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THE BOUNDARY OF PERSONAL JURISDICTION: THE "EFFECTS TEST" AND THE PROTECTION OF CRAZY HORSE'S NAME

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Personal jurisdiction affects dignity.[1] While most attorneys consider personal jurisdiction a strategic device, personal jurisdiction can have a profound impact on the dignity of both plaintiffs and defendants. Obviously, a state violates the dignity of a defendant when it asserts jurisdiction over a person or entity with which it has little or no connection. Less obviously, a state affects a plaintiff's dignity when it limits personal jurisdiction too much, thereby preventing that plaintiff from rectifying wrongs caused by others.

The litigation concerning the protection of Crazy Horse's name demonstrates how personal jurisdiction can affect the dignity of both plaintiffs and defendants, and it tests the boundary of personal jurisdiction.[2] The Hornell Brewing Company used the

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1. "Personal jurisdiction is a court's power to make a binding adjudication of a person's rights and obligations." Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 387 (1998). Courts generally distinguish between two types of personal jurisdiction: general jurisdiction and specific jurisdiction. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 610-11 (1988).

> If a court asserted jurisdiction based on the affiliations between the forum and one of the parties without regard to the nature of the dispute, it was exercising general jurisdiction. If, on the other hand, a court asserted jurisdiction based on affiliations between the forum and the controversy, as was usually the case in the twentieth century, it was exercising specific jurisdiction.

Id. at 611. This Article concerns specific jurisdiction.

2. Estate of Witko v. Hornell Brewing Co., 156 F. Supp. 2d 1092 (2001). *See also* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); Nell Jessup Newton, *Memory and Representation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995); Jessica R. Herrera, Note, *Not Even His Name: Is the Denigration of Crazy Horse Custer's Final Revenge?*, 29 HARV. C.R.-C.L. L. REV. 175 (1994); Antonia C. Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14 (1993). See the Crazy Horse Defense Project website, *at* http://crazyhorsedefense.org (last visited Mar. 5, 2005). Crazy Horse is called Tasunke Witko in Lakota. Herrera, *supra*, at 175. He died in 1877, and he is best known for defeating Custer at the Battle of the

Crazy Horse name in the manufacture, sale, and distribution of "The Original Crazy Horse Malt Liquor."[3] A descendant of Crazy Horse, who was acting as administrator of his estate, and the Rosebud Sioux Tribe sued Hornell and two individuals connected with Hornell in federal court in South Dakota, claiming "defamation, misappropriation and misuse of inheritable property rights, privacy violations, . . . negligent and intentional infliction of emotional distress," and "violations of the Indian Arts and Crafts Act, the Lanham Act, and the Federal Trademark Dilution Act."[4] The plaintiffs were troubled that Crazy Horse's name had been associated with alcohol because he "is the renowned and beloved leader of the Lakota Sioux who dedicated his life to protecting the cultural ways of his people and who vigorously opposed the use of alcohol by the Lakota people."[5] The two individual defendants moved to dismiss based on lack of personal jurisdiction, declaring that "they had not personally or individually transacted any business in South Dakota, and that Hornell Brewing Co., doing business as Ferolito, Vultaggio and Sons, has not and does not manufacture, advertise, sell or distribute Crazy Horse Malt Liquor in South Dakota."[6]

Personal jurisdiction was the key issue in the case. Because the essential claim in the litigation was based on tribal law, the plaintiffs might not have succeeded on the merits if the case were not heard in South Dakota, their home state. Thus, the ability of the Crazy Horse estate and his tribe to protect their dignity would be foreclosed. On the other hand, if the court asserted jurisdiction over the defendants when they had only a tenuous connection to South Dakota, their dignity would be violated.

This Article will analyze the boundary of personal jurisdiction by examining the Crazy Horse litigation and the "effects test," which the court used to find personal jurisdiction over the defendants. Part I of the Article will discuss the current Supreme Court view on personal jurisdiction, and it will examine the effects test, which the federal courts have used to take the boundary of personal jurisdiction to its limit. Part II will discuss the Crazy Horse litigation and the clash of cultures and laws involved in that case. Finally, Part III will evaluate the current Supreme Court rules on personal jurisdiction, the effects test, and the analysis of

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Little Big Horn. *Id.* at 175-76.

3. *Witko*, 156 F. Supp. 2d at 1094.

4. *Id.*

5. *Id.* at 1099. "Sioux" refers to a group of Native American peoples who have traditionally occupied the Dakotas. Herrera, *supra* note 2, at 175 n.3. The Sioux comprise "three nations: the Santee (Dakota), the Yankton (Nakota), and the Teton (Lakota)." *Id.* Crazy Horse was an Oglala, one of the seven bands that made up the Lakota nation. *Id.*

6. *Witko*, 156 F. Supp. 2d at 1095.

personal jurisdiction in the Crazy Horse litigation. It will also present this author's views on the boundary of personal jurisdiction.

I. PERSONAL JURISDICTION OVER OUT-OF-STATE DEFENDANTS AND THE "EFFECTS TEST"

A. International Shoe *and Its Progeny*

International Shoe Co. v. Washington established the modern test for the validity of service of process on out-of-state defendants under the Due Process Clause of the Fourteenth Amendment.[7] In *International Shoe*, the Court held that personal jurisdiction was proper in Washington over a Delaware corporation, with its principal place of business in Missouri, even though it had no office in Washington and did not make contracts for the sale and purchase of merchandise there, because the presence of eleven to thirteen salesmen in Washington created minimum contacts with the state.[8] The Court declared:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[9]

The Court noted:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[10]

The Court continued:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations rise out

7. 326 U.S. 310 (1945). Professor George Rutherglen has declared: "The modern law of personal jurisdiction owes its existence, and most of its structure and detail, to Chief Justice Stone's magisterial opinion in International Shoe v. Washington." George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 347 (2001).

8. 326 U.S. at 313-19.

9. *Id.* at 316.

10. *Id.* at 319.

> of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[11]

Based on this standard, the Court ruled in a later case that a California court had personal jurisdiction over an insurance company whose only tie to the state was a single insurance policy with a forum resident when the lawsuit concerned that insurance policy.[12] In contrast, the Court found that jurisdiction was not proper over a trustee who had no connection to Florida, even though Florida had jurisdiction over the other important parties to the trust,[13] and not proper over a New York parent who had allowed his children to live with their mother in California in a suit in a California court for child support.[14]

Later the Court separated the minimum contacts analysis from the traditional notions of fair play and substantial justice analysis, creating a minimum contacts requirement and a reasonableness requirement.[15] Under the minimum contacts analysis, courts look at purposeful availment and/or foreseeability.[16] Concerning purposeful availment, the Court has written:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.[17]

Furthermore:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. Thus, where the defendant "deliberately" has engaged in significant

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11. *Id.*
12. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).
13. Hanson v. Denckla, 357 U.S. 235 (1958).
14. Kulko v. Superior Court of Cal., 436 U.S. 84, 92 (1978).
15. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-78 (1985). *See also* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113-16 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).
16. *Burger King*, 471 U.S. at 471-76. The Supreme Court's analysis of personal jurisdiction is not always consistent, although one might say that the Court is adapting the criteria to different situations—e.g., contracts, torts, etc.
17. *Id.* at 474-75.

> activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[18]

The Court has written concerning the foreseeability criteria:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," . . . the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[19]

This "requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."[20] Such jurisdiction is justifiable under the Due Process Clause because a state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[21] In addition, it might be unfair to permit individuals to escape from jurisdiction when they have purposefully derived a benefit from their interstate activities; "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."[22]

Foreseeability alone, however, does not establish personal jurisdiction.[23]

> But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[24]

Thus, the Court held that Oklahoma may not "exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma . . . [was] the fact that an automobile sold in New York to New York residents . . . [was]

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18. *Id.* at 475-76 (citations omitted).
19. *Id.* at 472 (citations omitted). *See also World-Wide Volkswagen*, 444 U.S. at 297; Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).
20. *Burger King*, 471 U.S. at 472 (citations omitted).
21. *Id.* at 473.
22. *Id.* at 474.
23. *World-Wide Volkswagen*, 444 U.S. at 295.
24. *Id.* at 297.

involved in an accident in Oklahoma."[25] Furthermore, the defendant's action must "be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce."[26] The Court later elaborated:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, . . . advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.[27]

Therefore, a California court did not have personal jurisdiction over a Japanese manufacturer of components who was aware that the components, which were manufactured, sold, and delivered outside California, would reach the state in the stream of commerce.[28]

B. Calder *and the Effects Test*

Traditional concepts like "purposeful availment" and "foreseeability" do not always work well when applied to intentional conduct outside a state that causes injury within a state. However, courts have tried to tie these terms to such situations. For example, courts have stated that "within the rubric of 'purposeful availment' the [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state."[29] Similarly, courts have connected this situation with foreseeability: an "activity by the defendant need not physically take place in the forum state . . ."[30] as long as the "defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[31] Fortunately, however, most courts have used a test (the "effects test") especially developed to evaluate personal jurisdiction when conduct outside a state causes injury in the state.

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25. *Id.* at 287, 299.
26. *Asahi*, 480 U.S. at 110.
27. *Id.* at 112.
28. *Id.* at 105-14.
29. Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1485 (9th Cir. 1993) (quoting Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986)). *See also* Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002).
30. *Haisten*, 784 F.2d at 1397.
31. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

1. Calder v. Jones

The Supreme Court in *Calder v. Jones* held that jurisdiction was proper when a defendant acting outside a state caused harm within a state (the "effects test").[32] In *Calder*, actress Shirley Jones, a California resident, sued the National Enquirer, its distributing company, one of its reporters, and its president and editor for libel.[33] The reporter and editor, who had been served by mail in Florida, contested the California court's jurisdiction over them.[34] The article had been written and edited in Florida and distributed nationally.[35] Jones lived and worked in California. The magazine had its largest distribution in California, it was incorporated in Florida, and its principal place of business was there.[36] The reporter was a Florida resident who traveled six to twelve times a year on business to California.[37] He mainly researched the article in Florida, but he did make several phone calls to California concerning the article, including one to Jones's husband to elicit his comments on the article.[38] He had "no other relevant contacts with California."[39] The editor was a Florida resident who had been to California only twice on unrelated matters.[40]

The trial court granted defendants' motion to quash service.[41] Although the court felt that jurisdiction would ordinarily be proper when actions in one state caused injury in the forum, it believed that "special solicitude was necessary because of the potential 'chilling effect' on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked."[42] The California Court of Appeals reversed on the ground that the defendants had intended to and did cause tortious injury to the plaintiff in California.[43] The court noted, "[t]he fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."[44] The court also rejected the lower court's conclusion that First Amendment considerations were

32. 465 U.S. 783, 789 (1984).
33. *Id.* at 784-86.
34. *Id.* at 784-85.
35. *Id.* at 784.
36. *Id.* at 785.
37. *Id.* at 785-86, 785 n.3.
38. *Id.* at 785-86.
39. *Id.* at 786.
40. *Id.*
41. *Id.* at 784-85.
42. *Id.* at 786.
43. *Id.* at 787.
44. *Id.*

relevant.[45] The California Supreme Court denied a motion for a hearing, and the United States Supreme Court granted the petitioners' writ of certiorari.[46]

The Court held that jurisdiction was proper, noting that "the plaintiff is the focus of the activities . . . out of which the suit arises."[47] It declared: "California is the focal point both of the story and of the harm suffered."[48] The Court wrote:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California.[49]

The reporter and editor had argued that jurisdiction did not exist under the foreseeability rule of *World-Wide Volkswagen*.[50] They had contended that they had no direct economic stake in the Enquirer's sales in California and that they were not responsible for the article's circulation there because ordinary employees cannot control their company's marketing practices.[51] They had asserted that under *World-Wide Volkswagen*, the "mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction."[52] They had compared themselves to welders working in Florida on a boiler that later explodes in California.[53] Even if jurisdiction over the boiler's manufacturer was proper in California, jurisdiction should not be valid over the welders who had no control over and derived no benefit from sales in California.[54]

The Court rejected this foreseeability argument.[55] The Court pointed out that, unlike a welder, the editor and writer were "not charged with mere untargeted negligence."[56] They knew that the article would have a devastating impact on Jones and that the

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45. *Id.*
46. *Id.* at 787-88.
47. *Id.* at 788. The Court also rejected the petitioners' First Amendment argument. *Id.* at 790. The Court declared, "the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits." *Id.*
48. *Id.* at 789.
49. *Id.* at 788-89.
50. *Id.* at 789.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 789-90.
56. *Id.* at 789.

brunt of the harm would be felt in California, where Jones lived and worked.[57] In other words, the writer and editor satisfied the *World-Wide Volkswagen* requirement that a defendant must "reasonably anticipate being haled into court there. . . ."[58] The Court added: "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."[59]

The Court also remarked that jurisdiction was independent of the petitioners' employer's contacts with California.[60] The Court explained, "petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."[61] Their status as employees does not shield them from liability.[62]

2. *The Effects Test in Lower Courts*

Lower courts have developed a three-part effects test for specific jurisdiction based on *Calder*. Under the test, the plaintiff must show:

> 1) The defendant committed an intentional tort; 2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered as a result of the tort; 3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.[63]

Although *Calder* involved libel, the first part of the test can involve any type of intentional tort or similar intentional conduct, including fraud, trademark infringement, business torts, etc.[64]

Courts have found jurisdiction proper under the effects test when a foreign defendant commits fraud that causes harm in the forum.[65] For example, in *Finley v. River North Records*, an

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57. *Id.* at 789-90.
58. *Id.* at 790 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. William Rosenstein & Sons Co. v. BBI Produce, Inc., 123 F. Supp. 2d 268, 273 (M.D. Pa. 2000) (quoting IMO Indus., Inc. v. Keikert AG, 155 F.3d 254, 265-66 (3d Cir. 1998)). *Accord* Bancroft & Masters, Inc. v. Augusta Nat'l., Inc., 223 F.3d 1082, 1087 (9th Cir. 2000); Zumbro v. Cal. Natural Prods., 861 F. Supp. 773, 782-83 (D. Minn. 1994).
64. See the examples below in *infra* notes 65–175 and accompanying text.
65. *E.g.*, *Dole Food*, 303 F.3d at 1114 (allowing fraud suit by California-based company versus European defendants); Oriental Trading Co., Inc. v. Firetti, 236 F.3d 938, 943 (8th Cir. 2001); Finley v. River North Records, 148 F.3d 913, 917 (8th Cir. 1998); Rosenberg v. Seattle Art Museum, 124 F. Supp. 2d 1207 (W.D. Wash. 2000) (allowing third-party complaint by Washington resident against New York art dealer).

