NOTE

Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis

By KAREN HAVILAN*

Introduction

The institutional press currently is the subject of criticism for what some perceive as its misuse of power and its shirking of responsibility.[1] Despite its alleged transgressions, however, the press remains the first line of defense in protecting the First Amendment guarantees of freedom of expression and the public's right to know.[2]

The Supreme Court has recognized "that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[3] The factual errors inevi-

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1. Some of the criticism is perhaps well deserved. The *National Enquirer's* irresponsible journalistic practices were exposed by the recent spate of plaintiff's verdicts in libel actions against the tabloid. *See, e.g.*, Buckley, *Bravo, Burnett*, 33 NAT'L REV., May 1, 1981, at 508-09. The esteemed *Washington Post* shamefacedly returned the Pulitzer Prize when it was revealed that the award-winning story of a child heroin user named Jimmy was in fact a compilation of stories about many children, written by a reporter who had falsified her resume, *see* TIME, Apr. 27, 1981, at 52-3; NEWSWEEK, Apr. 27, 1981, at 62-3. In a recent movie, "Absence of Malice," the house counsel for a Florida newspaper was portrayed as a slick, jaded lawyer who advised reporters on the loopholes of libel law.

2. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The First Amendment was made applicable to the states through the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652 (1925), in which the Court stated that "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

3. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674-76 (1978). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of informa-

table in such uninhibited debate have been protected in order to give free expression its needed "breathing space."[4]

Debate has only marginal value unless it is informed as well as vigorous. "[I]nformed public opinion is the most potent of all restraints upon misgovernment."[5] Recognizing society's need for access to information, the Court has found that the First Amendment goes beyond protection of expression and protects the public's right to know,[6] which is the public's right to receive "information and ideas."[7]

The newspapers of this country play a necessary part in exercising and guarding First Amendment rights. Simultaneously, they are restricted by the constant threat of defamation actions.[8] The risk of large adverse judgments sometimes results in self-censorship, which inevitably has a "chilling effect" on freedom of expression. It has been argued that the decision in *New York Times v. Sullivan*,[9] which requires proof of "actual malice"[10] before liability will be imposed, sufficiently protects the press from the chilling effect of the possibility of large adverse judgments in libel actions.[11] The mere threat of sanctions for exercis-

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tion from which members of the public may draw"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (public has a right "to receive suitable access to social, political, aesthetic, moral and other ideas and experiences").

4. New York Times v. Sullivan, 376 U.S. at 260.

5. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

6. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

7. Herbert v. Lando, 441 U.S. 153, 189 (1979) (Brennan, J., dissenting in part) (quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)).

8. For an article suggesting that wealthy individuals initiate libel actions against newspapers that print articles opposing their interests, see Pell, *Libel as a Political Weapon*, THE NATION, June 6, 1981, at 681.

9. 376 U.S. 254 (1964).

10. A statement is made with "actual malice" when made "with knowledge that it is false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

11. *See, e.g.*, Buckley v. New York Post Corp., 373 F.2d 175, 182-83 (2d Cir. 1967). For some examples of recent libel verdicts against defendants in California state court actions, see Alioto v. Cowles Communications, Inc., 430 F. Supp. 163 (N.D. Cal. 1977) ($350,000 general damages); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979) ($50,000 general damages against author and publisher plus $25,000 punitive award against publisher); Montandon v. Triangle Publishing Co., 45 Cal. App. 3d 938, 120 Cal. Rptr. 186 (1975) ($150,000 general damages plus $1,000 punitive damages). *See also* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, A.B.A. RES. J. 455, 496 n.92 (1980). Franklin notes a $600,000 out-of-court settlement obtained by a libel plaintiff from a newspaper defendant in 1976. *Id.* at 461 n.16. Another observer has commented, "[A]n unprecedented number of libel verdicts in the seven- or eight-figure range recently entered at the lower court level are currently on appeal. If these verdicts are not overturned, they could . . . encourage even more aggressive action by plaintiffs against the media." *Writer Points Out Plethora of High Rolling Defamation Suits*, SAN FRANCISCO RECORDER, Oct. 6, 1981, at 10. At a conference on communications law in November, 1982, media attorneys

ing rights protected by the First Amendment, however, also has a chilling effect that has been recognized by the courts.[12] In today's economic climate, it is common knowledge that the cost of defending a lawsuit, even to the point of summary judgment, is monumental.[13] The expenses of litigation could devastate a medium or small-sized publication, or convince such a paper, already faced with escalating costs, to cease distributing beyond its immediate locale.

Small, independent newspapers often offer the only alternative to the mainstream view.[14] They provide information that allows the public to participate fully in both political activities and intellectual discussions. These newspapers often print controversial or unpopular views that act as catalysts for the free and robust debate to which our society is committed. Such critical commentary, however, is more likely to be the subject of an action for libel.

This Note discusses whether or not First Amendment considerations should be taken into account in determining whether or not jurisdiction can be asserted over a nonresident newspaper defendant in a defamation action. The discussion centers on the small or medium-sized newspaper whose publishers may decide that the economic benefits derived from circulation beyond the newspaper's immediate locale

predicted "more [libel] lawsuits against the press and less judicial intervention to protect the press against . . . juries." *Libel Lawyers Predict Tough Times*, THE SAN DIEGO UNION, Nov. 20, 1982, at A-23.

12. New York Times v. Sullivan, 376 U.S. at 279.

13. *See* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980). "The cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations. Five years ago, the minimum cost of defending a 'full-fledged libel suit' was estimated at $20,000. (citation omitted). The successful defense of [Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)], was nearly $100,000.00. . . . In [Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 690-91 (W. Va.), *cert. denied*, 423 U.S. 882 (1975)], the West Virginia Supreme Court of Appeals expressed concern that in its state, 'where a large portion of the State is served by newspapers which lack substantial financial assets, the threat of potential libel actions becomes repressive, not only because of possible judgments but also because of the inordinate legal expenses normally incurred in defending a protracted libel suit.'" *Steaks Unlimited, Inc.*, 623 F.2d at 280.

14. Chief Justice Burger, writing for the Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973), noted, "Nearly half of U.S. daily newspapers, representing some three-fifths daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities." *Id.* at 249 n.13 (quoting Balk, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS, 18 (1973)). *See also* Note, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867 (1972). With information and news becoming homogenized, the smaller and independent newspapers, which often do not subscribe to the wire services of syndicated columnists, take on added independence and importance.

are not substantial enough to outweigh the financial burdens of defending a lawsuit in a distant forum.

Part I of this Note discusses the First Amendment[15] and reviews the concept of personal jurisdiction as set forth in the recent decision of *World-Wide Volkswagen Corp. v. Woodson*.[16] Part II summarizes three ways in which different courts have resolved the jurisdictional dilemma posed by nonresident newspaper defendants in libel actions. The final section presents the author's solution to this jurisdictional dilemma. That section concludes that in libel actions against nonresident newspaper defendants, First Amendment interests should be considered by the court in deciding whether or not it has jurisdiction over such a defendant. Jurisdiction cannot be asserted consistently with due process where it is likely that a newspaper would sever its connection with the state asserting the jurisdiction.

I. Substantive First Amendment Considerations and Personal Jurisdiction

A. An Overview

A brief overview of the importance of First Amendment guarantees illustrates why such considerations should be part of the jurisdictional analysis in an action for defamation against a nonresident press defendant.

The First Amendment safeguards freedom of expression, which has been called an "indispensable condition, of nearly every other form of freedom."[17] Freedom of expression is a means of attaining the truth. As Supreme Court Justice Oliver Wendell Holmes declared, "the best test of truth is the power of thought to get itself accepted in the competition of the market."[18] All views and ideas, even unpopular ones, must

15. While the First Amendment protects expression in all aspects, including expression through religion and association, this Note will limit discussion to the First Amendment as it relates to freedom of expression through the press. The Note further narrows its scope by focusing primarily on newspaper defendants in defamation actions, as opposed to magazine, publishing, or broadcast defendants. For an explanation of the distinction between newspapers and magazines with respect to circulation, see Curtis Publishing Co. v. Golino, 383 F.2d 586, 590 (5th Cir. 1967).

16. 444 U.S. 286 (1980).

17. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

18. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). Justice Holmes was writing of a far different marketplace than that which we have now, and prior to the time when "truth" could be so neatly packaged and sold. *See generally* T. WHITE, THE MAKING OF THE PRESIDENT (1st ed. 1969). For further criticism of the "marketplace of ideas" theory, see L. TRIBE, *supra* note 3, at 577. Despite criticism, the metaphor is still employed. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 584 (1951)

be expressed and given the opportunity to compete with one another, for it is only by that process that truth can and will emerge.

The First Amendment also secures the public's right to receive information and ideas. Enforcing this right insures full, intelligent participation by the public in political decisionmaking. At least one commentator has observed a direct correlation between an uninformed electorate and ill-considered election results that are detrimental to the public good.[19] Unless voters have access to unfettered information, it is not likely that democracy will operate successfully.[20] The First Amendment must protect the communication of information that is necessary for prudent political decisions.

Freedom of expression has been called an end in itself.[21] Every individual, in the development of his personality and potentialities, has the right to form and express beliefs and opinions. Intertwined with that right are the individual's rights "of access to knowledge; to shape his own views; to communicate his needs, preferences and judgments."[22] The First Amendment, therefore, protects intellectual, as

(Douglas, J., dissenting); Herbert v. Lando, 568 F.2d 974, 975 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1978).

19. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).

20. Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 633 (1968). Judge Wright finds Meiklejohn's theory—*i.e.*, that there cannot be an effective democracy without the free flow of information—an appropriate approach to defining the scope of the "public's right to know." *Id.* Meiklejohn's theory, however, is problematic in that one still must determine what is a "political question" and how much of what type of information is necessary for a "sane and objective" judgment. L. TRIBE, *supra* note 3, at 501. Case law may provide guidance. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) (information about drug prices must not be suppressed; it is vital not only to consumer choices in a market system but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered"). A related problem in defining the scope of the public's right to know in terms of political questions is that dissemination of political information costs money, and candidates or groups with more money can more effectively communicate their views. Since the Court in Buckley v. Valeo, 424 U.S. 1 (1976), decided that the First Amendment prohibits limiting campaign *expenditures* (as opposed to campaign *contributions*), a wealthy candidate can disseminate his views more widely than can his opponent on a shoestring budget. *See* TIME, Nov. 15, 1982, at 43-44. Yet a voter who has heard from only one side is not truly informed. For further discussion of the problem of unequal dissemination of information, see Rembar, *For Sale—Freedom of Speech*, THE ATL. MONTHLY, Mar., 1981, at 25, 28-31.

21. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).

22. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5-6 (1966). Laurence Tribe calls this the "emotive role of free expression." L. TRIBE, *supra* note 3, at 578.

well as political, freedom.[23]

The Supreme Court has firmly established that the First Amendment protects "uninhibited, robust and wide-open" expression[24] and further protects the public's right to receive information and ideas.[25] This right to receive information and ideas is the public's "right to know."[26]

The press plays a profoundly important role in securing the public's right to know.[27] Newspapers provide the information concerning the public and business affairs of the nation that is necessary to the most potent of all restraints upon misgovernment—informed public opinion.[28] Newspapers are also the foundation for the freedom of discussion that the Supreme Court has held "must embrace all issues about which information is needed or appropriate to enable the mem-

23. *See* Rembar, *supra* note 20, at 25.

24. New York Times v. Sullivan, 376 U.S. at 270.

25. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).

26. *See generally* L. TRIBE, *supra* note 3, at 674-76. *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (public has a right "to receive suitable access to social, political, aesthetic, moral and other ideas and experiences").

27. It has been said that the press has a "special and constitutionally recognized role . . . in informing and educating the public, offering criticism and providing a forum for discussion and debate," Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979). There has been much debate concerning the constitutional guarantee of a free press and whether or not the press occupies a privileged position with respect to the First Amendment by virtue of its status as the "fourth branch" of government. *See, e.g.*, Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) ("The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches.") *But see* Houchins v. KQED, Inc., 438 U.S. 1, 7 (1978) (holding that the press has no constitutional right of access to government's information superior to that of the public generally); Pell v. Procunier, 417 U.S. 817, 827-28, 30 (1974) (holding that the press enjoys no greater right than the general public to acquire information about prison conditions). *See also*, First Nat'l Bank v. Bellotti, 435 U.S. at 797-98 (Burger, C.J., concurring). For further views on a debate that goes beyond the scope of this note, see Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Speech and Press: A Brief Reply*, 23 U.C.L.A. L. REV. 120 (1975). Whether or not the press is regarded as performing a *special constitutional* role, guaranteeing freedom from undue interference with the acquisition and dispensation of knowledge should be deemed central to the First Amendment. The fact that the press is particularly suited for and committed to this task cannot be ignored.

28. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979).

bers of society to cope with the exigencies of their period."[29]

Our law also places a premium on the individual's right to be free from unjustified harm to his or her reputation. The common law of libel seeks to protect society's interest in protecting individuals from false and defamatory communications.[30] It recognizes the right of the individual to be free from unjustified harm to his or her reputation.[31] Under certain circumstances, however, this law can conflict with the First Amendment's guarantee of unfettered expression; libel laws, therefore, must provide safeguards for the freedom of speech and of the press.[32] In *New York Times v. Sullivan*,[33] the Supreme Court recognized this principle and noted that any rule protecting only "true" statements will have a deterrent effect on expression that is critical of official conduct.[34] The Court in *Sullivan* then prescribed the standard of proof required in an action for defamation by a public official: "[A] public official [is prohibited] from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that

29. Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

30. Under the traditional law of libel, if the words of a publication brought injury to a person's reputation or subjected him to "public ridicule or contempt," an action for libel could be maintained. Absent proof that the statement was true or privileged, damages could be recovered by the plaintiff. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 116, at 801 (4th ed. 1971).

31. The protection of private personality is basic to our concept of the "essential dignity and worth of every human being," and hence to our constitutional system. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The "two-level" theory of the First Amendment supports this concept. It identifies classes of speech and expression not protected by the First Amendment, such as the lewd, the obscene and the profane, libelous speech, and insulting or "fighting" words. These types of speech are not considered protected because they are seen to be nonessential to the exposition of ideas and are of such small social value "that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). There is, of course, always the danger that the class of unprotected speech may expand too far, depending upon who is determining what is "nonessential" or of "small social value." This is evidenced by the current disturbing trend of banning great works of literature from elementary and high school library shelves. *See, e.g.*, THE NEW YORKER, Mar. 22, 1982, at 37.

32. New York Times Co. v. Sullivan, 376 U.S. at 297.

33. 376 U.S. 254 (1964).

34. *Id.* at 279. Even though a critic may believe his comments to be true, and though they may in fact be true, a rule compelling a guarantee of the truthfulness of those comments would result in self-censorship. This is because of the inevitable doubt as to whether or not the truth can be proved in court or because of the fear of expenses that would be incurred in having to do so. *See, e.g.*, Anderson, *Libel and Press Self-Censorship* 53 TEX. L. REV. 422, 424-25, 434-36 (1975) (Court in *Sullivan* recognized the "chilling effect" of the mere threat of, as well as actual imposition of, sanctions for exercising activities protected by the First Amendment). *See also* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965); Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

it was false or with reckless disregard of whether it was false or not."[35]

Although the Court has placed a premium on society's interest in affording the press First Amendment protection, both in its own right and as essential to furthering the public's right to know, it has not abandoned society's interest in protecting the individual from defamatory falsehoods. In the post-*Sullivan* decisions dealing with application of the constitutional law of libel to plaintiffs who could not be classified as "public officials" or "public figures,"[36] the Court has reiterated its commitment to society's interest in protecting the individual in his reputation and privacy.

In the conflict between society's interest in protecting the individual's reputation and privacy and society's interest in unfettered expression,[37] the actual malice standard of *New York Times v. Sullivan* gives newspapers an additional layer of protection from adverse judgments in libel actions by public figures or public officials, since malice is more difficult to prove than mere negligence.[38] This protection, however, may not sufficiently protect First Amendment interests. For instance, not all libel actions are brought by public figures. Also, editors may be overzealous in removing any possible traces of malice from an article, a practice that essentially constitutes censorship.[39] Furthermore, the pos-

35. New York Times Co. v. Sullivan, 376 U.S. at 279-80.

36. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 455-57 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49 (1974); Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

37. *See* Wright, *Defamation Privacy, and the Public's Right to Know: A National Problem and A New Approach*, 46 TEX. L. REV. 630, 633-34 (1968) ("[W]e are *not* here comparing the interest of an *individual* in his privacy or his reputation with the interest of *society* in the free flow of information. To relegate the interests of privacy and freedom from defamation to a single individual while at the same time attaching the right to know to *society* as a whole would be to prejudice the former even before the scales are erected. What we must weigh is *society's* interest in preserving each individual's right to privacy and freedom from defamation against *society's* interest in affording each individual full disclosure and commentary.") (emphasis in original).

38. With this new standard of proof, the Supreme Court essentially has altered a procedural element, *i.e.*, the evidentiary burdens, invoking substantive First Amendment principles in order to insulate the media from state libel laws. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. at 254.

39. A look at the editorial process in the publishing industry provides an example of the inhibiting effect *Sullivan* may have on First Amendment freedoms. See, *e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied*, Hotchner v. Doubleday & Co., 434 U.S. 834 (1977), in which the defendant had written a biography of Ernest Hemingway with uncomplimentary references to the plaintiff, a public figure. Prior to publication, the editor, pursuant to recommendations of the publisher's legal department, suggested that a number of passages be "eliminated or toned down." 551 F.2d at 912. Even though the author "vouched for the statements" in his manuscript, he "accepted the suggested modifications." *Id.* Thus, self-censorship was imposed, despite the court's subsequent conclusion that "[w]here a passage is incapable of independent verification, and where there are no convinc-

sibility of a seven- or eight-figure verdict is not the only threat presented by a potential libel action. The cost of litigation in a distant forum, even if only to the point of summary judgment, is enough to deter a newspaper from circulating its publication in foreign jurisdictions. When a plaintiff brings a defamation action in his or her own state against a nonresident newspaper, the judge sitting in the court of the forum state must first determine whether or not it comports with due process to assert jurisdiction over the newspaper defendant. When the consequence of subjecting a nonresident newspaper defendant to a foreign jurisdiction is likely to be a decision by the defendant newspaper no longer to publish in that state, courts should consider that First Amendment issue in the jurisdictional analysis.

In determining whether or not a court has personal jurisdiction, the ultimate inquiry under *International Shoe*[40] and *World-Wide Volkswagen*[41] is whether or not it is reasonable and fair to assert jurisdiction over that defendant. In *International Shoe*, the Supreme Court established that jurisdictional theory is based on a constitutional doctrine of fundamental fairness:[42]

> [D]ue 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 have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[43]

The contacts with the forum state must be such "as make it reasonable, in the context of our federal system of government, to require [defense of] the particular suit which is brought there."[44]

Hanson v. Denckla[45] refined the *International Shoe* doctrine. In *Hanson*, the Supreme Court emphasized the relationship between the nonresident defendant and the forum state, and held that it was essential in each case that there be some act by which the defendant purposefully availed himself of the privilege of conducting activities within

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ing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth." *Id.* at 914.

40. International Shoe v. Washington, 326 U.S. 310 (1945).

41. 444 U.S. 286 (1980).

