to contribute to its unemployment compensation fund. In challenging the state's jurisdiction, the company claimed it was not doing business in the state. Although the company was incorporated and headquartered outside Washington, it did employ eleven to thirteen resident salesmen to solicit orders in the state.<sup>46</sup> Using the solicitation plus theory, the Supreme Court of Washington held that the company was doing business sufficient for jurisdiction.<sup>47</sup>

The United States Supreme Court affirmed, but chose to base its holding on a new theory, that of "minimum contacts." The Court described the minimum contacts test as an inquiry into whether "the maintenance of the suit . . . offend[ed] 'traditional notions of fair play and substantial justice.'"<sup>48</sup> What was reasonable and fair under this test depended on the "quality and nature" of the defendant's activity and the relationship of the activity to the cause of action.<sup>49</sup> The Court described how this test could be applied in several hypothetical fact patterns. It suggested that the minimum contacts test clearly would be met when the defendant had engaged in "continuous and systematic" activity in the state and the cause of action was related to that activity.<sup>50</sup> In fact, the Court implied that substantial and continuous activity of a special nature might justify jurisdiction over causes of action arising outside the forum.<sup>51</sup> Although a state's exercise of jurisdiction would be unwarranted if based on occasional acts unrelated to the cause of action, jurisdiction based on some single or isolated act, such as committing a tort while driving in the state, would be enough because of its nature

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44. U.S. CONST. art. I, § 8, cl. 3. For a discussion of these cases, see *Developments in the Law*, *supra* note 2, at 983-87.

45. 326 U.S. 310 (1945).

46. *Id.* at 313.

47. 22 Wash. 2d 146, 154 P.2d 801 (1945).

48. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)).

49. *Id.* at 319.

50. *Id.* at 317.

51. *Id.* at 318. Jurisdiction over causes of action unrelated to the defendant's contacts with the forum state is called general jurisdiction. See generally von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

and circumstances.<sup>52</sup> Nevertheless, the Court stated, exercise of jurisdiction over an individual or corporation that had no contacts with the state would violate due process.<sup>53</sup> In the instant case, the Court found the International Shoe Company's in-state activity not only systematic and continuous, but also related to the cause of action.<sup>54</sup> The Court upheld Washington's jurisdiction.

In *International Shoe*, the Court refrained from overruling its prior decisions. Instead, it used earlier cases to show how the minimum contacts test should be applied. Nevertheless, the minimum contacts test clearly was intended to go beyond prior rulings by allowing courts to be more flexible. In addition, it was to apply to individuals as well as to corporations.<sup>55</sup>

Subsequent decisions have refined the test and marked its boundaries. In *Perkins v. Benguet Consolidated Mining Co.*<sup>56</sup> the Court considered a case in which the cause of action arose from activities unrelated to the defendant's contacts with the forum state. The plaintiff, a nonresident of Ohio, brought suit in that state for dividends she claimed from the defendant's mining operations in the Philippines.<sup>57</sup> Although the defendant was a Filipino corporation, its president had taken up residence in Ohio during the Japanese occupation of the islands in World War II. From Ohio the president had carried on the company's business, maintaining an office with the corporate files and two bank accounts from which he made corporate payments. The company had held its directors' meetings in Ohio as well.<sup>58</sup> The Court found these activities to constitute "a continuous and systematic, but limited, part of [the company's] general business."<sup>59</sup> As such, the Court allowed Ohio to accept jurisdiction, even though the claim related to the mining operations in the Philippines.

The Court next turned to a case involving only a single contact with the forum state. In *McGee v. International Life Insurance Co.*,<sup>60</sup> California asserted jurisdiction over a Texas insurance company whose only contact with the state had been to insure the plaintiff's decedent.<sup>61</sup> The Supreme Court,

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52. 326 U.S. at 318.

53. *Id.* at 319.

54. *Id.* at 320.

55. The minimum contacts test was first applied in *Milliken v. Meyer*, 311 U.S. 457 (1940), a case concerning jurisdiction over an individual based on domicile. In *International Shoe* the Court discussed the test in terms of both corporations and individuals. See *International Shoe*, 326 U.S. at 319.

56. 342 U.S. 437 (1952).

57. *Id.* at 438-39.

58. *Id.* at 447-48.

59. *Id.* at 438.

60. 355 U.S. 220 (1957).

61. *Id.* at 221-22. The decedent, a California resident, had bought a life insurance policy



noting a discernible trend toward expanding the scope of personal jurisdiction, unanimously upheld the state court. Justice Black, writing for the Court, stated that due process was not violated in this case because the insurance contract had a "substantial connection" with the forum state: the insurance company had sent the contract to California, the insured had resided there, and he had mailed his premiums from there.<sup>62</sup> Also supporting the fairness of jurisdiction were the state's interest in providing an accessible forum for its residents to adjudicate insurance claims, shown by its enactment of the insurance regulatory statute under which the case was brought; the cost disadvantage to plaintiffs with small claims in having to travel to the defendant's state to vindicate their rights; and the difficulty of transporting crucial witnesses to the defendant's home state.<sup>63</sup> In comparison, any inconvenience to the insurer caused by having to defend in California was insignificant.<sup>64</sup>

Later the same term, in another case involving a single contact, the Court warned that limitations on the exercise of jurisdiction still existed.<sup>65</sup> In *Hanson v. Denckla*,<sup>66</sup> a divided Court reversed Florida's assertion of jurisdiction over a Delaware trust company. The Delaware company had been trustee for a trust established in Delaware by a Florida resident while she was living in Pennsylvania.<sup>67</sup> After the settlor had moved to Florida, she and the trustee had corresponded, the trustee had sent her trust income, and the settlor had executed two powers of appointment.<sup>68</sup> The majority found that the trustee had performed no act in Florida sufficient for jurisdiction. Jurisdiction could not be based on the "unilateral activity" of someone associated with the defendant, such as the settlor in this case.<sup>69</sup> Rather, the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate,"<sup>70</sup> to the degree that it enjoyed "the benefits and protections of [the forum state's] laws."<sup>71</sup> The majority distinguished

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from a company that subsequently sold the policy to the defendant. The defendant offered to insure the decedent on the same terms as its predecessor. The decedent accepted and paid the premiums from California until his death. *Id.*

62. *Id.* at 223.

63. *Id.*

64. *Id.* For a discussion of the implications of the *McGee* decision, see Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

65. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

66. 357 U.S. 235 (1958).

67. *Id.* at 252.

68. *Id.*

69. *Id.* at 253.

70. *Id.*

71. *Id.* (citing *International Shoe*, 326 U.S. at 319).

*Hanson* from *McGee* on the grounds that the insurance company in *McGee* had solicited the contract, and the state, by statute, had shown special interest in regulating the insurance industry.<sup>72</sup>

In a strong dissent, Justice Black argued that the issue in the dispute, the validity of the power of appointment of the trust assets, had a substantial connection to Florida because Florida was charged with construing the settlor's will.<sup>73</sup> He would have allowed jurisdiction in such a case unless the litigation was so inconvenient to the defendant that it would offend due process.<sup>74</sup> Weighing the conveniences, as he did in *McGee*, Justice Black concluded that Florida was a convenient forum for all the parties.<sup>75</sup> Florida, as the state administering the will, had a strong interest in the matter.<sup>76</sup> In addition, allowing suit to go forward in Florida would avoid the problem of multiple litigation.<sup>77</sup>

Many commentators considered *Hanson* wrongly decided.<sup>78</sup> They preferred the "center of gravity" approach of Justice Black's dissent. Nevertheless, for almost twenty years the Court remained silent on the question. When it did address the issue in *Shaffer v. Heitner*,<sup>79</sup> it reaffirmed *Hanson's* purposeful availment test.<sup>80</sup> In *Shaffer*, the Court summarized the test of *International Shoe* as focusing on "the relationship among the defendant, the forum, and the litigation."<sup>81</sup> Only Justice Brennan, in dissent, argued that a court should consider the relationship "between the controversy, the parties

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72. *Id.* at 251-52.

73. *Id.* at 258 (Black, J., dissenting). The testatrix had executed the appointment in Florida; the primary beneficiaries lived there; and Florida law would be applied. *Id.*

74. *Id.* at 258-59.

75. *Id.* at 259. Not only did the primary beneficiaries live there, the Delaware trustee had maintained an ongoing business relationship with the testatrix while she resided in Florida. *Id.*

76. *Id.*

77. *Id.* at 261. Justice Douglas dissented in a separate opinion. *Id.* at 262 (Douglas, J., dissenting). He maintained that because the trustee was in privity with the settlor, the trustee would be represented in the proceedings by the settlor's executrix. *Id.* at 263. Florida should have the right to determine the interests in the trust without personal jurisdiction over the trustee. *Id.* at 262-64.

78. See, e.g., Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Reese & Galston, *supra* note 64, at 257-58; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law*, *supra* note 2, at 909; but see, Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407 (1980).

79. 433 U.S. 186 (1977).

80. *Id.* at 216.

81. *Id.* at 204.

and the forum [s]tate."<sup>82</sup>

### C. *The Effects Test and Due Process*

*McGee* suggested that jurisdiction could be asserted if the cause of action was related to an extraterritorial act that had produced in-state consequences. *Hanson* indicated that the act must have a purposeful relationship to the forum state. From these two cases the drafters of the *Restatement (Second) of Conflict of Laws* developed the "effects test."<sup>83</sup> They concluded that if the defendant intended to cause an effect in the forum state by an extraterritorial act, exercise of jurisdiction should be proper. For example, if a gunman intentionally fired across a state line, he should be amenable to jurisdiction in the state where injury occurred.<sup>84</sup> If the effect was reasonably foreseeable, although not intended, the drafters of the *Restatement (Second)* suggested that a court weigh the relationships of both the defendant and the plaintiff to the state, the nature and quality of the effect caused, and the inconvenience to the defendant in having to stand trial in the state.<sup>85</sup> The greater the relationship of either the defendant or the plaintiff to the state, the more appropriate jurisdiction would be. Similarly, if an effect that was foreseeable and that actually occurred was of a sort dangerous to persons or property, jurisdiction would be proper even without additional contacts by the defendant. On the other hand, if the effect was not dangerous, other contacts of the defendant with the forum state might be required. Finally, jurisdiction would be improper if the effect caused was neither intended nor foreseeable.<sup>86</sup>

In *Kulko v. California Superior Court*<sup>87</sup> and *World-Wide Volkswagen Corp. v. Woodson*,<sup>88</sup> the Supreme Court examined jurisdiction based on the foreseeability theory of the effects test. In *Kulko*, a child support action, California asserted jurisdiction over a New York father who had allowed his daughter to stay with her mother in California during his agreed custody period.<sup>89</sup> The state court reasoned that, by consenting to her stay in Califor-

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82. *Id.* at 225 (emphasis added).

83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). See *supra* note 18.

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 comment a (1971).

85. *Id.*

86. *Id.*

87. 436 U.S. 84 (1978).

88. 444 U.S. 286 (1980).

89. *Kulko*, 436 U.S. at 89. The couple had two children. The father had given his daughter a one-way plane ticket to California at her request. Later, the mother had mailed a plane ticket to the son so that he could come live with her. The father's only other contacts with California were two military stopovers in the state several years before. The California Supreme Court and the United States Supreme Court did not consider these contacts jurisdictionally significant. *Id.* at 87.

nia, the father had caused an effect there sufficient for jurisdiction.<sup>90</sup> The United States Supreme Court, after determining that the father's act failed to meet *Hanson's* purposeful availment test,<sup>91</sup> pointed out that it also failed to meet the effects test of the *Restatement (Second) of Conflict of Laws*.<sup>92</sup> The father had caused no physical injury in California, nor had he gained commercial benefit from his act.<sup>93</sup> In sum, his act gave him no reason to expect to be "haled before a [California] court,"<sup>94</sup> and thus, jurisdiction was improper.<sup>95</sup>

In *World-Wide Volkswagen*, Oklahoma asserted jurisdiction over the New York distributor and retailer of a car that had been purchased in New York, had been driven to Oklahoma, and had been involved in an accident there.<sup>96</sup> The Supreme Court of Oklahoma reasoned that jurisdiction properly could be exercised because a car dealer can reasonably foresee the use of cars it has sold in states beyond its sales district.<sup>97</sup> The United States Supreme Court reversed. The majority opinion began by stating that the minimum contacts test serves to protect the defendant from inconvenient suit and to ensure that states do not overreach their boundaries when exercising jurisdiction.<sup>98</sup> Although the fairness of exercising jurisdiction depends on balancing the inconvenience of suit to the defendant against the interests of the forum state, the plaintiff, and the shared policies of all the states,<sup>99</sup> jurisdiction can-

90. *Id.* at 88-89.

91. *Id.* at 93-94.

92. *Id.* at 96-97 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971)). See *supra* note 18. The Court observed, however, that the Restatement was not binding on its decision. 436 U.S. at 96.

93. 436 U.S. at 96-97. The Court implied that if the father had caused physical injury or benefited commercially, jurisdiction might have been reasonable.

94. *Id.* at 97-98 (quoting *Shaffer v. Heitner*, 433 U.S. at 216).

95. 436 U.S. at 101. Justice Brennan, joined by Justice White and Justice Powell, dissented. *Id.* (Brennan, J., dissenting). He would have weighed the facts differently and allowed jurisdiction. *Id.* at 101-02. For a discussion of *Kulko* and its implications, see Comment, *supra* note 14.

96. *World-Wide Volkswagen*, 444 U.S. at 288. Also joined in the suit were the car's manufacturer and importer. The manufacturer and importer did not challenge jurisdiction beyond the appeals court level. *Id.*

97. *Id.* at 290.

98. *Id.* at 291-92. In *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694 (1982), the Court described these two elements as "a function of the individual liberty interest preserved by the Due Process Clause." *Id.* at 702 n.10.

99. Specifically, the Court stated that:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum [s]tate's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court* . . . at least when that interest is not adequately protected by

not be exercised unless the defendant has had a contact with the forum state.<sup>100</sup> In this case, the car retailer and distributor had transacted no business in Oklahoma. Their only tie to the state was the fact that one of the cars they had sold was driven there by a customer.<sup>101</sup> The Court concluded that such a "fortuitous circumstance" could not suffice for jurisdiction.<sup>102</sup>

With respect to Oklahoma's reasoning that jurisdiction was proper because the car could foreseeably be used in Oklahoma, the Court noted that the foreseeability required for jurisdiction was not the mere possibility that a product might enter the forum state,<sup>103</sup> but the likelihood that the defendant, by its acts and relationship to the forum state, might reasonably expect to be haled into court there.<sup>104</sup> In dictum, the Court found this type of foreseeability demonstrated by a corporation's acts to market its products in the forum state, either directly or indirectly.<sup>105</sup> The corporation would have "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate" and thus, should reasonably foresee being asked to stand trial there for injuries arising from the sale of its products.<sup>106</sup>

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the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several [s]tates in furthering fundamental substantive social policies, see *Kulko v. California Superior Court*.