Arkansas federal district court had jurisdiction over an out-of-state record company who had induced plaintiffs, concert promoters, to enter into a concert promotion contract by falsely representing to the plaintiffs that certain pop stars would be appearing at a concert at the University of Arkansas.[66] An employee of the record company had sent promotional materials into Arkansas, knowing that they would be used to promote the concert.[67] The court held that this was "fraudulent conduct, intended to induce commercial activity within the forum state."[68] Similarly, in *Oriental Trading Co. v. Firetti*, a Nebraska court had jurisdiction over a Virginia company that had fraudulently represented that it had paid anti-dumping import duties on pencils and crayons it had imported from China for the plaintiff, a Nebraska corporation.[69] Although the defendants had never entered Nebraska and only made phone calls and faxes to Nebraska, the fraud was directed at residents of Nebraska where the harm was felt.[70]

Courts have also allowed jurisdiction in the plaintiff's home state over out-of-state defendants in trademark cases when the injury was primarily felt in the forum state.[71] For example, a Missouri court held that personal jurisdiction was proper against a New York marketer of postcards, when that marketer had used a Missouri corporation's trademark on its postcards.[72] On the other hand, other cases have rejected jurisdiction in trademark infringement cases in the state of the plaintiff's principal place of business when the injury was not aimed at the forum.[73] For example, the court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* stated that a trademark infringement on a "passive website"

66. 148 F.3d at 914, 917.

67. *Id.* at 916.

68. *Id.*

69. 236 F.3d at 943.

70. *Id.*

71. *E.g.*, Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1388 (8th Cir. 1991); Indianapolis Colts, Inc. v. Metro. Baltimore Football Club L.P., 34 F.3d 410, 411-12 (7th Cir. 1994); Anheuser-Busch, Inc. v. City Merchandise, 176 F. Supp. 2d 951, 956-57 (E.D. Mo. 2001); Inset Sys., Inc. v. Instruction Set, 937 F. Supp. 161, 164-66 (D. Conn. 1996). I will discuss *Dakota Industries* in detail below at *infra* notes 130–42 and accompanying text.

72. *Anheuser-Busch*, 176 F. Supp. 2d at 957-59.

73. *E.g.*, Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997) (involving an Arizona corporation that had registered a trademark versus a Florida corporation who had used the same trademark on its Internet website); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996). *But see* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-27 (W.D. Pa. 1997) (finding jurisdiction in this case, but setting a narrow standard for evaluating jurisdiction in certain cases involving the Internet).

did not establish jurisdiction.[74] This case distinguished among interactive, semi-interactive, and passive websites.[75] A passive website simply makes information available, a semi-interactive website allows the user to exchange information with the website, and an active website involves the knowing and repeated transmission of computer files over the Internet.[76]

Similar to trademark cases, courts have allowed jurisdiction when there is an intentional violation of a statute.[77] For instance, a Nevada court had jurisdiction over a Utah law firm under the Fair Credit Reporting Act ("FCRA") when one of its paralegals, a plaintiff in a lawsuit, wrongfully requested credit reports on the Nevada defendants in that lawsuit because the paralegal had intentionally aimed his conduct at Nevada.[78]

Some courts have also permitted jurisdiction under *Calder* when business torts were involved.[79] In *Janmark v. Reidy*, the court held that jurisdiction was proper in Illinois in a case concerning intentional interference with business relations.[80] A California mini shopping cart seller had threatened an Illinois competitor's customers with suits for contributory copyright infringement.[81] One threat caused a New Jersey customer to stop buying from the Illinois company.[82] The court felt that the injury occurred in Illinois, where the company suffered the harm from the cancelled order, so jurisdiction was constitutional there.[83] It should be noted, however, that several courts have decided that the application of *Calder* to business torts should result in a narrow construction of the test.[84] For example, the court in

74. 952 F. Supp. at 1124.
75. *Id.*
76. *Id.*
77. *E.g.*, Myers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001).
78. *Id.* at 1075.
79. *E.g.*, Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements (London), Ltd., 328 F.3d 1122, 1132, 1136 (9th Cir. 2003) (allowing jurisdiction in action for intentional interference with contract and business relations); Remick v. Manfredy, 238 F.3d 248, 260-64 (3d Cir. 2001) (holding that a Pennsylvania court had jurisdiction over Illinois lawyers who had allegedly interfered with plaintiff's, a Pennsylvania law firm, contract with an Indiana client); Janmark, Inc. v. Reidy, 132 F.3d 1200, 1203 (7th Cir. 1997).
80. 132 F.3d at 1201.
81. *Id.* at 1202.
82. *Id.*
83. *Id.*
84. *IMO Indus.*, 155 F.3d at 261. *See also* Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1078 (10th Cir. 1995); Southmark Corp. v. Life Investors, Inc., 851 F.2d 763, 772-73 (5th Cir. 1988); Esab Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir. 1997); Hicklin Eng'g, Inc. v. Aidco, 959 F.2d 738, 739 (8th Cir. 1992) (reading *Calder* narrowly); Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 14 F. Supp. 2d 710, 717 (M.D. Pa. 1998); *Zumbro*, 861 F. Supp at 783; Roquette Am., Inc. v. Gerber, 651 N.W.2d 896, 901 (Iowa Ct. App. 2002) (also reading *Calder* narrowly).

Hicklin stated that jurisdiction was not proper in Iowa in a business torts case when the only contact with Iowa was that the plaintiff's principal place of business was there.[85]

Establishing where the brunt of the harm was felt, the second prong of the effects test, can be difficult in some cases.[86] *Myers v. Bennett Law Offices* considered whether the harm from improperly obtaining a credit report in violation of the FCRA occurred in Utah, where the credit report was accessed, or in Nevada, where the plaintiff lived.[87] The court noted that the FCRA is intended to protect consumer confidentiality.[88] Like right to privacy cases, when a consumer's confidentiality is violated, the main damage is mental distress from having private information revealed publicly.[89] Since such mental distress occurs where the plaintiff resides, the harm in this case was felt in Nevada, and jurisdiction was proper there.[90]

Some courts have relaxed the brunt of the harm standard, allowing jurisdiction in more than one state. As one court has noted, the existence of jurisdiction in one state does not necessarily preclude jurisdiction in another state.[91] For instance, "a corporation can suffer economic harm both where the bad acts occurred and where the corporation has its principal place of business."[92] Another judge has written that *Calder* does not require that the brunt of the harm be in the forum, but that it was only a factor weighing in favor of purposeful direction in that case.[93] He declared: "To the contrary, the Court held that jurisdiction was proper because 'petitioners [were] primary participants in an alleged wrongdoing intentionally directed at a California resident.'"[94]

Expressly aiming, the third prong of the effects test, "encompasses wrongful conduct individually targeting a known forum resident."[95] Some courts have further stated that the defendant must know "that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to

85. 959 F.2d at 739.

86. *Core-Vent*, 11 F.3d at 1486-87. Personal jurisdiction "cannot be answered through . . . a mechanical test but instead must focus on the relationship among the defendant, the forum, and the litigation within the particular factual context of each case." *Id.* at 1487.

87. 238 F.3d at 1073-74.

88. *Id.* at 1074.

89. *Id.*

90. *Id.*

91. *Dole Food*, 303 F.3d at 1113. *See also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984) ("There is no justification for restricting libel actions to plaintiff's home forum.").

92. *Dole Food*, 303 F.3d at 1113.

93. *Core-Vent*, 11 F.3d at 1492 (Wallace, C.J., dissenting).

94. *Id.* (quoting *Calder*, 465 U.S. at 790).

95. *Bancroft*, 223 F.3d at 1087.

specific activity indicating that the defendant expressly aimed its tortious conduct at the forum."[96] Individualized targeting separates these cases from cases where the effects test is not satisfied.[97]

For instance, a California court had jurisdiction over an Alabama resident who sent a letter to an insurance company, claiming she was entitled to an insurance benefit that actually belonged to a California resident, because the defendant had purposefully defrauded the plaintiff in California.[98] Similarly, an Arizona court had jurisdiction in a libel case involving phone calls directed to defendants in Canada because the defendants knew their actions would be felt in Arizona.[99] Likewise, a California court had jurisdiction over a Georgia corporation that had contested a California corporation's use of a domain name by sending a letter to Virginia to the sole registrar of domain names in the United States because the letter individually targeted the California company.[100]

In contrast, a court found that Ohio did not have jurisdiction over the International Amateur Athletic Foundation in a case where it had issued an allegedly libelous press release, claiming that the plaintiff, an internationally known track star, had failed a drug test.[101] The release concerned the plaintiff's conduct in Monaco, not Ohio, it involved a drug sample taken in Monaco and tested in France, it was not published in Ohio by the defendant, and the plaintiff's reputation was not centered in Ohio.[102] In other words, "Ohio was not the 'focal point' of the press release."[103] Similarly, a court denied jurisdiction in South Carolina in a suit brought by a Delaware corporation, with its principal place of business in South Carolina, against Florida and New Hampshire residents for the misappropriation of trade secrets and customer lists.[104] The court ruled that knowledge that a plaintiff with its headquarters in South Carolina would lose sales was not enough

96. *IMO Indus.*, 155 F.3d at 266; Griffis v. Luban, 646 N.W.2d 527, 535 (Minn. 2002).

97. *Bancroft*, 223 F.3d at 1088.

98. Metro. Life Ins. Co. v. Neaves, 912 F.2d 1062, 1065-66 (9th Cir. 1990). *See also* Stevens v. Meaut, 264 F. Supp. 2d 226, 238 (E.D. Pa. 2003) (involving a slander of title outside of state while causing injury in plaintiff's home state).

99. Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257, 1259 (9th Cir. 1989).

100. *Bancroft*, 223 F.3d at 1082, 1084-88.

101. Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1114 (6th Cir. 1994).

102. *Id.* at 1120. The court noted that the fact that it was foreseeable that the report would be circulated in Ohio and have an effect there was not enough to create jurisdiction. *Id.*

103. *Id.*

104. *Esab Group*, 126 F.3d at 626. However, the court found that personal jurisdiction did exist under the federal RICO statutes. *Id.* at 626-27.

to create jurisdiction in South Carolina; otherwise, jurisdiction in intentional tort cases would always be sufficient where the plaintiff was headquartered.[105] Likewise, in a suit concerning the right of publicity, a California court did not have jurisdiction over an Ohio car dealer who had used a California actor's image in one of the dealer's ads because the ad was aimed at Ohio, not California.[106] Finally, a court thought that libel distributed worldwide did not necessarily injure a corporation at its principal place of business, thus not satisfying the targeting requirement.[107] Another court held that a libelous post on an internet bulletin board did not meet the targeting requirement because there was no evidence that the statements were targeted at the forum or a forum resident.[108]

3. *Extended Examples of the Application of the Effects Test*

Haisten v. Grass Valley Medical Reimbursement Fund, Ltd. demonstrates the boundary of personal jurisdiction when a foreign defendant who allegedly has not acted in the state is involved.[109] In *Haisten*, attorneys for a California hospital set up a self-insured

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105. *Id.* at 625-26. *See also Zumbro*, 861 F. Supp. at 783 (disallowing jurisdiction by a Minnesota court over a California company who had sent letters to companies in Illinois and California, alleging that a Minnesota corporation had committed patent infringement).

106. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 799-807 (9th Cir. 2004).

107. *See Core-Vent*, 11 F.3d at 1486 ("[A]lthough the medical journals were circulated worldwide, it has not been alleged that California was a primary audience for the medical journals or that the defendants knew that the journals would be circulated in that state."). *See also* Revell v. Lidov, 317 F.3d 467, 473-76 (5th Cir. 2002) (finding that not only was the article not directed at the individual plaintiff at his home in Texas, but the defendant was unaware that the plaintiff was a resident of Texas when he posted his article on an internet bulletin board centered in New York); Young v. New Haven Advocate, 315 F.3d 256, 263-64 (4th Cir. 2002) (denying jurisdiction over defendants in a suit brought by a Virginia prison warden involving articles in Connecticut newspapers distributed over the Internet concerning coverage of conditions in a Virginia prison that housed several Connecticut prisoners, because the articles did not have the intent of targeting readers in Virginia); Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790, 796 (W.D. Tenn. 2000) ("Here, the defendants attacked the plaintiff in their website as a business competitor who . . . [the plaintiff] has conceded 'solicits conversions [of aircraft engines] nationwide and worldwide.'").

108. *Griffis*, 646 N.W.2d at 535. *See also* Archer & White, Inc. v. Tishler, No. 3:03-CV-0742-D, 2003 U.S. Dist. LEXIS 19010 (N.D. Tex. Oct. 23, 2003). Professor Borchers has noted that "the reported cases leave open the substantial possibility that courts facing internet libel jurisdiction cases are striking out in their own direction with relatively little regard for the Supreme Court's guidance." Patrick J. Borchers, *Personal Jurisdiction in the Internet Age: Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 482 (2004).

109. 784 F.2d at 1392.

medical malpractice fund in the Cayman Islands to insure its California physicians.[110] The attorneys deliberately set up the fund to avoid jurisdiction in (and insurance regulations of) California.[111] The fund was incorporated in the Cayman Islands, it maintained its sole office there, all transactions and communications were conducted in the Cayman Islands, and the insureds did business through agents in the Cayman Islands.[112] Moreover, the fund claimed that it did not solicit business or advertise in California.[113] Finally, the fund's insurance contract stated that it was governed by Cayman Islands law, but that disputes between the fund and its insureds would follow California arbitration law.[114] Notably, under the insurance contract, the fund was obligated to pay only if the insured had first paid pursuant to a judgment or if there had been an approved settlement, which was contrary to California law.[115]

The plaintiff's wife had brought a malpractice claim against one of the insureds.[116] She had received $185,000 in binding arbitration, but the doctor filed bankruptcy and was discharged from his obligation to the plaintiff's wife.[117] The plaintiff, as administrator of his wife's estate, sued the fund in California to obtain satisfaction of the arbitration judgment under California law, "which requires the insurer to pay the outstanding judgment[s] of a bankrupt insured."[118] The district court granted the plaintiff's motion for summary judgment.[119]

A major issue in the case was whether California had jurisdiction over the Cayman Islands fund.[120] In this case, although the defendant had

> made a tremendous effort to construct a transaction in such a way as to avoid the appearance of contacts with California, and thus the reach of the California courts[,] . . . [the Fund's] only purpose was to provide insurance for California doctors treating California patients and to avoid requirements imposed by California law.[121]

The court held that the fund had purposefully availed itself of the privilege of conducting activities in California when it "purposefully directed" its activities toward California residents.[122]

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110. *Id.* at 1395.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1396-1402.
121. *Id.* at 1396.
122. *Id.* at 1397-98.

