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# A Return to Jurisdictional Due Process: The Case for the Vanishing Defendant

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# A Return To Jurisdictional Due Process—The Case For The Vanishing Defendant

Aaron D. Twerski\*

To author an article concerning the constitutional aspects of long-arm jurisdiction over non-resident defendants at this point in time requires an apology. The subject has been on the whole well treated by scholars and courts alike and the student can find excellent analytical and comprehensive works to inform him even as to the most subtle nuances of the field.<sup>1</sup> No new decisions of startling import have been thrust upon us in the past year<sup>2</sup> and those of more ancient vintage have been either fawned over or dissected with such fervor that nary a comma or quotation mark in *International Shoe*,<sup>3</sup> *McGee*<sup>4</sup> and *Hanson v. Denckla*<sup>5</sup> remain uncommented upon. My concern is frankly not with the analytical framework which has developed to date but rather with the more startling proposals which have been suggested by noted scholars in the past several years for the further extension of state-court jurisdiction. The first is the thesis expressed by Professors von Mehren and Trautman in their pervasive article, *Jurisdiction to Adjudicate: A Suggested Analysis*.<sup>6</sup> The second, the approach of Pro-

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1. It is not this author's intention to deal with the cases except for illustrative purposes. For comprehensive discussions on the subject that deal in depth with the leading cases, see *Developments In The Law-State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUPREME COURT REVIEW (Kutland Ed.).

2. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1969), cert. denied, 90 S. Ct. 69 (1969), rehearing denied, 90 S. Ct. 370 (1969); decided this past year concerned the constitutional validity of the attachment of the duty to defend and indemnify provisions of an automobile insurance policy as a res for quasi-in-rem jurisdiction. Although *Minichiello* is a highly significant case on numerous aspects of jurisdiction, it bears only peripherally upon the problem discussed in this article.

3. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

4. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

5. 357 U.S. 235 (1958).

6. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) [hereinafter cited as *von Mehren & Trautman*].

fessor David Seidelson in his view of the world that lay *Beyond Minimum Contacts and the Long-Arm Statutes*.<sup>7</sup> It shall be the purpose of this article to critically examine these proposals and then suggest a rationale for continuing constitutional control of the jurisdictional question.

### THE VON MEHREN-TRAUTMAN THESIS

Professors von Mehren and Trautman have undertaken in their landmark article to re-order the semantics which have pervaded discussion of jurisdictional problems for the past century. They argue with much force that the old terminology which speaks in terms of "in personam," "quasi in rem," and "in rem," is unsatisfactory primarily because it does not focus attention upon the functional problems involved in jurisdiction.<sup>8</sup> Rather, it focuses attention upon an object—human, physical or reified rights and thus fosters the impression that power is the basic criterion for jurisdiction.<sup>9</sup> By substituting a new terminology which is highly functional, they have exposed the true nature of each generic type of jurisdiction. The beguiling language of power jurisdiction has misled even the most sophisticated courts on the most complex of problems and its passing should be welcomed by all who prefer to do battle with real problems rather than shadow box in the twilight.

Realizing that terminology changes do not solve problems but merely expose them to the eye for rational solution, von Mehren and Trautman proceed to come to grips with the most vexing jurisdictional problems which face us today.<sup>10</sup> It is their judgment that the major developments in jurisdiction will come in the category which they have aptly labeled "specific jurisdiction."<sup>11</sup> The hallmark of specific

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7. Seidelson, *Beyond Minimum Contacts and The Long-Arm Statutes*, 6 DUQ. L. REV. 221 (1968) [hereinafter cited as *Seidelson*].

8. Von Mehren & Trautman at 1135-1165.

9. The power theory of jurisdiction has been attacked with great regularity over the years. See e.g. Ehrenzweig, *Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens* 65 YALE L.J. 289 (1956); Hazard, *supra* note 1. After *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966), the critics were out in force: Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation* 67 COL. L. REV. 550 (1967); Comment, *Jurisdiction in Rem and The Attachment of Intangibles: Erosion of The Power Theory*, 1968 DUKE L.J. 725 (1968); Comment, *Podolsky v. Devinney and The Garnishment of Intangibles: A Chip off The Old Balk*, 54 VA. L. REV. 1426 (1968).

10. Von Mehren & Trautman at 1165-1178.

11. Von Mehren and Trautman distinguish between specific and general jurisdiction.

jurisdiction is that a court will exercise adjudicatory power in situations where it finds that the *particular controversy* which it is being asked to decide either arose out of—or was intimately related to—the forum.<sup>12</sup> Admittedly, today the most serious problems in the area of specific jurisdiction have arisen under provisions of long-arm statutes which permit the assertion of jurisdiction based on isolated events or transactions arising in the forum. However, generically the problem is not new; in fact, its history is better than four decades in the making. Starting with *Hess v. Pawloski*<sup>13</sup> in which constitutional attack was attempted against a non-resident motorist statute when applied to a single foray by a non-resident motorist into the state of Massachusetts, the United States Supreme Court has indicated its willingness to permit states to broaden their jurisdictional base without running afoul of substantive due process. The trend toward liberalization was at first based on some rather non-sensical fictions<sup>14</sup> but in *International Shoe*<sup>15</sup> the Court decided that a state could constitutionally obtain personal jurisdiction over a corporation if it had certain "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions' of fair play and substantial justice."<sup>16</sup> The trend was further encouraged in *McGee v. International Life Insurance Company*<sup>17</sup> when the Court required that Texas grant full faith and credit to a California judgment even though the only nexus of defendant insurance corporation with California was that it issued a single reinsurance certificate to a California insured who thereafter paid premiums by mail to the Texas insurer.<sup>18</sup>

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General jurisdiction is based on a relationship between the forum and the person or persons whose rights are to be affected regardless of the nature of the controversy being adjudicated. They further break down the category of general jurisdiction into: (1) unlimited general jurisdiction, or what are today called *in personam* actions, in that the ensuing judgment is not limited to the defendant's assets located within the forum, and (2) limited general jurisdiction which is what we refer to as *in rem* or *quasi-in-rem* actions in that a judgment only affects the value of defendant's assets within the forum.

12. *Von Mehren & Trautman* at 1144. Von Mehren and Trautman differentiate between: (1) directly affiliating circumstances in which specific jurisdiction is asserted because the forum has a particular interest with one of the parties and the issue raised by the litigation (e.g. divorce jurisdiction based on domicile); and (2) indirectly affiliating circumstances in which the forum has an interest in the underlying controversy's relationship with the forum.

13. 274 U.S. 352 (1927).

14. For a comprehensive discussion of the fictions used to extend jurisdiction, both with regard to non-resident corporations and individuals, see *Developments in the Law*, *supra* note 1, at 919-923, 945-948.

15. 326 U.S. 310 (1945).

16. *Id.* at 316.

17. 355 U.S. 220 (1957).

18. The only other major pronouncement by the Supreme Court on this subject, *Han-*

There is no question that long-arm jurisdiction based on isolated events or transactions in the forum is here to stay; but shaping its contours is the problem of the day. And it is here that Professors von Mehren and Trautman make their most telling points. It shall be this author's intention at a later point<sup>19</sup> to question the analytical soundness of their approach and examine the susceptibility of their suggestions to unfair application. However, the von Mehren and Trautman proposals focus sharply on the underlying problems and a thorough understanding of their position is a requisite starting point for the ensuing discussion.