444 U.S. at 292.

100. *Id.* at 294 (citing *International Shoe*, 326 U.S. at 319).

101. 444 U.S. at 295.

102. *Id.* at 299.

103. *Id.* at 297. The Court likened this form of foreseeability to "mere 'unilateral activity,'" discarded as jurisdictionally insignificant in *Hanson*. *Id.* at 298.

104. *Id.* at 297. The Court explained that requiring this form of foreseeability for due process allows a person to arrange his activities so as to avoid liability for suit. *Id.*

105. *Id.* at 297-98.

106. *Id.* Justice Brennan dissented. *Id.* at 299 (Brennan, J., dissenting). He would have given greater weight to the forum state's interest in the matter, as well as to the actual inconvenience to the defendant. Justice Brennan considered Oklahoma a suitable forum in this case because the accident occurred in Oklahoma, the key witnesses and evidence were there, and Oklahoma had an interest in enforcing its traffic laws. *Id.* at 305. He found the distinction between a product that reaches the forum state through independent middlemen and one that is brought there by a consumer unrealistic. *Id.* at 306-07. In his view, a car dealer intends that its customers use the cars it sells for interstate travel. *Id.* at 306. Justice Brennan reiterated his assertion in *Shaffer* that jurisdiction should be based on the contacts between the parties, the forum, and the litigation. *Id.* at 310. See *supra* note 82 and accompanying text.

Justice Marshall dissented in a separate opinion. *Id.* at 313 (Marshall, J., dissenting). He would have interpreted the defendants' contacts more broadly, basing jurisdiction on the defendants' participation in a "nationwide, indeed a global, network for marketing and servicing automobiles." *Id.* at 314. To him, a car distributor and retailer should be able to anticipate that the cars they sell will travel to states beyond their sales districts, and thus, that they will be called into court for injury caused there by defects in those cars. *Id.* at 314-15.

In a third dissenting opinion, Justice Blackmun cautioned that the majority's decision would lead to "passing on every variant in the myriad of motor vehicle fact situations" to determine

Dicta in *Kulko* and *World-Wide Volkswagen* thus indicated that the Court would approve the foreseeability theory of the effects test, at least so far as the defendant derived commercial benefit from its acts or caused physical injury. Because neither case involved intent to cause an effect, the Court made no statement about that theory.

## II. APPLICATION OF DUE PROCESS PRINCIPLES TO NONRESIDENT PUBLISHERS

### A. *Decisions Prior to International Shoe*

Prior to *International Shoe* the doing business test was the only means of asserting jurisdiction over out-of-state publishers.<sup>107</sup> Courts focused on the business activities of the publisher in the forum state: whether it was involved directly in the sale of its publications, whether it solicited and accepted subscriptions, and whether it entered into contracts or received payments there. Nevertheless, publishers rarely were amenable to suit under this test because few of them performed any of these activities outside their states of incorporation or principal place of business.

The major bar to jurisdiction over nonresident publishers was the trade practice of contracting with independent parties to distribute the publications after they left the printer.<sup>108</sup> These contracts usually gave the distributor title to the publications at the time it received them. After taking possession, the distributors disseminated the publications to newsstands and subscribers in the various states.<sup>109</sup>

Because the distributors were not agents of the publisher, the publisher could not be bound through their activities,<sup>110</sup> even if the activities were to the publisher's benefit.<sup>111</sup> Similarly, when the distributors were wholly-owned subsidiaries, their independent organization and legal status shielded

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whether the defendant had a sufficient contact with the forum state. *Id.* at 319 (Blackmun, J., dissenting).

For a discussion of *World-Wide Volkswagen*, see Louis, *supra* note 78.

107. See *supra* notes 32-39 and accompanying text. Because publishers are corporations rather than natural persons, they are governed by the jurisdictional rules for businesses.

108. See, e.g., *Street & Smith Publication v. Spikes*, 120 F.2d 895 (5th Cir. 1941); *Cannon v. Time, Inc.*, 115 F.2d 423 (4th Cir. 1940); *Whitaker v. MacFadden Publications*, 105 F.2d 44 (D.C. Cir. 1939); *Kruger v. MacFadden Publications*, 38 F. Supp. 472 (D. Md. 1941); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945); *Lee v. Memphis Publishing Co.*, 195 Miss. 264, 14 So. 2d 351 (1943).

109. See, e.g., *Street & Smith Publications v. Spikes*, 120 F.2d 895 (5th Cir. 1941); *Cannon v. Time, Inc.*, 115 F.2d 423 (4th Cir. 1940).

110. See *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945).

111. *Cannon v. Time, Inc.*, 115 F.2d at 425 (no jurisdiction even though the distributor collected subscription applications for the publisher).

the parent company from jurisdiction.<sup>112</sup> In the few cases in which jurisdiction was upheld, the publisher either had disseminated news in the forum state through its news service,<sup>113</sup> had retained title to the publications after they had arrived in the forum state,<sup>114</sup> or had controlled distribution there.<sup>115</sup> The amount of circulation was not significant by itself.

If jurisdiction could not be based on distribution, courts looked for other activities the publisher conducted in the state. Frequently publishers did maintain offices in states to promote sales, to solicit advertising, and to gather news. For the most part, however, courts did not consider these activities sufficient to satisfy the doing business requirement. Sales promotion and advertising solicitation were not enough by themselves for jurisdiction unless the employees in the forum state had power to make binding contracts or to collect money for the publisher.<sup>116</sup> These responsibilities usually were retained by the home office out of state.

Although at least one court considered newsgathering a jurisdictionally significant activity,<sup>117</sup> others, most notably the United States Court of Appeals of the District of Columbia, declined to consider newsgathering in the

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112. See *Moorhead v. Curtis Publishing Co.*, 43 F. Supp. 67 (W.D. Ky. 1942); *Creager v. P.F. Collier & Son Co.*, 36 F.2d 783 (S.D. Tex. 1929). In *Moorhead*, the parent and the subsidiary shared the same name, officers, directors, and office building, but were incorporated in different states, maintained separate records and books, were staffed by different employees, and performed different functions. The court concluded that jurisdiction did not lie because they were separate legal entities.

113. See *Ricketts v. Sun Printing & Publishing Ass'n*, 27 App. D.C. 222 (1906). The publisher of the New York Sun maintained an office in the District of Columbia through which it furnished daily news reports to other newspapers.

114. See *Clements v. MacFadden Publications*, 28 F. Supp. 274 (E.D. Tex. 1939). An agreement between the publisher and its agent stipulated that the publisher would retain title to the magazines it shipped. The court found that the publisher was thus a property holder in the state through its magazines.

115. See *Acton v. Washington Times Co.*, 9 F. Supp. 74 (D. Md. 1934). A Washington, D.C., publisher maintained six distribution stations in nearby Maryland to which it delivered its newspapers. These stations were supervised by managers on its payroll. Distributors and supervisors were accountable to the publisher's main office in Washington, D.C.

116. See *Whitaker v. MacFadden Publications*, 105 F.2d 44 (D.C. Cir. 1939) (no jurisdiction over a publisher that had five sales promoters stationed in the District of Columbia because the promoters did not solicit advertising or subscriptions, nor did they collect money); *Kruger v. MacFadden Publications*, 38 F. Supp. 472 (D. Md. 1941) (no jurisdiction for the same reasons as in *Whitaker*, as well as the employees' lack of power to contract); *Lauricella v. Evening News Publishing Co.*, 15 F. Supp. 671 (E.D.N.Y. 1936) (no jurisdiction over a New Jersey newspaper that maintained an office in New York to solicit advertising because only the New Jersey office could approve orders and bill advertisers); *Merrimon v. Martindale-Hubbell, Inc.*, 36 F. Supp. 182 (E.D.S.C. 1940) (no jurisdiction when the only in-state activity was solicitation of subscribers).

117. See *Acton v. Washington Times Co.*, 9 F. Supp. 74 (D. Md. 1934) (calling newsgathering one of the essential functions of the newspaper business).

jurisdictional analysis.<sup>118</sup> The court concluded that mere newsgathering, like mere solicitation, did not amount to doing business. It reasoned that because most major newspapers maintained offices in Washington, D.C., to report on the national government, subjecting them to jurisdiction for this activity could affect the reporting of news to their home districts.<sup>119</sup>

### B. Early Interpretations of the Minimum Contacts Test

#### 1. Influence of the Doing Business Test

*International Shoe's* announcement of the minimum contacts test had little immediate effect on jurisdiction over nonresident publishers. Due process did not require states to extend their statutory jurisdiction to the constitutional limit.<sup>120</sup> Thus, cases could be decided on existing, more restrictive grounds. Because most cases against nonresident publishers were heard in federal courts, state courts had little opportunity to decide whether to accept the doctrine of *International Shoe*. Federal courts hesitated to discard doing business concepts in the absence of state court decisions or clear legislative intent.<sup>121</sup> When state legislatures did revise their statutes, they often retained "doing business" language. Courts construing the revised statutes often concluded they were not intended to reach to the limits of due process.<sup>122</sup> Finally, some courts explicitly chose to adhere to earlier rulings. The United States Court of Appeals for the District of Columbia Circuit, for example, has continued to follow the newsgathering exception created to

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118. See *Layne v. Tribune Co.*, 71 F.2d 223 (D.C. Cir. 1934); *Neely v. Philadelphia Inquirer Co.*, 62 F.2d 873 (D.C. Cir. 1932); *Lee v. Memphis Publishing Co.*, 195 Miss. 264, 14 So. 2d 351 (1943).

119. *Layne*, 71 F.2d at 224; *Neely*, 62 F.2d at 875. The court did not make clear whether its conclusion was based on the doing business theory, the commerce clause, or some wholly new rationale, such as the first amendment.

120. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 440 (1952); *Missouri Pac. R.R. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 222 (2d Cir. 1963). See also *Developments in the Law*, *supra* note 2, at 998-1008. Courts must decide whether the publisher's contacts are within the ambit of the state's statute as well as the due process clause. A state may require more contacts than are needed for due process but it may not allow less.

121. See *Walker v. Savell*, 335 F.2d 536, 542-43 (5th Cir. 1964) (no jurisdiction in Mississippi over the Associated Press); *Schmidt v. Esquire, Inc.*, 210 F.2d 908, 915-16 (7th Cir.) (no jurisdiction in Indiana over the publishers of *Esquire Magazine* and *Reader's Digest*), *cert. denied*, 348 U.S. 819 (1954); *Perna v. Dell Publishing Co.*, 240 F. Supp. 268, 269 (D. Mass. 1964) (no jurisdiction over the publisher of *Front Page Detective*). See also *Brewster v. Boston Herald-Traveler Corp.*, 141 F. Supp. 760, 763 (D. Me. 1956) (no jurisdiction over a Boston newspaper publisher).

122. See *Polizzi v. Cowles Magazine, Inc.*, 197 F.2d 74, 77 (5th Cir. 1952) (no jurisdiction in Florida over the publisher of *Look Magazine*), *rev'd on other grounds*, 345 U.S. 663 (1953); *Sonnier v. Time, Inc.*, 172 F. Supp. 576, 580 (W.D. La. 1959) (no jurisdiction over the publisher of *Time*, *Life*, *Sports Illustrated*, *Fortune*, and *House and Home* magazines).



protect newspapers that station permanent correspondents in Washington, D.C.<sup>123</sup>

At first, courts that chose to follow *International Shoe* were influenced by doing business concepts. They continued to focus on whether the publisher maintained an office, telephone listing, bank account, or agent in the state; whether it owned property or held its board meetings there; and whether it was authorized to do business in the state.<sup>124</sup> Central to these inquiries was the notion that the publisher must have performed some act in the state for jurisdiction. The publisher's circulation of its publication in the forum state, its greatest potential contact and the one from which defamation arises, was generally ignored, as it had been under the doing business test, because distribution in the state was carried out by independent contractors.<sup>125</sup> Doing business arguments that the publisher had relinquished title and control over

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123. See *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 433-34 (D.C. Cir. 1976); *Margoles v. Johns*, 483 F.2d 1212, 1222 (D.C. Cir. 1973); *Bulletin Co. v. Origoni*, 387 F.2d 240, 241 (D.C. Cir.), *cert. denied*, 389 U.S. 928 (1967).

On the other hand, some courts did find they could assert jurisdiction under a straight doing business test. In *Brandon v. Memphis Publishing Co.*, 194 F. Supp. 376, 377 (E.D. Ark. 1961), a Tennessee publisher had circulated two daily newspapers in nearby Arkansas, with an average Arkansas circulation of 21,084 daily and 30,249 Sunday newspapers. *Id.* at 377. Although most circulation was carried out by independent contractors, four of the publisher's employees regularly promoted circulation in Arkansas. In addition, the publisher maintained two offices in Arkansas to gather news. *Id.* The court granted jurisdiction on a "solicitation plus" theory emphasizing that the news report on which the claim was based originated in Arkansas. *Id.*

In contrast, the Mississippi Supreme Court, prior to *International Shoe*, had denied jurisdiction over the same publisher on similar facts. *Lee v. Memphis Publishing Co.*, 195 Miss. 264, 283, 14 So. 2d 351, 355 (1943). At that time the publisher maintained an office in Jackson, Mississippi to gather news. *Id.* at 276, 14 So. 2d at 352. It also sent 40,000 copies of its newspaper into the state daily. *Id.* at 283, 14 So. 2d at 355. Mississippi refused jurisdiction, however, because the newspapers were brought into the state by an independent contractor, and the court considered the act of newsgathering jurisdictionally insignificant. *Id.* at 279-83, 14 So. 2d at 353-55.