The court reiterated that the lack of physical contacts with a state does not defeat jurisdiction, when the defendant has purposefully directed its activities toward residents of that state.[123] The court emphasized that it is the substance, not the form, of the activities that is important.[124] "[P]remiums from California physicians are disbursed to California physicians who suffer loss due to malpractice liability."[125] In other words, "the Fund's existence was 'for the benefit of California residents; to wit, California doctors.'"[126] The court concluded that the fund's conduct "was 'purposefully directed' toward participation in the California insurance market."[127]

The court rejected the fund's argument that the purposefully directed rule should be limited to products liability cases.[128] The court asserted:

> As in the products liability area, the state has a manifest interest in providing its residents with a forum for reaching insurance companies who refuse to honor legitimate claims. This is especially true with regard to companies that insure against loss from liability for *personal injury*, whose actions implicate the safety of the state's residents.[129]

Another case that tested the boundary of personal jurisdiction was *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, which upheld jurisdiction in a case concerning an allegation of trademark infringement.[130] Dakota Industries, a South Dakota corporation, owned the incontestable trademark "Dakota" for certain types of women's clothing.[131] Dakota Sportswear, a California corporation, also manufactured women's clothing using the Dakota name.[132] Although Dakota Sportswear marketed "mostly in New York and California," some of its clothing had been sold to consumers in South Dakota.[133] The South Dakota district court "granted Dakota Sportswear's motion to dismiss for lack of personal jurisdiction."[134]

The appellate court found jurisdiction under *Calder* because "Sportswear's actions were uniquely aimed at the forum state and that the 'brunt' of the injury would be felt there."[135] The defendant alleged that it had no offices, agents, or property in South Dakota,

123. *Id.* at 1397.
124. *Id.* at 1398.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1399.
129. *Id.* (citations omitted).
130. 946 F.2d at 1384.
131. *Id.* at 1386.
132. *Id.*
133. *Id.* at 1386-87.
134. *Id.* at 1387.
135. *Id.* at 1391.

that it had not conducted any business there, and that it had not shipped any items to South Dakota.[136] It further claimed that the marketing of its product in South Dakota was the unilateral activity of others.[137] Thus, the defendant argued that under *Asahi*, which had declared that the "launching of a product into the stream of commerce with the awareness that the stream 'may or will sweep the product into the forum State' was insufficient to confer jurisdiction," South Dakota lacked jurisdiction over it.[138] The court distinguished *Asahi* on the ground that that case involved a negligent tort—personal injury—while this case involved trademark infringement—an intentional tort.[139] The defendant had used a trademark with knowledge of the infringement.[140] It had twice been denied registration of the trademark, and Dakota Industries had sent it a cease and desist letter.[141] The court concluded that under such circumstances, the defendant "'must "reasonably anticipate being haled into court"' in South Dakota."[142]

Some cases have limited the boundary of personal jurisdiction to protect defendants. These cases have found that jurisdiction did not exist under the effects test because the brunt of the harm was not felt in the forum or the defendant had not expressly aimed its conduct at the forum.[143] For example, in *William Rosenstein & Sons Co. v. BBI Produce, Inc.*, the court held that jurisdiction was not proper in Pennsylvania for libel published in Florida by a Florida corporation.[144] The plaintiff in *William Rosenstein* was a fruit and vegetable wholesaler and distributor in Pennsylvania, while the Florida corporation sold produce, principally strawberries.[145] The defendant had allegedly sent a defamatory statement by fax to sixteen other strawberry sellers in Florida.[146] The fax claimed that the plaintiff "had engaged in unsavory business practices" with the defendant, after the plaintiff had refused to pay for a shipment of strawberries.[147] The defendant contended that it had no place of business, business operation, bank account, agents, employees, or other ties to Pennsylvania.[148]

The court believed that jurisdiction was not proper in

136. *Id.* at 1388.
137. *Id.* at 1390.
138. *Id.*
139. *Id.* at 1390-91.
140. *Id.* at 1391.
141. *Id.*
142. *Id.*
143. *Rosenstein*, 123 F. Supp. 2d at 273-74.
144. *Id.* at 269.
145. *Id.* at 270.
146. *Id.*
147. *Id.*
148. *Id.*

Pennsylvania because the brunt of the harm was not felt there.[149] The court stated that the defendant "sent the allegedly libelous facsimile to other strawberry sellers located in Florida. It is clear that this facsimile would cause Rosenstein [the plaintiff] the greatest injury in Florida, among those from whom Rosenstein must purchase strawberries and other produce."[150] Similarly, the defendant had not expressly aimed its tortious conduct at Pennsylvania; Pennsylvania was not the "focal point of the tortious activity."[151] The defendant had not sent the fax to anyone in Pennsylvania except the plaintiff, and the defendant would have expected the harm to be centered in Florida, where the producers received the fax.[152]

Wolgin v. Fine Decorators, Inc. also held that jurisdiction was not proper when the brunt of the harm was not felt in the forum state.[153] In *Wolgin*, the plaintiff sued a real estate broker in Pennsylvania, alleging fraud in connection with the sale of a condominium in Florida.[154] The broker did business and was licensed in Florida.[155] The broker had advertised in two national magazines and made numerous calls to Pennsylvania that were not proven to be tied to the litigation.[156] The court rejected the plaintiff's argument that jurisdiction was proper under *Calder* because harm was caused in Pennsylvania.[157] The court thought that the focus of the broker's actions was Florida.[158] The suit concerned a Florida condominium, and the condo was sold in Florida.[159] In addition, the improper furnishings and uninhabitable condition of the condo occurred in Florida, and the contract stated that the action would be litigated in Florida and governed by Florida law.[160]

The plaintiff also sued a decorator who had contracted to make improvements on the condo.[161] The plaintiff and decorator had signed a retainer agreement in Florida that specified that any disputes would be settled by arbitration in Florida under Florida law.[162] The decorator also faxed subsequent contracts to the

149. *Id.* at 273.
150. *Id.*
151. *Id.*
152. *Id.* at 274.
153. No. 00-3997, 2001 U.S. Dist. LEXIS 11461, at *17 (E.D. Pa. Aug. 7, 2001).
154. *Id.* at *1.
155. *Id.* at *2.
156. *Id.* at *13-14.
157. *Id.* at *15-17.
158. *Id.* at *17.
159. *Id.*
160. *Id.*
161. *Id.* at *17-21.
162. *Id.* at *18.

plaintiff in Pennsylvania that had similar clauses.[163] While the decorator had made no trips to Pennsylvania, the plaintiff had made at least one trip to Florida to oversee the improvements and discuss the dispute.[164] The court held that Pennsylvania lacked jurisdiction over the decorator because the decorator was accustomed to dealing with the plaintiff in Florida, so the focal point of the activities was Florida; therefore, the decorator could not have anticipated being sued in Pennsylvania.[165] The court also pointed out that, since the contracts were governed by Florida law and required that all disputes be arbitrated in Florida, the defendant had not purposefully directed its activities toward Pennsylvania.[166] Finally, the court remarked that the minimal communications by fax with Pennsylvania by itself did not subject the defendant to jurisdiction there.[167]

Other cases have granted a motion to dismiss for lack of personal jurisdiction because the conduct was not expressly aimed at the forum—the forum was not the focal point of the harm. For example, *IMO Industries, Inc. v. Kiekert AG* held that a New Jersey court did not have jurisdiction over foreign defendants when a New Jersey corporation had been injured by a business tort because the defendant had not expressly aimed its conduct at New Jersey.[168] The plaintiff, a multinational corporation with its principal place of business in New Jersey, tried to sell its Italian subsidiary to a French company.[169] The defendant, a German corporation that also wanted to buy the subsidiary, tried to block the sale by threatening that it would revoke a licensing agreement it had with the subsidiary in a series of letters it sent to the subsidiary in Italy and a New York investment firm that was handling the sale.[170] The sale was never completed because of the threats, causing the plaintiff significant financial losses.[171]

The court held that New Jersey did not have jurisdiction over the defendant because it had not aimed its conduct at New Jersey.[172] First, none of the meetings were in New Jersey, and the correspondence was sent to New York and Italy, not New Jersey.[173] Second, the letters demonstrate that the defendant was focusing on the New York investment firm and the Italian

163. *Id.* at *19.
164. *Id.* at *20.
165. *Id.*
166. *Id.* at *18-19.
167. *Id.* at *19.
168. 155 F.3d at 256.
169. *Id.* at 257.
170. *Id.* at 257-58.
171. *Id.* at 258.
172. *Id.* at 268.
173. *Id.* at 267.

subsidiary, not the New Jersey parent.[174] Finally, the fact that the letters were forwarded to the New Jersey corporation and the New Jersey corporation made phone calls to the defendants were not enough to establish jurisdiction in New Jersey.[175]

In sum, *Calder* expanded the availability of personal jurisdiction over defendants who, while acting outside a state, caused harm within that state. Lower courts have differed in their interpretations of *Calder*, with the Eighth and Ninth Circuits usually applying it broadly and the Third Circuit narrowly.

C. Reasonableness in Effects Test Cases

As mentioned earlier, there is also a reasonableness element to the personal jurisdiction inquiry: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[176] The Court further stated that "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[177] However, "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."[178]

Burger King used five factors to evaluate reasonableness: (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies."[179] The Court noted: "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[180]

Lower courts have developed a seven-part test to determine reasonableness in the context of *Calder*-like cases:

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174. *Id.*

175. *Id.* at 268.

176. *Burger King*, 471 U.S. at 476. *See also Asahi*, 480 U.S. at 113-16 (stating it was a severe burden when a Japanese defendant had to travel to California to defend a lawsuit); *World-Wide Volkswagen*, 444 U.S. at 292 (noting the Due Process Clause "protects the defendant against the burdens of litigating in a distant or inconvenient forum").

177. *Burger King*, 471 U.S. at 477.

178. *Id.* at 478.

179. *Id.* at 477. *Accord Asahi*, 480 U.S. at 113-16.

180. *Burger King*, 471 U.S. at 477.

> (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of the conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[181]

A court must balance all seven factors.[182] *Core-Vent Corp. v. Nobel Industries AB* illustrates how one court applied this test to foreign defendants.[183] In this case, four Swedish professors—working as consultants to Nobelpharma, one of the two largest manufacturers of dental implants in the world—had published articles that allegedly made false comparisons of Nobelpharma's and Core-Vent's dental implants.[184] Core-Vent was a California corporation, and the articles had been published in magazines with international circulation, including California.[185] The defendants had only made limited visits to California; the most had been five times in four years.[186]

One ground the court used to uphold the trial court's grant of dismissal for lack of personal jurisdiction was the lack of reasonableness.[187] First, the court found that the purposeful injection into the forum factor favored the professors because their contacts with the forum were attenuated.[188] Second, the court concluded that the burden on the defendants in defending the action in California was great because they had no ongoing connection or relationship with the United States.[189] The court remarked that the plaintiff, a large international corporation, would have less of a burden in bringing its claims in Sweden than the four professors would have by defending in California.[190]

Third, the court thought that the sovereignty factor weighed heavily in favor of the defendants.[191] The court thought that sovereignty concerns were more important when the defendants had no United States-based relationships, as was true here.[192]

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181. *Dole Food*, 303 F.3d at 1114. *See also Core-Vent*, 11 F.3d at 1487-88 (using the term "purposeful interjection" instead of "purposeful injection"); Paccar Int'l, Inc. v. Commercial Bank of Kuwait, 757 F.2d 1058, 1065 (9th Cir. 1985).

182. Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1991).

183. 11 F.3d at 1487-88.

184. *Id.* at 1483-84.

185. *Id.* at 1483-86.

186. *Id.* at 1483.

187. *Id.* at 1490.

188. *Id.* at 1488.

189. *Id.* at 1488-89.

190. *Id.* at 1489.

191. *Id.*

192. *Id.*

Fourth, California did have "a strong interest in providing an effective means of redress for its residents [who are] tortiously injured" because the plaintiff had its operations in and was incorporated there, thus favoring the plaintiff on this factor.[193]

Fifth, the court refused to consider the efficiency of the forum because the parties had not addressed the primary location of the witnesses and evidence.[194] However, the fact that the lawsuit would "continue in California with other parties" favored the plaintiff.[195] Finally, the court evaluated the existence of an alternate forum and the "effectiveness of relief for the plaintiff."[196] The court thought that the plaintiff had not shown the unavailability of suing the doctors in Sweden.[197] The court declared: "The maintenance of a suit in Sweden may be costly and inconvenient for Core-Vent, but Core-Vent has not shown that its libel claims cannot be effectively remedied there."[198]

Based on a weighing of the factors, the court concluded that "the Swedish doctors have presented a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice and would thus be unreasonable."[199] Although California had a strong interest in providing a forum to its citizens who are injured in the state, "where the plaintiff is an international corporation and where the defendants are individual citizens of a foreign country who lack connections to the United States and whose purposeful interjection into the forum state has been very limited, that interest must give way."[200]

The fact that the dissent came to an opposite decision on the reasonableness part of the personal jurisdictional test demonstrates that this part of the personal jurisdiction test is difficult to apply in connection with defendants acting outside the forum.[201] The dissent thought that the first half of the test—purposeful availment—had been satisfied by the defendants' conduct.[202] The dissent pointed out that once the first half of the test is satisfied, the "burden of proof is now on the doctors to 'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'"[203] Concerning the first factor of the reasonableness test—the extent of the defendants' purposeful interjection into forum state affairs—

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 1490.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *See id.* at 1494-95 (Wallace, C.J., dissenting).
202. *Id.* at 1493-94.
203. *Id.* (quoting *Burger King*, 471 U.S. at 477).

the dissent questioned the majority opinion's statement that the connections were attenuated because the complaint alleged that the defendants were "primary participants in an alleged wrongdoing intentionally aimed at a California resident."[204] The dissent agreed with the majority concerning the burden on the defendant, but it noted that all factors needed to be weighed in the final determination.[205] The dissent also rejected the defendants' contention that defending in a foreign legal system would be extremely burdensome on the grounds that the defendants had not shown "that it would be difficult to transport evidence, witnesses, or attorneys" to California, and Nobelpharma attorneys were conducting their defense.[206]

Concerning the third factor—interference with a foreign state's sovereignty—the dissent rejected the defendants' contention that hearing the case in California would significantly interfere with Sweden's authority to try disputes involving its citizens because the case involved a California corporation and California law.[207] The fact that the defendants had a direct professional relationship with governmental institutions was irrelevant because those ties were not involved in this litigation.[208] Concerning the fourth factor—California's interest in hearing the suit—California has a strong interest in providing its citizens with a forum for those who are injured there.[209] The dissent then agreed with the majority's evaluation of the other three factors, but it thought that they were not determinative.[210]

The dissent concluded:

> [T]he Swedish doctors' purposeful direction of tortious activity into California and the state's strong concomitant interest in providing a forum in which its residents may seek redress of their grievances must be weighed against the burden on the Swedish doctors in having to litigate in a foreign legal system and any possible interference with Sweden's sovereignty. I conclude that the Swedish doctors have failed to meet their burden requiring them to present a compelling case that jurisdiction would be unreasonable. The Swedish Doctors purposefully directed their tortious conduct into the forum for the purpose of harming Core-Vent. They should not now be heard to complain that it would be unfair to require them to defend themselves in a forum in which they intended their tortious

204. Id. at 1494 (quoting *Calder*, 465 U.S. at 790).
205. *Id.*
206. *Id.* at 1494-95.
207. *Id.* at 1495.
208. *Id.* (Wallace, C.J., dissenting).
209. *Id.* (Wallace, C.J., dissenting). The dissent added that "California has an interest in 'employing its libel laws to discourage the deception of its citizens.'" *Id.* (quoting *Keeton*, 465 U.S. at 776).
210. *Id.*

conduct to have its effect.[211]

Other courts that have considered the reasonableness factors more often adopt the position of the dissent in *Core-Vent*, rather than the majority analysis.[212] These courts think that the defendants' purposeful interjection into the home state's affairs and the interest of the forum state in protecting its residents usually outweigh any burden on the defendants or interference with the foreign state's sovereignty.[213] These courts point out that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country," thus easing any burden on the defendant.[214]

II. THE CRAZY HORSE LITIGATION

The marketing of the "Crazy Horse Malt Liquor" created great controversy.[215] One author has written, "[f]or the Lakota, and for all Native Americans, the existence of Crazy Horse Malt Liquor is a problem of epic proportions."[216] As another writer has noted: "On the glass bottle in which the beer is sold there is an image of an [sic] Native American chief in a war bonnet. Further, the bottle is decorated with representations of Native American bead work and a medicine wheel."[217] Although Congress passed legislation banning the use of Crazy Horse's name "on any distilled spirit, wine, or malt beverage product,"[218] a federal court quickly invalidated this law on First Amendment grounds.[219]

Several prominent people have criticized the marketing of Crazy Horse Malt Liquor. For example, in 1992, shortly after the introduction of the malt liquor, Surgeon General Antonio C. Novello declared that marketing the "malt liquor showed a 'lack of

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211. *Id.*

212. *E.g.*, *Harris Rutsky*, 328 F.3d at 1132-34; *Dole Food*, 303 F.3d at 1114-17; Panavision Int'l L.P. v. Toeppen, 141 F.3d 1316, 1323-24 (9th Cir. 1998); *Haisten*, 784 F.2d at 1400-02.