Von Mehren and Trautman begin their functional analysis of the future of specific jurisdiction<sup>20</sup> with the proposition that there are two classes of cases in which it is not unfair to reverse the normal defendant bias and expect the defendant to respond to the plaintiff's choice of jurisdiction:

(1) when the traditional jurisdictional bias in favor of the defendant is not justified; (2) when very strong consideration of convenience, relating not only to the plaintiff but also to the taking of evidence and other litigational considerations, point to a particular community.<sup>21</sup>

They support this proposal on the rationale that in any class of cases in which the controversy arises out of conduct that is essentially *multi-state*<sup>22</sup> on the part of defendant, and which affects a plaintiff whose activities are *localized*, it is only fair that the defendant be required to answer the plaintiff in his locale. Furthermore, they advocate that when plaintiff's activities are highly localized and when litigational convenience so requires, the plaintiff should be able to call the defendant to his home state even though the defendant has not engaged in activity in that state and *has not anticipated* that his multi-state activity might produce consequences in that state. Thus, given a highly localized plaintiff foreseeability is negated as a significant factor in the

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*son v. Denckla*, 357 U.S. 235 (1958), will be dealt with at length at a later point. See text accompanying note 57 *infra*.

19. See text accompanying note 37 *infra*.

20. *Von Mehren & Trautman*, at 1164-1179.

21. *Id.* at 1167.

22. Von Mehren and Trautman equate multi-state and international problems of adjudicatory jurisdiction throughout their paper. *Von Mehren & Trautman*, note 8 at 1125. Thus a multi-state jurisdictional problem need only involve more than one of the fifty states. It is possible that von Mehren and Trautman slid too easily over the functional difference between inter-state conflicts in a federal system and international adjudicatory problems. See note 43 *infra*.

decision of whether to accept jurisdiction over a multi-state defendant except in the most unusual circumstances.<sup>23</sup> On the other hand, a multi-state plaintiff would not, according to their proposal, be entitled to ask a multi-state defendant to respond in his jurisdiction unless there were very significant litigational considerations which would point to the plaintiff's forum and *a fortiori* a localized defendant could expect a localized plaintiff to come to him.

Given the above framework for jurisdiction, it is no surprise that von Mehren and Trautman find themselves dissatisfied with significant aspects of existing long-arm legislation. For example, most long-arm statutes provide for the assertion of jurisdiction in the foreign-act local-injury situation.<sup>24</sup> In an attempt to limit the unfairness to those whose sole contact with the forum state is that their manufactured product happened to go awry and cause injury within the state, several statutes require that in addition to the injury occurring within the state the defendant must be engaged in a persistent course of conduct<sup>25</sup> within the forum state or derive "substantial revenue" from interstate commerce.<sup>26</sup> According to the proposed functional analysis, these statutes are inadequate for although they exclude the essentially localized defendant they do not take into account the plight of the plaintiff and the effect of litigational considerations on jurisdiction. Furthermore, since they permit the assertion of jurisdiction over a defendant depending on the quality and quantum of activity within the state, it could result in an essentially localized defendant responding to a multi-state plaintiff, a situation which von Mehren and Trautman believe to be both unnecessary and unfair. Although they express concern about the present make-up of specific jurisdiction, the authors conclude that the expansion of specific jurisdiction especially if coupled with a functional approach will lead to a diminishing role for general jurisdiction and probably spell the demise of limited jurisdiction.

#### SEIDELSON AND PLAINTIFF ORIENTED JURISDICTION

Although the von Mehren and Trautman thesis operationally results in a heavy plaintiff bias, it still maintains considerable concern

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23. *Von Mehren & Trautman* at 1172.

24. E.g. Wisconsin; WIS. STAT. ANN. tit. 25 § 262.05 (1963); Virginia, VA. CODE tit. 8, § 8.81.2 (1964).

25. Pennsylvania, PA. STAT. ANN. tit. 15 § 2011 (1965).

26. New York, N.Y.R. CIV. PRAC. 302 (1963).

for the localized defendant. Professor Seidelson, if he were to have his way, would opt for *total* freedom of choice by plaintiff in choosing the jurisdiction in which to bring suit.<sup>27</sup> To appreciate the Seidelson position, it will be necessary to trace his approach to the case law and the underlying policies which he believes should control jurisdictional choice.<sup>28</sup>

Seidelson approaches his topic by seeking to discover what content the courts have given to the delphic test suggested for jurisdiction by *International Shoe*:

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 has certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>29</sup>

Not surprisingly, Seidelson finds substantial disagreement among the state courts in their interpretation of *International Shoe* and he directs his attention to two of the more famous cases, *O'Brien v. Comstock Foods, Inc.*<sup>30</sup> and *Gray v. American Radiator & Standard Sanitary Corp.*<sup>31</sup> to illustrate the differing interpretations. In *O'Brien*, plaintiff, a Vermont resident, sued defendant, a New York corporation in Vermont, for injuries resulting from her ingestion of a piece of glass contained in a can of beans prepared and packed by defendant in New York. Plaintiff asserted that the can of beans had been "placed in the stream of commerce in New York . . . (and) purchased by plaintiff in Burlington, Vermont."<sup>32</sup> The Vermont court held that the mere presence of defendant's product in Vermont was not sufficient to demonstrate an "*intentional and affirmative* action on the part of the non-resident defendant in pursuit of its corporate purposes within this jurisdiction"<sup>33</sup> and thus concluded that to assert jurisdiction would violate due process. In *Gray*, plaintiff, an Illinois resident, was injured when a water heater exploded in Illinois due to a defective safety

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27. *Seidelson* at 247.

28. *Seidelson* at 226-232.

29. 326 U.S. at 316.

30. 123 Vt. 461, 194 A.2d 568 (1963).

31. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

32. 123 Vt. at 462, 194 A.2d at 569. Plaintiffs amended their complaint and alleged that defendant sold the can to International Grocers Alliance for distribution in Vermont and other states. The court upheld jurisdiction on the amended complaint. *O'Brien v. Comstock Foods, Inc.*, 125 Vt. 158, 212 A.2d 69 (1965).

33. 123 Vt. at 464, 194 A.2d at 570.

valve. Titan Valve Manufacturing Co., the Ohio manufacturer of the negligently constructed safety valve was named as a party defendant in the Illinois suit. Titan had sold the safety valve to American Radiator which had incorporated the valve into the heater in Pennsylvania. The heater was ultimately sold to the Illinois consumer. To the best of anyone's knowledge, this was Titan's only contact with Illinois. The court upheld jurisdiction over Titan saying:

In the case at bar defendant does not claim that the present use of its product in Illinois is an isolated instance. While the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its valve are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in *substantial use and consumption* in this state.<sup>34</sup> [Emphasis added.]