42. Although the Court in *International Shoe* spoke only of "fair play and substantial justice," 326 U.S. at 314, Professor Kurland has referred to these guidelines as the constitutional doctrine of fundamental fairness. *See* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 590, 592 (1958).

43. 326 U.S. at 316.

44. *Id.* at 317.

45. 357 U.S. 235 (1958).

the forum state.[46]

Courts in later decisions determined the type and number of contacts necessary to comport with the due process requirement of fair play and substantial justice. If a corporation did "substantial" or "continuous and systematic" business in the forum, if it entered into a contract there,[47] or if it sent a product into the "stream of commerce" thus making it foreseeable that the product would enter the forum,[48] it was likely that the corporation would be subject to jurisdiction in that state.[49] If a nonresident defendant's activities were neither "substantial" nor "continuous and systematic," the existence of jurisdiction depended on the nature and quality of those of the defendant's contacts that were related to the cause of action.[50]

The recent decision in *World-Wide Volkswagen Corp. v. Woodson*[51] provides a comprehensive statement of the Supreme Court's current position regarding personal jurisdiction. In that case, a products liability suit was brought in Oklahoma against the manufacturer, importer, regional distributor, and retail dealer of an allegedly defective automobile. None of the defendants were residents of Oklahoma. The distributor, World-Wide Volkswagen, and the dealer unsuccessfully challenged the Oklahoma court's assertion of jurisdiction and then unsuccessfully sought a writ of prohibition from the state supreme court to restrain the trial court judge from exercising jurisdiction over them.[52]

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46. *Id.* at 253.

47. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

48. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 571, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

49. Two students of jurisdiction have proposed that the expansion of state courts' jurisdiction was the result of states' interests in protecting their citizens from the transgressions of foreign corporations and other dangers of modern society, such as automobiles and insurance companies. *See* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967). *See also* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (Court found sufficient contacts to hold that California's courts had jurisdiction over Texas life insurance company that mailed reinsurance certificate and premium notice from Texas on only one policy insuring California resident); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Note, *The Growth of the* International Shoe *Doctrine*, 16 U. CHI. L. REV. 523 (1949).

50. International Shoe Co. v. Washington, 326 U.S. at 317.

51. 444 U.S. 286 (1980).

52. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978). As two justices noted, given the facts of the case and the interrelationships among manufacturers, distributors, dealers, and service facilities of today's automobile industry, the Oklahoma court's assertion of jurisdiction was not a farfetched, unusual, or unjust result. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 313-19 (Marshall and Blackmun, JJ., dissenting).

The United States Supreme Court granted certiorari and reversed. The Court found that the constitutional requirement of "minimum contacts" had two component functions: to protect a defendant from "the burdens of litigating in a distant or inconvenient forum," and to prevent states, "through their courts [from reaching] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[53] With respect to the latter, the Court stated that the due process clause does not permit a state to make a binding personal judgment against an individual or corporate defendant with which the state has "no contacts, ties or relations."[54] In fact, in these circumstances, the due process clause, acting as an instrument of federalism, may divest the forum state of its power to render a valid judgment. This is true regardless of whether the defendant would be inconvenienced by being forced to litigate there, whether the forum had a strong interest in applying its law to the controversy, or whether the forum would in fact be the most convenient location for litigation.[55]

The Court did not discard the other elements of the jurisdictional formula, such as the forum's interest in adjudicating the dispute,[56] the plaintiff's interest in obtaining convenient and effective relief,[57] the interstate judicial system's interest in obtaining efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.[58] Still, the Court's main con-

53. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292.

54. *Id.* at 294 (quoting International Shoe Co. v. Washington, 326 U.S. at 319). At least one commentator feels that after *World-Wide Volkswagen*, the jurisdictional question is not one that refers to a multitude of factors and considers the administration of justice in all its aspects, but rather one that looks only to the relationship between the forum and the individual defendant. *See* Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 20 (1980). *See also* Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 875-76 (1980). Perhaps this apparent pro-defendant bias is a reaction to the prior movement of "permitting the plaintiff to insist that the defendant come to him" in situations providing a basis for doing so. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128, 1167-73 (1966). *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 571, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). This pro-defendant approach seems consistent with the Burger Court's general concern for state sovereignty. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976). *See also* Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407, 422 (1980).

55. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 294.

56. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

57. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 92 (1978).

58. *Id.* at 98. *Kulko* involved a child custody action between a plaintiff residing in California and a defendant residing in New York. In its decision, the Court considered California's participation in the Revised Uniform Reciprocal Enforcement of Support Act

cern seemed to be the nonresident defendant:[59] It held that the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into a forum state, but that the defendant's conduct *and* connection with a forum state "are such that he should reasonably anticipate being haled into court there."[60]

The Court opined that this brand of foreseeability "gives a degree of predictability to the legal system" that allows defendants to structure their conduct with some assurance as to where that conduct will or will not render them liable to suit.[61] A corporation that is purposefully availing itself of "the privilege of conducting activities within the forum State,"[62] "has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."[63]

Application of the jurisdictional standards set forth in *World-Wide Volkswagen* may not provide sufficient protection against the "chilling effect" that a libel action against a nonresident newspaper has on the public's right to know. While it is true that the Court's main concern in *World-Wide Volkswagen* was the defendant's conduct and connection with the forum state,[64] the decision also announces that due process is satisfied if the defendant's conduct and connection with the forum are such that it is foreseeable that the defendant will be haled into the forum state's courts.[65] Under this formula, a libel plaintiff successfully could argue that the publisher of any controversial article had every reason to expect a lawsuit in the forum state of the citizen about whom

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of 1968. CAL. CIV. PROC. CODE §§ 1650-1656 (West 1982). The Act permits a California resident claiming support from a nonresident to file a petition for support in California and to have the merits adjudicated in the alleged nonresident obligor's state of residence, without either party having to leave his or her own state. *See* Kulko v. Superior Court, 436 U.S. at 98-100. The fact that the Court took the effect of the Act into account may remove *Kulko* from the mainstream of jurisdictional cases. At the very least, the decision is an instance in which the Supreme Court did not make a jurisdictional decision in a vacuum, but looked to the nature of the action, the complexity of the issues, and the substantive policies inherent in child custody and support matters, and considered the implication of those interests in making its decision.

59. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292, 295-97.

60. *Id.* at 297.

61. *Id.* Query how "predictable" *World-Wide Volkswagen's* definition of foreseeability will be. In that very case, three justices thought World-Wide Volkswagen's conduct and connection with Oklahoma were such that it should have been subject to jurisdiction there. 444 U.S. at 299-319 (Brennan, Marshall, and Blackmun, JJ., dissenting).

62. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

63. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297.

64. *See id.* at 294.

65. *Id.* at 292, 295-97.

the article was written, or to which the article was directed, and that therefore, jurisdiction could be asserted consistently with due process.[66] A plaintiff also could argue that a nonresident newspaper with subscribers in the forum, while not doing "continuous and systematic" business in the forum, did have sufficient contacts related to the libel action such that jurisdiction could be asserted.

Where the nonresident defendant is a newspaper, the assertion of jurisdiction may concurrently impinge upon the defendant's and the public's First Amendment rights. The mere threat of the assertion of judicial power over a nonresident press defendant in a libel action may come dangerously close to violating the spirit, if not the letter, of the First Amendment's prohibition on chilling free expression if, as a result, the newspaper decides to sever its connection with that state or resorts to self-censorship.[67] In order to prevent the probable chilling effect on newspapers if the standard jurisdictional formula is applied, the substantive First Amendment implications of asserting jurisdiction over a nonresident newspaper defendant should be considered in some manner. The question is whether the due process analysis should include the First Amendment by limiting a court's jurisdiction over a newspaper defendant if it would violate First Amendment guarantees, or, whether the First Amendment implications of the assertion of jurisdiction should be considered separately by a court, not in connection with the existence of its power, but rather with its decision whether to exercise or decline to exercise that power.

B. Examples of First Amendment Considerations Affecting Procedural Standards

The position that courts should employ substantive considerations to either limit or extend *in personam* jurisdiction is not without precedent. The expansion of *in personam* jurisdiction beyond the confines of the territorial power theory[68] arguably was premised on states' substantive interests in protecting their citizens from the transgressions of foreign corporations and in compensating automobile accident victims.[69] Similarly, the expansion of state court jurisdiction during the years between *International Shoe* and *Shaffer v. Heitner* was in large part a

66. *See* notes 160-65 and accompanying text *infra*.

67. For a case supporting this proposition, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

68. In Pennoyer v. Neff, 95 U.S. 714 (1877), the Supreme Court held that a state's sovereign power, and hence the jurisdiction of its courts, was confined by the territorial boundaries of the state. *Id.* at 722.

69. *See* notes 47-50 and accompanying text *supra*.

result of states' placing great weight on their interest in providing local plaintiffs with a forum for the redress of injuries. The rationale for such expansion of state court jurisdiction over nonresident defendants is that "certain activities . . . so justifiably invoke protective interests of the state that only minimal contacts are necessary. Among such activities are the operation of a motor vehicle, dealing in securities and dealing in insurance."[70] For example, in *McGee v. International Life Insurance Co.*,[71] the United States Supreme Court upheld California's assertion of jurisdiction over a Texas life insurance company, finding sufficient minimum contacts between the company and California in a situation where the company had mailed a reinsurance certificate and premium notice on only one policy insuring a California resident.