213. *See Dole Food*, 303 F.3d at 1114-17; *Panavision*, 141 F.3d at 1323 (stressing the purposeful injection factor); *Haisten*, 784 F.2d at 1400-02. *See also Harris Rutsky*, 328 F.3d at 1134 ("On balance, we conclude that [the defendant] has not met its burden of presenting a compelling case that the exercise of jurisdiction would not comport with fair play and substantial justice.").

214. *E.g.*, *Harris Rutsky*, 328 F.3d at 1133 (quoting Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988); *Dole Food*, 303 F.3d at 1115.

215. Newton, *supra* note 2, at 1019; Herrera, *supra* note 2, at 177.

216. Herrera, *supra* note 2, at 195.

217. Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 388 (1998).

218. Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, § 633, 106 Stat. 1729 (1992).

219. Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1233 (E.D.N.Y. 1993).

respect for one of the greatest chiefs and leaders of the Oglala Sioux.'"[220] Similarly, in letters to the defendants, South Dakota Senators Tom Daschle and Larry Pressler argued that "defendants use of the name 'Crazy Horse' for malt liquor was an affront to native Americans."[221]

A. A Conflict of Cultures and Laws

The Crazy Horse Litigation involved a clash of cultures. On the one side were Crazy Horse's descendants and tribe who were trying to protect Crazy Horse's name. On the other side were two Brooklyn men who were trying to live the great American, capitalist dream.

Native Americans have long felt that they have been mistreated in this country in a way that other minorities have not been.[222] Nell Jessup Newton, an attorney for the plaintiffs in the Crazy Horse litigation, has declared: "A grievance widely shared by many Indian people in the United States is the commercial appropriation of Indian names, images, stories, religious practices, and patterns."[223] He has further asserted:

> More generally, this case is part of a multivocal, multilocal, struggle of Indian people in the late twentieth century to destabilize the stereotypes that make up the dominant society's image of "Indianness" and replace these ahistorical, timeless, static, passive, decontextualized, Orientalized images with multilayered, multipurposive, individual and collective identities claimed by Indian people and tribes in the late-twentieth century.[224]

Native Americans believe that the dominant culture has regarded them as "nothing more than stereotypes."[225] They object to the use of their images and symbols by others as dehumanizing, and believe they have been depicted as "objects, cartoon characters, and animals instead of as living persons."[226] They point out that these images have been "presented as ahistorical and contextless."[227] Some writers have contended that this negative image of Native Americans has negatively affected their self-image and contributed to societal problems in their

220. *Witko*, 156 F. Supp. 2d at 1095. *See also* Novello, *supra* note 2, at 21 ("This product is insensitive to the plight of the American Indian with regard to alcohol abuse and the progress that has been made against it on reservations.").
221. *Witko*, 156 F. Supp. 2d at 1095.
222. Newton, *supra* note 2, at 1006-09, 1012.
223. *Id.* at 1003.
224. *Id.* at 1004.
225. *Id.* at 1011. *See also* Herrera, *supra* note 2, at 177.
226. Newton, *supra* note 2, at 1009.
227. *Id.* at 1010.

communities.[228] In particular, former Surgeon General Novello has asserted, "negative stereotypes linking alcohol to the Native American population cast a shadow over the entire Native American population."[229]

Many Native Americans consider their cultural images to be property.[230] They feel that their images and symbols have been "treated as goods lying about in the public domain ready to the hand of any entrepreneur with something to sell."[231] They are especially upset in this case because Crazy Horse had opposed the use of alcohol,[232] and one bottle of this malt liquor had "as much alcohol as a six pack of beer."[233] In addition, they felt that "[t]o associate the life of any spiritual leader for the purpose of commercial and financial gains is insulting and offensive to the meaning of their life."[234] They also believed that Hornell had target marketed the malt liquor to African-American and Hispanic men.[235]

The defendants were "second generation Italian Americans from Brooklyn" who had been beer truck drivers.[236] A Hornell lobbyist had asserted: "Their fledgling small business is their only way of finding a release from the confines of driving beer trucks on Brooklyn streets for the rest of their lives and achieving their vision of a better, more independent and secure life."[237] The defendants claimed that they had spent thousands of hours developing their product.[238] They stated that they had chosen the Crazy Horse name "to celebrate a great Native American Chieftain

228. Dougherty, *supra* note 217, at 376-77. *See generally* Laurel Davis, *Protest Against the Use of Native American Mascots: A Challenge to Traditional American Identity*, 17 J. SPORT & SOC. ISSUES 14 (1993).

229. Novello, *supra* note 2, at 16. Dr. Novello has written that "a large proportion of the Native American population dies before age forty-five." *Id.* at 15. He considers alcoholism to be a significant factor in this early death rate. *Id.* at 15-16.

230. Newton, *supra* note 2, at 1011.

231. *Id.* at 1009.

232. *Witko*, 156 F. Supp. 2d at 1099; Herrera, *supra* note 2, at 176 ("He abhorred alcohol use and encouraged his people to stay away from the drug, which he saw as the white man's tool for debilitating the Lakota."); Novello, *supra* note 2, at 17 ("[M]ost disturbing was the tasteless and misleading use of the name on this product of an Indian leader deeply opposed to alcohol use by his people, and the reinforcement of a harmful cultural stereotype."); Crazy Horse Defense Project, *Overview: Why Does This Matter to Us?*, *at* http://crazyhorsedefense.org/menu2b.html (last visited Mar. 5, 2005) ("To use the name and mystique of a great protector and spiritual leader to market a product that kills so many Indians is despicable.") (emphasis omitted).

233. Newton, *supra* note 2, at 1023.

234. Crazy Horse Defense Project, *supra* note 232.

235. Newton, *supra* note 2, at 1025-26.

236. *Id.* at 1024.

237. *Id.*

238. *Witko*, 156 F. Supp. 2d at 1095.

as part of our introduction of a line of beers which commemorate the American West and its legends."[239] According to a Wall Street Journal report, "[b]anning Crazy Horse could easily bankrupt the company and destroy scores of jobs."[240]

The Crazy Horse Litigation also involved fundamental differences in the concept of law. The American legal system is based on a system of individual rights—rights against the government and rights to own property against the world. In the American legal system, group rights are usually unimportant.[241] Under this system, "cultural symbols are considered part of the public domain and as a result are available for use in business contexts."[242] On the other hand, the United States government has often treated Native Americans as having group rights.[243] In addition, Professor Terence Dougherty has argued that group rights of Native Americans should be recognized in certain instances.[244] Professor Dougherty has declared that "[i]t is essential that a group be allowed to assert a group right when that right cannot be subsumed within an individual or societal rights argument."[245] He concluded:

> Since Native American tribal sovereignty rests on a group rights framework, Native American tribes must be able to use these rights when certain aspects of their sovereignty and maintenance as viable cultural entities are at stake. Thus I argue it is essential that federal courts recognize group rights when the right the group asserts implicates the self-preservation or survival of the group.[246]

Because American intellectual property law protects individual rights, American intellectual property laws do not defend Indian group cultural rights very well.[247]

The case also involved a clash of laws. The main basis for this lawsuit was the right of privacy, or the right of publicity as it is sometimes called. The concept of the right of privacy is very different under tribal law than it is under the law of the fifty states.

> Lakota custom protects the spiritual, personal, social and cultural importance of an individual's name during his life and extends

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239. *Id.*
240. James Bovard, *The Second Murder of Crazy Horse*, WALL ST. J., Sept. 15, 1992, at A16.
241. Dougherty, *supra* note 217, at 361.
242. *Id.* at 355.
243. *Id.* at 363-64. Professor Dougherty has noted that American tribes are specifically mentioned in the Constitution, they have political sovereignty, and they have been treated as "distinct political group entities." *Id.* at 364.
244. *Id.* at 368.
245. *Id.* at 369.
246. *Id.*
247. *Id.* at 376.

> protection to his spirit and reputation after death. . . . While the United States does not formally recognize defamation of the dead, the tribal court may nevertheless find that the Crazy Horse name has been defamed under customary tribal law.[248]

Under Lakota law, "a person's right to protect his or her name lasts for seven generations."[249] As one writer has noted, "the tribal causes of action are grounded in tribal tradition, custom, and common law, and are likely quite different from available state causes of action."[250]

No American state would recognize a right to protect Crazy Horse's name under the facts of this case. The right of privacy/publicity varies among the states. In recent years, many jurisdictions have recognized the right of publicity as surviving a person's death and descending to his or her heirs.[251] However, most courts require that the decedent have exploited the commercial value of the name in his or her lifetime; otherwise, the right of publicity enters the public domain.[252] A few courts have held that the right is inheritable, regardless of whether the decedent exploited the right during his or her lifetime.[253] Still, it is doubtful that any state would allow the right of privacy for a person who died over one hundred years ago. It is a basic principle of American intellectual property law that the intellectual property right will end at some time.[254] As the court in *Lugosi* asked, "[m]ay the remote descendants of the historic public figures obtain damages for the unauthorized commercial use of the name or likeness of their distinguished ancestors? If not, where is the line to be drawn, and who should draw it?"[255] While some states have a post-mortem right of publicity statute, the maximum term

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248. Herrera, *supra* note 2, at 187. *See generally* VINE DELORIA, JR., GOD IS RED (1973).

249. Rob Capriccioso, *Out of the Closet; Activists Snag Crazy Horse Label*, AM. INDIAN REP., Oct. 2003, at 8. *Accord* Crazy Horse Defense Project, *Overview: Basis of Our Lawsuit*, *at* http://crazyhorsedefense.org/menu2d.html (last visited Mar. 5, 2005).

250. Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 170 (2000).

251. 62A AM. JUR. 2D *Privacy* § 25 (2004).

252. *Id. See, e.g.*, Pirone v. MacMillian, Inc., 894 F.2d 579, 585-86 (2d Cir. 1990); Lugosi v. Universal Pictures, 603 P.2d 425, 430 (Cal. 1979).

253. *E.g.*, Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 683 (11th Cir. 1983) ("[A] person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.").

254. For example, under copyright law, "[c]opyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the life of the author and 70 years after the author's death." 17 U.S.C. § 302(a) (2000).

255. 603 P.2d at 430.

is 100 years after the person's death.[256] In addition, the purpose of the right of publicity in American law is to protect the commercial exploitation of a person's name or likeness by others so that the owner can exploit the right—not to protect the reputation of the owner or the culture of his or her descendants.[257] The right of privacy, separate from its subcategory of the right of publicity, ends with a person's death because the purpose of the right is to protect injury to feelings.[258] The plaintiffs in this case are not complaining that their right to exploit Crazy Horse's name has been violated; they are claiming something that is more like a traditional right of privacy.

B. The Crazy Horse Litigation

The defendants introduced the Crazy Horse Malt Liquor on March 17, 1992.[259] After sending several letters to Hornell requesting that it discontinue the use of the Crazy Horse name, a relative of Crazy Horse, Seth Big Crow, and his tribe brought suit on August 25, 1993 in Rosebud Sioux Tribal Court, which was the domicile court of both Crazy Horse at his death and the plaintiffs.[260] The plaintiffs' lawyers thought that a right of publicity was the most promising ground to protect Crazy Horse's name.[261] As one of the plaintiffs' lawyers has declared, "[t]he right of publicity protects a person's right to exploit her name for commercial purposes; moreover it survives the death of the rightholder, descending to her estate."[262] The estate requested a combination of traditional Indian and common law remedies: an injunction against misuse, a public apology to be publicized in major newspapers, punitive damages, and "compensation 'in a culturally appropriate manner' . . . one braid of tobacco, a racehorse, and a four-point Pendleton blanket for each state and month in which products were sold."[263]

The tribal court held that it had no jurisdiction over the defendants.[264] Concerning personal jurisdiction, the tribal long-arm statute permits personal jurisdiction to the full extent of due

256. *E.g.*, IND. CODE ANN. § 32-36-1-8 (Michie 2004); OKLA. STAT. tit. 12, § 1448(G) (2004).

257. Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975).

258. *Id.* at 843.

259. Crazy Horse Defense Project, *Chronology: Case Chronology of Major Events Between the Plaintiffs and Defendant Hornell Brewing Company, at* http://crazyhorsedefense.org/menu5c.html (last visited Mar. 5, 2005).

260. Dougherty, *supra* note 217, at 389; Newton, *supra* note 2, at 1023-24; *Witko*, 156 F. Supp. 2d at 1095; Crazy Horse Defense Project, *supra* note 259.

261. Newton, *supra* note 2, at 1046-49.

262. *Id.* at 1047.

263. *Id.* at 1048.