Professor Seidelson notes that the *O'Brien* test of "intentional and affirmative action" by defendant and the *Gray* test of "substantial use and consumption" of defendant's product lead to differing results. It is altogether possible that a defendant may intend to enter a market without significant success so that there may be no "substantial use." Conversely, there may be substantial use and consumption of a product although no proof is offered as to the distributive chain and the defendant's intent to enter the market, thus negating the assertion of jurisdiction. Seidelson instinctively recoils from the conclusion that courts would in truth follow through with such a result. Furthermore, he finds it difficult to understand why a defendant whose product is sold within the forum state should not be required to answer there "since each sale of the manufacturer's product enlarges its potentially profitable manufacturing capacity."<sup>35</sup>

Having examined the inadequacies of the tests which focus on the defendant's activities, Seidelson questions the willingness of the courts to extend long-arm jurisdiction when plaintiff and defendant are non-residents. He finds it hard to believe that when both parties are non-residents of the state the assertion of jurisdiction is motivated by the desire to regulate conduct within the state by assuring itself that its substantive law will govern. This, he contends, is accomplished by an

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34. 22 Ill. 2d. at 442, 176 N.E.2d at 766.

35. *Seidelson* at 228.



appropriate interest analysis which assures that the state whose interest in regulating conduct is greatest will have its law applied.<sup>36</sup>

From all of the above Seidelson concludes that he can find no other reason for the expansion of jurisdiction through long-arm but convenience to the litigants. And if convenience to the litigants is to be the criterion for jurisdiction, then the plaintiff who is the wronged party should have the choice of jurisdiction. If one were to ask how can we be sure that the plaintiff has been wronged Seidelson assures us that we dare not assume that claims are submitted in bad faith. Even if the plaintiff were so inclined Seidelson assures us that counsel will discourage his client from bringing suit; that basic morality and ethics should cause the lawyer to stop short at this point. Thus, instead of difficult-to-apply jurisdictional tests we now would have an easy "minimum contact" test—*plaintiff's home forum*. Professor Seidelson goes on to argue that logically there is now no stopping; if plaintiff's home forum is proper because it facilitates his convenience then any forum which would facilitate plaintiff's convenience should be constitutionally permissible subject to forum non-conveniens objection.

Although, for reasons to be later stated, it is believed that the Seidelson proposal is untenable, it is significant to keep in mind what factors led him to the conclusion that unfettered plaintiff's choice of jurisdiction should be supported:

- (1) The tests for applying the minimum contacts rule of *International Shoe* are too complex and are often illogical.
- (2) Defendant enjoys economic advantage by the use and consumption of his product by the plaintiff since it enlarges his potentially profitable manufacturing capacity.

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36. Seidelson's statement that "... application of the regulatory law of the state in which the conduct occurred seems likely regardless of which state becomes the forum," *Seidelson* at 235, is indeed puzzling. The pull on a court to assert jurisdiction so that it can give effect to its substantive policy in favor of its own domiciliary should be a rather substantial one. In a true conflicts case, the pull would be justified since a court could expect a sister state to assert its own interest. Von Mehren and Trautman have recognized the problem and suggest that constitutional control over choice of law and/or jurisdiction may have to become more stringent. (*Von Mehren & Trautman* at 1132). In effect Seidelson seems to be saying that a state will apply the law of the jurisdiction in which the accident occurred because it applies *lex loci* as its conflicts rule or because an interest analysis will lead to the conclusion that it has the greater interest in the application of its law. In light of the heavy forum-oriented approach to choice of law espoused by the courts and scholars alike, this result need not necessarily follow.

- (3) Given the inconvenience in litigating in a foreign court such inconvenience should logically be placed on the defendant since plaintiff is at least *in limine* the wronged party.
- (4) Since courts already assert jurisdiction when the plaintiff is a non-resident even though there are no strong reasons of state interest for the courts to do so the primary reason for doing so must be convenience to the plaintiff.

### THE NEW PROPOSALS—A CRITIQUE

#### I. THE FUNCTIONAL REALITIES OF FUNCTIONAL ANALYSIS

At the outset this author must admit to a period of enchantment with the von Mehren-Trautman functional analysis approach. After all, what could be more fair than requiring a multi-state defendant to answer to a localized plaintiff? And why should a multi-state plaintiff be able to litigate in his home forum against an essentially localized defendant merely because the injury occurred in the plaintiff's jurisdiction? For the following reasons, it is suggested that von Mehren-Trautman proposals for optimum fairness mask some very real and profound problems and that there may indeed be no neat method available to accomplish this desirable goal:

- A. The Von Mehren-Trautman approach could remove jurisdiction from constitutional control.
- B. The emphasis on the multi-state defendant assumes that entrance of the defendant into an interstate market is *per se* proof of his greater ability to defend interstate vis-a-vis a localized plaintiff. Multi-state is simply not a functional category.
- C. The strong plaintiff orientation presupposes a bona fide claim on the part of plaintiff and does not account for the "nuisance-suit" in which a plaintiff is given unconscionable advantage over a non-resident defendant.

#### A. Jurisdiction and Constitutional Control

It is clear that the von Mehren-Trautman thesis seeks to set jurisdiction in the forum of optimum fairness to all parties concerned.<sup>37</sup> By removing the focus from the defendant alone and viewing the litiga-

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37. *Von Mehren & Trautman* at 1167-1168.

tional setting in light of the relative degree of multi-state activity of both parties in addition to considering litigational conveniences, they hope to arrive at *the* jurisdiction in which the case should be tried. It is difficult indeed to quarrel with a proposal that seeks optimum fairness but there is a good probability that in this case the search may be for the pot of gold and the end of the rainbow.

The problem is fundamental. The more complex the test for jurisdiction and the more factors which must be considered in its application the more one must expect state courts to exercise their prerogative in justifying any result which they may reach for assertion of jurisdiction as a product of the interrelation of these factors. Given the propensity of state courts to assert jurisdiction to constitutional limits to accommodate a resident plaintiff, what is to stop state courts from using the multiplicity of factors as a screen for plaintiff oriented jurisdiction? It is suggested that once the brake of constitutional control is removed, the floodgates will be open. To expect the United States Supreme Court to control the flow of decisions when the highest courts of the several states have assessed the various factors and given them different weight is to expect an ability to read an appellate record bordering on the omniscient.

Professors von Mehren and Trautman take the position that the normal bias favoring defendant should not be overturned when the relative degree of multi-state activity of both parties is approximately the same. They would, however, permit litigational convenience to become a factor in setting the proper jurisdiction. Assume, for example, a New Yorker who visits Colorado on her summer vacation and there purchases a jar of face cream manufactured by a Colorado defendant and distributed in Colorado and Wyoming. On her return home she applies the cream and suffers injury. The plaintiff alleges that the injury is due to the chemical decomposition of the cream and defendant claims that the injury arose due to a hypersensitive skin condition which it did not owe a duty to warn against. If we were to describe the plaintiff's status, we would have to characterize her as an essentially localized New York plaintiff who is suing an essentially localized Colorado defendant. Given this assessment, the traditional bias favoring defendant remains intact and Colorado is the appropriate forum. However, if a New York court has the option of considering the litigational convenience and the relative degree of multi-state involvement of the parties as factors in determining jurisdiction, what is to stop the court from

arguing that since the medical testimony concerning the plaintiff's prior skin condition and all subsequent effects of the alleged harm are best determined in New York that it should assert jurisdiction. And could it not buttress its finding by showing that the defendant, by engaging in some interstate commerce, should not be treated as localized vis-a-vis the plaintiff? Even if we were to accept the restriction that "very strong considerations of convenience"<sup>38</sup> need be proven, how would one control at the national level the finding of a trial or appellate court that this case indeed was a case where "very strong consideration of convenience" governed? Referring again to our hypothetical New York plaintiff, one might contend that considering the fact that it was she who ventured forth into the wild west, that she was a "multi-state plaintiff" suing a localized defendant and that the traditional defendant bias was deserving of considerable respect. Yet, once litigational convenience becomes a factor, what is to stop a court desirous of assisting a local plaintiff from pointing to the great inconvenience to the plaintiff as the controlling factor? And again, who is to dispute the judgment of the court in its weighing of these very sensitive factors?