If courts may *extend* their jurisdictional reach in certain kinds of cases based on substantive policy considerations and find jurisdiction where there are relatively few contacts, it seems logical that they may also *limit* their jurisdictional reach based on different substantive constitutional policy considerations and require a greater quantum of contacts in certain cases before finding that the jurisdictional minimum has been attained. Indeed, *World-Wide Volkswagen*, which counsels a less expansive approach to long-arm jurisdiction, supports this logic for it is in part based upon the substantive policy concerns of federalism and respect for states' rights as evidenced by its respect for their boundaries.[72]

It has been stated that there is "a discernable hierarchy among the many interests and values which may be asserted in favor of a decision to exercise, or to refrain from exercising, the judicial power."[73] Should the First Amendment be part of the hierarchy of values and interests examined by courts in deciding whether to assert jurisdiction over a nonresident press defendant? More specifically, should a court refrain from exercising jurisdiction over such a defendant unless contacts with the forum are so great as to outweigh the risk that the prospect of litigation might limit the newspaper defendant's circulation and thus deprive

70. Hunt v. Nevada State Bank, 285 Minn. 77, 111 n.32, 172 N.W.2d 292, 312 n.32 (1969) (citations omitted). For a similar discussion, see, *e.g.*, Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir. 1977).

71. 335 U.S. 220 (1957).

72. 444 U.S. at 292-94. The dissenting justices in *World-Wide Volkswagen* persuasively argued that jurisdiction could have been asserted by Oklahoma with no violation of due process. *Id.* at 299-319. The implication is that federalism concerns led the majority to confine the powers of Oklahoma courts within the state's borders.

73. Carrington & Martin, *supra* note 49, at 231.

the public of its First Amendment "right to know"?[74]

Courts have often invoked the First Amendment as the rationale for altering traditional rules of procedure.[75] For example, in *New York Times v. Sullivan*,[76] the Supreme Court applied substantive constitutional law to effect a change in procedure in order to safeguard the First Amendment guarantee of a free press. The Court did so by imposing a more exacting standard of proof on public officials who institute libel actions.[77] The *Sullivan* case also established the procedure of independent examination of the record upon appeal in libel actions.[78]

The Supreme Court later expanded the constitutional safeguards of *Sullivan* to libel actions brought by "public figure" plaintiffs.[79] Further changes in the evidentiary standard for libel actions have been effected under the auspices of the First Amendment. For example, trial courts have been more willing in the area of libel than elsewhere to grant summary judgment in favor of the defendant, because the mere pendency of litigation by a public official or public figure "may be as chilling to the exercise of First Amendment freedoms as fear of the outcome itself."[80] This is particularly true when the defendant is an advocate of an unpopular cause.

The First Amendment has impacted other areas of procedure as well. It has provided the impetus for the Supreme Court to relax the normal procedural rule of standing where a danger to freedom of expression is threatened by an overbroad statute.[81] The First Amend-

74. Competing with the state's interest in preserving for its citizens the right to know is the state's interest in providing citizens injured by defamation with a forum for redress.

75. *See, e.g.*, Herbert v. Lando, 568 F.2d 974, 976-80 (1977).

76. 376 U.S. 254 (1964).

77. *See* notes 30-35 and accompanying text *supra*.

78. 376 U.S. at 297 n.30.

79. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

80. *See* Herbert v. Lando, 568 F.2d 974, 979 n.11 (2d Cir. 1977), *rev'd*, 441 U.S. 155 (1979). Recently, the Supreme Court has expressed disapproval of this practice of liberally granting media defendants summary judgment motions in public figure libel actions. Hutchinson v. Proxmire, 443 U.S. 111 (1979). Although declining to rule specifically on the issue, the Court expressed its doubt about the so-called "rule" of summary judgment on the resolution of the actual malice question in libel actions against media defendants. *Id.* at 120 n.9. As one commentator has noted, this indication of the Court's willingness to compel media defendants to withstand costly jury trials in cases where a trial court might otherwise find no genuine issue of fact, and where there is detriment to First Amendment interests, is disturbing. Note, *Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media*, 48 U. CINN. L. REV. 1027, 1030 (1979). If indeed the Court is preparing to circumscribe the liberal summary judgment policy in libel actions, that is all the more reason to examine the First Amendment at the jurisdictional stage.

81. *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

ment also has special relevance in federal removal jurisdiction,[82] where it cuts against the rule that resolves all doubts in favor of a remand to the local state court forum. The rationale is that in a defamation case arising out of criticism of local officials, the defendant might be subject to the less objective judgment of local juries.[83] Recently, judicial proceedings have been televised, indicating that the First Amendment's guarantee of freedom of expression has been given preference over the Sixth Amendment's guarantee of a fair trial.[84]

These examples undercut the position that substantive considerations have no place in a procedural analysis. They support the proposition that the First Amendment should be part of the hierarchy of values and interests examined by courts in deciding whether to assert jurisdiction over a nonresident newspaper defendant,[85] particularly when there is a possibility of injury to a constitutional interest.

In the cases that have grappled with the issue of whether or not to assert jurisdiction over nonresident press defendants in defamation actions, courts either have acknowledged their consideration of the First Amendment in assessing jurisdiction,[86] or, although disclaiming that the First Amendment gives press defendants special protection, have often adopted tests and considered factors unique to the press industry in determining whether or not to exercise jurisdiction over newspaper defendants.[87]

II. Three Approaches That Courts Have Applied

A. First Amendment Factors in the Due Process Determination

The case that most adamantly declares that jurisdiction cannot be asserted consistently with due process unless it is determined that no

82. 28 U.S.C. § 1441(c) (1976) provides that otherwise non-removable claims may be adjudicated in a federal district court when joined with a removable claim.

83. *See, e.g.*, Lewis v. Time, Inc. 83 F.R.D. 455 (1979).

84. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976). California presently allows trials and judicial proceedings to be televised on an experimental basis.

85. The examples also indicate that First Amendment interests are located at the top of the hierarchy. *See* note 101 and accompanying text *infra*; note 113 *infra*.

86. *See* notes 91-141 and accompanying text *infra*.

87. The latter approach may demonstrate the courts' implicit consideration of free speech concerns. *See* Carrington & Martin, *supra* note 49, at 243. The authors state that failure to explicitly recognize the impact of a decision on substantive interests, however, tends to hinder understanding, promotes the use of fiction, and complicates the task of the lawyer trying to assist a court in directly confronting the issues. The result may be more confusion and intellectual dishonesty than could possibly result from the efforts of courts to state candidly the ways in which jurisdiction over media cases differs from other cases they consider).

First Amendment interests will be unduly circumscribed is *New York Times Co. v. Connor*.[88] In that case, the Fifth Circuit reversed an Alabama district court's judgment against the *New York Times* ("*Times*") in a libel action brought by Eugene "Bull" Connor, Police Commissioner of Birmingham, Alabama, on the grounds that the district court did not have jurisdiction over the nonresident *Times*.[89] The circuit court boldly declared that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."[90]

The Fifth Circuit came to this conclusion after examining the contacts between the *Times* and Alabama and finding them to be minimal. The *Times* was incorporated and published in New York and maintained no offices, agents, or employees in Alabama. Alabama advertising accounted for only a minute fraction of one percent of the total advertising revenue. The average daily circulation in Alabama was about 395 copies, compared with a total average daily circulation of 659,000. The average Sunday circulation in Alabama was about 2,455 copies, compared with a total Sunday circulation of over one million. Newspapers were mailed from New York directly to individual subscribers, wholesalers, and retailers. Finally, the reporter who had been assigned the story that was the subject of the action spent only five days in Alabama.[91]

The court in *Connor* then looked to *Buckley v. New York Times Co.*,[92] an earlier Fifth Circuit decision concerning a libel action against a nonresident newspaper, and found that the contacts were "virtually

88. 365 F.2d 567 (5th Cir. 1966).

89. *Id.* at 571. On appeal, the *Times* argued both that its subjection to jurisdiction in Alabama violated due process and the First Amendment, and that the jury's finding of "actual malice" was not supported by the evidence. *Id.* at 569. The circuit court also found in favor of the *Times* on the second ground after an extensive discussion of the merits. *Id.* at 573-77. The dissent, however, noted that because the court had already found insufficient minimum contacts, this discussion was "frank dictum." *Id.* at 582 (Lynne, J., dissenting). Although this dictum did not affect the conclusion that the district court lacked jurisdiction, it is unclear why the appellate court chose to rule on the merits. Its stated reasons for considering the merits were the facts that the parties had been before it three times on the same matter and that *Buckley v. New York Times Co.* had been criticized. *Id.* at 573. Perhaps Judge Thornberry, the author of *Connor*, was merely writing an advisory opinion, or perhaps he was not certain of his rule requiring greater contacts before jurisdiction can be asserted consistently with the First Amendment. Thus, he bolstered his decision by pointing out that the plaintiff also lost on the merits.

90. *Id.* at 572.

91. *Id.* at 570.

92. 338 F.2d 470 (5th Cir. 1964).

identical"[93] in the two cases. *Connor* followed *Buckley* in holding that mere circulation of a periodical through the mails to subscribers and independent distributors, sporadic newsgathering activities by reporters on special assignment, and the solicitation of a small amount of advertising do not constitute the continuous and systematic contacts necessary to satisfy the constitutional conditions for the assertion of jurisdiction.[94] This aspect of the *Connor* decision is not particularly controversial. Nonetheless, in reconciling its conclusion with another recent Fifth Circuit decision, *Elkhart Engineering Corp. v. Dornier Werke*,[95] the court was forced to make a logical leap.

The *Elkhart* court asserted jurisdiction over a nonresident corporation in a suit for damages for tortious injury arising out of the corporation's activity in the forum, even though only a single transaction was involved. Whether or not the activity was dangerous was not considered by the court in the jurisdictional analysis of *Elkhart*. The court in *Connor* distinguished *Elkhart*, finding that acts by the *Times*, which certainly constituted more than a single transaction, did not amount to sufficient minimum contacts. The *Times*' acts were found to be insufficient because First Amendment considerations surrounding libel actions require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity.[96]

At first glance, it seems possible that the principle and rationale of *Connor* were applied to the wrong case. For instance, one can argue that it is doubtful that publications such as the *New York Times* would cease printing controversial articles or distributing nationwide because of the threat of expensive libel actions in distant forums. On the other hand, when advertising and sales revenues from a state are only a minute fraction of total revenues (as little as 46/1000 of one percent in

93. 365 F.2d at 570.