264. *Hornell Brewing v. Rosebud Sioux Tribal Court*, 133 F.3d at 1089; Newton, *supra* note 2, at 1048.

process, and the tribal court follows Supreme Court precedent on personal jurisdiction.[265] The plaintiffs' attorneys had argued that "[t]he claim arose on the reservation, the defendant purposefully directed conduct at the forum by committing intentional torts, and the defendant, having marketed the product in 40 states, would not be unduly inconvenienced by having to travel to the Rosebud Reservation."[266] The plaintiffs used *Calder v. Jones* to support their argument.[267] While the plaintiffs asserted that the key point in *Calder* was that the harm had been directed at the forum, the defendants contended that *Calder* was not applicable because the malt liquor had not been marketed in South Dakota.[268] The judge rejected the plaintiffs' argument because, in fact, the malt liquor had not been marketed in South Dakota.[269] However, the judge did find that tribal law recognized the right of publicity.[270]

The Rosebud Supreme Court reversed, based on *Calder*.[271] The court averred:

> Because the defendants marketed the malt liquor nationally, advertised and sold other nonalcoholic beverages on the Rosebud reservation (the home of both Crazy Horse and the plaintiff), sent a package of allegedly defamatory materials to the plaintiff on the Rosebud reservation, and because the advertising label on the Crazy Horse Malt Liquor bottle exalts and targets the Rosebud reservation, there was enough factual justification to hale the defendants into Rosebud Sioux Court consistent with federal due process.[272]

The defendants then challenged the jurisdiction of the tribal court in federal court in South Dakota.[273] The district court held that the tribal court lacked subject matter jurisdiction over the case, but it also held that the defendants had not exhausted their remedies in tribal court.[274] It enjoined the tribal court from proceeding on the merits, and it remanded the case for the purpose of an evidentiary hearing on questions of personal and subject matter jurisdiction.[275] The tribal court, the tribal judge, and the Crazy Horse estate appealed the district court ruling.[276] The

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265. Newton, *supra* note 2, at 1049.
266. *Id.*
267. *Id.* at 1049 n.181.
268. *Id.* at 1049-50.
269. *Id.*
270. *Id.* at 1050.
271. *Hornell Brewing v. Rosebud Sioux Tribal Court*, 133 F.3d at 1089-90; Dougherty, *supra* note 217, at 389-90.
272. Dougherty, *supra* note 217, at 390.
273. *Hornell Brewing v. Rosebud Sioux Tribal Court*, 133 F.3d at 1090; *Witko*, 156 F. Supp. 2d at 1095-96.
274. *Hornell Brewing v. Rosebud Sioux Tribal Court*, 133 F.3d at 1090-91.
275. *Id.* at 1091.
276. *Id.*

Eighth Circuit held that the tribal court lacked subject matter jurisdiction over the case because the conduct "did not occur on the Rosebud Sioux Reservation."[277] The court declared: "The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty."[278] The court also ruled that the exhaustion rule did not apply to this case because, under the circumstances, it would only cause delay.[279]

With their recourse to tribal courts ended, the plaintiffs then filed suit in the United States District Court for the District of South Dakota.[280] The defendants again moved to dismiss because of lack of personal jurisdiction.[281] The court found jurisdiction based on the effects test.[282]

The court stated that the analysis of personal jurisdiction usually requires two steps: 1) jurisdiction must satisfy the state long-arm statute, and 2) assertion of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[283] However, under South Dakota's long-arm statute, the court needs to look only at the federal due process analysis.[284]

In determining whether a court has jurisdiction over the defendant upon a motion to dismiss, the court can rely on the parties' pleadings and affidavits, rather than holding an evidentiary hearing.[285] In this instance, "the Court must view the facts in the light most favorable to the plaintiff, the non-moving party," and the plaintiff must only make a prima facie showing of jurisdiction.[286]

The court first looked at the due process standard set forth in United States Supreme Court cases.[287] The court emphasized that "[t]he inquiry is whether the defendants have directed their activities toward residents of the forum and whether the litigation arises out of those activities."[288] The court also looked at five

277. *Id.* at 1091-92. For a note criticizing this decision, see Christopher J. Schneider, Note, Hornell Brewing Co. v. Rosebud Sioux Tribal Court: *Denigrating the Spirit of Crazy Horse to Restrain the Scope of Tribal Court Jurisdiction*, 43 S.D. L. REV. 486 (1998).
278. *Hornell Brewing v. Rosebud Sioux Tribal Court*, 133 F.3d at 1091.
279. *Id.* at 1092-93.
280. *Witko*, 156 F. Supp. 2d at 1094.
281. *Id.*
282. *Id.* at 1101.
283. *Id.* at 1096.
284. *Id.*
285. *Id.* at 1097.
286. *Id.*
287. *Id.* at 1096.
288. *Id.* (citing *Burger King*, 471 U.S. at 472).

factors developed in Eighth Circuit cases: "(1) the nature and quality of the defendants' contacts with South Dakota; (2) the quantity of their contacts with this state; (3) the relation of the cause of action to the contacts; (4) the interest of South Dakota in providing a forum for its residents; and (5) the convenience of the parties."[289] The court noted that it could consider the first three factors together and that the last two factors are less important than the first three.[290] The court thought that the effects test was one method of evaluating the first three factors.[291] The court declared: "[T]he effects test is a method of determining whether a non-resident defendant has sufficient minimum contacts with the forum so that the exercise of personal jurisdiction is consistent with traditional notions of fair play and substantial justice."[292]

Based on the effects test, the court concluded:

> Although [the defendants] have never been to South Dakota and Crazy Horse Malt Liquor is not marketed in South Dakota, defendants effectively have "reached into" South Dakota by using the Crazy Horse name on liquor and proceeding to do so while knowingly impacting the descendants of Crazy Horse who are residents of South Dakota.[293]

Based on their connections with South Dakota, the defendants should have reasonably anticipated being sued there.[294] The court thought this case was similar to *Calder*, where the individual defendants had "'expressly aimed' their tortious actions at a California resident knowing that the brunt of the injury would be felt by the plaintiff in California."[295]

After reviewing the Eighth Circuit cases on the effects test, the court applied the three-part test courts often employ to evaluate the effects test: the plaintiff must "show 'that the defendant's acts (1) were intentional, (2) were 'uniquely' or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered—and which the defendant knew was likely to be suffered—there.'"[296] The court first thought that the defendants' conduct was intentional and "uniquely directed at South Dakota," where Crazy Horse's descendants live.[297] His descendants live in South Dakota on the Rosebud reservation, the Pine Ridge Reservation, and the Cheyenne River Reservation.[298]

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289. *Id.*
290. *Id.*
291. *Id.* at 1101.
292. *Id.*
293. *Id.* at 1099.
294. *Id.* at 1100.
295. *Id.* at 1099.
296. *Id.* at 1098 (quoting *Zumbro*, 861 F. Supp. at 782-83).
297. *Id.*
298. *Id.*

The court noted that Crazy Horse is the "beloved leader of the Lakota Sioux," that he devoted his life to protecting his people's cultural ways, and that he vehemently condemned the use of alcohol by his people.[299] Crazy Horse's descendants respected his dying wish not to disturb his mind or spirit after his death, and they have used his name in only limited circumstances, making certain that no one exploited his person, name, or spirit.[300] The court declared: "Having spent thousands of hours in research and development of the product and its introduction into the marketplace, the defendants had to know that their actions were uniquely aimed at residents in South Dakota."[301]

Similarly, the court concluded that the brunt of the harm was suffered in South Dakota, and the defendants knew that it would probably be felt there.[302] Although it might not be clear what state Crazy Horse would be considered a citizen of, the harm was being felt by Crazy Horse's descendants in South Dakota.[303] The court declared:

> The malt liquor bears the Crazy Horse name which the descendants of Crazy Horse, residents of South Dakota, have tried to protect from misuse pursuant to a sacred trust. The plaintiffs allege that because of defendants' actions the descendants of Crazy Horse have suffered a shameful slur in Lakota culture: "He (Crazy Horse) must be without relatives who can stand up for him at a time when they have given his name to a liquor."[304]

In addition, the defendants knew their actions were affecting South Dakota residents, through the letters from South Dakota Senators Daschle and Pressler, through a letter from counsel, and through the prior litigation.[305] Finally, the defendants had not argued that their conduct "was felt more significantly in a state other than South Dakota."[306]

The court also rejected the defendants' argument that, to obtain jurisdiction over a defendant, the plaintiff must establish some other contact with the forum, in addition to the effects test.[307] The court noted that under the purposeful availment analysis, the Supreme Court has permitted jurisdiction over a defendant "whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum

299. *Id.*
300. *Id.*
301. *Id.* at 1100.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*

state."[308] The court distinguished this case from *Casualty Assurance Risk Insurance Brokerage Co. v. Dillon*.[309] In that case, the court had noted the importance the Supreme Court in *Calder* had placed on the fact that approximately 600,000 copies of the National Enquirer had been distributed in California.[310] *Dillon* rejected personal jurisdiction over the defendants because the plaintiff had only shown "an injurious effect in the forum, while the effects test requires proof [1] that the defendant's actions were uniquely aimed at the forum, [2] that the brunt of the harm was suffered in the forum and [3] that the defendants knew it would be suffered there."[311] The court declared that harm from a "libelous statement is not necessarily suffered in the place of incorporation."[312] The court in *Witko* distinguished its facts from those in *Dillon* on the ground that all elements of the effects test had been satisfied.[313] In other words, there was more than an injurious effect in the forum; the brunt of the harm had been felt there.

The court also considered the second half of the due process test: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"[314] When the first half of the due process test has been satisfied, the defendant "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[315] Among the factors that a court looks at are "the interest of the forum state in providing a forum for its residents" and "the convenience of the parties."[316] The defendants had asserted that it was not convenient to have the case tried in South Dakota.[317] However, the court declared it "finds that the inconvenience to defendants is outweighed by the extent of the defendants' purposeful interjection into the affairs of residents of South Dakota, by South Dakota's interest in adjudicating the dispute and by the efficiency of hearing the entire case in one forum."[318]

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308. *Id.* at 1100–01.
309. *Id.* (citing Cas. Assurance Risk Ins. Brokerage Co. v. Dillon, 976 F.2d 596 (9th Cir. 1992)).
310. *Id.* at 1101.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* (quoting *Burger King*, 471 U.S. at 476-77).
315. *Id.* at 1101-02.
316. *Id.* at 1101 (quoting Guinness Import Co. v. Mark VII Distrib. Co., 153 F.3d 607, 614 (8th Cir. 1998)).
317. *Id.* at 1102.
318. *Id.*

Following the denial of defendants' motion to dismiss for lack of personal jurisdiction, the case was scheduled for trial.[319] However, the parties have since settled the case.[320]

III. THE BOUNDARY OF PERSONAL JURISDICTION

A. Evaluation of the Supreme Court's Approach to Personal Jurisdiction and a Proposal for a Minimal Constraints Test of Personal Jurisdiction Under the Due Process Clause

The boundary of personal jurisdiction should prevent states from asserting jurisdiction over defendants who have no significant connection with the state, yet permit broad jurisdiction so that plaintiffs have the opportunity to litigate their grievances. The Due Process Clause guards individuals' liberty interests[321]—in other words, it prohibits a state from asserting jurisdiction over an individual that has no connection or a weak connection with that state, or when assertion of jurisdiction would be unfair to the defendant because the defendant cannot mount a proper defense to the suit. On the other hand, when personal jurisdiction is limited too much, a plaintiff's rights are infringed; the plaintiff may not be able to litigate the claim, or the litigation may become unduly burdensome. Accordingly, the way to balance the rights of defendants and plaintiffs is by having minimal due process constraints on personal jurisdiction that are based on a state's power over an individual grounded in territory and fairness.[322]

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319. Capriccioso, *supra* note 249, at 8.

320. *Crazy Horse Case Finally Dismissed; Use of Brandname-Breweries*, MODERN BREWERY AGE, Jan. 19, 2004, at 1.

321. *Burger King*, 471 U.S. at 471-72 (citing *Int'l Shoe*, 326 U.S. at 319 n.13) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'"). *But see* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 516 (1987) ("The right to be free from litigation in a state in which one has not purposefully connected oneself does not seem to be one of those obvious fundamental rights 'valued by sensible men.'") (citation omitted).

322. Others who have proposed a minimal constraints test for due process include Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 795-802 (2003); Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 955 (2000) ("[T]he constitutional limitation on state court assertions of personal jurisdiction would be the same as for choice–of–law determinations."); Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 994-97 (1995) (advocating use of the English model); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 545–50 (1995). *See also* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995) [hereinafter Borchers, *Jurisdictional Pragmatism*] ("[T]he Due

The most important aspect of personal jurisdiction is territorial—has the defendant performed some act that has brought him or her within the state's sovereign power based on its territory?[323] Although *International Shoe* rejected the strict

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Process Clause places almost no limitations on personal jurisdiction."); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 839-44 (1995); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1073 (1994) (questioning whether personal jurisdiction should be grounded in the Fourteenth Amendment). Professor McFarland has recently proposed a due process test that is broader and narrower than the current Supreme Court test. McFarland, *supra*, at 795-802. He proposes that personal jurisdiction be based on "an intentional transactional entry." *Id.* at 796. "The defendant must know, or be substantially certain, that its actions will pierce the borders of the forum state." *Id.* He also rejects the concept of general jurisdiction and any consideration of reasonableness. *Id.* at 797-98. His approach differs from the approach proposed here in that I still retain general jurisdiction and a minimal constraint on reasonableness. His test resembles my first prong, although there are differences because our analyses of some cases differ. For example, he would find jurisdiction in *Hanson* (he is not specific as to why) and *Asahi*, and I would not. *See id.* at 807. I reject personal jurisdiction in *Hanson* because I do not think that the trustee made a purposeful connection with the forum. I reject personal jurisdiction over the defendant in *Asahi* because California's regulatory authority does not extend to an indemnity action by a Taiwanese manufacturer against a Japanese manufacturer concerning the sale of parts that took place outside California after the underlying claims have been dismissed. California would have had jurisdiction over the component manufacturer if the claim had concerned the injury in California because California has regulatory authority over injuries that occur there.

323. Professor Rutherglen has identified two strands that have appeared in academic analyses of *International Shoe*: The first is based on "'traditional notions of fair play and substantial justice' as the test for jurisdiction under the Due Process Clause," and the second "takes the standard of 'minimum contacts' at face value, emphasizing territorial limitations on state power." Rutherglen, *supra* note 7, at 360-61. This Article stresses the territorial aspects of jurisdiction, although it does consider fairness to a limited extent in the second prong of this author's proposed test of personal jurisdiction. Other scholars who have advocated territory as the basis of jurisdiction include McFarland, *supra* note 322, at 790-794 ("State boundaries matter."); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 383 (1985) ("[T]erritorial limitations on state court jurisdiction may be deduced from general federalism-related territorial limitations on state sovereignty."); Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 290-92 (1989). "[T]he existence of sovereignty limitations on a state's authority to assert jurisdiction is readily supported whether on the basis of structural considerations or the due process clause itself." Julia Christine Bunting, 47 VAND. L. REV. 189, 221 n.182 (1994). *See also* Lea Brilmayer, *Introduction: Three Perennial Themes in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 561-64 (1991). However, other authors have rejected territory as a basis of personal

territorial rules of *Pennoyer v. Neff*[324] in favor of a fairness inquiry, the Supreme Court still based that fairness inquiry on territory—a defendant must have minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[325] The Due Process Clause dictates this result.[326] The Due Process Clause is about the relationship of the state and the individual.[327] Since a state is defined by its territory,[328] a state cannot assert its sovereignty over an individual when that individual has no connection with the territory of that state. As Professor Lea Brilmayer has noted, personal jurisdiction implicates an "*individual's* right to be left alone."[329]

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jurisdiction, instead emphasizing the fairness of the forum. *E.g.*, Jack B. Weinstein, *American Conflicts Law at the Dawn of the 21st Century: Panel Presentations Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 146 (2001); Perdue, *supra* note 321, at 479, 509-10; Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 727-28, 732-34 (1983).