In another post-*International Shoe* case, the Supreme Court of Oklahoma resolved the question of jurisdiction over a publisher that distributed its magazine through an independent contractor by focusing on which party had practical control over the magazine, rather than which party had title. *Fawcett Publications v. Morris*, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964). The court found that the publisher had discretion over the number of copies it sent; it could dictate promotional activities to the distributor; it could increase or decrease the distributor's territory at will; and it could cancel the contract with ten days notice and without cause. *Id.* at 46. Reasoning that the distributor was little more than a conduit for the publisher, the court upheld jurisdiction. *Id.*

124. See, e.g., *Breckenridge v. Time, Inc.*, 253 Miss. 835, 839-40, 179 So. 2d 781, 782-83 (1965).

125. One court acknowledged the paradox by observing that:

Circulation is the source of life to the magazine publisher. Not only are readers a source of revenue, but their number is an important factor in attracting advertising and determining rates therefor. . . . [D]istributors . . . are but the conduit between

the publications outside the forum state frequently prevailed.<sup>126</sup>

Several early courts did find ways to assert jurisdiction without focusing directly on circulation. Some resorted to a functional analysis. They considered whether the publisher had carried out any of its essential operating functions—gathering news, soliciting advertising, or printing and circulating its publications—in the forum state.<sup>127</sup> Having its publication printed in the state was enough to bring a publisher into court; such activity not only was continuous but was part of the process of publishing a libel.<sup>128</sup> Likewise, maintaining a resident employee to write features, promote circulation, and solicit advertising in the state could bring the publisher within the court's jurisdiction, particularly when the edition in question was directed solely to that state.<sup>129</sup>

Other courts, by analyzing the relationship between the publisher and its distributor, found the publisher sufficiently involved in distribution to be amenable to suit. One court held a publisher subject to suit for employing eight persons to act as liaisons with its distributor and to travel throughout the state promoting circulation.<sup>130</sup> This court reasoned that promotional activity was sufficiently connected to the publication of a defamation for it to grant jurisdiction.<sup>131</sup> Another court determined that if a wholly-owned subsidiary acted as an agent for its parent organization, contacts of the subsidiary could be imputed to the parent.<sup>132</sup> It found that the parent company in

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the publisher and the reader, and they certainly establish contacts that are essential to the very existence of [the] defendant.

*Sonnier v. Time, Inc.*, 172 F. Supp. 576, 579 (W.D. La. 1959). The court in *Sonnier* denied jurisdiction, however, because of a restrictive state statute. *Id.* at 580.

126. See, e.g., *Jenkins v. Fawcett Publications*, 204 F. Supp. 361, 364 (N.D. Fla. 1962); *Fawcett Publications v. Rand*, 144 So. 2d 512, 513 (Fla. Dist. Ct. App. 1962) (no jurisdiction in Florida over the publisher of *Startling Detective Magazine*); *Putnam v. Triangle Publications*, 245 N.C. 432, 434-38, 96 S.E.2d 445, 447-50 (1957) (no jurisdiction in North Carolina over the publisher of *Official Detective Stories*, *Seventeen*, and *TV Guide*).

127. The first publishing case to use a functional approach was *Acton v. Washington Times Co.*, 9 F. Supp. 74 (D. Md. 1934), decided prior to *International Shoe*. The *Acton* court reasoned that "[i]f a foreign corporation sees fit to perform any one of these functions in a given jurisdiction, it necessarily follows that such performance raises the inference that the corporation is present and doing business within the jurisdiction." *Id.* at 76.

128. *LaBonte v. American Mercury Magazine, Inc.*, 98 N.H. 163, 167-68, 96 A.2d 200, 203 (1953); *Consolidated Cosmetics v. D-A Publishing Co.*, 186 F.2d 906, 908 (7th Cir. 1951).

129. *Hunter v. Afro-American Co.*, 133 F. Supp. 812, 820 (E.D.S.C. 1955).

130. *Jenkins v. Dell Publishing Co.*, 130 F. Supp. 104, 107, *aff'd on rehearing*, 132 F. Supp. 556 (W.D. Pa. 1955), *dismissed on other grounds*, 143 F. Supp. 952 (W.D. Pa. 1956).

131. *Id.* at 106-07. Compare *Jenkins* with *Whitaker v. MacFadden Publications*, 105 F.2d 44 (D.C. Cir. 1939), and *Kruger v. MacFadden Publications*, 38 F. Supp. 472 (D. Md. 1941) (jurisdiction in both cases denied on similar facts under the doing business theory prior to *International Shoe*). See *supra* note 116 and accompanying text.

132. *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 137 (10th Cir. 1962). The United

question—by giving its wholly-owned distributor credit for unsold copies, by paying it commissions on subscriptions received, and by reimbursing it for promotional activities—had borne the risks of distribution, and as such, was liable to suit in the forum state.<sup>133</sup>

Nevertheless, some courts were reluctant to explore ways to expand their jurisdiction. Even after *McGee* they continued to read *International Shoe* narrowly, as requiring the publisher to have performed a continuous and substantial amount of activity in the forum state. One court denied jurisdiction over the syndicator of a newspaper column that had been published for ten years in one of the forum state's newspapers.<sup>134</sup> Ignoring *McGee*, the court found the syndicator's act of contracting with the newspaper to publish the column too casual for jurisdiction.<sup>135</sup> Another court refused jurisdiction over the publisher of *Life Magazine*.<sup>136</sup> It interpreted *Hanson* as requiring the defendant to have physically transacted business in the forum state.<sup>137</sup> Because the publisher had contracted with independent parties to gather news, to distribute its magazines, and to solicit subscriptions in the state, the only activity its staff members conducted there was occasional solicitation of advertising.<sup>138</sup> The court considered this activity too inconsequential for jurisdiction.<sup>139</sup>

As these cases illustrate, courts that focused on the business activity of

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States Court of Appeals for the Tenth Circuit observed that the Supreme Court in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925), had placed importance on the agency relationship between a parent and its subsidiary.

133. *Id.* at 137-38. Compare *Cassel with Moorhead v. Curtis Publishing Co.*, 43 F. Supp. 67 (D. Ky. 1942) (jurisdiction over the same publisher denied under the more stringent requirements for doing business). See *supra* note 112.

134. *Walker v. General Features Corp.*, 319 F.2d 583 (10th Cir. 1963).

135. *Id.* at 586. In a separate opinion the United States Court of Appeals for the Tenth Circuit denied jurisdiction over the owner of the allegedly defamatory column. *Walker v. Field Enterprises*, 332 F.2d 632 (10th Cir. 1964) (*per curiam*). This decision was based solely on state law. *Id.* at 633.

136. *Breckenridge v. Time, Inc.*, 253 Miss. 835, 179 So. 2d 781 (1965).

137. *Id.* at 844, 179 So. 2d at 784.

138. *Id.* at 840-41, 179 So. 2d at 782-83. The complaint alleged that the publisher entered the forum state, took the defendant's picture, and published it in its magazine along with a defamatory caption. *Id.* at 840, 179 So. 2d at 782. In fact, the photographer was an independent contractor who sold the picture to Time, Inc., outside the state. The article and caption were written elsewhere, too. *Id.*

139. *Id.* at 844, 179 So. 2d at 784. In contrast the Supreme Court of Alabama allowed jurisdiction over the New York Times even though it used independent contractors for much of its in-state work. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964). In *Sullivan*, the New York Times had no staff stationed in Alabama but did have contracts with at least two Alabama residents to write occasional stories as string correspondents. The Times used one of these "stringers" to investigate the libel alleged by Sullivan. The Supreme Court of Alabama determined that these stringers were effectively agents of the Times. *Id.* at 669, 144 So. 2d at 33. The Times also solicited advertis-

publishers remained bound by earlier jurisdictional concepts. Only with the development of a theory basing jurisdiction on tortious activity were courts able to build a new framework for jurisdiction over publishers.

## 2. *Defamation as a Tortious Contact*

Prior to *International Shoe*, a corporation could not be summoned to court for having committed a tort in the state. The only jurisdictional basis available was doing business.<sup>140</sup> *International Shoe* incorporated the tort theory of jurisdiction, which previously had applied only to individuals being sued for tortious driving, into the minimum contacts scheme.<sup>141</sup> The tort basis of jurisdiction thus was broadened to cover all torts, including that of defamation. At the same time, states gained a means of exercising jurisdiction over corporations that had committed torts in the state but whose activity there amounted to less than "doing business."<sup>142</sup>

Once due process clearly allowed jurisdiction over a corporation for committing a tort, states began to amend their statutes to allow jurisdiction for all forms of tortious conduct. Two basic types of long-arm tort statutes were developed. On the one hand, several states enacted provisions requiring "the commission of a tortious act" in the state<sup>143</sup> or "the commission of a tort in whole or in part" there.<sup>144</sup> On the other hand, some states, and the Uniform Interstate and International Procedure Act,<sup>145</sup> allow jurisdiction only for in-

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ing in Alabama and sent its newspapers into the state. Relying on *McGee*, the court concluded that these activities were sufficient for jurisdiction. *Id.*

140. See *supra* note 32 and accompanying text.

141. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). The Court used the nonresident motorist cases of *Hess v. Pawloski*, 274 U.S. 352 (1927), and *Kane v. New Jersey*, 242 U.S. 160 (1916), as examples of single acts which by their nature and quality were sufficient to confer jurisdiction under the minimum contacts test.

142. See generally Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959).

143. See, e.g., ILL. ANN. STAT. ch. 110, § 2-209(a) (Smith-Hurd 1980). This act provides that:

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

...

(2) The commission of a tortious act within this State.

*Id.* Illinois was one of the first states to enact a comprehensive long-arm statute. Other states have adopted the language of the Illinois statute. See, e.g., N.M. STAT. ANN. § 38-1-16 (Michie 1978); TENN. CODE ANN. § 20-2-214(2) (Michie 1980). For a discussion of the Illinois statute and its interpretation, see Currie, *supra* note 14; Cleary & Seder, *supra* note 43.

144. See, e.g., TEX. REV. CIV. STAT. ANN. art. 2031(b) § 4 (Vernon 1964).

145. 13 U.L.A. 459 (1980).

jury caused by an act in the state or for injury caused by an act outside the state, as long as the defendant engages in business or in any other persistent conduct within the state.<sup>146</sup> These statutes were intended to be construed more narrowly than the tortious act statutes to obviate any due process concerns.<sup>147</sup>

Initially, courts construed all the new tort provisions narrowly. In *Putnam v. Triangle Publications, Inc.*,<sup>148</sup> the Supreme Court of North Carolina held that the state's statute, which required "tortious conduct" in the state for jurisdiction, could not be applied constitutionally to the facts of the case.<sup>149</sup> The court found that Triangle Publications had not entered North Carolina either personally or through its chattels because it had consigned its magazines to independent distributors, who brought them into the state. Without conducting any activity in the state, Triangle Publications was not subject to jurisdiction.<sup>150</sup>

The United States Court of Appeals for the Seventh Circuit took another approach in *Innull v. New York World-Telegram Corp.*<sup>151</sup> In *Innull*, an Illinois resident sued the Scripps-Howard newspapers in Illinois. These newspapers, incorporated and published in cities outside Illinois, had very limited circulation in the state.<sup>152</sup> The plaintiff argued that the defendant's sale of the newspapers in Illinois completed a tort commenced elsewhere. As the last event necessary for liability, the sale of the newspapers was part of the

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146. Section 1.03 of the Uniform Interstate and International Procedure Act provides that:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's

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(3) causing tortious injury by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside the 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.

UNIF. INTERSTATE AND INT'L PROCEDURE ACT § 1.03, 13 U.L.A. 466 (1980 & Supp. 1985). See *Margoles v. Johns*, 483 F.2d 1212, 1216-17 (D.C. Cir. 1973), for an explanation of the District of Columbia statute and for a discussion of long-arm tort provisions generally.

147. UNIF. INTERSTATE AND INT'L PROCEDURE ACT § 1.03(a)(3)-(a)(4), 13 U.L.A. 468-69 (1980 & Supp. 1985), commissioner's comment.

148. 245 N.C. 432, 96 S.E.2d 445 (1957).

149. *Id.* at 443, 96 S.E.2d at 455.

150. *Id.* at 444, 96 S.E.2d at 454-55. The court made a similar argument in denying jurisdiction under the distribution of goods provision of the North Carolina long-arm statute. *Id.* at 454. See *supra* note 126.

151. 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

152. *Id.* at 169. The New York World-Telegram circulated 37 papers in Illinois daily. The other Scripps-Howard newspapers circulated even fewer. As in *Putnam*, the court rejected jurisdiction under the doing business theory because the newspapers were delivered into Illinois by mail and by independent contractors.

"tortious act" required by the Illinois statute.<sup>153</sup> The Seventh Circuit rejected this argument and held that in cases of multistate publication, the cause of action is complete where the communication is first published.<sup>154</sup> In this case, the newspapers were first published outside Illinois. The Seventh Circuit concluded that the tortious act occurred there, not in Illinois.<sup>155</sup>

Other courts criticized *Putnam* and *Insull*.<sup>156</sup> Both cases now appear to have been overruled.<sup>157</sup> The major turning point in interpreting "tortious act" provisions came with the decision of the Supreme Court of Illinois in *Gray v. American Radiator & Standard Sanitary Corp.*<sup>158</sup> In *Gray*, an Illinois resident had been injured in Illinois in a hot water heater explosion, caused by a faulty valve manufactured in Ohio and installed in the heater in

153. *Id.* at 171. Plaintiff's argument was based on the last event doctrine. See RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

154. 273 F.2d at 171. The court based its argument on the single publication rule. See *supra* note 22. In this case, the court used the single publication rule to determine a single place for the commission of the tort.

155. 273 F.2d at 171.

156. *Putnam* was rejected in *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified on other grounds, 448 F.2d 378 (4th Cir. 1971). Courts that have rejected the *Insull* approach include *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir.), cert. denied, 432 U.S. 911 (1977); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Blount v. T D Publishing Co.*, 77 N.M. 392, 423 P.2d 426 (1966); *Roy v. North Am. Newspaper Alliance, Inc.*, 106 N.H. 92, 205 A.2d 844 (1964). See also *Process Church of the Final Judgment v. Sanders*, 338 F. Supp. 1396 (N.D. Ill. 1972); *Novel v. Garrison*, 294 F. Supp. 825 (N.D. Ill. 1969); *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978).

For commentators rejecting *Putnam*, see Note, *Foreign Corporations—Jurisdiction—State Statute Asserting Jurisdiction Over Foreign Corporations Held Unconstitutional As Applied to Defendant—Putnam v. Triangle Publications, Inc.*, 71 HARV. L. REV. 554 (1958); Note, *Corporations—Jurisdiction—"Doing Business"*, 26 FORDHAM L. REV. 342 (1957). See also Note, *Service of Process—Jurisdiction Over Foreign Corporations*, 35 N.C.L. REV. 546 (1957). For commentators rejecting *Insull*, see Currie, *supra* note 14; Comment, *Newspaper Libel: Barriers to Expanding Personal Jurisdiction*, 29 U. CHI. L. REV. 569 (1962).