94. *Id.* The court in *Connor* declined to distinguish *Buckley* on the grounds that the disputed article in *Buckley* came from an Associated Press ("AP") dispatch rather than a *Times* reporter, finding instead that AP, an association of member newspapers, was as much an agent of the *Times* as was one of its own staff. *Id.* at 570-71. Although this may be theoretically correct, as a practical matter there does seem to be a distinction between a newspaper's sending a reporter to cover a story in a state and its purchasing an AP article about events in a state. *See* Comment, *Long-Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 COLUM. L. REV. 342, 357 n.90 (1967).

95. 343 F.2d 861, 868 (5th Cir. 1965). In *Elkhart*, a Wisconsin corporation sued in Alabama, though it did no business in Alabama, for damages to its plane—purchased from the defendant, a German corporation—which had crashed in Alabama during a demonstration flight performed by an employee of the defendant.

96. 365 F.2d at 572.

Connor),[97] publishers of the *New York Times* and newspapers similar in size may indeed decide that the risk of defending libel actions is not offset by the benefits derived from circulation, and cease distributing in such forums. Judge Thornberry also was concerned with the spector of a newspaper defendant with only a single copy circulating within a state being subjected to jurisdiction in libel actions, where the risk of large judgments rendered by local juries unsympathetic to the out-of-state newspaper's alternative views would cause that newspaper to cease distributing in the forum, and perhaps other forums as well.[98]

A round of criticism followed the *Connor* decision.[99] For the most part, the outcry stemmed from the mistaken belief that *Connor's* principle grants immunity to nonresident press defendants in all actions for defamation and unfairly limits plaintiffs' choice of forum.[100] *Connor* was never intended, however, to set forth a rule stating that "because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication."[101]

97. *Id.* at 570.

98. *Id.* at 572. It is unlikely that the *New York Times* defendant in *Connor* would have only a single copy circulating in almost any given jurisdiction. Judge Thornberry's concern for the defendant with one lone circulating copy, while valid, was dictum.

99. *See, e.g.*, Buckley v. New York Post Corp., 373 F.2d 175, 182-84 (2d Cir. 1967); Comment, *supra* note 94; Comment, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967); Note, *Jurisdiction—Exercise of Jurisdiction Over A Newspaper Vacated on the Basis of the First Amendment*, 35 FORDHAM L. REV. 726 (1967). *But see* Carrington & Martin, *supra* note 49, at 227. Recent commentary has been more favorable. *See, e.g.*, Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COMM. L.J. 19 (1980); Casenote, *Jurisdiction—Long-Arm Statute—Slanderous Statement Made Outside Forum State by Nonresident Causing Consequences Within Forum State As Basis for Jurisdiction Under Michigan Long-Arm Statute*, 26 WAYNE L. REV. 263 (1979).

100. *See, e.g.*, Comment, *supra* note 94, at 343; Comment, *supra* note 99, at 447.

101. Curtis Publishing Co. v. Golino, 383 F.2d 586, 592 n.13 (5th Cir. 1967) ("*Connor* does not categorically protect all newspapers whenever or wherever sued outside of the state of publication."). The United States Supreme Court has not specifically ruled on the validity of *Connor*; however, in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), Justice Harlan cited *Connor* with approval.

In the *Butts* case, petitioner Butts argued that the defendant waived its right to assert the constitutional defense of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in the Supreme Court because it had not raised the defense during trial. Trial was completed before *Sullivan* came down, but Butts asserted (1) "that the state of the law at the time of trial was such that" Curtis should have seen "the handwriting on the wall," and (2) that because "some of Curtis' trial attorneys were involved in the *Sullivan* litigation [they] should have been especially alert to constitutional considerations." Curtis Publishing Co. v. Butts, 388 U.S. 130, 143-44 (1967). The Supreme Court rejected the waiver argument. "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [*i.e.*, the freedom of expression protected by the First Amendment], we are unwilling to find waiver in circumstances which fall short of being clear and compelling." 388 U.S. at 145. The reference is to the portion of the *Connor* opinion that states that First Amendment considerations surrounding the law of libel may require greater contacts for the assertion of

This was made clear the year following *Connor* in *Curtis Publishing Co. v. Golino*,[102] another opinion written by Judge Thornberry.

In *Golino*, a libel action was brought in Louisiana against the nonresident publisher of the *Saturday Evening Post*. In asserting jurisdiction over the defendant, the court in *Golino* distinguished *Connor* by noting the differing business activities, purposes, and motivations of publishers of newspapers and publishers of the *Saturday Evening Post*, a nationwide magazine. The court noted that most newspapers are local in nature, while the primary aim of the defendant's magazine was to capture a nationwide market.[103]

The court explained the local character of newspapers by noting the difference between the "primary circulation" in the vicinity of a newspaper's publication and the "passive" secondary circulation beyond the vicinity of publication. The latter may well be welcomed by the newspaper, but it is not critical to the newspaper's continued existence. This secondary circulation is a product of the publication's excellence rather than of a business effort to actively solicit throughout the nation.[104] In contrast to a magazine's solicitation, a newspaper's passive, secondary circulation should not be considered "purposeful availment."

Having carefully considered the First Amendment issues at stake, the court found that the publisher of a magazine directed to a nationwide audience had contacts with the forum state that were more than sufficient to give rise to jurisdiction. The court reasoned that the expense of defending periodic lawsuits there or in other distant forums would not chill the publisher's pursuit of the widest possible circulation.[105] Hence, the court implicitly held that there was no unconstitu-

jurisdiction than are necessary in other types of cases. Apparently, the Supreme Court agrees with the notion that when First Amendment interests are involved, procedural standards may be heightened in order to provide maximum protection for such interests.

102. 383 F.2d 586 (5th Cir. 1967).

103. *Id.* at 590. A newspaper such as the *Wall Street Journal* is perhaps in a hybrid category, requiring still another jurisdictional analysis based upon its methods of circulation and solicitation and the economics of its business practices. *Connor* did not intend to draw a bright line between newspapers and national magazines. *Id.* at 592 n.13.

104. *Id.* at 586. Secondary circulation, although perhaps not critical to the newspaper's *existence*, is critical to the maintenance of the broad spectrum of ideas, which is the foundation of robust public debate and a fully informed polity. A decision by a newspaper to stop its secondary circulation because of the strong possibility of lawsuits in a distant forum would have an impermissible chilling effect on free expression. *Id.* at 592.

105. "We are convinced that suits such as the present one, unless assumed to occur in unrealistically large numbers, will in no way inhibit the zeal with which Curtis distributes its ideas." *Id.* The court noted that its decision was not controlling in the case of a smaller magazine publisher that intends a primarily local market. *Id.* at 592 n.13.

tional abridgement of free expression inherent in its exercise of jurisdiction.[106]

The *Golino* case clarifies the rule stated by the court in *Connor*. The court in *Golino* first reasoned that First Amendment considerations are "*factor[s]* relevant to a determination of the jurisdictional question,"[107] and then asserted jurisdiction over Curtis Publishing Co. ("Curtis") because it was convinced the suit would have no inhibiting effects on Curtis' dissemination of ideas.[108] *Golino* thus indicates that First Amendment considerations are not the overriding jurisdictional factor in libel actions against nonresident newspapers, but are to be considered with other relevant factors. The First Amendment does require, however, that the defendant's contacts with the forum be sufficient to overcome any threat to the public's right to know. Thus, a newspaper defendant may have to have greater contacts with the forum than a products liability defendant before jurisdiction can be asserted over it without violating due process.

Golino's assurance that *Connor* was not intended to grant immunity to all nonresident newspapers sued for libel was borne out in later cases applying the principles set forth in *Connor* and refined in *Golino*. Two relatively recent Fifth Circuit cases, *Edwards v. Associated Press*[109] and *Rebozo v. Washington Post Co.*,[110] demonstrate that even when the First Amendment is a factor in the jurisdictional equation, courts may still find the defendant's activities in the forum sufficient to maintain jurisdiction in accordance with the First Amendment.

In *Edwards*, the court considered the following facts: Associated Press (AP) maintained five correspondents and a maintenance employee in the forum state of Mississippi; the employees occupied an office located in that state; and, most significantly, the news report upon which plaintiffs' libel action was predicated was aimed exclusively at Mississippi.[111]

In asserting jurisdiction, the court focused on the defendant's intent to become involved with the forum state. This intent was indicated by the specific geographic target of the subject news report.[112] The court noted that this specificity also gives the newspaper some indica-

106. *Id.* at 592, 594.
107. *Id.* at 592 (emphasis added).
108. *Id.* at 586.
109. 512 F.2d 258 (5th Cir. 1975).
110. 515 F.2d 1208 (5th Cir. 1975).
111. Edwards v. Associated Press, 512 F.2d at 267.
112. *Id.*

tion that it might be called into that forum to defend a suit.[113] More importantly, the court noted that AP was able to apportion the costs of defending defamation suits among its members, thus diminishing the risk that the costs of litigation would deter AP from distributing news in distant forums.[114] The court in *Edwards* justified its assertion of jurisdiction by assuring itself that a chilling effect was unlikely.[115]

In *Rebozo v. Washington Post Co.*, even the defendant admitted its contacts with the forum were substantial.[116] The alleged libel was printed in a year during which the *Washington Post* ("*Post*") derived $42,000 in advertising revenues from Florida-related advertisements. Additionally, during that year reporters from the *Post* spent 288 days in Florida and produced over 140 published articles, and the news service in which the Washington Post Company ("Post Company") was a joint venturer derived almost $90,000 in revenue from Florida.[117] The court considered whether or not the extent of the Post Company's activities in Florida were sufficient to "ameliorate the fear that the prospect of litigation might limit the circulation of information to which the public is entitled."[118] The court concluded that the quantum of the defendant's contacts made it doubtful that circulation would be limited by the threat of defending lawsuits in the distant forum.[119]

Similarly, a Texas district court made the First Amendment part of its jurisdictional analysis in *McBride v. Owens*,[120] a defamation action against the *Los Angeles Times*, three smaller out-of-state newspapers,[121] and two syndicated columnists. The court echoed *Rebozo* and inquired as to whether or not "the prospect of litigation might limit the

113. *Id.* at n.36. This conclusion raises First Amendment problems. If a significant factor weighing in favor of a state's assertion of jurisdiction over a nonresident newspaper defendant is that an allegedly defamatory story was aimed at a particular locale, foreign newspapers will become reluctant to distribute articles in a distant forum that are exclusively aimed at that forum. This will result in the citizens of that forum being deprived of perhaps the only alternative, controversial, commentary regarding persons and events in such a forum.