324. 95 U.S. 714 (1878).

325. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

326. Just because strict territorial rules do not work does not mean that we should reject more flexible ones.

327. The Court has occasionally phrased the due process inquiry in terms of interstate federalism. For example, *World-Wide Volkswagen* stated:

> The Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293. This statement is obviously wrong because the Due Process Clause has nothing to do with the relationship of the states. The Court later recognized this in *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982), where it noted, the due process clause "is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns." *See also* Perdue, *supra* note 321, at 514 ("[I]t simply makes no sense to turn the fourteenth amendment from a provision protecting citizens from states into a provision protecting states from other states."); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 948 (1995) ("Concerns of interstate federalism upon which the purposeful availment requirement has traditionally been premised simply have no textual, historical, or theoretical connection to the Due Process Clause.").

328. Weisburd, *supra* note 323, at 383 ("[S]tate sovereignty, as a matter of law, is limited territorially."); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18 (1989).

329. LEA BRILMAYER, CONFLICT OF LAWS 270-71 (1995). *See also* Stewart, *supra* note 328, at 18 ("The state's lack of authority simply reflects the defendant's right to be free from certain assertions of such authority—his

Territorial limitations on personal jurisdiction do not require that the defendant have acted within the state's boundaries, only that the consequences of the act be felt within the state. As Professor Stein has pointed out, "in order to protect persons and property within its borders, a state must have the authority to regulate beyond its borders."[330] The Supreme Court does not dictate that a defendant "*physically* enter the forum state," only that the defendant "purposefully directed" its efforts at the forum state.[331] Such pragmatic territorialism recognizes the importance of physical borders as well as the realities of modern life, where occurrences or transactions can take place in more than one state.

While the Supreme Court has allowed jurisdiction by a state over defendants who acted outside that state, it has unduly restricted that jurisdiction through its foreseeability requirements in cases like *World-Wide Volkswagen*,[332] *Burger King*,[333] and *Asahi*.[334] Although the completely unilateral activity of another

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right to be, and to be treated as, unconnected.").

330. Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 376 (2001).

331. *Burger King*, 471 U.S. at 476.

332. 444 U.S. at 298.

333. 471 U.S. at 474.

334. 480 U.S. at 110-20. Professor Heiser has written: "For reasons that have never been explained, however, the Supreme Court has instead adopted a more intrusive role in this area [personal jurisdiction] than, for example, in such areas as choice–of–law, service of process, and procedural or substantive due process generally." Heiser, *supra* note 322, at 916. Other scholars who have criticized the Supreme Court standard of foreseeability include McFarland, *supra* note 322, at 808-09; Diane S. Kaplan, *Paddling up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503 (2003); Bruce Posnak, *The Court Doesn't Know Its* Asahi *from Its* Wortman*: A Critical View of Constitutional Constraints of Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 889 (1990) ("If defendant manufacturer does not directly or indirectly sell in the forum state, there will be no jurisdiction."). *See also* Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) ("[D]efendants simply do not need all of the constitutional protection from plaintiff's choice of forum that the Supreme Court keeps lavishing on them."). *But see* Christine M. Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 OHIO ST. L.J. 403, 424-37 (1993) (agreeing with the reasoning in *World-Wide Volkswagen* but criticizing *Asahi*.).

Professor Kaplan has advocated a basis for stream of commerce jurisdiction that is separate from the normal minimum contacts analysis:

> Lack of control, knowledge, or awareness of a product's route does not mean, however, that the stream participant's conduct is jurisdictionally insignificant. To the contrary, component part manufacturers purposefully participate in networks that connect to other networks in order to access distant markets. In fact, a component manufacturer without a network of other manufacturers, sellers, and distributors would be a jurisdictional nonstarter since it has no independent access to consumer markets.

should not permit jurisdiction over a defendant,[335] almost any act by the defendant that the defendant knows or should know might harm a plaintiff in the forum should create jurisdiction. However, the Supreme Court standard is much narrower. As stated earlier, the Supreme Court has required that

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[336]

It has further refined that requirement: the defendant's activities must "be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce."[337] The Court elaborated:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, . . . advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.[338]

This standard is too narrow; purposefully directed is a useful term, but it has been applied too narrowly. A state should have personal jurisdiction over a defendant who places an item in the stream of commerce when the defendant knows or should know that the item will enter the forum and the defendant derives some benefit from the item being in the forum, such as sales in that state. The important fact is that a defendant has knowingly benefited from a state's market; further conduct, such as advertising in a state or having sales agents in a state, should not be required. Thus, when a manufacturer sells a component part, such as a tire valve, to another manufacturer who uses that part in a finished item, such as a tire, and it causes injury in the forum, the court should have jurisdiction over the component part manufacturer as long as the first manufacturer knew or should have known that the second manufacturer sold tires in the forum, nationwide, or worldwide. While it was the act of the second manufacturer that brought the tire into the forum, the first

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Kaplan, *supra*, at 591.

335. *Burger King*, 471 U.S. at 474.

336. *World-Wide Volkswagen*, 444 U.S. at 297.

337. *Asahi*, 480 U.S. at 110.

338. *Id.* at 112.

manufacturer knowingly benefited from the sale.[339] Accordingly, it does not violate due process to assert personal jurisdiction over the defendant.

The situation would be different if none of the connections with the forum state were created by the defendant. Say, a manufacturer sells DES, a drug known to cause vaginal cancer in women,[340] only in California. A woman bought and used the manufacturer's DES in California. Later, she moved to New York and develops vaginal cancer. Despite the fact that the harm was felt in New York, she should not be able to sue in New York because all the New York connections were created by the plaintiff. Similarly, if a Nevada resident buys a power saw in Nevada and lends it to a friend in Utah who is injured there by a defect in that power saw, a Utah court should not have jurisdiction over the Maine manufacturer who does not sell the item in Utah and has no connections to that state.

Although fairness should be part of the due process evaluation, the factors the Court normally looks at under this part—(1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies"[341]—have little to do with due process protections for defendants.[342] The last

339. Professor Wiseman has remarked that the plurality analysis in *Asahi* is "troublesome because it effectively abrogates a right of action for many products liability plaintiffs against component part manufacturers." Wiseman, *supra* note 334, at 434. Later, she added:

> By infusing the requirement of jurisdictional privity into a plaintiff's ability to sue directly a component part manufacturer, a plurality of the United States Supreme Court has allowed the component part manufacturer to effectively immunize itself from suit by an injured plaintiff—even in those situations where it is the only solvent source of relief.

Id. at 443.

340. Diethylstilbestrol ("DES") is "a synthetic nonsteroidal substance having estrogenic properties and once used to treat menstrual disorders. It is no longer used due to the incidence of certain vaginal cancers in the daughters of women so treated." AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY (2002), http://dictionary.reference.com/search?q=DES (last visited Mar. 5, 2005).

341. *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). *Accord Asahi*, 480 U.S. at 113-16.

342. Others who have criticized the Court's reasonableness test include Heiser, *supra* note 322, at 925-28 ("The main criticism is that the Supreme Court has provided little guidance as to what these factors mean, beyond that they serve the purpose of assisting the courts to achieve 'fair play and substantial justice.'"); Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International

four factors have nothing to do with protecting the defendant from overreaching by the state—rather they are like forum non conveniens considerations. Only the first factor—the burden on the defendant—is relevant to fairness, and this factor should be part of the due process inquiry only when the burden of defending in a forum is so great that the defendant cannot mount an effective defense. The Due Process Clause does not protect from mere inconvenience.

Finally, the current Supreme Court test of personal jurisdiction is often hard to apply, causing great variation in lower courts' applications of the test and even variations within the Supreme Court's application.[343] It seems that each federal court of appeals and state supreme court has its own view of personal jurisdiction under *International Shoe*.[344] Such differences create uncertainty in our legal system, and it has generated thousands of personal jurisdictional challenges in trial courts.[345]

Shoe, 28 U.C. DAVIS L. REV. 755, 758-61 (1995); Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 581 (1991) ("The addition of a separate 'reasonableness' criterion . . . tends to suggest a free-form 'fairness' inquiry where additional criteria such as choice of law, over–all convenience, and specific individual characteristics might be considered."); Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 804-05 (1988) ("[T]he current test attempts to factor into the equation every element that has ever been deemed relevant to jurisdictional analysis."); Posnak, *supra* note 334, at 887-88, 891-95; Ralph U. Whitten, *The Constitutional Limitations on State–Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 735, 843-46 (1981) ("[T]o the extent that it imposes a balancing test as the measure of whether the forum is an 'unreasonably' burdensome place for trial, it is essentially unprincipled.").

343. McFarland, *supra* note 322, at 767-78, 781-90. (asserting that the *International Shoe* test "guarantees that each case will turn on what one judge thinks fair"). *See also* Heiser, *supra* note 322, at 916 ("The current doctrine lacks coherence and is, therefore, unpredictable."); Sheehan, *supra* note 1, at 393-94 ("[The Court] cannot agree on an articulation of rules or standards to apply to decide future cases, even when the need for a clear statement of such rules is the explicit purpose for accepting review of a given case."). Professor McFarland has added: "The problem is of course that the Supreme Court, and other courts under its mandate, are trying to define the undefinable. When is personal jurisdiction in a singular case consistent with 'fair play and substantial justice?'" McFarland, *supra* note 322, at 778.

344. McFarland, *supra* note 322, at 781-90.

345. *Id.* at 769 ("[T]he Supreme Court has eliminated its 'torrent' of once-a-year decisions by requiring lower courts to decide thousands of cases annually."); *id.* at 796. *See also* Heiser, *supra* note 322, at 916; Weintraub, *supra* note 322, at 531 ("[T]he threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts."). *But see* Erwin Chemerinski, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 865-68 (1995). "[U]ncertainty in the law of personal jurisdiction is inevitable and desirable."

Minimal constraints on personal jurisdiction that are based on territory and fairness would both protect defendants from overreaching by states and allow plaintiffs to pursue their claims.[346] While this author agrees with the Supreme Court that due process constraints on personal jurisdiction involve both territorial and fairness considerations, this author evaluates these factors differently. The proper test for personal jurisdiction under due process should be the following: 1) Does the defendant have a significant, purposeful contact or connection with the forum or has the defendant knowingly received some benefit from the forum state in connection with the forum's regulatory authority? 2) If so, is defending the lawsuit in the forum so burdensome that the defendant cannot mount a proper defense?

This test is based on both substantive and procedural due process evaluations of personal jurisdiction. Although no court has ever considered due process in this manner in connection with personal jurisdiction,[347] there are two types of due process inquiries: substantive due process and procedural due process.[348] Substantive due process considers whether the substance of a law is constitutional, while procedural due process asks whether the judicial process is fair when direct impairment of life, liberty, or property is involved.[349] Substantive due process restricts the power of government, limiting a state's ability to interfere with an individual's liberty.[350] It is "a check on the content of

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Id. at 866.

346. For a discussion on the proper basis of personal jurisdiction in connection with class actions and mass torts, see Scott Fruehwald, *Judge Weinstein on Personal Jurisdiction in Mass Tort Cases: A Critique*, 70 TENN. L. REV. 1047, 1087-93 (2003).

347. Professor Redish has declared: "By shaping jurisdictional doctrine without reference to the terms, policies or history of the due process clause, the Court has imposed limitations on state authority wholly unwarranted by constitutional principles." Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory after* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 675-76 (1991).

348. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.6, at 374-75 (6th ed. 2000); *see also* 16 C.J.S. *Constitutional Law* § 968, at 254 (1985); EDWIN SCOTT FRUEHWALD, CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD 72-73 (2001) (applying these concepts to choice of law); Borchers, *Jurisdictional Pragmatism*, *supra* note 322, at 576.

349. NOWAK & ROTUNDA, *supra* note 348, § 10.6, at 374-75.

350. James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 96, 114 (1996). Professor Van Detta has noted that in the eighteenth century, "the concept of personal liberty was called the preservative of all other rights." Jeffrey A. Van Detta, *Constitutionalizing* Roe, Casey, *and* Carhart*: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Regulation*, 10 S. CAL. REV. L & WOMEN'S STUD. 211, 237 (2001). He added: "The true concept of personal liberty in the eighteenth century was that the individual should be

legislation."[351] The degree of scrutiny that a court applies in a substantive due process inquiry depends on whether the law involves an economic or social right or a fundamental right. A court applies a rational basis test when an economic or social right is involved: a law satisfies due process as long as the law "bears a reasonable relation to the State's legitimate purpose" in enacting the law.[352] "Although rational basis review is deferential, it is not a mere formality."[353] On the other hand, when a fundamental right is involved, a court should apply a strict scrutiny test: A government may regulate fundamental rights only for a compelling state interest, and such regulations must be narrowly tailored to further that compelling state interest.[354]

In contrast, procedural due process determines only whether the decision-making process is fair.[355] Procedural due process protects rights like the right to be heard and the right to receive notice.[356]

Substantive due process supports the first half of the proposed test—does the defendant have a significant, purposeful contact or connection with the forum or has the defendant knowingly received some benefit from the forum state in connection with the forum's regulatory authority? Because substantive due process limits a state's power (sovereignty) to restrict an individual's liberty, it limits a state's ability to assert personal jurisdiction through its long-arm statute over an individual with whom it has either no connection or a tenuous connection.[357] However, because personal jurisdiction does not involve a fundamental right,[358] this limitation should be minimal.

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free to act in recognized areas of personal conduct without government coercion." *Id.* at 237-38.

351. Hilliard, *supra* note 350, at 95.

352. Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978). *Accord* Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486-88 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

353. Hilliard, *supra* note 350, at 106.

354. Reno v. Flores, 507 U.S. 292, 302 (1993); Roe v. Wade, 410 U.S. 113, 155 (1973).

355. NOWAK & ROTUNDA, *supra* note 348, § 10.6, at 374-75.

356. 16B AM. JUR. 2D *Constitutional Law* § 902 (2004); 16C C.J.S. *Constitutional Law* § 968 (1985).

357. Professor Weisburd points out that a state's assertion of jurisdiction over a defendant "is more than an effort to provide a forum for dispute resolution; it is an exercise of governmental power. Assertions of jurisdiction, therefore, must be subject to the same limitations that exist for exercises of government power generally." Weisburd, *supra* note 323, at 385. *See also* Murphy, *supra* note 323, at 291 ("When a state asserts jurisdiction over a nonresident in excess of its sovereign power it acts without authority and, thus, in violation of defendant's due process interests.").