Simply stated, the von Mehren-Trautman thesis proposes to decide jurisdiction on a theory of "forum most conveniens." However, more than one court could easily judge itself the most convenient forum to try a particular case. Once we remove the focus from the defendant and focus on the complexities of a given *fact situation* it should be possible for a court to build a case in favor of almost any assertion of jurisdiction. The importance of constitutional control of jurisdiction has not been overlooked by von Mehren and Trautman. In fact, they have even posited the theory that more strict constitutional control over jurisdiction than is presently extant may be necessary in order to prevent forum shopping on the part of plaintiffs desiring to avail themselves of the new forum oriented choice-of-law tendencies.<sup>39</sup> Given the trend toward plaintiff-oriented jurisdictional biases on the part of state-courts it would seem very questionable whether strict constitutional control over jurisdiction is at all compatible with the functional analysis approach which von Mehren and Trautman advocate.

#### B. *Multi-state as a Functional Category*

Assuming for the moment that the courts would respond to the von

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38. *Id.* at 1167.

39. *Id.* at 1131-1132.

Mehren-Trautman thesis with a sense of altruism<sup>40</sup> and would depart from their tendencies displayed heretofore to tip the scales in favor of a local plaintiff, we are then faced directly with the validity of functional analysis. In attempting to arrive at the proper forum, von Mehren and Trautman suggest that it is necessary to gauge the varying involvement in interstate activity of the parties litigant. They forthrightly face the possibility, however, that cases will arise in which the plaintiff will be highly localized and the defendant, although involved in multi-state activity, could not foresee any possible litigation arising in the forum. Their position is crystal clear:

When the plaintiff's activities are highly localized . . . and when litigational convenience so requires, we believe the plaintiff should be able to call the defendant to . . . (his home state) even though defendant has engaged in no activity in . . . (the forum state) and has not anticipated that his multi-state activity might produce consequences in . . . (the forum state). *It is enough in assessing the relative fairness to plaintiff and defendant that the plaintiff whose affairs are essentially local, has been injured by the activity of the defendant who has involved himself in multi-state activity.*<sup>41</sup> [Emphasis added.]

Let us return for a moment to our hypothetical of the Colorado manufacturer of face cream but vary the hypothetical slightly so that this time he sells a jar of the face cream to a Colorado woman who takes the cream with her on a trip to New York to visit her daughter. In New York she gives the jar of face cream to her daughter who suf-

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40. It could be suggested that courts, given unchecked discretion to assert jurisdiction, might voluntarily fashion restrained rules which would deny jurisdiction in certain classes of cases in the hope that a sister-state might follow its example. Professor David Cavers has suggested a set of principles of preference in the choice-of-law field which are bottomed on the assumption that even the most interested of jurisdictions would supposedly relinquish its claim for the application of its law in cases where it had some interest, for the overall benefit of protecting more significant state interests. It would do so in the hope that other states might reciprocate with similar judgments. D. CAVERS, *THE CHOICE OF LAW PROCESS* 130-133 (1965). Although the analogy is forceful, this author questions its applicability to jurisdictional problems. Jurisdictional problems have a sense of immediacy about them. A resident plaintiff stands before a court asking it to hear the merits of his claim. Whereas choice-of-law problems tend to be esoteric and removed and have been viewed as such by the courts; jurisdictional questions are seen as a matter of basic justice. Throwing a resident-plaintiff out of court is not a pleasant task and one should not expect courts, released from constitutional control, to indulge in the practice. Even in *forum non conveniens* and transfer practice under 28 U.S.C. § 1404(a) (1948), when the effect of granting the motion is far less significant, the general rule has developed that if the plaintiff is a resident of the forum or if some of his important witnesses reside there, his choice of venue will not be disturbed. See Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice*, 40 IND. L.J. 99, 135 (1965). Also see: *Schindelheim v. Brainiff Airways Inc.*, 202 F. Supp. 313 (S.D.N.Y. 1962).

41. *Von Mehren & Trautman* at 1172.

fers injuries after applying it. The daughter, in seeking to assert jurisdiction in New York would contend that she is a localized plaintiff. But what of the defendant? Is it significant that the defendant also markets in Wyoming as well? It would appear that under the von Mehren-Trautman thesis the defendant, who is involved in multi-state activity, should respond in New York to the localized plaintiff. Yet, if the defendant were entirely localized and had sold his product only in Colorado he would be immune from suit in New York.

There are small manufacturers, numbering in the tens of thousands, who are involved in interstate business in localized marketing areas. Their business activities may overlap into three or four states and they should be as immune to cross-country law suits in a far flung forum as the purely one state defendant.<sup>42</sup> It is suggested that von Mehren and Trautman have erred in isolating the state as the functional economic marketing unit when experience dictates otherwise.<sup>43</sup> There are numerous small functional marketing areas that are essentially localized in scope and the fact that a defendant deals in such a market bears no relevance whatsoever to his ability to respond to a suit against a localized plaintiff far removed from the defendant's home base.<sup>44</sup> If the normal bias favoring defendant is to remain intact, it is important that any exceptions based on functional categories be functionally relevant.

It is essential to keep in mind that von Mehren-Trautman premise their approach with the principle that the traditional bias in favor of defendant is altogether proper but seek to shift that bias in cases where

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42. The number of small manufacturers is often grossly underestimated. In Pennsylvania in 1963, out of 19,460 establishments engaged in some form of manufacturing, 8,792 had nine or fewer employees. U.S. BUREAU OF CENSUS, CENSUS OF MANUFACTURERS (1963).

43. Perhaps in attempting to use the term "multi-state" to describe both interstate and international problems of adjudicatory jurisdiction, von Mehren and Trautman presumed too much. In the international theatre the fact that a defendant markets outside of his own nation may be significant in telling us something about the scope of his economic adventurism. In the interstate setting, one who markets in a particular region, which is composed of all or parts of several states, cannot be, ipso facto, presumed to have broadened the scope of his economic venture to the point that national service of process becomes fair.

44. Pittsburgh, Pennsylvania is a classic example of a focal point for a limited multi-state marketing area. A small manufacturer located in or around Pittsburgh almost certainly does some business in Ohio and West Virginia which are located less than fifty miles away. The area encompassing southwestern Pennsylvania, southeastern Ohio and northern West Virginia is known and referred to as the tri-state area. It would be unfair and unnecessary to impose nationwide service of process upon a manufacturer in this area and, at the same time, not impose such a burden upon a like sized manufacturer who happens to be located in the geographical center of the state.

it is not unfair to the defendant or the particular litigation to do so. This being the case it becomes very difficult to understand why they shift the bias so easily, simply because the defendant is engaged in multi-state activity.<sup>45</sup> One must assume that the authors believe that as a class those involved in multi-state commerce are better able to bear the burdens of litigation away from home. They assume that since a defendant has after all indicated his desire to spread his business activities beyond state border lines asking him to go past those states in which he markets is not unconscionable vis-a-vis a localized plaintiff. However, focusing on multi-state activity as a functional category appears to be an obvious error. Involvement in limited multi-state commerce is no indication whatsoever of the relative ability of the defendants to bear the burden of away from home litigation.