114. *Id.* at 268 n.41.

115. *Golino's* rationale was similar. *See* notes 105-09 and accompanying text *supra*.

116. 515 F.2d 1208, 1214 (5th Cir. 1975).

117. *Id.* at 1210, 1215.

118. *Id.* at 1215.

119. The court also spent some time discussing the Post Company's other enterprises, such as Newsweek, Inc. and Post-Newsweek Stations, Florida, Inc., both wholly owned subsidiaries of the Post Company. *Id.* at 1210-11. The court thus made it clear that the Post Company was significantly present in Florida, as well as able to afford the costs of defending a lawsuit there.

120. 454 F. Supp. 731 (S.D. Tex. 1978).

121. The smaller papers are the *Denver Post*, the *Orlando Sentinel Star*, and the *Long Island Press*.

circulation of information to which the public is entitled."[122]

With respect to two of the smaller newspaper defendants, the *Denver Post* and the *Sentinel Star*, the court found that, given their minimal amount of circulation in Texas, the answer to the above inquiry was affirmative. The court was "compelled," under *Connor* and *Buckley v. New York Times Co.*, to grant defendants' their motions to dismiss, despite the fact that their sending newspapers to subscribers or newstands in Texas constituted a contact resulting from an affirmative and voluntary act.[123]

The court did not dismiss the Los Angeles Times Syndicate ("Syndicate"). Three bases for jurisdiction over the Syndicate were advanced. First, the Syndicate's sale of the allegedly libelous articles to publishers in Texas was found to be analogous to the injection by a manufacturer of a part into the stream of commerce such that shipment into the forum is reasonably foreseeable. Jurisdiction was based on the single, foreseeable tortious act of injecting a libel into the forum.[124] Second, the Syndicate's agreement to forward the columnist defendants' articles to Texas was found sufficient to sustain jurisdiction.[125] Third, the extent of the Syndicate's activities was found to negate any chilling effect the litigation might have.[126]

Finally, the court in *McBride* likened the syndicated columnist defendants to a magazine defendant that actively seeks a nationwide audience[127] and found that not only did the columnists have sufficient contacts with Texas, but that the "pecuniary benefits derived from national syndication greatly [lessened] any chilling effect caused by the

122. McBride v. Owens, 454 F. Supp. at 735-36.

123. *Id.* at 735-36. The court did not discuss the *Long Island Press*, nor did it indicate whether or not it had been dismissed.

124. *Id.* For discussion of jurisdiction over a manufacturer in a cause of action arising from a single tortious act within the forum, see generally Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

125. McBride v. Owens, 454 F. Supp. at 737.

126. *Id. See also* Curtis Publishing Co. v. Golino, 383 F.2d 586, 590 (5th Cir. 1967). The district court in *McBride* did not make clear whether these are concurrent or alternative bases of jurisdiction when First Amendment rights are implicated. It is also unclear whether the court meant that the Syndicate's activities *in general* were extensive enough to ameliorate the fear that possible litigation would limit circulation, or that its activities *in Texas* were extensive enough. Provided there are sufficient contacts with the forum to satisfy *World-Wide Volkswagen v. Woodson's* standards, it should not matter whether the other activities of the defendant that provide enough economic benefits to reduce the risk of the defendant ceasing circulation in the forum occur in the forum or elsewhere. The significant point is that the possibility of a chilling effect was in fact considered by the court in *McBride* and jurisdiction asserted only upon concluding there would be no such effect.

127. McBride v. Owens, 454 F. Supp. at 737.

prospect of litigation."[128]

Connor and the cases following its directive illustrate that courts can protect First Amendment guarantees without creating an unwieldy jurisdictional formula and without cloaking the press with jurisdictional immunity from libel actions. This is accomplished by examining the extent of a nonresident newspaper defendant's activities in the forum in connection with the effect a defamation lawsuit might have on future circulation in the forum. These cases conclude that jurisdiction cannot be asserted consistently with due process, unless the nature or extent of the defendant's activities negate the possibility of a chilling effect on future distribution.

B. First Amendment Considerations Affecting *Forum Non Conveniens*

A second approach to the problem of asserting jurisdiction over a nonresident newspaper defendant is to focus on a court's discretionary exercise of jurisdiction rather than on its power to assert jurisdiction. Under this approach, which was developed by the Second Circuit Court of Appeals in *Buckley v. New York Post Corp.*,[129] a court may have the power to assert jurisdiction, but may decline to do so because of its belief that the forum is not convenient.

William F. Buckley, Jr. brought a defamation action in Connecticut against the New York Post Corp., a Delaware corporation whose principal place of business is in New York. The Second Circuit found that inflicting harm within a state appeared to meet the jurisdictional requirements of *Hanson v. Denckla*,[130] but did not assert jurisdiction on this ground. Instead, the First Amendment implications were examined by the court.

The court in *Buckley* acknowledged the threat that libel actions against newspapers pose to the public's right to receive information, but chose not to follow *Connor*, explaining that it was likely the substantive principles of *New York Times v. Sullivan* provided sufficient protection for the press.[131] Nevertheless, the Second Circuit went on to fashion a procedural rule that was a means to the substantive end of protecting newspaper defendants from burdensome suits. This ap-

128. *Id.*

129. 373 F.2d 175 (2d Cir. 1967).

130. *Id.* at 181. *See* notes 45-46 and accompanying text *supra*.

131. Buckley v. New York Post Corp., 373 F.2d at 182-83. *Buckley v. New York Post Corp.* was, of course, decided before the Supreme Court extended *Sullivan* to public figure plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *Buckley*, however, correctly predicted that *Sullivan* would be extended at least to "persons who have projected themselves into public controversy." Buckley v. New York Post Corp., 373 F.2d at 182.

proach may indicate the court's doubt that the actual malice standard of *Sullivan* was sufficiently protective. Judge Friendly, writing for the court, proposed that the First Amendment not be considered during the court's determination of whether it has jurisdiction over a defendant, but rather, that judges decide whether it would be consistent with the guarantees and policy of the First Amendment to *exercise* jurisdiction over a media defendant in a particular case.[132] In other words, "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters."[133]

Applying this principle to the facts in *Buckley*, Judge Friendly found nothing in the record to indicate that the *New York Post* ("*Post*") would forego circulation in Connecticut because of the danger of a plaintiff's verdict in a libel action before Connecticut rather than New York jurors.[134] Judge Friendly also noted that in many respects, "the southwestern corner of Connecticut and New York City, although divided by a state boundary, are economically and intellectually one."[135] The court concluded that to hold the existence of a state border as permitting the *Post* to invoke the First Amendment as a bar to having to defend a libel suit by a Connecticut citizen would be to "substitute formalism for the *reality that should be requisite*"[136] before such a First Amendment protection is afforded.

Unfortunately, the court did not detail what sort of "reality" must exist before the First Amendment would operate to preclude a state's exercise of jurisdiction over a nonresident newspaper defendant. Ear-

132. *Buckley*, 373 F.2d at 182.

133. *Id.* at 183-84. Judge Medina, concurring, was refreshingly frank when he stated, "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person. Nor would I temporize by suggesting that this is some sort of venue or *forum non conveniens* problem. To me this adds an element of unnecessary confusion." *Id.* at 184-85 (Medina, J., concurring).

134. Buckley v. New York Post Corp., 373 F.2d at 184.

135. *Id.* The court is doubtless correct that as a practical matter, the boundary between New York and southwestern Connecticut is nonexistent. Nonetheless, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), seems particularly directed to this kind of analysis with its emphasis on states' boundaries and the limits imposed on states "as coequal sovereigns in a federal system." *Id.* at 292. After *World-Wide Volkswagen*, it is irrelevant if two states are economically and intellectually one—a defendant still must have minimum contacts such that assertion of jurisdiction will not offend fairness and justice. In *Buckley*, "an average of 1707 copies of the daily and 2100 copies of the weekend edition of the New York Post were distributed in Connecticut to dealers and subscribers, not to mention the indeterminable number of copies purchased in New York and taken into Connecticut by commuters." Buckley v. New York Post Corp., 373 F.2d at 177. The court in *Buckley* implies, but does not make clear, that these connections alone would be sufficient for jurisdiction.

136. *Buckley*, 373 F.2d at 177 (emphasis added).

lier in the *Buckley* opinion, however, the court stated the normative principle it extracted from *Connor* and the subsequent cases: "[J]urisdiction over an action against an out-of-state newspaper for circulating a libel within the state . . . cannot be asserted consistently with due process 'where the size of his [sic] circulation does not balance the danger of this liability.' "[137] "This liability" was interpreted as meaning "the added danger of being sued in the state of circulation before 'local juries incensed by the out-of-state newspaper's coverage of local events' rather than in the state of circulation."[138] The real danger, of course, is that newspapers will cease distributing out-of-state in order to avoid the large verdicts. If the court in *Buckley* meant that the reality requisite to applying the First Amendment as a bar to the exercise of jurisdiction by a forum was that the amount of circulation in that forum, and the benefits derived therefrom, be sufficient to offset the possibility that a newspaper would cease distributing there, then *Buckley* is essentially tracking *Connor*. The crucial difference is that *Buckley* speaks in terms of *exercising* jurisdiction rather than the *existence* of jurisdiction.