358. As Professor Hilliard has noted, "the Court is disinclined to discover new fundamental rights in the Due Process Clause." Hilliard, *supra* note 350,

Any act by which the defendant purposefully creates a connection with a state or knowingly derives a benefit from a state that is connected with that state's regulatory authority establishes a rational basis for the state to apply its long-arm statute to the dispute. The constitutionality of requiring a defendant to defend an action in a state with which he or she has purposefully created a connection should be obvious. A state is not interfering with an individual's liberty to be free from governmental interference when that individual has intentionally created a relationship with that state. The individual has reached into the state, not the other way around. A state has a right to govern conduct in its territory or conduct that affects its territory. The second half of this factor allows a state to assert jurisdiction over a defendant who has knowingly derived a benefit from a state. This half is broader than the current Supreme Court test of foreseeability, which requires that there be more than an awareness that a product might be brought into a state or that an injury might occur in a state.[359] However, it is hard to argue that a defendant's minimal due process rights have been violated by having jurisdiction asserted over it when the defendant has knowingly derived a benefit from a state.[360] In such an instance, it is not the unilateral act of another that has created jurisdiction; it is the defendant's own conduct. Only when the defendant had no control over the product being in the state or the harm caused in the state should jurisdiction be unconstitutional. In addition, a defendant should not be able to hide behind a sophisticated marketing scheme or some other ruse to prevent jurisdiction. As long as the defendant knows or should know that a product will be brought into a state and defendant benefits from marketing there or knows or should know that harm from the defendant's conduct might occur there, there is a rational basis for a state to extend its long-arm statute to the matter. Thus, a court should have jurisdiction in a products liability suit when an independent distributor brings the product into the state, as long as the defendant knew or should have known that the product could end up there and it benefits from the market.

On the other hand, these minimal constraints are still important to the protection of liberty under due process. Such

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at 107.

359. *Asahi*, 480 U.S. at 110; *World-Wide Volkswagen*, 444 U.S. at 297.

360. Professor Kaplan has written:

> [I]t is more accurate to say that minimum contacts jurisdiction is based on a reciprocal relationship of mutual obligations and benefits as between the defendant and the forum; in essence, a quid pro quo of constitutional significance. The defendant's receipt of benefits from its purposeful forum-related activities justifies the state's authority to adjudicate claims against that defendant based on those activities.

Kaplan, *supra* note 334, at 579.

minimal constraints serve as a limitation on sovereignty—a state should not be able to assert jurisdiction over an individual who is not within its territory or who has not made some connection with that territory through a purposeful act.[361] In such a case, the state lacks a rational basis for applying its long-arm statute to the defendant.

Accordingly, the rational basis for applying a state's long-arm statute to a situation must relate to the defendant's actions—not an action by another person or entity or the existence of a state interest. For example, Professor Weintraub has proposed "due process as requiring only that the forum have some rational basis for wishing to decide the case—either because the plaintiff resides in the forum state or because the defendant acted or caused consequences there, or both."[362] This author disagrees with the first half of that proposal. A state should not have personal jurisdiction over a defendant solely because the plaintiff resides there. A state may have an interest in protecting its citizens, but this interest is not enough to permit jurisdiction over a defendant who had no connection to that state. Such a rule would allow California to have personal jurisdiction in a case involving a traffic accident in New York between a California plaintiff and a New York defendant who has never left the state or established ties outside the state (assuming the defendant is not seriously inconvenienced). Similarly, a California citizen could go to New York and enter into a partnership there with a New York citizen with all the partnership business being in New York, and force that New York citizen to litigate a dispute concerning the partnership in California. While this author believes that due process constraints on personal jurisdiction should be minimal, these examples go beyond the proper boundary of personal jurisdiction.

Professor Borchers also uses a rational basis test in connection with personal jurisdiction that this author thinks goes too far.[363] He has stated that "the rational basis test is a weak check on state court jurisdiction."[364] "[A]s long as the state

361. Professor Wiseman has written, "jurisdiction is really nothing more than governmental power and authority—quite literally, the power to declare the law." Wiseman, *supra* note 334, at 406.

362. Weintraub, *supra* note 322, at 545. He added that easy transfer should be allowed "if the defendant makes a cogent showing of unfairness in plaintiff's chosen forum." *Id.* "The two factors most likely to make suit in an interested forum unfair to the defendant are the forum's choice-of-law rule and serious inconvenience to the defendant." *Id.* at 546. It is unclear how often these fairness factors would be applied. However, this author maintains that jurisdiction should never be proper based solely on a plaintiff's citizenship in a state.

363. Borchers, *Jurisdictional Pragmatism*, *supra* note 322, at 577-78.

364. *Id.* at 577.

advances a legitimate goal in a not-irrational manner, substantive due process demands no more."[365] Based on this standard, he believes that assertion of jurisdiction in every Supreme Court case since *International Shoe* is rational.[366] I cannot agree with this approach. The key should be the individual's connection to the jurisdiction, not the state's legitimate goal in hearing the case. For example, I believe that jurisdiction was not proper in *Kulko*, a case involving child support in California against an out-of-state father.[367] Professor Borchers would allow jurisdiction in California because taking "jurisdiction was a rational manner of advancing the legitimate goal of protecting the child-support rights of two children then living in California."[368] I would reject jurisdiction because the father had not made any purposeful connection with the state or derived any benefit from the state in connection with its regulatory authority.

The second half of the personal jurisdiction due process test—whether defending the lawsuit in the forum is so burdensome that the defendant cannot mount a proper defense—involves procedural due process, fairness in adjudication.[369] Only when litigating a lawsuit in a forum is so burdensome that the defendant cannot mount a proper defense is procedural due process violated. Mere cost or inconvenience should not prevent jurisdiction when a defendant has purposefully created ties with the forum.

In the modern world, this factor will be implicated only rarely. As the Court has noted, modern means of transportation and communication have made litigating in a distant forum less burdensome.[370] One can travel by plane in a few hours to almost anywhere in the world. Communications by phone, fax, and e-mail are almost instantaneous to even the most remote parts of the globe. Defendants can hire local counsel who understand the forum law and who can handle most of the litigation. Only when an individual's or company's resources are so limited that they cannot present an effective defense should a case be dismissed under this factor.

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365. *Id.*
366. *Id.* at 577-78.
367. 436 U.S. at 84.
368. Borchers, *Jurisdictional Pragmatism*, *supra* note 322, at 578.
369. Others who agree with this view include Heiser, *supra* note 322, at 934–35; Goldstein, *supra* note 322, at 985 ("[E]ight of the nine Justices . . . accepted the view of Justices Stevens and White in the Burger King case that the Supreme Court should invalidate state assertions of personal jurisdiction if, on the particular facts of the case before it, a majority of the Justices found the assertion of jurisdiction to be 'unfair.' What an usurpation of state discretion!"); Whitten, *supra* note 342, at 843–45. *See also* Weinstein, *supra* note 323, at 146.
370. *World-Wide Volkswagen*, 444 U.S. at 294.

This should also apply to foreign defendants; a defendant should not be able to complain that it is unfair to defend in a foreign country when that defendant has made some purposeful connection with that foreign country, purposefully caused harm in that foreign country, or derived a benefit from that foreign country's markets. This is contrary to *Asahi*, which held that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[371] However, the defendant in *Asahi* could have countered these difficulties by hiring California counsel who knew California law. The defendant was apparently a large corporation that had not claimed that it lacked the funds to litigate in California.[372]

While a plaintiff's interest in the jurisdictional inquiry has played only a small part in Supreme Court personal jurisdiction cases (appearing as a factor in the reasonableness inquiry), the plaintiff's interest in the lawsuit should not be ignored. Under the Fifth and Fourteenth Amendment Due Process Clauses, a plaintiff has a property right in its lawsuit.[373] However, if a state lacks personal jurisdiction over a defendant, that state cannot assert jurisdiction over that defendant, even if the plaintiff has no access to any court in which to vindicate its claims. A defendant's right to be free of the power of a state with which it has no connection or only tenuous connections should be absolute. Thus, the only way to respect both plaintiff's and defendant's rights is through minimal due process constraints on personal jurisdiction, such as the test suggested above. In such an instance, the plaintiff's due process interest in bringing a lawsuit in a jurisdiction will be foreclosed only in a small number of cases—when a defendant has no significant connection to a state.[374]

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371. *Asahi*, 480 U.S. at 114.

372. The tire manufacturer had "incorporated into its tire tubes 150,000 Asahi valve assemblies in 1978; 500,000 in 1979 . . . and 1980; 100,000 in 1981 . . . and 1982." *Id.* at 106. "These sales comprised 1.24 percent of Asahi's income in 1981 and 0.44 in 1982." *Id.*

373. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."). *See also* Martinez v. California, 444 U.S. 277, 281-82 (1980) (declaring that "[a]rguably," a state tort claim "is a species of 'property' protected by the Due Process Clause."); R. D. Rees, Note, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405, 409 (2003) ("[U]nder current, uncontroverted Supreme Court doctrine, a potential plaintiff has a property right to a cause of action.").

374. Mr. Rees has proposed a balancing test of plaintiff's and defendant's interests in the due process inquiry. Rees, *supra* note 373, at 433-34. He has asserted: "A balancing test imposing jurisdiction in the face of strong plaintiff contacts and slightly less than what now might be considered defendant minimum contacts should not offend the Constitution." *Id.* at 433. I reject a

B. Evaluation of Calder *and the Effects Test*

Calder expanded jurisdiction in a way that both respects a defendant's due process rights and allows plaintiffs to assert their claims. When a reporter and an editor commit defamation in one state, knowing that it will cause harm in another state where the plaintiff lives, they should be subject to jurisdiction in the state where the harm was caused. The fact that the reporters had no economic stake in the magazine and they did not distribute it in California is irrelevant; they knew that the harm would occur in California, and they intended that it would take place there. This satisfies even the Supreme Court's narrow view of foreseeability[375] because the harm was targeted at the forum state. Surely, such defendants cannot reasonably argue that they did not have fair warning that they would be haled into the courts of a state in which they intended harm. Due process protects an individual from a forum state's overreaching when the individual has not established any connection with the forum; it is not a "shield" based on strict territorial rules.

Consider the three-part test that lower courts have used to evaluate the effects test:

> 1) The defendant committed an intentional tort; 2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; 3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.[376]

This author agrees with the first factor, but believes that the second and third factors should be broader than they have been applied by many courts. Jurisdiction should be allowed when there is significant harm in the forum state, rather than limiting jurisdiction to when the brunt of the harm is in the forum state. Similarly, jurisdiction should exist when the conduct is intentionally targeted at the forum state; requiring that the forum state be the focal point is unnecessarily limiting. These two changes would allow for broader jurisdiction than many cases have permitted under the effects test.[377]

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balancing test because, as stated in the text, I believe that a defendant has a minimal due process right against assertions of jurisdiction that is absolute. However, the results under my minimal constraints standard and Mr. Rees's balancing test might be similar. He does add that "because liberty interests are generally thought to have more significance than property interests, the burden of persuasion could rest with the plaintiff." *Id.* at 434.

375. *See Burger King*, 471 U.S. at 472-73; *World-Wide Volkswagen*, 444 U.S. at 297-98.

376. *Rosenstein*, 123 F. Supp. 2d at 273. *See also supra* note 63 and accompanying text.

377. One author has expressed concerns that lower courts have interpreted

First, limiting jurisdiction to intentional torts and similar causes of action under the effects test comports with due process requirements because this factor establishes a knowing connection with the forum by the defendant; jurisdiction has been established by the defendant, not the unilateral act of the plaintiff or a third party. The lack of a physical connection with the forum is irrelevant. There should be no difference between harm caused intentionally within a state and conduct outside a state that is intended to cause harm within a state.

All the intentional torts and similar acts used by courts under the effects test—defamation, fraud, business torts, trademark, violations of consumer protection acts, etc.—contain the necessary element of intent and satisfy due process considerations, as long as the other parts of the effects test are satisfied. Libel, fraud, and violations of consumer protection acts usually injure individuals where they reside. Likewise, trademark violations and business torts often injure a corporation at its principal place of business.

Commanding that the brunt of the harm be felt in the forum state is more than due process compels. Requiring that there be significant injury in the forum state should be enough. First, as one judge has pointed out, *Calder* does not mandate that the brunt of the harm be in the forum state;[378] rather this is a factor supporting jurisdiction.[379] Second, the key factors should be knowledge that the harm will occur or will probably occur in the forum and the intention that it happen there. Finally, as noted previously, jurisdiction is often proper in more than one state.[380] The fact that there is more harm in State One than in State Two should not make jurisdiction unconstitutional in State Two when there is still significant harm in State Two. This will also alleviate the difficulty of locating the state where the brunt of the harm occurred.

Take the example of someone who intentionally releases an internet worm that causes harm worldwide.[381] Although the "inventor," who lives in Iowa, does not know where harm might occur, he intentionally released the worm, and he should know that the worm could cause harm anywhere. Assume that the worm, in addition to producing havoc worldwide, causes $50,000 in

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Calder too broadly, allowing jurisdiction in almost all cases involving the plaintiff's home state. *See generally*, Laura S. Ferster, *Recent Decisions of the Minnesota Supreme Court:* Griffis v. Luban*: A Red Herring in the High Seas of Personal Jurisdiction*, 29 WM. MITCHELL L. REV. 343 (2002). However, as noted throughout this Article, this author believes that broad jurisdiction is appropriate in our modern society because it allows plaintiffs to adjudicate their grievances as fully as possible.

378. *Core-Vent*, 11 F.3d at 1492 (Wallace, C.J., dissenting).

379. *Calder*, 465 U.S. at 789-90.

380. *See supra* note 91 and accompanying text.

381. This hypothetical is based on Sheehan, *supra* note 1, at 431-32.

damages to a computer in Maine. Should the inventor escape jurisdiction in Maine because the brunt of the harm was not felt there? This author believes that jurisdiction should be proper in Maine. Such jurisdiction should satisfy due process because the inventor intentionally created a connection with Maine by his intentional act, thus giving Maine a rational basis to assert its sovereignty over the inventor.

On the other hand, jurisdiction under the effects test should not be proper where a minimal amount of harm happened; a defendant should not be subject to jurisdiction in an unlimited number of forums with weak connections to the defendant's conduct. Since significant harm usually occurs with intentional torts in the state where the plaintiff resides, this limitation should not be unfair to plaintiffs.

Jurisdiction over the defendant in a libel case should be proper in plaintiff's home state when significant harm is felt by the plaintiff in his or her home state. In such a case, the defendant has purposefully made a connection with the state, thereby satisfying due process requirements. The fact that harm, even the majority of the harm, is felt elsewhere is irrelevant. The same should be true of other intentional conduct out of state that creates significant harm in the plaintiff's home state, including fraud, violation of consumer protection acts, etc.