157. In *Johnston v. Time, Inc.*, the United States District Court for the Middle District of North Carolina concluded that the Supreme Court of North Carolina had overruled *Putnam* by its subsequent decision in *Painter v. Home Finance Co.*, 245 N.C. 576, 96 S.E.2d 731 (1957). *Johnston*, 321 F. Supp. at 842. The federal court was quick to note, however, that the North Carolina contacts of Time, Inc., greatly exceeded those of Triangle Publications in *Putnam*. Not only did Time have over 200,000 subscribers in North Carolina to four of its magazines, it owned property in the state and sold advertising to North Carolina businesses. *Id.* at 841.

In *Process Church of the Final Judgment v. Sanders*, 338 F. Supp. 1396 (N.D. Ill. 1972), the United States District Court for the Northern District of Illinois concluded that *Insull* was overruled by the decision of the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). See *infra* notes 158-62 and accompanying text.

158. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

Pennsylvania.<sup>159</sup> The Illinois court determined it could not separate the negligence in manufacturing the valve from the injury it had caused.<sup>160</sup> The court reasoned that injury was a necessary component of a tortious act. It accepted the last event argument rejected by *Insull*, stating that the place of the wrong is where the last event necessary for liability occurs.<sup>161</sup> Because the injury occurred in Illinois, suit in Illinois was proper.<sup>162</sup>

Courts in states that have "tortious act" statutes like that of Illinois generally have accepted *Gray*, as has the United States District Court for the Northern District of Illinois, which has held that it overrules *Insull*.<sup>163</sup> In contrast, courts applying "act in state" statutes have interpreted them more narrowly than the Illinois statute.<sup>164</sup> They usually require that the defendant commit the causative act within the bounds of the state before they will assert jurisdiction.<sup>165</sup> Thus, only those publishers who have written, printed, mailed, or personally distributed the publication in the forum state may be subject to suit under one of these provisions. On the other hand, some courts have been fairly liberal in applying the companion provisions that allow jurisdiction for an act occurring elsewhere as long as the defendant has engaged in business activity within the forum state.<sup>166</sup> These courts have asserted jurisdiction over publishers for out-of-state publication even when the publishers' in-state business activity is relatively minor.<sup>167</sup>

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159. *Id.* at 434, 438, 176 N.E.2d at 762, 764.

160. *Id.* at 436, 176 N.E.2d at 763.

161. *Id.* at 435-40, 176 N.E.2d at 762-65.

162. *Id.* at 444, 176 N.E.2d at 767.

163. *See* *Process Church of the Final Judgment v. Sanders*, 338 F. Supp. 1396 (N.D. Ill. 1972). *See also* *Novel v. Garrison*, 294 F. Supp. 825 (N.D. Ill. 1969). In *Process Church*, the District Court for the Northern District of Illinois held a Louisiana book publisher and a New York author subject to jurisdiction in Illinois for distributing their book in that state. The court, in addition to finding that *Gray*'s acceptance of the last event doctrine conflicted with *Insull*, noted that Illinois had adopted the Uniform Single Publication Act. 338 F. Supp. at 1399-1400. The Uniform Act does not restrict the place where an action may be brought. UNIF. SINGLE PUBLICATION ACT, 14 U.L.A. 351 (1980).

164. *See supra* notes 145-47 and accompanying text. One court, recognizing that the state statute would not allow jurisdiction over the defendants for mailing defamatory letters into the state, disregarded the statute and asserted jurisdiction as consistent with due process, relying on *Gray* for its holding. *St. Clair v. Righter*, 250 F. Supp. 148, 153, 155 (W.D. Va. 1966).

165. For example, in *Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit denied jurisdiction over a defendant who had made a defamatory telephone call from Wisconsin to the plaintiff in Washington, D.C. *Id.* at 1213. The plaintiff argued that the defendant had acted in the District of Columbia by projecting her presence through the device of the telephone. *Id.* at 1217. The court rejected this argument. It concluded that, according to the plain language of the District's statute, the "act" must be considered separately from its consequences. Thus, the act of uttering the statements took place in Wisconsin, not in the District of Columbia. *Id.* at 1218.

166. *See supra* note 146.

167. *See* *Founding Church of Scientology v. Verlag*, 536 F.2d 429 (D.C. Cir. 1976). In

### 3. *The Stream of Commerce Theory and a Balancing of Interests*

In addition to defining how "tortious act" provisions of long-arm statutes should be interpreted, *Gray* introduced the "stream of commerce" theory. Under this theory, if a corporation chooses to market its products for ultimate use in the forum state, the forum is justified in exercising jurisdiction over claims of injury caused by those products.<sup>168</sup> Shipment into the state by an independent middleman is immaterial because the manufacturer derives a benefit from the state that is essential to its business.<sup>169</sup> The stream of commerce theory combines elements of both the doing business and tort theories of jurisdiction. It draws from *McGee* the concept that a defendant can be subject to jurisdiction for an extraterritorial act. It justifies jurisdiction on the ground that by including the forum state within its market, the defendant enjoys the benefits and protections of its laws, as required by *Hanson*.

The stream of commerce theory provided a mechanism to assert jurisdiction over publishers who used the mails or independent contractors for distribution or who rarely were present in the forum state. During the 1960's several courts did accept this rationale. The first to use it was *Roy v. North American Newspaper Alliance, Inc.*<sup>170</sup> *Roy* concerned a distributor of syndicated columns. Although the syndicator in *Roy* distributed its features directly to newspapers in New Hampshire without resort to a middleman, it rarely entered the state itself.<sup>171</sup> The Supreme Court of New Hampshire upheld jurisdiction, reasoning that a publisher should be treated no differently than a product manufacturer; both purposefully had caused their products to be marketed in the forum state even though they had not been present there.<sup>172</sup> The court found that New Hampshire had an interest in

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*Verlag*, the United States Court of Appeals for the District of Columbia Circuit found that, in addition to circulating 56 copies of the allegedly defamatory magazine in the District of Columbia, the publisher had received \$26,000 in revenue from its sales there during a 10-month period, an amount equal to about 1% of its total revenues. *Id.* at 431-33. This amount, although not great, was sufficient to meet the statute's "substantial revenue" standard for supporting business activity, and thus, to bring the publisher within the court's jurisdiction. *Id.* at 433. The substantial revenue test, also used in Maryland and Virginia, considers both the absolute amount and percentage of total sales to determine whether contacts are sufficient for jurisdiction. *Id.*

See also *Akbar v. New York Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1980) (allowing jurisdiction over a New York publisher with annual sales in the District of Columbia of only \$32,897, an amount equal to 0.7% of its total circulation revenues).

168. "[I]f a corporation elects to sell its products for ultimate use in another [s]tate, it is not unjust to hold it answerable there for any damage caused by defects in those products." *Gray*, 22 Ill. 2d at 442, 176 N.E.2d at 766.

169. *Id.* at 442, 176 N.E.2d at 766.

170. 106 N.H. 92, 205 A.2d 844 (1964).

171. *Id.* at 95-96, 205 A.2d at 846.

172. *Id.* at 96, 205 A.2d at 847. Compare *Roy* with *Walker v. General Features Corp.*, 319



the litigation, that of protecting its citizens from defamation.<sup>173</sup> A publisher could reasonably anticipate libel actions there from the distribution of its publications.<sup>174</sup> Weighing the equities and conveniences of trial in New Hampshire, the court concluded that exercise of jurisdiction was fair because New Hampshire's law would be applied to the matter; most of the crucial witnesses lived there; and North American had derived benefit for years from its sales in the state.<sup>175</sup>

In *Roy*, there was no middleman between the syndicator and the newspapers to which it sold its features. In *Bibie v. T.D. Publishing Corp.*,<sup>176</sup> the publisher's magazines were shipped into the state by independent parties. In accordance with *Gray*, the United States District Court for the Northern District of California upheld jurisdiction, finding that the publisher was aware that over eleven percent of its magazines were destined for California.<sup>177</sup> The defendant had chosen to exploit that market and had derived substantial revenue from sales there.<sup>178</sup> The court then balanced the interests of the plaintiff and the state against the inconvenience to the defendant in standing trial and held that trial in California would be fair.<sup>179</sup>

The majority of courts now accept the stream of commerce theory.<sup>180</sup> *Roy* and *Bibie* demonstrate the general characteristics of cases decided under this theory. Instead of searching for in-state activities attributable to the

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F.2d 583 (10th Cir. 1963) (jurisdiction over a syndicator denied because the court ignored the syndicator's act of contracting to distribute the column). See *supra* notes 134-35 and accompanying text.

173. 106 N.H. at 97, 205 A.2d at 847. The court noted that the choice of forum was not motivated by forum-shopping because the plaintiff lived and worked there.

174. *Id.* at 97-98, 205 A.2d at 847. That North American did foresee libel actions was shown by its contract with the column's author, Drew Pearson. The contract indemnified it against liability from libel. *Id.*

175. *Id.* at 98, 205 A.2d at 848.

176. 252 F. Supp. 185 (N.D. Cal. 1966).

177. *Id.* at 189.

178. *Id.* In addition to subscription and newsstand revenues, the publisher's magazines carried \$2,052 of advertising from California businesses. *Id.* at 187.

179. *Id.* at 188-89. The balancing factors the court considered were: the state's interest in providing a forum for its residents; the availability of evidence and witnesses; the accessibility of another forum; the desire to avoid multiple lawsuits; and the extent to which the cause of action arose from local activity. *Id.* at 189. The court concluded that the plaintiff's interests were established by her residence in the state, the location of her witnesses there, and the difficulty she would have in bringing suit in New York, the defendant's state. *Id.* California had an interest in the matter because the cause of action arose from the publisher's sales there, the plaintiff was a resident, California was the real locus of injury, and California law would apply. *Id.* at 190. These interests outweighed any inconvenience to the defendant who had affirmatively chosen to market its magazines in California. *Id.* at 190-91.

180. Courts that do not accept the stream of commerce theory have restrictive doing business or tort provisions in their long-arm statutes.

publisher, as in cases decided under a pure doing business theory, courts following the stream of commerce rationale look for distribution of the publication in the forum state and economic benefit to the publisher.<sup>181</sup> The results are more consistent with *International Shoe* than the doing business test because the basis for the cause of action, injury to reputation, is related to the contact of circulating defamatory material.

As the United States Supreme Court did in *McGee*, courts following the stream of commerce theory frequently balance interests to determine the fairness of holding the trial in the state. Usually, courts have found that the interests of the state and plaintiff outweigh the inconvenience to the defendant. Nevertheless, the balancing factors have provided defendants a new means to challenge jurisdiction. In one case, *Curtis Publishing Co. v. Birdsong*,<sup>182</sup> the United States Court of Appeals for the Fifth Circuit denied jurisdiction because it found that the forum state, Alabama, had no interest in the suit that it did not share with the forty-nine other states.<sup>183</sup> Neither the plaintiff nor the publisher resided in the state. The majority ignored the fact that the publisher had circulated almost 70,000 copies of its allegedly defamatory issue in Alabama.<sup>184</sup> Instead, it noted that most of the injury occurred in Mississippi, where the plaintiff lived. The court concluded that if plaintiffs were allowed to sue in any state of their choosing, businesses operating nationwide could be subjected to frivolous and harassing lawsuits throughout the country.<sup>185</sup>

### C. Jurisdiction Over Publishers When Circulation Is Small

#### 1. First Amendment Considerations

Once the publisher's act of sending its publications into the state was accepted as a jurisdictionally significant contact, the question shifted to the point at which circulation becomes too inconsequential for the exercise of

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181. *But see* *Blount v. T D Publishing Corp.*, 77 N.M. 384, 423 P.2d 421 (1966) (court concluded that by sending its magazines into the national stream of commerce the defendant had submitted to the jurisdiction of all states in which its magazines caused injury, and thus, did not balance the interests and conveniences of the parties).

182. 360 F.2d 344 (5th Cir. 1966).

183. *Id.* at 347. The court found that no rational nexus existed between Alabama and the parties, the injury to their reputations, or the subject matter of the allegedly defamatory article. *Id.* at 346-47.

184. *Id.* at 347. The circulation of the *Saturday Evening Post* in Alabama at the time was 69,552 copies per issue. The court did not decide whether the circulation amounted to a contact with the state. The concurring opinion by Judge Rives found that the circulation did constitute a contact. *Id.* at 349 (Rives, J., concurring). Nevertheless, he agreed that due process would not allow the court to exercise jurisdiction because Alabama had no legitimate interest in the case. *Id.* at 353.

185. *Id.* at 347.

jurisdiction. This issue has arisen most often when a newspaper disseminates only a handful of copies in a state distant from its principal place of business.

After a series of cases brought in Southern states against the New York Times during the civil rights unrest of the early 1960's, the United States Court of Appeals for the Fifth Circuit, in *New York Times Co. v. Connor*,<sup>186</sup> concluded that a "greater showing of contact" was needed for newspaper publishers than for other types of businesses because of first amendment considerations.<sup>187</sup> The New York Times had circulated an average of 395 daily and 2,455 Sunday papers in Alabama, where Eugene Connor lived and brought suit.<sup>188</sup> The Times' newsgathering and advertising activities in Alabama were equally small.<sup>189</sup> These contacts were almost identical to the Times' contacts with Louisiana in *Buckley v. New York Times Co.*<sup>190</sup> and its contacts with Alabama in *New York Times Co. v. Sullivan*.<sup>191</sup> Although both earlier cases had been decided on due process grounds, the Fifth Circuit denied jurisdiction in *Buckley*,<sup>192</sup> while the Supreme Court of Alabama allowed it in *Sullivan*.<sup>193</sup> Further complicating the matter was the fact that

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186. 365 F.2d 567 (5th Cir. 1966). The jurisdictional issue in this case had been appealed to the Fifth Circuit twice before. In *New York Times Co. v. Conner* [sic], 291 F.2d 492 (5th Cir. 1961), the court denied jurisdiction on grounds similar to *Insull*. *Id.* at 494. After the Supreme Court of Alabama ruled that it did have jurisdiction over the Times in *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), and expressed disapproval of *Conner*, the Fifth Circuit vacated its decision. *Connor v. New York Times Co.*, 310 F.2d 133 (5th Cir. 1962). Both cases concerned the same contacts. The Fifth Circuit allowed the case to go forward, but reserved hearing on the due process question until trial had been conducted on the merits. 310 F.2d at 135. The instant case was brought after trial on the merits.

187. 365 F.2d at 572. Such a policy was suggested in two earlier Fifth Circuit cases. In *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), the court speculated that Mississippi courts might require a higher standard of doing business for publishers than for other commercial corporations because of a threat to the freedom of the press. *Id.* at 544. In *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964) (Brown, J., dissenting), the dissent would have granted jurisdiction over the New York Times for contacts almost identical to those in *Connor* unless first amendment policies precluded it. *Id.* at 476.

188. 365 F.2d at 570.