### C. *Jurisdiction and the Nuisance Suit*

Perhaps the most glaring fault in the numerous works done to date on the subject of jurisdiction is that the authors premise their proposals on the assumption that they are concerned with bona fide law suits.<sup>46</sup> Thus in attempting to work out the equities between the parties the authors see in their minds' eye an injured plaintiff with substantial injuries seeking legal redress for a claim which at least has the color of legitimacy.<sup>47</sup> Given these assumptions there is a strong psychological

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45. Von Mehren and Trautman often refer to "pervasively multi-state" activity on the part of defendants. It is not clear whether they would limit their proposal for reversing the defendant bias to cases where the defendant has been involved in "pervasive-multi-state" activity. A fair reading of their proposal would indicate that it is not so limited. See *von Mehren & Trautman* at 1172. If it is limited to pervasive activity, then one must question whether pervasiveness is to be defined by the number of states in which defendant markets or by dollar volume of sales in a narrow interstate market.

46. The problem has received some attention. Wisconsin allows the defendant to compel the plaintiff to post bond to reimburse him for litigation expenses if the action is dismissed for lack of jurisdiction. WIS. STAT. ANN. tit. 25, § 262.20 (01) (1963). The maximum amount recoverable is 500 dollars. Michigan, MICH. COMP. LAWS § 600.741 (1962). Neither statute comes to grips with the very real due process question involved. A small manufacturer is faced with a Hobson's choice of either settling a nuisance claim or suffering extreme inconvenience and business disruption by litigating the claim. The statutes do not nor could not provide for the numerous intangibles involved in litigating far from a small manufacturer's home base.

47. For a judicial view on this point see: *Buckley v. New York Post Corp.* 373 F.2d 175, 181 (2d Cir. 1962). Judge Friendly makes the following observation:

Despite some language emphasizing considerations peculiar to insurance, it would not be difficult to extrapolate from the *McGee* decision and opinion a general principle that the due process clause imposes no bar to a state's asserting personal jurisdiction, of course on proper notice, in favor of a person within its borders who suffers damage from the breach of a contract the defendant was to perform there or a tort the defendant committed there. Once we free our minds from traditional thinking that the plaintiff must inevitably seek out the defendant, such a doctrine would not seem to violate basic notions of fair play; any view that it does must

pull to permit the plaintiff his day in court in the forum most convenient to him. The status quo has been disturbed by the defendant and whether he is liable or not, perhaps the price for disturbing the status quo is litigation in an inconvenient forum.

The presence of broad based liability insurance coverage has, however, altered the normal litigation setting considerably. Claim conscious Americans by the thousands have come to view even the most minor "accidents" as Manna from heaven. They have come to view insurance theft with approximately the same moral reservations as minor cheating on income tax—it has become a national sport of sorts. For years the insurance industry was in a quandary as to how to handle this problem of "nuisance" suits. Since very often these suits could be settled for a rather nominal sum it was at first thought the better strategy to settle rather than face the often substantial cost of litigation. In recent years there has been a serious reassessment of this policy by many thoughtful insurers.<sup>48</sup> They came to believe that the practice of settling nuisance suits was the equivalent of feeding a cancer. The more one fed the disease the more voracious its appetite became. Simply the feeling grew that indiscriminate and ill founded settlements led to more indiscriminate and ill founded law suits. In order to combat this trend many insurers decided to make it their policy to resist nuisance suits by litigating all questionable claims. Although the practice is not yet industry wide, there is convincing evidence of its success.<sup>49</sup>

It would seem only proper that a functional analysis of jurisdiction

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*rest on an inarticulate premise, which a legislature is free to question, that plaintiffs are much more given to making unjust claims than defendants are to not paying just ones. (Emphasis added.)*

For this author's view on the due process implications of this argument, see text accompanying note 60 *infra*.

48. See *Nuisance Litigation—One Theory of Defense*, 5 FOR THE DEFENSE 26 (Apr. 1964); *Resistance To Unmeritorious Claims*, 6 FOR THE DEFENSE 10 (Feb. 1965); Jones, *Evaluation and Settlement of Personal Claims for Damages*, ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW PROCEEDINGS, 58 (1959); Carlson, *Nuisance Value Settlements—A Necessary Evil?*, 22 INS. COUN. J. 156 (1955); Benjamin, *Products Liability—The How, What and Why of Settlement on Trial*, ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW PROCEEDINGS 565, 569 (1968).

Professor James D. Ghiardi, Director of Research of the Defense Research Institute, in a June 1967 speech stated, "All the precautions in the world will not save manufacturers from inflated and fraudulent claims. Such suits must be defended." The possible scope of defending such suits was also commented upon by Professor Ghiardi. "It seems reasonable that one fundamental decision might be, that to reduce the ultimate costs of product claims, all claims should be resisted." Professor Ghiardi was referring to the practice of General Motors in defending all Corvair cases when it became clear that many were vexatious and groundless.

49. *Id.* 5 FOR THE DEFENSE; 6 FOR THE DEFENSE.



take into consideration some of the prevailing litigational problems facing us today. A defendant facing a nuisance claim arising in his locale is indeed faced with a difficult choice in deciding whether to settle or litigate. If he should decide to settle, the amount of settlement will reflect an estimate of his inconvenience in litigating in his own forum. If we remove the defendant three thousand miles from the plaintiff the picture changes significantly. Now the plaintiff can include in his settlement demand the additional factor that the defendant is truly put out to defend his law suit. The dollar amount for the nuisance suit must substantially rise.

Should the insurer decide to litigate in order to discourage nuisance suits he is now faced with the problem of asking his insured to litigate a far distance from home. Given the nature of products liability suits it may be necessary to take key production personnel a long way from the home plant to defend a bogus law suit. At a certain point a defendant may have to plead with his insurer to settle—for the cost of implementing the overall strategy of deterrence is simply too high. And if the insurer refuses to settle, the insured must face the prospect that his duty to cooperate in the defense of his law suit has left him the remaining option of settling the nuisance claim out of his own pocket.

The problem is serious enough for the large or medium sized manufacturer. However, for the small manufacturer who deals in a small multi-state market the problem is even more substantial. He is faced with very limited personnel, all who are vital to the daily operation of his plant. To spare a production manager for a trial 3,000 miles away from the plant for a week may be an impossible price to pay in light of the settlement option available.