C. The First Amendment Not An Element of the Jurisdictional Formula, but Newspapers Treated Differently from Other Defendants

Other courts have declined to follow the precedent of either *New York Times v. Connor* or *Buckley v. New York Post Corp.* These courts believe that freedom of expression is fully served by *New York Times Co. v. Sullivan* "actual malice standard, and further disapprove of incorporating substantive First Amendment issues in preliminary procedural analysis, due process or otherwise. At the same time, these courts have treated newspaper defendants differently from defendants in products liability actions and often have considered the merits of the plaintiff's action in determining whether or not to assert jurisdiction. Ultimately then, these courts also have employed special procedures in order to prevent an impermissible chilling effect on the public's right to know.

This type of analysis is exemplified in *Church of Scientology v. Adams*, a Ninth Circuit case.[139] In *Adams*, suit was brought in California by the California Church of Scientology against the authors of allegedly libelous articles about Scientology, and against the Pulitzer Pub-

137. *Id.* at 182 (quoting New York Times v. Connor, 365 F.2d at 572).
138. Buckley, 373 F.2d at 182 n.8.
139. 584 F.2d 893 (9th Cir. 1978).

lishing Company, the publisher of the Missouri newspaper that had printed the articles. The articles made specific reference to the Missouri Church of Scientology, but no reference was made to the California Church or its members.[140]

Reviewing Pulitzer's contacts with California, the court found that neither the advertising revenues it received from California nor the contacts with California of an independently operated subsidiary were sufficient bases for jurisdiction.[141] The court concluded that the only relevant contact Pulitzer had with the forum was the distribution in California of about 150 copies of the allegedly libelous article.[142]

Using the traditional basis for assertion of jurisdiction in a products liability case, the Ninth Circuit could have stated that Pulitzer purposefully sent its "product" into the stream of commerce, knowing it would reach the forum state and that it created a potential risk of injury.[143] The court, however, did not adopt this analysis, and instead found that in libel cases

> the likelihood that an offending publication will enter a forum is [not] a fair measure of the reasonableness of the exercise of jurisdiction over a publisher. The nature of the press is such that copies of most major newspapers will be located throughout the world, and we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspaper were circulated in the forum state. *In a defamation case, therefore, the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state.*[144]

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140. *Id.* at 895.

141. *Id.* at 896-97.

142. The court found that advertising revenues were not a sufficient basis for jurisdiction. It stated that the nonresident Pulitzer's contacts with California companies for advertising purposes were not related to the libel, but instead gave those companies a chance to reach customers *outside* of California, and was not evidence of an intent to publish in California or reach readers there. *Id.* (emphasis added). This is interesting because other courts have used advertising revenues as one element of contact. *See, e.g.*, Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975); New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966). Focusing on contacts evidencing the defendant's intent to *publish* in the forum, rather than on all its business contacts with the forum, reduced the amount of contacts to merely 150 copies of the disputed article, in effect dictating a finding of insufficient contacts.

143. *See* note 127 and accompanying text *supra*.

144. Church of Scientology v. Adams, 584 F.2d at 897-98 (emphasis added). This "special" jurisdictional analysis invoked because of the peculiar nature of the press is, after World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the very analysis to be used in products liability cases. There, the Court stated: "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

Applying the foreseeability of risk of injury by defamation standard, the court found that although the defendant publisher did mail copies of the newspaper to regular subscribers and delivered copies to some independent distributors, it had little reason to expect a risk of injury from defamation in that state. This determination was based primarily on the court's examination of the merits of the lawsuit and the conclusion that it was doubtful whether the Church of Scientology could prove that the articles were published "of and concerning" the plaintiff,[145] an essential element in a cause of action for libel.[146]

Significantly, the court in *Adams* concluded that the risk of defamatory injury was not foreseeable only after it examined the merits of the libel action. Surely proving the foreseeability of a risk of injury arising in the forum requires more extensive foraging into the merits of the action than determining whether or not the prospect of litigation would limit future circulation. Although the court in *Adams* ostensibly declined to weigh the First Amendment with other jurisdictional factors,[147] it appears to have given the newspaper defendant preferential treatment by inquiring into the merits of the defamation action at the jurisdictional stage.

Under a different set of facts, the test employed in *Adams* may not be protective enough. For example, where an allegedly libelous article clearly is "of and concerning" the plaintiff, employing the standard of foreseeability that a risk of injury would arise in the forum state would provide little protection against the assertion of jurisdiction over a newspaper that circulates only a few copies in the forum.[148] In addition, a court using this test may decline to examine the "of and concerning" issue and assert jurisdiction whenever the newspaper has

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are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297. For a pre-*Connor* and pre-*World-Wide Volkswagen* case employing logic similar to *World-Wide Volkswagen*, see Roy v. North Am. Newspaper Alliance, Inc., 205 A.2d 844, 847 (N.H. 1964) (asserting jurisdiction, the court reasoned, "the defendant could reasonably anticipate that the sale, distribution and promotion of the . . . column and other news features might entail libel actions."). Compare *Roy* with *World-Wide Volkswagen*, which, although denying jurisdiction, employed a similar test: "[the defendant] should reasonably anticipate being haled into court there." 444 U.S. at 297. For a case applying the *World-Wide Volkswagen* standard in a libel action, see Schwegmann Bros. Giant Super Markets, Inc. v. Pharmacy Reports, 486 F. Supp. 606 (E.D. La. 1980).

145. Church of Scientology v. Adams, 584 F.2d at 898-99.

146. *See* CAL. CIV. PROC. CODE § 460 (West 1973). In essence, the Ninth Circuit was mixing jurisdiction and summary judgment analysis.

147. 584 F.2d at 899.

148. This is because jurisdiction may be asserted consistently with due process where there is some nexus among the contacts and the cause of action alleged. *See, e.g.*, Forsythe v. Overmyer, 576 F.2d 779, 782 (9th Cir. 1978) (nexus was circulation).

subscribers in a forum, reasoning that it is foreseeable that a risk of injury by defamation could arise when articles are sent into the forum.

The California Court of Appeals has similarly declined to weigh the First Amendment at the jurisdictional stage in *Sipple v. Des Moines Register & Tribune Co.*[149] *Sipple* arose out of the attempted assassination of former President Gerald R. Ford by Sarah Jane Moore. Sipple, an ex-Marine, had helped frustrate the attempt on Ford's life. Included in the publicity following the incident were articles published in out-of-state newspapers that had purchased accounts of the thwarted attempt from the Los Angeles Times news service. These articles stated rather explicitly that Sipple was a homosexual. Sipple, together with his lawyer and minister, called a press conference and alleged injury to family relationships as a result of the publicity. He then filed a lawsuit against the Des Moines Register & Tribune Company and others for invasion of privacy.[150]

Declining to apply the *Connor* test, the appellate court proposed that the First Amendment "fails to give special protection from jurisdiction to defendants whose tortious acts performed out of state arise from exercise of rights arguably protected by the First Amendment."[151] The court pointed out that although *Connor* seemed to give such special protections, that decision had been criticized and appeared to have been "discarded" by the very court that wrote the decision.[152]

149. 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978).

150. *Id.* at 146-47, 147 Cal. Rptr. at 61. Sipple's calling a press conference and then filing an action for invasion of privacy seems curious, if not inherently contradictory. The court of appeal took note of this contradiction. 82 Cal. App. 3d at 147 n.1, 147 Cal. Rptr. at 61 n.1. Since *Sipple* concerned an action for invasion of privacy, it involved different interests than those at stake in libel actions. The balance is not society's interest in promoting First Amendment values against society's interest in protecting individuals from defamatory falsehoods, but rather whether or not the interest in privacy is outweighed by newsworthiness. For further discussion of this matter, see generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802-18 (4th ed. 1971).

151. Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d at 149, 147 Cal. Rptr. at 63.

152. *Id.*, 147 Cal. Rptr. at 63. *Connor*, in fact, has not been discarded. To the contrary, *Connor* is alive and still cited as controlling authority. *See* Gonzales v. Atlanta Constr., 4 MEDIA L. RPTR. (BNA) 2146, 2148 (N.D. Ill. 1979). Both *Sipple* and *Church of Scientology v. Adams* cite David v. National Lampoon, Inc., 432 F. Supp. 1097, 1100 (D.S.C. 1977), and Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir. 1977), as stating that *Connor* had been discarded. Yet *David* and *Anselmi* are too hasty in announcing the demise of *Connor*. *David* was incorrect in contending that the Fifth Circuit discarded *Connor* in Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967). As discussed at notes 103-09 and accompanying text *supra, Golino* tempered the *Connor* decision, but continued to call for the consideration of First Amendment values at the jurisdictional stage in an action for defamation. The court in *David* also overlooked the fact that in *Golino*, Judge Thornberry noted the distinction between the local character of a newspaper and the national character of a

Nevertheless, the court held that the defendant newspapers' contacts with California were insignificant. The court examined factors it found pertinent to the assertion of jurisdiction over a newspaper defendant: the distant place of publication, the insignificant amount of circulation, the lack of reporter contact with the forum, the lack of intention to transmit the story to California newspapers, and the fact that the story was not particularly aimed at or expected to receive greater attention in California. The court found that "there was little more than publication of an article which would conceivably have a tortious effect in California. No other case has authorized jurisdiction on so little."[153]