189. *Id.* Staff reporters had visited Alabama on seven occasions between April 1, 1959 and August 22, 1960. Occasionally, the Times bought stories from independent correspondents, or "stringers," living in Alabama. During the same period, Times' employees had traveled to Alabama five times to solicit advertising. Only 0.025% to 0.046% of the Times' total advertising revenue came from Alabama.

190. 338 F.2d 470 (5th Cir. 1964).

191. 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964).

192. 338 F.2d at 474-75. Jurisdiction was denied on the grounds that mere circulation of a periodical, even though accompanied by sporadic newsgathering and solicitation of a small amount of advertising, did not constitute doing business.

193. 273 Ala. at 670-71, 144 So. 2d at 34-35. Jurisdiction was upheld on the grounds that the Times conducted the activities of a publisher to a substantial degree in Alabama, and the cause of action, defamation in an advertisement printed in the newspaper, although not solic-

the Fifth Circuit previously had asserted jurisdiction over a foreign manufacturer for a single tort committed in Alabama.<sup>194</sup> If the Fifth Circuit allowed jurisdiction for a single act of defamation, circulation of a single copy of a newspaper in the state would suffice. A newspaper publisher, faced with the threat of suit in a distant forum and at the hands of a hostile local jury, might cease to circulate there at all if the cost of defending the suit outweighed the publisher's gain from sales. Readers in the forum state would be deprived of the newspaper's point of view. To protect the free flow of ideas, the Fifth Circuit decided that the first amendment required a greater showing of contacts for publishers.<sup>195</sup> Jurisdiction in *Connor* was denied.

Using the first amendment in the jurisdictional analysis went beyond previous Supreme Court rulings. In subsequent decisions, the Fifth Circuit made clear that its test would not always bar jurisdiction over publishers. In *Curtis Publishing Co. v. Golino*,<sup>196</sup> the Fifth Circuit allowed jurisdiction in Louisiana over the publisher of the Saturday Evening Post, which circulated less than one percent of its total circulation in that state. The Court distinguished between the business orientation and motivations of newspaper publishers and those of magazine publishers. It concluded that, unlike a newspaper publisher, which caters primarily to a local market, a magazine publisher like Curtis actively seeks a national market.<sup>197</sup> The court reasoned that although a newspaper might curtail its circulation in a distant market if confronted with suit there, a national magazine publisher would be unlikely to take the same action.<sup>198</sup> Circulation of the Saturday Evening Post in Louisiana, although only a small percentage of its total circulation, amounted to 60,000 copies per issue.<sup>199</sup> The Fifth Circuit concluded that Curtis Publishing would not curtail its circulation in Louisiana to avoid having to appear

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ited, related to those activities. In contrast to the facts ascertained in *Connor*, 365 F.2d at 570, the Alabama court found that Times correspondents had spent a total of 153 days in Alabama gathering news between 1956 and 1960. 273 Ala. at 665, 144 So. 2d at 29. See *supra* note 189. The Times maintained an ongoing contract with a stringer in Montgomery, Alabama, and sought to have two other stringers as well. *Id.* From January to May 1960, the Times received \$17,000 to \$18,000 of advertising from Alabama. *Id.* at 666, 144 So. 2d at 30.

194. *Elkhart Eng'g Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965) (jurisdiction allowed in Alabama over a foreign aircraft manufacturer for a single airplane crash in the state).

195. 365 F.2d at 572-73.

196. 383 F.2d 586 (5th Cir. 1967). By the time of the Fifth Circuit's decision in *Golino*, Louisiana had revised its statute to reach to the full extent of due process. *Cf. Sonnier v. Time, Inc.*, 172 F. Supp. 576 (W.D. La. 1959) (no jurisdiction over a major publisher under the former, more restrictive statute). See *supra* note 122.

197. *Golino*, 383 F.2d at 590.

198. *Id.* at 592.

199. *Id.* at 588.

in court there.<sup>200</sup>

Similarly, first amendment considerations did not prohibit jurisdiction over a wire service that had aimed its allegedly libelous report exclusively at the forum state. In *Edwards v. Associated Press*,<sup>201</sup> the Fifth Circuit found that the Associated Press, by permanently stationing five correspondents in Mississippi and by beaming its reports continuously into the state, enjoyed the benefits and protections of Mississippi's laws.<sup>202</sup> Accordingly, the court concluded that these contacts greatly exceeded those of the New York Times in *Connor*.<sup>203</sup>

In *Rebozo v. Washington Post Co.*,<sup>204</sup> the Fifth Circuit held that a newspaper's substantial activities in the forum state made jurisdiction fair despite its limited circulation there. The court found that the Washington Post derived significant economic benefit from its activities in Florida; not only did it own fifty percent of a news service that distributed stories to Florida newspapers, including the story about Rebozo, it also owned Newsweek Magazine and two Florida television stations.<sup>205</sup> Furthermore, Post reporters spent a considerable amount of time gathering news in Florida, and \$42,000 of the newspaper's advertising revenue came from the state.<sup>206</sup> In contrast to *Connor*, the Post's Florida activities were substantial enough to dispel fears of a "chilling effect" on circulation.<sup>207</sup>

Despite these exceptions, the Fifth Circuit has continued to deny jurisdiction on first amendment grounds when a newspaper's circulation and other activities have been minimal.<sup>208</sup> In contrast, commentators and other courts

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200. *Accord* *David v. National Lampoon, Inc.*, 432 F. Supp. 1097, 1098 (D.S.C. 1977). Both the *Golino* and *David* courts realized that despite a small in-state percentage of total circulation, the actual number of copies circulated could be quite large.

201. 512 F.2d 258 (5th Cir. 1975).

202. *Id.* at 267. In *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), the Fifth Circuit had held, on identical facts, that the Associated Press was not doing business under the former Mississippi statute. After that decision, Mississippi revised its statute. *Edwards* was decided under the new Mississippi tort provision. 512 F. 2d at 260.

203. 512 F.2d at 268.

204. 515 F.2d 1208 (5th Cir. 1975). *Rebozo* was brought under the tort provision of Florida's newly revised long-arm statute. *Cf.* *Jenkins v. Fawcett Publications*, 204 F. Supp. 361 (N.D. Fla. 1962); *Fawcett Publications v. Rand*, 144 So. 2d (Fla. Dist. Ct. App. 1962) (jurisdiction denied under Florida's former statute, which required that a corporation be involved in a business venture in Florida).

205. 515 F.2d at 1210.

206. *Id.*

207. *Id.* at 1215-16.

208. *See* *Wolfson v. Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971) (*per curiam*) (no jurisdiction in Florida over a Texas newspaper when its yearly circulation of between 10,000 and 11,000 copies amounted to approximately 0.15% of its total circulation); *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978) (no jurisdiction in Texas over newspapers published in Florida, New York, and Colorado because, although their very limited circulation met the

did not readily accept the first amendment rule.<sup>209</sup> In *Buckley v. New York Post Corp.*,<sup>210</sup> the United States Court of Appeals for the Second Circuit refused to consider the first amendment in determining jurisdiction over a New York newspaper that distributed approximately 2,000 newspapers daily in Connecticut.<sup>211</sup>

Judge Friendly, writing for the majority, noted that ordinarily jurisdiction in Connecticut would be proper because injury to the plaintiff's reputation had occurred there.<sup>212</sup> He acknowledged, however, the Fifth Circuit's ruling in *Connor* that first amendment concerns play a role when the cost of defense outweighs the benefits of in-state circulation.<sup>213</sup> Observing that publishers are businesses established to make profits<sup>214</sup> and that developments in the substantive law of defamation were designed to mitigate the hazards of

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minimum contacts test, they had not purposefully attempted to market their newspapers in the state). Cf. *Stabler v. New York Times Co.*, 569 F. Supp. 1131 (S.D. Tex. 1983) (jurisdiction allowed over the New York Times in Texas for distributing approximately 6,725 copies of a defamatory article about a citizen of that state).

209. See, e.g., Comment, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967); Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967); Note, *Exercise of Jurisdiction Over a Newspaper Vacated on the Basis of the First Amendment*, 35 FORDHAM L. REV. 726 (1967); Comment, *Due Process and First Amendment Considerations in Libel Cases*, 52 IOWA L. REV. 1034 (1967); Recent Case, *First Amendment Requires a Greater Showing of Contact in a Libel Action to Satisfy Due Process Than Is Necessary in Other Types of Actions*, 20 VAND. L. REV. 921 (1967). But see Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975 (1982); Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COM. L.J. 19 (1980); Note, *First Amendment's Role in Determining Place of Trial in Libel Actions*, 66 MICH. L. REV. 542 (1968); Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967).

210. 373 F.2d 175 (2d Cir. 1967).

211. *Id.* at 177. Daily circulation of the Post in Connecticut averaged 1,707 copies. Week-end circulation averaged 2,100. These figures did not include an indeterminate number of newspapers bought in New York by Connecticut commuters to read on their way home. *Id.*

212. *Id.* at 181 (citing *Elkhart Eng'g v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965), and other tort cases allowing jurisdiction in the state of injury). The court also acknowledged the general rule that injury from defamation is held to occur wherever the defamatory material is circulated. *Id.* at 178. It pointed out that *McGee* could be read as allowing jurisdiction in the state of injury. *Id.* at 181.

213. *Id.* at 182.

214. *Id.* The court noted that:

Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public, such as providers of food or shelter or manufacturers of drugs designed to ease or prolong life, they must pay the freight; and injured persons should not be relegated to forums so distant as to make collection of their claims difficult or impossible.

*Id.*

defense in a distant and possibly hostile forum,<sup>215</sup> he suggested that the first amendment be considered for forum non conveniens, rather than in the jurisdictional analysis.<sup>216</sup> In this case, he determined that the Post would be unlikely to curtail its sales in Connecticut to avoid trial there. He noted the larger number of copies circulated in this case than in *Connor*, the economic and intellectual identity of New York City and lower Connecticut, the proximity of the two jurisdictions, and the fact that a considerable number of Connecticut residents commuted daily to New York where many of them purchased copies of the Post at newsstands.<sup>217</sup> Under these circumstances, he found that denial of jurisdiction would be unwarranted.<sup>218</sup>

Other courts agreed that the first amendment should not be considered in the jurisdictional analysis.<sup>219</sup> Nevertheless, several of the United States District Courts in the Third,<sup>220</sup> Seventh,<sup>221</sup> and Eleventh Circuits recently adopted the Fifth Circuit's test.<sup>222</sup> These courts denied jurisdiction on first amendment grounds over newspaper and magazine publishers that circulated either a small number or a small percentage of copies in the forum state and engaged in few other activities there.<sup>223</sup>

In addition, several state legislatures ensured that courts in their states would not infringe on first amendment rights by expressly excluding jurisdic-

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215. *Id.* (citing the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

216. *Id.* at 183-84. *See also* *Cordell v. Detective Publications*, 307 F. Supp. 1212, 1216 (E.D. Tenn. 1968).

217. 373 F.2d at 184.

218. *Id.* One judge concurred separately. *Id.* (Medina, J. concurring). He would allow jurisdiction but would reserve judgment on whether first amendment considerations should be used for forum non conveniens purposes.

219. *See* *Church of Scientology v. Adams*, 584 F.2d 893, 899 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir. 1977); *Sipple v. Des Moines Register & Tribune Co.*, 82 Cal. App. 3d 143, 148-50, 147 Cal. Rptr. 59, 62-63 (1978). *But see* *Johnston v. Time, Inc.*, 321 F. Supp. 837, 846-47 (M.D.N.C. 1970) (court considered the first amendment but gave it very little weight).

220. *McCabe v. Kevin Jenkins & Assocs.*, 531 F. Supp. 648 (E.D. Pa. 1982) (no jurisdiction over a small California magazine publisher with a monthly circulation of six copies in Pennsylvania).

221. *Gonzales v. Atlanta Constitution*, 4 Media L. Rep. (BNA) 2146 (N.D. Ill. 1979) (no jurisdiction over a Georgia newspaper publisher with a daily circulation of 37 copies in Illinois).

222. *Cox Enterprises v. Holt*, 678 F.2d 936 (11th Cir. 1982) (former Fifth Circuit) (no jurisdiction over a Georgia newspaper publisher with an indeterminate, but small, circulation in Alabama); *Ziegler v. Ring Publishing Corp.*, 9 Media L. Rep. (BNA) 1303 (S.D. Fla. 1982) (no jurisdiction over a New York magazine publisher with only 3.5% of its total circulation in Florida).

223. *Cox Enterprises*, 678 F.2d at 939; *McCabe*, 531 F. Supp. at 655; *Ziegler*, 9 Media L. Rep. at 1304; *Gonzales*, 4 Media L. Rep. at 2148.

tion for defamation from the tort provisions of their long-arm statutes.<sup>224</sup> These states did not deny plaintiffs complete access to the courts, however. If the publisher's contacts were sufficient to meet another long-arm provision, such as one for doing business, a plaintiff could still bring suit.

## 2. *The Effects Test: Basing Jurisdiction on Intended or Foreseeable Injury*

Some courts that declined to consider the first amendment in analyzing a publisher's contacts used the effects test to determine whether a publisher with limited circulation should be summoned to defend.<sup>225</sup> In its broadest sense, the effects test includes the stream of commerce theory, exemplified by *Gray*, which enables courts to exercise jurisdiction over businesses that derive economic benefit from ultimate sales in the forum state.<sup>226</sup> When circulation is very small, however, the stream of commerce form of the effects test is inapplicable because the publisher derives little economic benefit from the state. In such a case, the inquiry shifts to whether injury in the state is intended or foreseeable.<sup>227</sup>

In contrast to cases like *Roy v. North American Newspaper Alliance, Inc.*,<sup>228</sup> in which defamation was presumed foreseeable from the act of marketing in the forum state, jurisdiction based on injury requires that foreseeability of defamation be shown by specific facts. Courts usually consider the content of the allegedly defamatory publication, whether the publication is likely to defame the plaintiff in that state, and the publisher's awareness that the publication will be disseminated there. When the publisher has known or intended that the publication defame the plaintiff in the forum state, courts have required no additional contacts.<sup>229</sup> Nevertheless, when defama-

224. See, e.g., CONN. GEN. STAT. ANN. § 52-59(b) (West Supp. 1985); GA. CODE ANN. § 9-10-91(2) (Michie 1982); MINN. STAT. ANN. § 543.19(1)(d)(3) (West Supp. 1985); MO. ANN. STAT. § 351.633 (Vernon 1966); N.Y. CIV. PRAC. LAW § 302(a)(2), (3) (McKinney 1972). Florida formerly had such a rule, but dropped it in 1973. Compare FLA. STAT. ANN. § 48.181 (West 1969) with FLA. STAT. ANN. § 48.193 (West Supp. 1985). Maine requires physical injury for jurisdiction under its tort provision. ME. REV. STAT. ANN. tit. 14, § 704-A(2)(B) (1964). For a discussion of the New York provision, see 1 J. WEINSTEIN, H. KORN, & A. MILLER, NEW YORK CIVIL PRACTICE § 302.15, at 3-130 (1975). For a discussion of the Georgia statute, see *Bradley Management Servs. v. Cassells*, 249 Ga. 614, 292 S.E.2d 717 (1982).

225. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, *supra* note 18.

226. See *supra* notes 168-69 and accompanying text.

227. See *supra* notes 83-86 and accompanying text.

228. 106 N.H. 92, 205 A.2d 844 (1964).

229. See, e.g., *Appleyard v. Transamerican Press*, 539 F.2d 1026 (4th Cir. 1976) (allowing jurisdiction in North Carolina over a publisher that had directed libelous articles in its magazine at a North Carolina resident), *cert. denied*, 429 U.S. 1041 (1977); *St. Clair v. Righter*, 250



tion has been merely foreseeable, although not intended, courts have looked for other contacts to make assertion of jurisdiction more reasonable.

The leading case to assert jurisdiction for foreseeable injury was *Anselmi v. Denver Post, Inc.*<sup>230</sup> The plaintiffs in *Anselmi*, Wyoming politicians, sued the Los Angeles Times and the Denver Post in Wyoming for publishing articles that implicated them in gun running and for releasing the stories to their news services.<sup>231</sup> The story was published in several other newspapers, including some in Wyoming. Despite a Wyoming circulation of only five to twenty-three copies daily, the Los Angeles Times was held subject to suit.<sup>232</sup>

The United States Court of Appeals for the Tenth Circuit based jurisdiction not only on the Times' limited circulation but also on its general business contacts with Wyoming,<sup>233</sup> its having sent three reporters to the state to develop the story,<sup>234</sup> and the substantial and foreseeable effect the article had produced there.<sup>235</sup> The court found the story capable of inflicting injury in Wyoming because Wyoming readers had considerable interest in it, more than readers in other states.<sup>236</sup> The Tenth Circuit interpreted *International Shoe, McGee*, and *Hanson* to allow jurisdiction for a single transaction in the state, such as this tort, provided that the defendant had some connection to the state and the suit was related to the defendant's activities there.<sup>237</sup> The Tenth Circuit rejected the Fifth Circuit's requirement of greater contacts for first amendment concerns because it would place too great a burden on Wyoming residents who wish to vindicate their reputations.<sup>238</sup> Instead, it found jurisdiction reasonable because the Times had "released a force which took effect in Wyoming."<sup>239</sup>

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F. Supp. 148 (W.D. Va. 1966) (allowing jurisdiction for purposefully mailing defamatory letters into Virginia "calculated to have an effect" there).

230. 552 F.2d 316 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977).

231. *Id.* The story appeared not only in the Los Angeles Times but also in newspapers published in Wyoming and other states. The Times contended it had no subscribers to its news service in Wyoming and that, if Wyoming newspapers did publish the story, they did so in violation of its copyright. *Id.* at 317.

232. *Id.* at 325. Jurisdiction over the Denver Post was not at issue.

233. *Id.* The Times sold syndicated features to Wyoming newspapers and solicited Wyoming advertisers.

234. *Id.* The Wyoming long-arm statute applied to the case allowed jurisdiction for causing tortious injury by an act committed in the state.

235. *Id.*

236. *Id.*

237. *Id.* at 323-24. *Anselmi* was decided before *Shaffer* but foreshadowed *Shaffer's* "relationship among the defendant, the forum and the litigation." See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

238. 552 F.2d at 324-25.

239. *Id.* at 325. See also *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978); *infra* notes 267-70 and accompanying text.

In *Anselmi*, forum state injury was foreseeable from the content of the article and the plaintiffs' residence. When the text of the publication has not readily identified the plaintiff, however, a publisher with limited circulation in the state may have little reason to foresee injury or to expect a defamation suit there. In such a case, exercise of jurisdiction would be unfair unless the publisher had significant additional contacts. The United States Court of Appeals for the Ninth Circuit reached this conclusion in *Church of Scientology v. Adams*.<sup>240</sup> In *Adams*, the California Church of Scientology sued the publisher of the St. Louis Post-Dispatch in California for printing a series of articles about scientology. The article did not mention the California church, the events discussed did not take place in California, and the articles were not aimed at a California audience.<sup>241</sup> Because no reporter had traveled to California to gather information for the series, the only contact on which jurisdiction could be based was the circulation in California of between 121 and 156 copies of each of the articles.<sup>242</sup> Applying *Shaffer's* test, the court found the relationship between the publisher, the state, and the litigation too attenuated for jurisdiction.<sup>243</sup> It reasoned that the publisher could not have foreseen a defamation suit in California based on these particular articles.<sup>244</sup>

Recently, courts have retreated from *Anselmi's* expansive view of jurisdiction. In *Sipple v. Des Moines Register and Tribune Co.*,<sup>245</sup> the California Court of Appeals denied jurisdiction over several out-of-state newspapers that had reported that the plaintiff was a homosexual. At the time, the plaintiff, a California resident, was in the "national limelight" for thwarting an attempt on President Ford's life.<sup>246</sup> None of the newspapers in question had sent reporters to California to develop the story. The only contact any of them had with the state was the circulation there of approximately 0.3% of their total circulation.<sup>247</sup> The California court distinguished this case from *Anselmi* in that no reporters had gone to the state to cover the story, nor had these newspapers transmitted the story to a news service for addi-

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240. 584 F.2d 893 (9th Cir. 1978).

241. *Id.* at 895. The articles described scientology generally and the Church of Scientology of Missouri in particular.

242. *Id.* at 896. These figures represented 0.04% of the paper's total circulation. Although 2.91% of the newspaper's advertising revenues came from California, the court did not consider advertising a jurisdictionally significant contact because it was unrelated to the cause of action. *Id.*

243. *Id.* at 899 (citing *Shaffer*, 433 U.S. at 204). See *supra* note 81 and accompanying text.

244. *Id.*

245. 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978).

246. *Id.* at 146-47, 147 Cal. Rptr. at 61.

247. *Id.* at 147, 147 Cal. Rptr. at 61. The actual circulation figures were not given.

tional publication.<sup>248</sup> Furthermore, it found the story itself to be of national importance. Ignoring the fact that the plaintiff was a resident, the court concluded that the story could have no foreseeably greater effect in California than anywhere else.<sup>249</sup>

Other courts have been less explicit in their analysis than the *Sipple* court. Nevertheless, *Sipple* suggests a trend to allow jurisdiction for foreseeable defamation only when *Anselmi's* fact pattern has been met or exceeded.<sup>250</sup> After *Sipple*, several courts have resorted to denying jurisdiction on first amendment grounds when confronted with difficult fact patterns.<sup>251</sup>

### III. PERSONAL JURISDICTION OVER AUTHORS AND EDITORS

Traditionally, liability for defamation lies with all who take a responsible part in communicating it.<sup>252</sup> Authors, and even editors, may be held liable for their roles in writing and editing a defamatory statement.<sup>253</sup> Recently, there has been a trend to sue nonresident authors along with their publishers.<sup>254</sup> In several cases, however, courts have failed to analyze author's contacts separately from those of their publishers.<sup>255</sup> Usually, a court will assert jurisdiction over both the publisher and the author or over neither.

Prior to *International Shoe*, no means existed for asserting jurisdiction over nonresident authors unless they had consented to suit or could be found within the state's borders.<sup>256</sup> Although the minimum contacts theory ex-

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248. *Id.* at 151-52, 147 Cal. Rptr. at 64.

249. *Id.* at 152, 147 Cal. Rptr. at 64.

250. Only one court has granted jurisdiction over a publisher on the basis of *Anselmi*. In *Stabler v. New York Times Co.*, 569 F. Supp. 1131 (S.D. Tex. 1983), the United States District Court for the Southern District of Texas asserted jurisdiction over the New York Times for developing a colorful story about a Texas resident that foreseeably produced great reader interest in Texas. The Times also maintained a news bureau in Houston and circulated 6,725 copies of the alleged libel in the state.

251. See *supra* notes 220-23 and accompanying text.

252. W. PROSSER & W. KEETON, THE LAW OF TORTS § 113 (5th Ed. 1984).

253. *Id.*

254. See, e.g., *Cox Enterprises v. Holt*, 678 F.2d 936 (11th Cir. 1982); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); *McCabe v. Kevin Jenkins & Assocs.*, 531 F. Supp. 648 (E.D. Pa. 1982); *Ziegler v. Ring Publishing Corp.*, 9 Media L. Rep. (BNA) 1303 (S.D. Fla. 1982); *Carter v. Houston Chronicle Publishing Co.*, 514 F. Supp. 12 (W.D. Okla. 1980); *Gonzales v. Atlanta Constitution*, 4 Media L. Rep. (BNA) 2146 (N.D. Ill. 1979); *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978); *Sipple v. Des Moines Register & Tribune Co.*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978); *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978).

255. See *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); *McCabe v. Kevin Jenkins & Assocs.*, 531 F. Supp. 648 (E.D. Pa. 1982); *Carter v. Houston Chronicle Publishing Co.*, 514 F. Supp. 12 (W.D. Okla. 1980); *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970).

256. Jurisdiction over individuals was governed by *Pennoyer v. Neff*, 95 U.S. 714 (1878),

panded available bases for jurisdiction, no court has been able to find an author amenable to suit on a pure doing business theory.<sup>257</sup> Even when the state has been the focus of business transactions between the author and the publisher, the court has used the tortious act theory to assert jurisdiction.<sup>258</sup>

In cases considering the contacts of staff reporters, the issue on which most decisions have turned has been whether the author traveled to the state or called persons there to gather news.<sup>259</sup> If the reporter has not gone to the state or placed calls there, courts usually have denied jurisdiction for lack of contact<sup>260</sup> or for lack of purposeful activity in the forum state.<sup>261</sup>

One court did allow jurisdiction even though the authors, syndicated columnists, had not gathered news in the state. In *McBride v. Owens*,<sup>262</sup> the United States District Court for the Southern District of Texas allowed the columnists to be sued in Texas because distribution of their column in that state was foreseeable and part of a concerted effort to achieve wide circulation.<sup>263</sup> In addition, the authors had derived revenue from their column's sale to Texas newspapers.<sup>264</sup> The court likened their contacts to those of a national publisher that had launched its publication in the stream of commerce.<sup>265</sup> First amendment considerations also failed to tip the balance. Because of the benefits the columnists derived from Texas, litigation in Texas would not chill the continued publication of the column there.<sup>266</sup>

Although *McBride* is the only case upholding jurisdiction over authors using the stream of commerce test, one court has upheld jurisdiction over a nonresident author using a foreseeable injury test. In *McGuire v.*

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which required a nonresident individual to be present in the forum state for valid service of process.

257. See, e.g., *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959); *Novel v. Garrison*, 294 F. Supp. 825 (N.D. Ill. 1969).

258. *Novel v. Garrison*, 294 F. Supp. 825 (1969).

259. See *Cox Enterprises v. Holt*, 678 F.2d 936 (11th Cir. 1982); *Ziegler v. Ring Publishing Corp.*, 9 Media L. Rep. (BNA) 1303 (S.D. Fla. 1982); *Gonzales v. Atlanta Constitution*, 4 Media L. Rep. (BNA) 2146 (N.D. Ill. 1979); *Sipple v. Des Moines Register & Tribune Co.*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978); *McGuire v. Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1978). See also *Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973) (jurisdiction can be based only on an act taking place in the District of Columbia, not on a telephone call from outside).

260. *Ziegler*, 9 Media L. Rep. at 1304; *Gonzales*, 4 Media L. Rep. at 2148; *Sipple*, 82 Cal. App. at 147, 147 Cal. Rptr. at 61.

261. *Cox*, 678 F.2d at 939.

262. 454 F. Supp. 731 (S.D. Tex. 1978).

263. *Id.* at 737.

264. *Id.*

265. *Id.* See also *Process Church of the Final Judgment v. Sanders*, 338 F. Supp. 1396 (N.D. Ill. 1972) (jurisdiction allowed over a book author and publisher on the stream of commerce theory).

266. 454 F. Supp. at 737.

*Brightman*,<sup>267</sup> the California Court of Appeals gave full faith and credit to a South Dakota judgment against the president of a Native American organization who had written and published an article libelling the plaintiff in his organization's newspaper. The plaintiff was a doctor at a Public Health Service hospital on a South Dakota reservation.<sup>268</sup> The defendant had gathered the information for the article while on a trip to South Dakota and had published it, knowing that 4.3% of the paper's 1193 subscribers resided in South Dakota.<sup>269</sup> The California court found jurisdiction proper because of the author's purposeful acts of gathering the information in state and publishing it, coupled with the knowledge that the article would be circulated in South Dakota, where it would injure the plaintiff.<sup>270</sup>

The reluctance of courts to assert jurisdiction over newspaper and magazine authors without a showing of presence in the state contrasts sharply with their willingness to allow jurisdiction over individuals who have sent defamatory letters into the forum state.<sup>271</sup> In these cases, courts have not required that a person enter the state to be amenable to suit. Rather, they have emphasized that the purposeful nature of sending the letters, as well as the foreseeability of harm, are jurisdictionally significant contacts.<sup>272</sup>

#### IV. THE SUPREME COURT DECISIONS IN *KEETON* AND *CALDER*

##### A. *Keeton v. Hustler Magazine, Inc.*

The question whether the exercise of jurisdiction offends due process usually has arisen when a plaintiff has brought suit in his home state against an out-of-state publisher. On a few occasions, plaintiffs have sought to sue publishers in states in which neither resided.<sup>273</sup> Usually these plaintiffs have been unsuccessful. In *Curtis Publishing Co. v. Birdsong*,<sup>274</sup> the only publishing case to address the issue directly, the Fifth Circuit disallowed jurisdiction on the ground that the forum state had no special interest in the matter.<sup>275</sup>

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267. 79 Cal. App. 3d 766, 145 Cal. Rptr. 256 (1978).

268. *Id.* at 779, 145 Cal. Rptr. at 258.

269. *Id.*

270. *Id.* at 788, 145 Cal. Rptr. at 263.

271. See *Rusack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978) (jurisdiction allowed in Pennsylvania for sending a copy of a letter defaming the plaintiff to his employer); *St. Clair v. Righter*, 250 F. Supp. 148 (W.D. Va. 1966) (jurisdiction allowed in Virginia for purposefully mailing letters to Virginia residents to persuade them to sue the plaintiff). See also *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661 (1st Cir. 1972) (jurisdiction allowed in Massachusetts for intentionally misrepresenting earnings on a contract in letters mailed into the state).