A decade ago, Dean Prosser in his article entitled *The Assault Upon the Citadel (Strict Liability to the Consumer)* struck a note of caution concerning the effects of strict liability on the small manufacturer:

It is a common failing to overlook the problem of the small manufacturer. When social reformers speak of "manufacturers" they generally assume that all manufacturers are in the position of U. S. Steel Corporation or General Motors or Standard Oil Company of New Jersey. It may very well be (leaving out considerations of justice) that large organizations of this character can absorb or distribute an item of increased cost such as that which would result from the imposition of strict liability. But many manufacturers are in a totally different situation. Their position in the industry

is vulnerable and their competitive situation delicate. It is these comparatively small manufacturers who suffer when additional costs are added without regard to their situation.<sup>50</sup>

It would appear that the evils of which Dean Prosser spoke are *a fortiori* true with regard to the jurisdictional problem. A defendant facing a products liability suit thousands of miles away from his plant now faces not only strict liability but strict jurisdiction. Now we tell him that not only are his defenses limited but even if he can prove his defenses that it is too costly for him to do so. As indicated earlier this situation appears unfair even in a bona fide law suit against a small regional manufacturer. However, when placed in the context of a nuisance suit it became an evil raised to the second power—one that we need not sanction with the cloak of due process.<sup>51</sup>

One additional point merits special attention. When viewing the economic effects of multistate litigation, it has become fashionable to focus our sympathies with the individual plaintiff who is injured versus the corporate business defendant who has caused the injury. It is easy to view this scene and come to the conclusion that the defense of the suit is part of the cost of doing business. Yet, when one looks at the economic realities of multistate litigation especially to small manufacturers the estimate of inconveniences may alter sharply. An individual plaintiff who is forced to litigate out of state is inconvenienced *qua* individual. The disruption, although substantial, is highly personal and rarely economically significant. The small manufacturer with ten to twenty employees who is faced with a highly competitive business situation may be placed in a serious bind by repeated and vexatious out of state suits. To relinquish production personnel for suits in a jurisdiction in which he could not and should not foresee his product would enter, may indeed be a violation of due process of rather substantial proportions.

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50. 69 YALE L.J. 1099 (1960) note 147 at 1121.

51. For this author's suggestion of the approach for balancing the equities between plaintiff and defendant in these difficult cases, see text accompanying note 62 *infra*. In a closely balanced situation, the tendency has been to identify with the plight of the plaintiff. The standard refrain being "of what value is a claim that the plaintiff cannot litigate." It would seem that if the claim is of any substance and value the contingent fee system should provide sufficient incentive for enterprising counsel. If the rather substantial volume of nuisance litigation is indicative, it would appear there are lawyers aplenty to present even these most attenuated claims.

## II. BEYOND MINIMAL CONTACTS AND PROFESSOR SEIDELSON

Given this author's dissatisfaction with the more even tempered handling of jurisdictional considerations by Professors von Mehren and Trautman, it should be evident that the Seidelson thesis of granting plaintiff total freedom in choosing his forum would be viewed with still more alarm.<sup>52</sup> Professor Seidelson's position that a presumption in favor of the *prima facie* validity of plaintiff's claims exist in the law is one that would seem to run counter to both the fundamental philosophy of our legal system and to some significant practical experience.

Unless we are prepared to alter some very basic assumptions surrounding the process of litigation we should directly acknowledge that an overall defendant bias exists throughout the entire procedural and substantive framework of litigation. It is the plaintiff who seeks to convince a court that the status quo be changed and that the defendant has a duty to respond. It is philosophically unsound to isolate one area of procedure (*viz.*, jurisdiction) and sacrifice the normal defendant bias even if it be on the altar of convenience. There is a sense of symmetry and a thorough consistency which pervades a legal system and piecemeal attacks at specific problems may leave us with some momentary solutions but no framework in which to place them. Simply stated, this author views it jurisprudentially unsound to isolate jurisdiction from the overall matrix of procedural and substantive law within which it must function. Furthermore, as discussed earlier, Professor Seidelson's assumptions about the validity of plaintiff's claims simply do not jibe with the recent traumatic experience of insurers with nuisance litigation.<sup>53</sup>

In attempting to determine why Professor Seidelson is so willing to barter the normal defendant bias for a convenient plaintiff forum, this author is led to a theme which appears to run throughout the article. In numerous instances Seidelson alludes to the proposition that there is really no great unfairness to the defendant in asking him to respond to the plaintiff when the defendant's product is sold within the forum state since "each sale of the manufacturer's product enlarges its potentially profitable manufacturing capacity."<sup>54</sup> This statement

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52. See text accompanying note 27 *supra*.

53. See text accompanying note 48 *supra*.

54. See note 35 *supra*.

would seem to be open to most serious empirical questioning. Given a small manufacturer who seeks only a limited multi-state market, it is not true that he either seeks or benefits from an isolated sale in a far flung market. Marketing and sales are generally the product of conscious management decisions. The decision not to enter a particular marketing area far removed from a manufacturer's home base may be made for a multitude of reasons. The manufacturer may feel that competition in general is too stiff or that the expansion of his market beyond a certain point would strain the existing framework of his sales and production force or he may have any one of a hundred good business reasons for not wishing to expand his business at a particular point in time. Thus, if a defendant does not market in a particular area, all that one can say is that he has decided that sales and consumption in that area are not relevant to his legitimate business concerns. Thus, the argument that once one has placed his product in the stream of national commerce he should be prepared to face nationwide jurisdiction is true, if and only if, the defendant does in fact seek to place his product in the stream of "national commerce." But the mere appearance of a jar of Colorado face cream in New York is not enough. Jurisdiction is not a "jar of face cream" or as I am wont to tell my students after discussing *O'Brien v. Comstock Foods*—"jurisdiction is not a can of beans."

Having indicated points of disagreement with the Seidelson thesis, it is only proper to indicate areas of concurrence. In reviewing state appellate court decisions Professor Seidelson has exposed a sensitive nerve. In general, state courts are unable to determine what the constitutional standard mandated by *International Shoe* really means. The problem is not one of having a standard and varied decisions with regard to its application. Rather the uneven content of the long arm statutes and the state appellate court decisions indicate a lack of direction on the subject. Seidelson is correct that decisions such as *Gray* and *O'Brien v. Comstock Foods* appear to be philosophically poles apart.

Furthermore, Professor Seidelson poses the rather formidable question as to why courts have been willing to exercise adjudicatory power in favor of a non-resident plaintiff against a non-resident defendant. To answer the above stated problems, he concludes that convenience to the plaintiff is the only rational reason and the only easily applicable rule which should and does guide the courts. For the reasons stated,

this author does not concur but the questions deserve serious consideration. And if this author finds himself dissatisfied with both the von Mehren-Trautman and Seidelson suggestions, an alternative framework becomes a necessary consideration.