The situation is harder with corporations, especially when trademark infringement or business torts are involved. Where does an entity like a corporation feel harm? The key questions should be the following: Did the corporation feel the harm at its principal place of business? Did the corporation suffer lost profits, did it lose a tax break, or was its value otherwise damaged by a knowing act of the defendant? In other words, was the value of its stock materially affected? If so, there should be enough harm to allow jurisdiction in the state of the corporation's principal place of business.

The targeting requirement protects both defendants and plaintiffs. A defendant will not be subject to jurisdiction unless that defendant targeted the forum in some way. On the other hand, if the defendant has targeted the plaintiff in the forum, the plaintiff will not have to seek out the defendant at its home. While mere foreseeability of harm occurring in the forum may not be enough to establish jurisdiction, the intention that harm occur there should be enough, even under the Supreme Court's narrow view of foreseeability. Targeting ties the defendant to the forum. A defendant should be subject to jurisdiction when he or she has intentionally caused harm in the forum.[382]

382. In the above hypothetical concerning an internet worm, the defendant targeted Maine, even though he did not know that harm would occur there,

On the other hand, the forum should not have to be the focal point of the intentional conduct. Intentional conduct can be targeted at more than one state. As stated with the second factor, jurisdiction can be proper in more than one state, and if the defendant targeted intentional harm at the defendant in more than one state, then jurisdiction should be proper in all states the defendant targeted.

Libel and similar torts will usually be proper in the plaintiff's home state, even for corporate plaintiffs, because the defendant targets that state by intentionally causing harm to the plaintiff in its home state. It is not that the defendant knew that the plaintiff resided in the forum, but that the defendant knew that its intentional actions would harm the plaintiff at his or her home. However, the court in *Reynolds* was correct that jurisdiction was not proper in the plaintiff's home state of Ohio over an international athletic organization that had released a statement that the plaintiff, an internationally known track star, had failed a drug test.[383] The plaintiff's *international* reputation had been affected, and there had been no targeting of Ohio.[384] Similarly, *Schwarzenegger*, which found that California lacked jurisdiction over an Ohio car dealership that had violated the right of publicity of the California actor (and now Governor), was correct because the defendant solely targeted Ohio.[385] The result would be the same in both cases under this author's personal jurisdiction test; neither defendant made a purposeful connection with the respective forum state.

Most of the jurisdiction cases discussed in Part I that granted jurisdiction over out-of-state defendants came to the correct conclusions. *Haisten*, which involved a Cayman Islands malpractice fund whose only purpose was to self-insure California doctors, was decided correctly. First, the fund had purposefully established a significant connection with California. It was insuring California doctors for their California conduct. Moreover, the fund was obtaining a benefit from California—the payments from the doctors related to the practice of medicine in California. Although the fund had cleverly avoided physical contacts with California, a defendant should not be able to avoid jurisdiction with a state when the out-of-state conduct is intended to have effects within the state.[386]

The court's holding in *Dakota Industries*, which involved a trademark infringement claim by a South Dakota clothing

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because he intended harm anywhere the Internet reached. Targeting the entire world targets every state.

383. *Reynolds*, 23 F.3d at 1120-21.

384. *Id.*

385. *Schwarzenegger*, 374 F.3d at 807.

386. *See Haisten*, 784 F.2d at 1399.

company against a California clothing company, was also correct. Although the California corporation did not sell any products in South Dakota and had no physical contacts with it, the corporation knew that harm was occurring in South Dakota to a South Dakota company through its actions. Thus, the harm the California corporation knowingly caused in South Dakota created a connection to South Dakota that justifies the assertion of jurisdiction over it under the Due Process Clause. The trademark infringement and the harm it caused was not the unilateral act of another; it was the defendant's intentional conduct.[387]

Although there should be restrictions as to how far jurisdiction should extend, some of the cases discussed in Part I have limited jurisdiction too much. In *Rosenstein*, the court found that Pennsylvania lacked jurisdiction over a Florida corporation that had allegedly libeled a Pennsylvania produce wholesaler and distributor by sending letters to Florida strawberry sellers.[388] The court based its decision on the fact that the brunt of the harm had been felt in Florida.[389] The court should have granted jurisdiction in this case because the defendant had intentionally caused harm in Pennsylvania. Since the defendant had dealt with the plaintiff before, it knew where the plaintiff's business was located, and it obviously intended that the plaintiff be harmed there. While harm was felt in Florida where the libel was published, significant harm was also felt in Pennsylvania, where the plaintiff's produce business was affected. As noted above, there is no reason to limit jurisdiction to one forum when harm is caused in more than one forum. The defendant targeted both Florida and Pennsylvania. Not only had the defendant intended to harm the plaintiff's dealings with strawberry sellers in Florida, it purposefully and knowingly interfered with plaintiff's produce business in Pennsylvania. A business cannot sell strawberries in Pennsylvania unless it can buy them from a grower.

IMO Industries similarly set the boundary of personal jurisdiction too narrowly when it ruled that New Jersey lacked personal jurisdiction over a foreign defendant.[390] In *IMO Industries*, a German corporation had intentionally interfered with a New Jersey corporation's sale of its Italian subsidiary.[391] The defendant had sent its letters to the Italian subsidiary and a New York investment firm. Nevertheless, the German defendant knew that significant harm would occur in New Jersey when the sale of the subsidiary fell through, causing IMO significant financial

387. *See Dakota Indus.*, 946 F.2d at 1391.
388. *Rosenstein*, 123 F. Supp. 2d at 274-75.
389. *Id.* at 273.
390. *Cf.* 155 F.3d at 256.
391. *Id.* at 258.

losses.[392] The focal point of the conduct might have been Italy, the home of the subsidiary, or New York, where the investment firm was located, but the defendant had still made enough of a connection with New Jersey by knowingly causing significant harm there.

While personal jurisdiction should be broad enough to allow plaintiffs to fully vindicate their rights, there are limits on personal jurisdiction. *Wolgin* was correct that a Pennsylvania court did not have jurisdiction over a Florida real estate broker for misrepresentation in the sale of a condominium located in Florida and over a Florida decorator for breach of contract concerning improvements on that condominium.[393] Although the broker had advertised in national magazines and made unconnected phone calls to Pennsylvania, it did no business in Pennsylvania and the sale of the condominium was negotiated and occurred in Florida. Similarly, the decorator did not do business in Pennsylvania and the original contract was executed in Florida. Although subsequent contracts were faxed to Pennsylvania, they concerned performance in Florida. In addition, the decorator did not make any trips to Pennsylvania concerning the improvements, but the plaintiff had gone to Florida in connection with the improvements.

Jurisdiction is unconstitutional over both defendants. The broker had not made any purposeful ties with Pennsylvania or derived any benefit from a connection with Pennsylvania. The fact that a party is from the forum should not create jurisdiction in the forum, as long as there are no other connections with the forum. The harm occurred in Florida; the alleged misrepresentation by the broker caused the defendant to buy a Florida condominium. There was no targeting of Pennsylvania. A Pennsylvania resident may now have less money, but that is not a Pennsylvania harm. The plaintiff made a connection with Florida by going to Florida and buying property there. This unilateral act by the plaintiff does not connect the broker with Pennsylvania. Similarly, the transaction with the decorator was significantly connected only to Florida. The improvements were for a Florida condominium by a Florida decorator. The harm from the breach of contract was felt in Florida, not Pennsylvania. The decorator did not reach into Pennsylvania; the plaintiffs reached into Florida.

As mentioned in the previous subsection, the reasonableness prong of the due process inquiry should be triggered only in extreme circumstances—i.e., when the defendant lacks the resources to mount a defense in the forum because of the foreign forum. As mentioned earlier, courts look at seven factors in connection with reasonableness in regard to the effects test:

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392. *Id.*

393. *Cf. Wolgin*, 2001 U.S. Dist. LEXIS 11461, at *26.

> (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[394]

Because of this author's proposed minimal reasonableness requirement, analysis of these factors is not really necessary. However, this author agrees with those courts that have declared that the defendant's purposeful interjection into the home state's affairs and the interest of the forum state in protecting its residents usually outweighs any burden on the defendants or interference with the foreign state's sovereignty.[395] A defendant should not be able to complain about the burden of defending in a foreign legal system when that defendant has intentionally caused harm in that forum. Similarly, a forum should not have to defer to a foreign jurisdiction when its laws have been intentionally violated.

Accordingly, the majority in *Core-Vent* was wrong when it held that a California court did not have jurisdiction on reasonableness grounds over Swedish professors who had defamed a California corporation's products in articles written in Sweden but published worldwide.[396] First, any burden of having to defend in a foreign jurisdiction is far outweighed by the fact that the defendants had intentionally caused harm in California and California's interest in protecting its citizens. A plaintiff should not have to travel to a foreign land to obtain justice when the plaintiff has been intentionally harmed at its home. Second, Sweden's sovereignty is not offended by California jurisdiction and the application of California law when the injury is felt in California and California law has been violated. Finally, the defendants could not show that they could not mount a proper defense; in fact, the corporation for which they were consultants conducted their defense.[397]

C. Evaluation of Personal Jurisdiction in the Crazy Horse Litigation

The Crazy Horse litigation tested the boundary of personal jurisdiction. On the one hand were defendants who had no physical contacts with South Dakota; on the other hand were

394. *Dole Food*, 303 F.3d at 1114. *See also supra* note 181 and accompanying text.

395. *See supra* note 213 and accompanying text.

396. *See* 11 F.3d at 1483-84, 1490.

397. *Id.* at 1494-95 (Wallace, C.J., dissenting).

plaintiffs who might not receive justice outside South Dakota.

The court's decision to allow jurisdiction over the defendants was correct under a broad reading of the effects test used by many courts. The first prong is easy: the complaint alleged that the defendant intentionally violated plaintiffs' right to privacy. The second prong was also satisfied: the plaintiffs felt the brunt of the harm in South Dakota. The plaintiffs all lived in South Dakota, and they all felt the harm there. Finally, the defendants had targeted the plaintiffs in South Dakota. After they had been informed that harm was being caused by their distribution of Crazy Horse Malt Liquor, they knew that harm was being caused in South Dakota.

On the other hand, this analysis could be questioned under some courts' narrower interpretations of the effects test. Was the brunt of the harm really felt in South Dakota? As noted above, the malt liquor was not distributed in South Dakota. Wasn't the right to privacy violated in those states where the malt liquor was distributed, rather than where the plaintiffs lived? Similarly, did the defendants target South Dakota? Rather, didn't they target the states in which they distributed the malt liquor?

Moreover, the case might be distinguishable from *Calder*. In *Calder*, the libelous material was distributed in the forum state. Here, the defendants did not distribute the malt liquor in South Dakota. Is the Crazy Horse litigation more like *Reynolds*, where a press release stating that an athlete had failed a drug test affected his worldwide reputation, rather than targeted him in his home state?

There are also problems in applying the seven-part reasonableness test. Does the extent of the defendants' interjection into the forum state's affairs and the forum state's interest in the dispute justify the burden on the defendants and the extent of the conflict of the sovereignty with the defendants' home states? As was true of targeting, is there any interjection into the forum state's affairs? How does a court evaluate the conflict of sovereignty between South Dakota and New Jersey or New York, the domiciles of the defendants? As noted in Part II, if the case is heard in South Dakota, the plaintiffs would have a significant chance of succeeding, while if the case is heard in New Jersey or New York, it is uncertain what the outcome might be. How does the availability of an alternate forum in New Jersey or New York affect the balance? Those states could certainly provide a forum for this action, and the action would be subject to all the rights of the American legal system, but the plaintiffs might have a significantly reduced chance of prevailing than in South Dakota.

In Part III.A., I proposed a minimal constraints test for personal jurisdiction that I feel satisfies the requirements of due process, but that sweeps away hard to apply concepts like

foreseeability and purposeful availment and eliminates the need for balancing under the traditional notions factor. Not only does this test broaden the availability of personal jurisdiction, it simplifies it, making the determination of personal jurisdiction easier. While this author believes that the court's analysis in the Crazy Horse litigation was correct, the alternative analysis above suggests that a simpler test is called for.

Personal jurisdiction is proper over the defendants in the Crazy Horse litigation under the first part of this author's test: Does the defendant have a significant, purposeful contact or connection with the forum or has the defendant knowingly received some benefit from the forum state in connection with the forum's regulatory authority? The defendant has a significant, purposeful contact or connection to the forum: The defendant has knowingly caused harm to the plaintiffs in South Dakota through its wide-spread distribution of Crazy Horse Malt Liquor in violation of plaintiffs' right to privacy under tribal law. Under this prong, it does not matter whether the brunt of the harm or the focal point was in South Dakota; all that is important is that the defendants knowingly created a significant connection with the state. As has been stated previously in this Article, is it unfair to require a defendant to answer in the forum when he or she has knowingly harmed the plaintiff there?

Personal jurisdiction is also proper in South Dakota under the second half of the test: Is defending the lawsuit in the forum so burdensome that the defendant cannot mount a proper defense? There is no indication that the defendants were unable to mount a proper defense in South Dakota. They were successful businessmen who apparently owned a thriving business. Certainly, there would be some burden to the defendants from defending in South Dakota. For example, they would have to travel to South Dakota to participate in their defense. However, they could (and did) hire local counsel to appear for them and assist them in South Dakota. There is no reason to believe that their attorney's fees would be any greater in South Dakota than in New York or New Jersey; in fact, their litigation costs might be cheaper in South Dakota.

Does the above analysis solve the clash of cultures and values that was mentioned in Part II? I think it does. Both parties had legitimate arguments concerning personal jurisdiction and the merits of their interests. However, the defendants reached into South Dakota to interfere with the plaintiffs' interest. In addition, the plaintiffs had not created the clash of cultures and values; the defendants had.

IV. CONCLUSION

Minimal constraints on personal jurisdiction are fair to both

defendants and plaintiffs. Minimal constraints prevent a state from asserting jurisdiction over individuals who have no connection or a weak connection to a jurisdiction. These constraints are also fair to plaintiffs because they allow them to vindicate their rights in the appropriate jurisdiction.

If the court in the Crazy Horse litigation had not found that South Dakota had jurisdiction over the defendants, the plaintiffs would probably have not been able to properly litigate their claims in New York or New Jersey. So the court's decision on personal jurisdiction allowed the plaintiffs to adjudicate their claims in a court that would treat them in the manner they deserved, and it facilitated settlement.

Despite the correctness of the court's decision, the effects test is problematic. The second and third factors can be interpreted in broad or narrow manners as the cases examined in Part I demonstrate. This means that some plaintiffs will get to litigate their claims in the proper forum, while others with similar claims will have to go to distant forums, which might hinder the proper adjudication of their grievances. This is why the test of personal jurisdiction needs to be simplified and broadened while retaining some protection for defendants. In this way, personal jurisdiction can respect the dignity of plaintiffs and defendants.