272. *Rusack*, 470 F. Supp. at 291; *St. Clair*, 250 F. Supp. at 154.

273. See, e.g., *Bulletin Co. v. Orioni*, 387 F.2d 240 (D.C. Cir.), *cert. denied*, 384 U.S. 928 (1967); *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966).

274. 360 F.2d 344 (5th Cir. 1966).

275. See *supra* notes 182-85 and accompanying text.

The United States Court of Appeals for the First Circuit decided *Keeton v. Hustler Magazine, Inc.*<sup>276</sup> on similar grounds. Kathy Keeton, a New York resident, brought a libel action in New Hampshire against Hustler Magazine.<sup>277</sup> The suit sought nationwide damages for defamatory photographs, text, and cartoons appearing in five issues of Hustler published between September 1975 and May 1976.<sup>278</sup> Keeton chose New Hampshire because it was the only state in which the statute of limitations had not run.<sup>279</sup>

Hustler was incorporated in Ohio and had its principal place of business in California.<sup>280</sup> The publisher's only contact with New Hampshire was the distribution of its magazine by independent contractors.<sup>281</sup> Sales in New Hampshire amounted to less than one percent of Hustler's total United States circulation.<sup>282</sup> Keeton's only connection with New Hampshire was the circulation there of Penthouse Magazine, of which she was a corporate officer.<sup>283</sup> Her name appeared on the Penthouse masthead.<sup>284</sup>

Applying *World-Wide Volkswagen's* balancing test for determining the reasonableness of exercising jurisdiction,<sup>285</sup> the First Circuit stated that if Keeton had been a New Hampshire resident suing for New Hampshire damages, Hustler's circulation of its magazines in New Hampshire would suffice for jurisdiction.<sup>286</sup> Such a suit would be fair because Hustler's limited contacts would combine with Keeton's many contacts and with the state's interest in protecting its residents.<sup>287</sup>

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276. 682 F.2d 33 (1st Cir. 1982).

277. *Id.* In an earlier action, Keeton had sued for libel and invasion of privacy in Ohio. Her libel claim was dismissed as barred by the Ohio statute of limitations, and her claim for invasion of privacy was held barred by the New York statute of limitations, as applied by the Ohio court. This suit was brought after the Ohio claims were dismissed. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1477 n.1 (1984).

278. 104 S. Ct. at 1477. The material contained allegations about the plaintiff's sex life. It included photographs of a nude woman, falsely identified as the plaintiff. Brief for Petitioner at 2-3, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

279. *Id.* See also 682 F.2d at 33.

280. 104 S. Ct. at 1477.

281. 682 F.2d at 33.

282. *Id.*

283. *Id.* at 33-34. She was also an editor of *Viva* and *Omni* Magazines.

284. *Id.* at 34.

285. 444 U.S. 286, 292 (1980). See *supra* note 99 and accompanying text.

286. 682 F.2d at 34-35. The First Circuit found support for such an action in *Buckley v. New York Post Co.*, 373 F.2d 175 (2d Cir. 1967), and in *Curtis Publishing Co. v. Golino*, 383 F.2d 586, 591-92 (5th Cir. 1967). It noted that New Hampshire's long-arm statutes were intended to reach to the limits of due process. 682 F.2d at 33.

287. *Id.* at 35. The First Circuit did observe that the United States Supreme Court in *World-Wide Volkswagen* had suggested in dicta that an out-of-state plaintiff could properly sue an out-of-state defendant that marketed its products in such a way as to expect them to be sold in the forum state. *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 286, 297-98).

The difficulty for the court in this case was that, although some of the alleged damages could be attributed to Hustler's New Hampshire activity, most damages related to circulation outside the state.<sup>288</sup> Because New Hampshire followed the single publication rule,<sup>289</sup> however, damages arising in all states could be recovered in this single suit.<sup>290</sup> Moreover, the statute of limitations already had run in every state but New Hampshire.<sup>291</sup> Allowing suit in New Hampshire would revive an action barred everywhere else.<sup>292</sup>

The First Circuit determined that suit in New Hampshire would be unfair under these circumstances.<sup>293</sup> New Hampshire had no particular interest in protecting a nonresident from defamation occurring primarily in other states.<sup>294</sup> Moreover, if it did have such an interest, that interest was outweighed by the policies of finality and repose underlying statutes of limitations.<sup>295</sup> The court concluded that in this case Hustler's contacts were too insubstantial to support jurisdiction over such a large multistate claim.<sup>296</sup>

The Supreme Court reversed.<sup>297</sup> It found Hustler's "regular circulation of magazines in the forum state . . . sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."<sup>298</sup> Noting that Hustler's monthly circulation in New Hampshire amounted to 10,000 to 15,000 copies,<sup>299</sup> the Court concluded that Hustler's activity could not be called "random, isolated, or fortuitous."<sup>300</sup> Rather, as the United States District Court for the District of New Hampshire found, dissemination of the magazines was directed purposefully at New Hampshire and inevitably had had an effect there.<sup>301</sup>

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288. *Id.* at 35.

289. *See supra* note 22.

290. 682 F.2d at 35.

291. *Id.* at 33.

292. *Id.* at 35.

293. *Id.* at 36.

294. *Id.* (citing *Roy v. North Am. Newspaper Alliance*, 106 N.H. 92, 97, 205 A.2d 844, 847 (1964)).

295. *Id.* at 35-36.

296. *Id.* at 36. The First Circuit noted that it was not deciding that an out-of-state plaintiff could never sue an out-of-state publisher, only that "the New Hampshire tail [was] too small to wag so large an out-of-state dog" in this case. *Id.*

297. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

298. *Id.*

299. *Id.* at 1477. The Court gives the figures as "10 to 15,000." *Id.* A close reading of the petitioner's brief makes clear that monthly circulation was between 10,000 and 15,000 copies. Brief for Petitioner at 10-12, 16, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

300. *Id.* at 1478.

301. *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, No. C-80-498-D (D.N.H. June 18, 1981)). The District Court had denied jurisdiction, however, on the same grounds as the First Circuit.

The Court maintained that the concerns of the First Circuit—the multi-state nature of the action, the extremely long statute of limitations, and the plaintiff's lack of New Hampshire contacts—were insufficient to defeat otherwise proper jurisdiction.<sup>302</sup> The Court conceded, however, that the multistate nature of the action was a factor to be considered in determining the fairness of bringing the suit in New Hampshire.<sup>303</sup>

In contrast to the First Circuit, the Supreme Court found that New Hampshire did have sufficient interest in the case for jurisdiction.<sup>304</sup> Keeton's complaint alleged tort damages suffered in New Hampshire.<sup>305</sup> For its part, New Hampshire had expressed an interest in redressing torts occurring within its borders.<sup>306</sup> The Court maintained that this interest could properly extend to torts committed against nonresidents.<sup>307</sup> In fact, New Hampshire had shown such an interest by deleting from its long-arm statute a restriction that plaintiffs be residents.<sup>308</sup>

In addition to its interest in redressing torts, New Hampshire, in following the single publication rule, shared an interest with other states in providing a single forum for the efficient adjudication of defamation suits.<sup>309</sup> The Court concluded that these two legitimate state interests made New Hampshire a proper forum for Keeton's multistate suit.<sup>310</sup>

The Court stressed that choice of law concerns, such as the length of statutes of limitations, should have nothing to do with the jurisdictional inquiry.<sup>311</sup> Finding a favorable statute is part of an overall litigation strategy,

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302. 104 S. Ct. at 1478.

303. *Id.* (citing *Shaffer's* "relationship among the defendant, the forum, and the litigation," 433 U.S. 186, 204 (1977)).

304. *Id.* at 1478. Both courts used the balancing test from *World-Wide Volkswagen*, 444 U.S. 286, 292 (1980), to determine the fairness of suit in New Hampshire. Nevertheless, they arrived at different results.

305. *Id.* at 1479.

306. *Id.* (citing *Leeper v. Leeper*, 114 N.H. 294, 298, 319 A.2d 626, 629 (1974)).

307. *Id.* at 1479. The Court pointed out that a libel occurs wherever it is circulated. *See* RESTATEMENT (SECOND) OF TORTS § 577A comment a (1977). The Supreme Court concluded that injury to Keeton in New Hampshire was conceivable because a libel could harm someone previously unknown by creating a negative reputation. 104 S. Ct. at 1479. The Court added that it was not relying on the fact that Keeton's name appeared on the masthead of several magazines circulated in the state. *Id.* at 1479 n.5.

308. 104 S. Ct. at 1479. *See* N.H. REV. STAT. ANN. § 300:14 history (1977). In addition, the Court noted that New Hampshire's criminal defamation statute was not limited to wrongs against residents. *See* N.H. REV. STAT. ANN. § 644:11(I) (1974).

309. 104 S. Ct. at 1480. The Court noted that the interstate judicial system benefited from the single publication rule because it reduces the drain on judicial resources and protects defendants from multiple harassing lawsuits. *Id.*

310. *Id.*

311. *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).



not an indication of due process unfairness.<sup>312</sup> The question whether New Hampshire's extremely long statute of limitations should be applied to all damages should be raised after jurisdiction has been established. The Court also noted that it had never required the plaintiff to reside in the forum state in order to sue a nonresident defendant that met the minimum contacts test.<sup>313</sup>

Finally, the Court declared that, by "continuously and deliberately"<sup>314</sup> marketing its magazines in the forum state, Hustler reasonably could anticipate being summoned to defend a libel action arising from the content of those magazines.<sup>315</sup> The Court emphasized that a publisher who regularly circulates "a substantial number of copies"<sup>316</sup> of its magazine in the forum state cannot claim due process unfairness in having to appear there. Furthermore, because a defendant can be charged with knowledge of the state's laws, a publisher of a national magazine must reasonably expect that a defamation suit will seek nationwide damages under the single publication rule.<sup>317</sup>

#### B. *Calder v. Jones*

In *Calder v. Jones*,<sup>318</sup> the Court was called upon to decide whether California could validly assert jurisdiction over two Florida residents for writing and editing a defamatory magazine article. Entertainer Shirley Jones, a California resident, brought an action against the National Enquirer; its distributing company; its editor, Iain Calder; and its reporter, John South, for publishing an article through which, she claimed, they sought intentionally to injure her personal and business reputations.<sup>319</sup>

Only Calder and South contested California's jurisdiction.<sup>320</sup> Calder

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312. 104 S. Ct. at 1480.

313. *Id.* at 1480-81. On the contrary, the Court stated that it had previously upheld jurisdiction in a case in which neither the plaintiff nor the defendant was a resident of the forum state. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

314. 104 S. Ct. at 1481.

315. *Id.* (citing the foreseeability test of *World-Wide Volkswagen*, 444 U.S. at 297-98).

316. 104 S. Ct. at 1482.

317. *Id.* at 1481-82. Justice Brennan concurred in the judgment. *Id.* at 1482 (Brennan, J., concurring). He agreed that Hustler's regular circulation of magazines in New Hampshire was sufficient for jurisdiction in a cause of action relating to the contents of the magazines. Moreover, he would find jurisdiction fair without regard to the state's interest in redressing libels or applying its statute of limitations. State interests, he argued, should be relevant only to protecting individual liberty interests under due process. *Id.* at 1482 (citing *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.10 (1982)).

318. 104 S. Ct. at 1482.

319. *Id.* at 1484.

320. *Id.* at 1485.

claimed he had not entered California or made any telephone calls to persons there while editing the Jones article.<sup>321</sup> South argued that his only contacts with California while researching the article were one trip to gather information and a few telephone calls to verify it.<sup>322</sup> The Superior Court for the County of Los Angeles agreed these contacts were insubstantial.<sup>323</sup> The court recognized that it could assert jurisdiction using the effects test but decided that first amendment considerations precluded it.<sup>324</sup> In the court's view, the threat of being called to defend in a distant forum against sizeable claims of punitive damages could easily chill the willingness of reporters and editors to write controversial stories.<sup>325</sup>

The California Court of Appeal reversed.<sup>326</sup> It rejected the first amendment test, pointing out that both California and the Ninth Circuit previously had refused to adopt it.<sup>327</sup> The court found jurisdiction proper over both defendants under the effects test because of their intent to cause tortious injury in California.<sup>328</sup> The court held that due process did not require a defendant's physical presence in the forum state for jurisdiction.<sup>329</sup> Moreover, if physical presence was required, the Court of Appeal concluded that South's visit and telephone calls constituted sufficient contacts for jurisdiction over him.<sup>330</sup> It noted that one of South's calls, placed to Jones and her husband, Marty Ingels, just before publication, directly caused some of the injury alleged.

The Supreme Court unanimously affirmed the California Court of Appeal,<sup>331</sup> observing that the *National Enquirer* was circulated heavily in California, where Jones lived and worked.<sup>332</sup> It stated that although the plaintiff need not reside in the forum state, the plaintiff's contacts there might be so great as to enhance the defendant's contacts and make jurisdiction over a defendant with relatively few contacts proper.<sup>333</sup> Here, California was "the

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321. *Id.* He had been in California only twice: once for pleasure and once to testify in an unrelated case.

322. *Id.*

323. *Jones v. National Enquirer, Inc.*, No. C 305 009 (Super. Ct. L.A. Oct. 2, 1981).

324. *Id.* The Superior Court observed that if Jones had been physically injured by a defective product, it would clearly have had jurisdiction under the authority of *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

325. *Id.*

326. *Jones v. Calder*, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982).

327. *Id.* at 132, 187 Cal. Rptr. at 828.

328. *Id.* at 134, 187 Cal. Rptr. at 829.

329. *Id.* at 133-34, 187 Cal. Rptr. at 829.

330. *Id.* at 135, 187 Cal. Rptr. at 830.

331. *Calder v. Jones*, 104 S. Ct. 1482 (1984).

332. *Id.* at 1484-85.