### III. DUE PROCESS THROUGH THE EYES OF THE DEFENDANT

At the outset let it be said that this author is not prepared to offer a talismanic test for jurisdiction. The business of due process is too complex to permit one to establish *a priori* a rule to cover all fact patterns. Perhaps at some future time the commercial realities of marketing and business within the fifty states will take on a complexion of sufficient uniformity that it will become reasonable to speak of functional categories such as classes of defendants and multi-state defendants, but that time, if it is ever to come, is a long way off. The small local and regional manufacturer is still a vital factor in our economy and the due process clause should afford him protection against nationwide service of process when he has acted to limit his activities in an appropriate fashion. His protection lies, as it always has, in the hands of the United States Supreme Court and in the guidelines which it has drawn to direct the courts of the several states as to how to handle this complex problem.<sup>55</sup> The court cannot functionally, nor should it

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55. The question as to why Congress can legislate to extend in personam jurisdiction to nationwide service if it desires, without violating due process, has no easy answer. *Mississippi Publishing Co. v. Murphy*, 326 U.S. 438 (1946). This author would suppose that the answer lies in the philosophical justification for a federal court system. To the degree that Congress views this problem in federal dimensions, the courts may be far more reluctant to challenge its judgment on due process grounds. Thus, it may be too bold to read *Mississippi Publishing* as a carte blanche on the due process issue. It would seem that it should be read as a broad mandate to Congress rather than an absolute license. For a similar view on nationality as the basis of jurisdiction see: *Blackmer v. United States*, 284 U.S. 421 (1932); *RESTATEMENT (SECOND) OF CONFLICTS, PROPOSED OFFICIAL DRAFT* § 31(b) (1967).

The recent ALI Study of the *Division of Jurisdiction Between State and Federal Courts* supports the position that Congress can provide for nationwide service of process in diversity cases. It thus finds no constitutional problems with the proposals to provide for multi-party multi-state jurisdiction, in situations where an individual state could not, through the reach of its long arm, obtain service of process over all litigants whose interests must be decided in order to provide for a final adjudication of the rights of all parties to the action. Because of the peculiar nature of the multi-party multi-state problem and the serious effects of partial adjudication of the rights of some of the parties in a law suit, this is the very kind of problem which a federal system must attack and due process objections are not to be taken seriously. But to generalize and say that there are never due process jurisdictional considerations in a diversity situation would be academic overkill. See Abraham, *Constitutional Limitation Upon the Territorial Reach of Due Process*, 8 VILL. L. REV. 520 (1963). To the credit of the ALI reporters, they have carefully noted this point:

We are here concerned with the general power of Congress to authorize service of

philosophically, fashion any test which addresses itself to anything but minimum standards.<sup>56</sup> To do otherwise would be to make a mockery of judicial review and to sorely misunderstand the basic concept of federalism.

But all this is not enough; we are constantly faced with the problem of reading substance into the trilogy of cases in which the Supreme Court of the United States has spoken. Realistically, *International Shoe* cannot be read as anything more than a green light for experimentation; *McGee* suffers from the specialized nature of the subject matter which it dealt with and *Hanson v. Denckla*, a case which could have gone a long way to clarify the problems was so badly mishandled on both substantive and jurisdictional grounds that one is skittish about drawing meaningful conclusions from the case. However, it is important not to overstate the problem of lack of direction, because even if guidelines were not provided the three cases do express a mood and it is best expressed in *Hanson*:

The unilateral activity of those who claim some relationship with a non-resident 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 protection of its laws.<sup>57</sup>

Perhaps an accurate description of scholarly reaction to the above quoted paragraph is that it is inadequate to the task. Take for example the problem raised by *McGee* where a Texas insurer who had issued a single reinsurance certificate to a California insured was held subject to the jurisdiction of the California court for a claim arising under the policy. Although the *McGee* result fits easily under the *Hanson* test, a perceptive writer has pointed out that our sense of jus-

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process across state lines, not with possible limits on the use of such power dictated by considerations of fairness embodied in the due process clause of the Fifth Amendment. (ALI, Supporting Memorandum B, 437, footnote 1.)

56. See text accompanying note 37 *supra*. The answer to Professor Seidelson's question as to why a non-resident plaintiff may sue a non-resident defendant without due process objections is that as long as we admit that due process speaks to "minimum contacts" we will have to live with such results as a matter of constitutional law. Since it is the thesis of this article that appellate control can only operate on a "minimum contacts" theory, any mitigation of harsh results will have to come on a *forum non conveniens* motion.

57. 357 U.S. at 253.

tice might be offended if the Texas court sought to bring the California insured under its jurisdiction for a claim arising from the failure of the insured to pay premiums.<sup>58</sup> Yet, couldn't such a result be justified by the *Hanson* language in that the insured has "purposefully availed itself of the privilege of conducting activities within the forum state." And what of a buyer who orders an item from a mail order house in a far distant state; can the mail order house reduce its contracts to judgments in a home forum and enforce them under full faith and credit in the defendant's home state?<sup>59</sup>

It is clear that the second part of the *Hanson* formula was never intended to provide the *necessary and sufficient* conditions for the assertion of jurisdiction. The "purposefully avails itself" formula is a *necessary* condition for the assertion of jurisdiction. The court fully well realized that once the defendant's involvement was found the next step was to assess the "quality and nature of defendant's activity" before deciding that it was fair to assert jurisdiction. This much is evident from a fair reading of the crucial language of *Hanson*. However, it seems that the dissatisfaction with *Hanson* is even more basic. The attitude of the *Hanson* court in focusing in on the quality and nature of the defendant's activities is considered even by traditional commentators too limiting. It is suggested that if we are to make any sense out of the cases at all we will find ourselves considering such factors as: (1) whether defendant is the buyer or seller; (2) whether he or the plaintiff is in business; (3) who took the initiative in the transaction; (4) whether the defendant sent agents into the plaintiff's state and if so under what circumstances; (5) what are the relative abilities of the plaintiff and defendant to litigate in a foreign forum; (6) the identity and size of the parties; (7) the nature of the plaintiff's claim and (8) the expectation of the defendant.<sup>60</sup>

This author will agree that we do indeed find ourselves looking at a multitude of factors in deciding the constitutional sufficiency of jurisdiction once it is established that defendant has involved himself in some way in activity in the forum state. However, this does not

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58. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 575 (1963).

59. See *Conn. v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959).

60. See R. CRAMPTON & D. CURRIE, *CONFLICT OF LAWS* at 484-486 (1968); Currie, *The Growth of the Long Arm*, *supra* note 58 at 577; Carrington and Martin, *Substantive Interest and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967). See also note 62 *infra*.

render the reaching of *Hanson* irrelevant. First, and foremost the multiplicity of factors mentioned above do not come into play unless we have made a preliminary determination that defendants' activities do involve a "purposeful activity in the forum state." It is not suggested that this is a task for an automaton. Judge Sobello's famous hypothetical of the California tire dealer who sells a defective tire to a Pennsylvania resident whose car bears Pennsylvania license plates is an excellent example of the difficulty in making this threshold decision.<sup>61</sup> Essentially, this is a foreseeability issue and carries with it the difficult problem of establishing the foreseeability concept as regards the jurisdictional issue in a manner that makes decent business sense and that does not make every case a foregone conclusion on this point in a highly mobile society.

Having ascertained that the first criterion is met, it is the function of a court to ascertain the meaningfulness of the defendant's involvement in the forum state, *i.e.* what is the quality and nature of his act. And it is here that the major error in the interpretation of *Hanson* is made. At this point courts and commentators seek to balance out the equities by taking into consideration the factors enumerated above.<sup>62</sup> The problem is that they presume to do this as impartial arbiters of fairness rather than attempting to assess the factors from the point of view of the defendant as *Hanson* instructs us to do. In order to assess in any given case what the nature of defendant's activity has been and

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61. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.* 239 F.2d at 502, 507 (4th Cir. 1956).