333. *Id.* at 1486. The Court observed that in this case, as in *McGee*, "the plaintiff [was] the focus of the activities of the defendants out of which the suit arises." *Id.*

focal point both of the story and of the harm suffered",<sup>334</sup> it was the center of the activities described in the story; it was where information for the article originated; and it was where most of the injury occurred.<sup>335</sup> In writing and editing the story, South and Calder knew it would have a substantial effect on Jones.<sup>336</sup> They also knew the article would be circulated in California and would cause considerable harm there.<sup>337</sup> Thus, the Court found jurisdiction over Calder and South proper under the effects test for their intentional acts aimed expressly at California.<sup>338</sup> The Court based its holding solely on the intent of the writers and declined to consider the author's trip or telephone calls to California in making its decision.<sup>339</sup>

Calder and South had argued that they should not be drawn into jurisdiction by their employer's decision to market its magazines in California, a decision over which they had no control and from which they derived no financial benefit.<sup>340</sup> The Court rejected this argument. It noted that although employees' contacts must be judged separately from those of their employer, employees are not insulated from jurisdiction by their status.<sup>341</sup>

The Court firmly rejected the need to find a greater showing of contacts for first amendment concerns.<sup>342</sup> The Court pointed out that through cases like *New York Times, Co. v. Sullivan*<sup>343</sup> and *Gertz v. Robert Welch, Inc.*<sup>344</sup> safeguards had been developed in the substantive law of defamation to protect first amendment rights.<sup>345</sup> In the Court's view, consideration of the first amendment at the jurisdictional stage as well as during trial on the merits would amount to "double counting."<sup>346</sup>

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334. *Id.* at 1487.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 286, 297-98, and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37).

339. *Id.* at 1486 n.6.

340. *Id.* at 1487. They had analogized their position to that of a welder who fashions a boiler that ultimately injures someone in another state. They argued that jurisdiction over the welder does not follow from jurisdiction over the manufacturer. *Id.*

341. *Id.* (observing that *Rush v. Savchuk*, 444 U.S. 320, 322 (1980), requires that each defendant's contacts be assessed individually).

342. *Id.*

343. 376 U.S. 254 (1964).

344. 418 U.S. 323 (1974).

345. 104 S. Ct. at 1488.

346. *Id.* To rule otherwise would give defendants in defamation cases special procedural protections not accorded in other types of cases.

V. THE IMPLICATIONS OF *KEETON* AND *CALDER* FOR JURISDICTION  
OVER NONRESIDENT PUBLISHERS AND AUTHORS

Although *Keeton* and *Calder* are the first cases since *McGee* in which the Supreme Court has allowed personal jurisdiction over a nonresident defendant, the Court's basic analytical approach is consistent with its earlier decisions.<sup>347</sup> As in *Hanson*, *Shaffer*, *Kulko*, and *World-Wide Volkswagen*, the Court in *Keeton* and *Calder* first determined whether the defendant had a jurisdictionally cognizable contact with the forum state that was related to the cause of action.<sup>348</sup> Then, in *Keeton*, it balanced the interests of the state against the inconvenience to the defendant in being sued there.<sup>349</sup> Unlike the four earlier cases, the defendants in *Keeton* and *Calder* did have a jurisdictionally cognizable contact. The contacts in both cases had a direct relationship to the cause of action for defamation. In both cases the defendant's acts were purposefully directed at the forum state.

In *Keeton* and *Calder*, the Supreme Court approved the effects test in both its stream of commerce form and its intentional injury form. As in *McGee*, the Court did not require the defendants to be physically present in the forum state for jurisdiction. Instead, the Court based its holdings on acts it found to be purposefully directed at the forum state and directly related to the cause of action. Contrary to dicta in *Kulko*, the Court did not require a showing of physical injury in either case as a prerequisite for jurisdiction, nor did it require the defendants in *Calder* to have reaped commercial benefit from the forum state.<sup>350</sup> Thus, the Court's holdings in these cases are more expansive than earlier decisions might indicate.

In *Keeton*, the Court allowed jurisdiction although Hustler's only contact with New Hampshire was the circulation of its magazines in the state by independent middlemen. *Keeton* thus affirms dicta in *World-Wide Volkswagen* suggesting that the Court would approve the stream of commerce theory.<sup>351</sup> It also differs little from lower court decisions using the stream of commerce theory to assert jurisdiction over publishers.<sup>352</sup> Nevertheless, it clearly calls into question a case like *Birdsong*<sup>353</sup> in which jurisdiction was

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347. For a discussion of the Court's analytical approach in the earlier cases, see Louis, *supra* note 78. See also Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

348. *Keeton*, 104 S. Ct. at 1478; *Calder*, 104 S. Ct. at 1486.

349. *Keeton*, 104 S. Ct. at 1481-82.

350. *Kulko v. California Superior Court*, 436 U.S. 84, 96-97 (1978). See *supra* note 93 and accompanying text.

351. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). See *supra* notes 105-06 and accompanying text.

352. See *supra* notes 168-81 and accompanying text.

353. *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966).

denied because the court determined that the state had no interest in litigation concerning nonresidents.<sup>354</sup>

In *Calder*, jurisdiction was based solely on the author's and editor's acts of writing and editing an article that they knew would cause harm in the forum state.<sup>355</sup> The Court expressly ignored a trip and telephone calls the author had made to the state in reaching its holding.<sup>356</sup> No court before *Calder* had found jurisdiction over an author under the intentional injury test without a showing of presence.<sup>357</sup> Thus, the Supreme Court in *Calder* went farther than lower courts in asserting jurisdiction over magazine and newspaper authors. On the other hand, several lower courts have held private individuals subject to suit for the mere act of intentionally sending defamatory letters into the forum state.<sup>358</sup> In effect, it is these cases that the Court approved by its holding in *Calder*. The Court apparently found no reason to distinguish magazine and newspaper authors from private individuals.

Not only do *Keeton* and *Calder* uphold the effects test, they also resolve the debate among drafters of the tort provisions of state long-arm statutes. After *Hanson*, several states, to obviate due process concerns, adopted statutes that required the defendant to have engaged in business activity or some other persistent course of conduct before a court could exercise jurisdiction for an extraterritorial act.<sup>359</sup> Now, to be consistent with due process, these states no longer need to require that the defendant engage in in-state activity.

In *Calder*, the Court rejected the need for any special jurisdictional test for publishers and authors because of first amendment concerns.<sup>360</sup> It reached this conclusion without much discussion, other than to observe that first amendment safeguards exist in the substantive law of defamation.<sup>361</sup> Nevertheless, this decision comports with the Court's recent trend to keep the minimum contacts test free from exceptions.<sup>362</sup> It also agrees with several lower courts and commentators that would strengthen the substantive law of defamation for first amendment concerns rather than complicate the jurisdictional inquiry.<sup>363</sup> Such a policy is sound, as long as the substantive

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354. See *supra* notes 182-85 and accompanying text.

355. *Calder*, 104 S. Ct. at 1487.

356. *Id.* at 1486 n.6.

357. See *supra* notes 260-61 and accompanying text.

358. See *supra* notes 271-72 and accompanying text.

359. For a discussion of the state tort provisions, see *supra* notes 143-47 and accompanying text.

360. 104 S. Ct. at 1487-88.

361. *Id.* at 1488.

362. See *Rush v. Savchuk*, 444 U.S. 320 (1980) (rejecting *Seider* jurisdiction); *World-Wide Volkswagen*, 444 U.S. 286 (1980) (rejecting automobile exception); *Shaffer*, 433 U.S. 186 (1977) (rejecting some forms of quasi in rem jurisdiction).

363. See *supra* notes 215, 219 and accompanying text.

law is applied diligently enough to deter lawsuits brought merely to harass the publisher. It is consistent with the view that the jurisdictional inquiry stands merely as a preliminary step in the litigation, one to be followed by other steps with appropriate safeguards.

Although *Calder* rejected first amendment concerns as a due process requirement, it did not address the issue of long-arm statutes that exclude defamation from their tort provisions for first amendment concerns.<sup>364</sup> Because states traditionally have been allowed to require more contacts than are needed for due process,<sup>365</sup> these states should be able to retain their restrictions despite *Calder's* holding. No state is required to expand its statutory jurisdiction.

The newsgathering exception of the District of Columbia Circuit<sup>366</sup> presents a different question. The District of Columbia court never made clear whether the exception was based on the first amendment, the commerce clause, or some other rationale.<sup>367</sup> If the exception is based on the first amendment, it should be overruled. If it is based on the commerce clause, it should still be valid because the Supreme Court has never overruled its commerce clause cases.<sup>368</sup> Conversely, if the exception is based on neither constitutional provision, the court should address the question through minimum contacts analysis. Thus, the court should determine whether the defendant's newsgathering is directly related to the cause of action, and thus a jurisdictionally significant factor, or whether it is unrelated and should be relegated to a role of lesser or no jurisdictional significance.

Because of *Calder*, courts that have used first amendment considerations in the past now will have to use other means to determine jurisdiction over nonresident publishers and authors with limited contacts. Although both *Keeton* and *Calder* affirm the trend among lower courts to expand their exercise of jurisdiction over nonresident publishers and authors, they fail to answer what degree of contacts represents the minimum required for jurisdiction. The actual contacts in both cases were substantial compared to many decided cases. Indeed, each case represents one end of the effects test spectrum, with *Keeton* on the stream of commerce end and *Calder* on the intentional injury end.

To develop a model for analysis, tests devised in *Edwards*,<sup>369</sup> *Rebozo*,<sup>370</sup>

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364. For a discussion of these statutes, see *supra* note 224 and accompanying text.

365. See *supra* note 120 and accompanying text.

366. See *supra* notes 119, 123 and accompanying text.

367. See *supra* note 119.

368. See *Developments in the Law*, *supra* note 2, at 983-87.

369. *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975).

370. *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975).

*Anselmi*,<sup>371</sup> and *Adams*<sup>372</sup> are instructive. In *Edwards*, the Fifth Circuit based jurisdiction on the defendant's act of purposefully directing its news into the forum state.<sup>373</sup> This was the only contact and it was directly related to the cause of action. Other contacts were unnecessary for jurisdiction. In *Rebozo*, the contact directly related to the cause of action, circulation, was limited.<sup>374</sup> Consequently, the Fifth Circuit considered newsgathering, advertising solicitation, and other business activities as contacts supporting the fairness of jurisdiction.<sup>375</sup> In *Anselmi*, circulation was considerably smaller than in *Rebozo*.<sup>376</sup> The Tenth Circuit considered the same supporting contacts as the Fifth Circuit in *Rebozo*, as well as the fact that the allegedly libelous article had great reader interest in the forum state.<sup>377</sup> Finally, the Ninth Circuit in *Adams* suggested that a court might consider whether the publisher has attempted to market its publications in the state.<sup>378</sup> If it has not sought that market, and other contacts are negligible, jurisdiction should not be exercised unless defamation in that state is foreseeable or intended.<sup>379</sup>

A model for analysis can be developed from these cases. For a publisher, the court should first decide whether jurisdiction can be based on circulation alone. If it cannot, the court should then consider whether the publisher has had additional contacts that would show an attempt to derive financial benefit from the forum state. If the publisher's other contacts are minimal or if the publisher has sought no benefit from the state, the court should then determine whether the defendant could reasonably foresee causing defamation in the forum state. Finally, if the publisher has had no other contact with the state, the court should decide whether the publisher intended to injure the plaintiff there.

Most cases concerning nonresident authors and editors usually will involve a single contact like *Calder*. Thus, courts will have to decide whether the author or editor intentionally sought to aim the defamatory article at the forum state or whether the defendant had reason to know that the plaintiff would be injured there. Although in most situations only the intentional

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371. *Anselmi v. Denver Post Co.*, 552 F.2d 316 (10th Cir. 1977).

372. *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978).

373. 512 F.2d at 267-68.

374. In-state circulation averaged 622 copies daily and 684 copies on Sunday. 515 F.2d at 1210.

375. *Id.* at 1215-16. See *supra* notes 204-07 and accompanying text.

376. In *Anselmi*, in-state circulation averaged between 5 and 23 copies daily. 552 F.2d at 325. The publisher also had released the article to its news service. *Id.* at 317. Thus, copies from subscriber newspapers may have been circulated in the state.

377. *Id.* at 325. See *supra* notes 233-37 and accompanying text.

378. 584 F.2d at 896.

379. *Id.* at 897-98.

effects test will apply to nonresident authors and editors, the stream of commerce theory might be applicable to some authors, such as syndicated columnists.<sup>380</sup> In these cases, the *Keeton* test would apply.

Finally, plaintiffs will have to consider where to bring suit. Unlike most torts, defamation can occur in many places at the same time. In *Keeton*, the Court found no reason to deny access to the forum simply because the plaintiff was a nonresident.<sup>381</sup> Thus after *Keeton*, a plaintiff can conceivably bring suit in any state in which the publisher has regularly and deliberately circulated its publications, as long as the state's long-arm statute allows suit by a nonresident<sup>382</sup> and the court can find a state interest in the litigation.

In contrast to *Keeton*, the Court in *Calder* emphasized the importance of the plaintiff's residence in the forum state as a factor enhancing the defendants' contacts.<sup>383</sup> Although the Court did not elaborate on its "enhancement" concept, presumably it meant that the defendants in *Calder* clearly knew that the plaintiff would be injured in California because she lived there. Nevertheless, to be consistent with *Keeton*, courts should not require that the plaintiff reside in the forum state for jurisdiction under the intentional effects test. Instead, they should consider the degree to which the defendant knew the plaintiff would suffer injury there. If the defendant clearly knew that his actions would injure the plaintiff's reputation in the forum state, the state should be able to assert jurisdiction. Alternatively, if injury to reputation was merely foreseeable, additional contacts should be required and the court should seriously balance the conveniences of holding trial.

## VI. CONCLUSION

*Keeton* and *Calder* provide guidance to lower federal and state courts for determining whether they have personal jurisdiction over nonresident publishers and authors. *Keeton* approves the effects test in its stream of commerce form, already widely accepted for obtaining jurisdiction over nonresident publishers. It extends the application of this test to multistate actions involving the single publication rule. *Calder* approves the effects test for intentional injury. A few courts had accepted this test, but had applied it more narrowly than the Supreme Court, requiring the defendant's physical presence in the forum state for jurisdiction. *Calder* also resolved a major split among courts concerning whether first amendment considerations

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380. This theory was used in *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978). See *supra* notes 262-66 and accompanying text.

381. *Keeton*, 104 S. Ct. at 1480-81.

382. Some states do have provisions in their long-arm statutes requiring that the plaintiff be a resident of the state. *Keeton* does not overturn these statutes.

383. *Calder*, 104 S. Ct. at 1486-87.



should enter into the jurisdictional analysis. The Court determined that they should not.

Although *Keeton* and *Calder* resolved the question of what jurisdictional theories may be applied to nonresident publishers, the opinions failed to address what contacts constitute the “minimum” required for jurisdiction over nonresident publishers and authors. Courts will have to make this determination themselves, considering the defendant’s actions to circulate its publications in the forum state or defendant’s knowledge that the plaintiff would be harmed there. To the extent that contacts are minimal and injury from defamation is merely foreseeable, courts should continue to weigh the conveniences of standing trial.

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