62. *Conn. v. Whitmore* 9 Utah 2d 250, 342 P.2d 871 (1959); *Ciprari v. Servicos Aeroeos Cruzdiro do Sul*, 232 F. Supp. 433 (S.D.N.Y. 1964), at 441. *Hearne v. Dow-Badische Chemical Co.*, 224 F. Supp. 90, 99 (S.D. Texas 1963). [The court considers among factors to decide "whether there are minimum contacts":

- (1) The nature and character of the business;
- (2) The number and type of activities within the forum;
- (3) Whether such activities give rise to the cause of action;
- (4) Whether the forum has some special interest in granting relief; and
- (5) The relative convenience of the parties.] See also *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 185 F. Supp. 48, 56 (S. D. Texas 1960). *Roy v. North American Newspaper Alliance*, 106 N.H. 92, 205 A.2d 844, 848 (1964) ("... the equities and convenience of trial designate this state as a just and fair forum because its law applies and because crucial witnesses will for the most part be from within this state.")

Chief Justice Traynor has also catalogued these factors in *Fisher Governor Co. v. Superior Ct.*, 53 Cal. 2d 222, 1 Cal. Rptr. 1, 347 P.2d 1 (1960):

The interest of the state in providing a forum for its residents . . . or in regulating the business involved . . . the relative availability of evidence and the burden of defense and prosecution in one place rather than another . . . the ease of access to an alternative forum . . . the avoidance of multiplicity of suits and conflicting adjudications . . . and the extent to which the cause of action arose out of defendant's local activities . . . are all relevant to this inquiry.



how meaningful it was, the activity must be viewed in context of the overall transaction but it must be viewed over the shoulder of the defendant and not as a detached observer.

*McGee* is correct and can be justified from the defendant's point of view because a court could assess that the sale for the insurer of a policy to a California resident was a conscious business transaction in the normal operation of the insurer's business and one in which he could foresee serious problems to a claimant under the policy. Whereas, in the reverse of *McGee* the purchase of a policy by an isolated insured is not a significant meaningful business transaction. No doubt, the size, the identity of the parties, who initiated the transaction, the nature of that transaction are all important in this decision making, but they are important because they give character and explanation to the defendant's activity.

It is submitted that the suggestion that we focus on all the surrounding conditions as a method of understanding the significance of defendant's act is not merely a play on words but goes to the heart of the jurisdictional problem. Again we shall call on a hypothetical to demonstrate the thesis. Assume a California toy manufacturer, who markets in several adjacent western states, receives a telephone call from an Illinois retailer who had heard through a mutual friend, of the manufacturer's reasonable prices. He inquires as to the cost of bulk purchases of a certain new item. At this juncture, the dispute arises. The plaintiff, Illinois retailer, claims that the defendant-manufacturer promised to sell him a gross of toys at a certain price. The defendant claims that nothing transpired and that he merely quoted the plaintiff his price on the new item. The obvious inquiry—can the Illinois court assume jurisdiction under the section of its long-arm permitting suits in Illinois arising from “the transaction of any business within the state?”<sup>63</sup>

At first glance, it would seem that we are faced with the *Nelson v. Miller*<sup>64</sup> argument. It will be recalled that in that case a Wisconsin defendant sought to escape the assertion of jurisdiction by an Illinois court arising from an accident when defendant's agent injured the plaintiff in the process of unloading a truck in Illinois. The claim of the defendant was that there was no proof that he had committed a

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63. ILL. REV. STAT. ch. 110, § 17 (1959).

64. 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

tortious act since that was the very question to be decided in litigation and thus Illinois could not assert jurisdiction under the provision of its long arm which provides for jurisdiction arising from the commission of a tortious act within the state. The Illinois court correctly decided that the question was whether Illinois had sufficient contact with the accident so that it was fair to litigate the matter in the Illinois court and that the tort issue need not be decided in order to determine jurisdiction. Similarly one could argue that in the toy manufacturer hypothetical, one need not decide the very issue to be litigated, *i.e.* was there a valid contract. Yet, here one is faced with a difficult question. Assuming that in truth the facts of the transaction were as the plaintiff claimed them to be and that it would be proper for Illinois to assert jurisdiction—we must face the problem that in this situation a court attempting to decide the jurisdictional question doesn't know whether defendant has been involved in the kind of activity in relation to the forum state which justifies the assertion of jurisdiction. Unlike *Nelson v. Miller*, where the sending of the agent into Illinois was the jurisdictionally significant act, in this case we simply don't know whether an act which has jurisdictional significance has occurred.

To decide the jurisdictional question we are forced to make a choice. This case has to be assessed either from the defendant's viewpoint or the plaintiff's viewpoint. One judging this case from a position of impartiality without a point of view is at a loss. It is possible to view this problem as one of burden of proof and proclaim that it is the business of the plaintiff to prove that the defendant's activity in the state has been of the sort which we deem jurisdictionally significant.<sup>65</sup> But, the problem is more fundamental. If a court faced with the above problem tells the Illinois retailer that it cannot assert jurisdiction without him actually proving his substantive case, we are telling the plaintiff that the normal substantive bias which favors the defendant carries over to jurisdiction as well. We ought to be willing to admit that when a choice is made, the defense bias cannot be avoided.<sup>66</sup>

The attempt to attach independent significance to factors in the jurisdictional scene that do not characterize the scope of defendant's activity is a mistake of significant proportions. When we ask whether the assertion of jurisdiction by a court over a non-resident defendant

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65. To the extent that *Gray* is willing to assume without proof defendant's involvement in the forum, it operates contra to the thesis expressed herein.

66. Carrington and Martin *supra* note 60 at 247.

## Jurisdictional Due Process

is in violation of due process we make certain assumptions. By injecting the notion of due process into the discussion we question whether the power of the state over an individual has been expanded past the bounds of propriety. But, this presupposes a *right* to be free from the power of the state in a situation in which the defendant has done nothing to subject himself to the jurisdiction of a given forum. It is no answer to the due process question that although it is unreasonable to assert jurisdiction over the defendant, it must be done because otherwise an innocent plaintiff will suffer. Due Process does not speak to a situation. It presupposes a right that is deserving of protection—and address itself to the fair assessment of its application in a particular case. The right of defendants to be free from litigation in an inconvenient forum is the basic due process right under consideration and it must be assessed on the basis of the types of activity in which they engage. We have to be willing to honestly and forthrightly examine the totality of the defendant's conduct to understand what his activity has been. But at a certain stage we must call it quits for to do otherwise would be to deny that there is any right worthy of recognition. Overall fairness to everyone may be a desideratum of the common law but it is not the foundation of the due process clause. If we desire to engage in a common law evaluation of fairness to all parties, then the due process clause ceases to be the vehicle for limiting the exercise of jurisdiction.

This author's criticism of the von Mehren and Trautman thesis and the Seidelson proposal is based on their willingness to isolate the plaintiff's plight as an independent factor. To the extent that more traditional writers and courts have attached significance to non-defendant factors, they have confused the issue. The thrust of decisional law cannot be uniform—the factors will of necessity be weighed differently by courts according to their particular philosophies and the factual nuances of the cases. However, to the extent that courts flounder in search of a basic philosophy and fail to understand the underlying biases of the system in which they are called upon to function to that extent, the decisions will lack a sense of symmetry that a rational system of law must possess.