Despite this emphatic conclusion, the court further explained its decision not to assert jurisdiction. The court reasoned that the generation of income from the incidental distribution of a local newspaper from a distant state in California "is so fortuitous or unforeseeable as to negative the existence of an intent" on the part of the newspaper to engage in business within California.[154] By so rationalizing, the court gave more protection to newspaper defendants than to products liability defendants, the latter having been subjected to jurisdiction on the basis of what arguably are fortuitous and unforeseeable contacts.[155] This is not too different from *Connor's* finding that the First Amend-

magazine actively pursuing a nationwide market, and found that jurisdiction could be asserted over the latter because of the minimal risk of a "chilling effect" on a national magazine's distribution in distant forums. In *David*, the defendant, *National Lampoon*, pursued a nationwide market and the court found it had sufficient minimum contacts with the forum state. David v. National Lampoon, Inc., 432 F. Supp. at 1100. Therefore, the court could have asserted jurisdiction over the *National Lampoon* consistently with the rationale of *Golino* without claiming to discard *Connor* in the process. *Anselmi* likewise cited *Curtis Publishing Co. v. Golino* as evidence of the Fifth Circuit's retraction of the *Connor* decision. Anselmi v. Denver Post, Inc., 552 F.2d at 324. In *Anselmi*, the defendant seeking dismissal on the ground of lack of jurisdiction was the wealthy Times-Mirror Corporation. It is doubtful that Times-Mirror would be forced to limit its nationwide publishing activities because of the expense of lawsuits. The circuit court in *Anselmi* also could have reversed the trial court's dismissal of the Times-Mirror Corporation without transgressing the principle of *Connor. See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) (Supreme Court citing *Connor* with approval).

153. Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d at 152, 147 Cal. Rptr. at 64. Yet there is only a fine line between publishing an article that could *conceivably* have a tortious effect in the forum, and publishing an article that makes it *foreseeable* that a risk of tortious injury by defamation would arise in the forum state. The latter was found to be a sufficient basis for jurisdiction by the Ninth Circuit. *See* notes 142-47 and accompanying text *supra*.

154. Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d at 152, 147 Cal. Rptr. at 65.

155. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

ment requires greater contacts when the nonresident defendant is a newspaper.[156]

Not all courts that insist the First Amendment is not a factor in their decisions surreptitiously manipulate procedure in order to give press defendants additional protection. For example, a Tenth Circuit case, *Anselmi v. Denver Post, Inc.*,[157] denied defendant Times-Mirror Corporation's motion to dismiss on the ground of lack of jurisdiction. The court viewed the transaction that led to the libel action as a whole. It found that the defendant had sufficient contacts with the forum state, Wyoming, and that the libelous article was "a special event."[158] Three Times reporters were dispatched to Wyoming to write the story, which carried a Wyoming dateline, had substantial reader interest, and was "colorful, [and] . . . explosive."[159] The court concluded that the foreseeability critical to due process was that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."[160]

The court in *Anselmi* maintained that, even if the First Amendment were made a factor in jurisdictional determinations, it would be outweighed by the countervailing policy consideration against forcing a plaintiff to travel to the home of the newspaper in order to vindicate his reputation.[161] This is a legitimate concern. Should an injured plaintiff, who has an interest in reestablishing his good name in his own community, be made to travel to a distant state in order to bring a defamation action, particularly when witnesses and evidence are located in the plaintiff's home state?[162] A better way of dealing with these conflicting

156. The fact that *Sipple* was a privacy action rather than a defamation action may also have led the court to rule in favor of the press defendants. Privacy actions seek damages for injury to "feeling and sensibilities," while defamation actions seek compensation for harm to reputation. On the other hand, both privacy and defamation principles "involve restrictions upon freedom of expression which raise serious questions under the First Amendment." Note, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, 67 COLUM. L. REV. 926 (1967).

157. 552 F.2d 316 (10th Cir. 1977).

158. *Id.* at 325.

159. *Id.*

160. Anselmi v. Denver Post, Inc., 552 F.2d at 325. This analysis is problematic. If a major factor weighing in favor of a state's assertion of jurisdiction over a nonresident newspaper defendant is that a story is colorful, explosive, and interesting to readers in a particular locale, foreign newspapers, which can provide more objective reporting, will be reluctant to print stories about or distribute in that locale, thus impairing the citizens' constitutional right to know. For a review of this proposition, see discussion of Edwards v. Associated Press at note 113 *supra*.

161. *See* Anselmi v. Denver Post, Inc., 552 F.2d at 324-25.

162. The added publicity of a trial may in fact make it more desirable for the plaintiff to seek damages in a distant forum. The community at large does not adhere to the belief that

interests is not to ignore the First Amendment implications, or to conclusively state that in every case the countervailing policy in favor of the plaintiff outweighs the First Amendment considerations. Rather, in each case the plaintiff's interests should be weighed against the First Amendment interests and other jurisdictional factors in order to determine whether or not jurisdiction exists.

The analysis of these cases reveals that many of those courts most adamantly opposed to applying First Amendment values as factors in the due process personal jurisdiction equation, find themselves examining the consequences of assertion of jurisdiction over newspaper defendants in terms of First Amendment analysis. Perhaps the most accurate assessment of the conflict that arises when the First and Fourteenth Amendments confront one another was made by the trial court in *Buckley v. New York Post Corp.*:[163] "If the law of libel represents an effort to balance the competing policies favoring freedom of the press and protection of reputation, First Amendment considerations necessarily find their way into the jurisdictional assessment."[164] In that statement, "necessarily" may not have been used in the sense of a rule of law, but as a statement of jurisprudential fact. The discussion of cases in which courts have grappled with the issue of assertion of jurisdiction over nonresident media defendants illustrates that the First Amendment does enter into the courts' analysis.

Conclusion

First Amendment interests cannot be fully protected by a traditional jurisdictional analysis in defamation actions against newspaper defendants. As the discussion of the *Adams, Sipple*, and *Anselmi* cases illustrates, where courts apply a traditional minimum contacts approach, they often consider only whether the defendant could expect that litigation would arise as a result of a news story or whether the story was directed to a specific forum. While the specificity with which an article is written is relevant to a determination of a newspaper defendant's contacts with the forum, this factor, if considered the determinative element in the jurisdictional equation, would undercut First Amendment protections. Foreign newspapers, rather than being en-

one is "innocent until proven guilty" and the realities of a defamation action mean that the plaintiff is as much on trial as the defendant. The result may be further besmirchment of the plaintiff's reputation rather than vindication. Note also that the plaintiff is not being deprived of a forum, but rather is forced to go to the defendant.

163. 260 F. Supp. 282 (D. Conn. 1966).

164. *Id.* at 285 (citations omitted).

couraged to present alternative viewpoints and to promote public debate, would be discouraged from sending controversial articles to places where they are needed most.

Libel plaintiffs may argue that *World-Wide Volkswagen Corp.*[165] provides newspapers sufficient protection against unreasonable assertions of jurisdiction. Although *World-Wide Volkswagen* appears to protect a nonresident newspaper because of its emphasis on the defendant's contacts and its refinement of the foreseeability requirement, a closer look reveals that *World-Wide Volkswagen* does not sufficiently shield a nonresident press defendant, absent special recognition of First Amendment considerations.[166]

In *World-Wide Volkswagen*, the Supreme Court stated that when a corporation "purposefully avails itself of the privilege of conducting activities within the forum State,"[167] it has notice that it is subject to suit there and "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, *or, if the risks are too great, severing its connection with their State*."[168]

When the defendant is a newspaper, this latter alternative cannot occur without violating the First Amendment right of the public to be free from government interference with its receipt of information.[169]

165. 444 U.S. 286 (1980).

166. At least one court since *World-Wide Volkswagen* has purported to apply its standard to an action for defamation against an out-of-state publisher. *See, e.g.*, Schwegmann Bros. Giant Super Markets, Inc. v. Pharmacy Reports, 486 F. Supp. 606, 612 (E.D. La. 1980). In *Schwegmann Bros.*, the district court found that the defendant had sufficient contacts with the forum and was not "surprised" by the suit. Nevertheless, the court examined the First Amendment and concluded that, due to the offending publication's character as essentially a professional newsletter, the possibility of a chilling effect was remote. Jurisdiction was asserted. *Id.* at 611-13. Note that the court did not stop with an examination of contacts and foreseeability, but continued to analyze the chilling effect, asserting jurisdiction only upon a finding that the likelihood of a chilling effect was remote.

167. 444 U.S. at 294 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1957)).

168. 444 U.S. at 297 (emphasis added).

169. Libel plaintiffs could argue that a newspaper with a minimal number of mail order subscribers in a foreign forum has purposefully availed itself of the privilege of conducting activities based on the fact that it derives revenue from the subscriptions. The subscribers' names and addresses in the newspaper's files provide evidence that the defendant was conducting activities in the forum. The newspaper, therefore, has notice that it is potentially subject to a defamation suit in the forum. Another possible argument is that the publisher of any controversial article has every reason to expect to be haled into the courts of the forum state of citizens about whom the article was written, or to which the article was directed. Under *World-Wide Volkswagen*, jurisdiction could thus be asserted consistently with due process, but at the expense of the First Amendment. A newspaper that severs its connection with a state in order to avoid the risk of burdensome litigation violates the First Amendment rights of the subscribers in that state. *World-Wide Volkswagen's* jurisdictional standard is

Neither may a newspaper "structure its conduct"[170] so as to provide some assurance that the conduct will not subject it to suit in a given locale. Any "structured conduct" by a newspaper beyond fair and responsible journalistic practices is the equivalent of self-censorship, which is not tolerable under the First Amendment.

Finally, the argument that media defendants are sufficiently protected from the chilling effects of litigation by the *Sullivan* decision must be addressed. As noted above,[171] the expense of a motion for summary judgment is in itself a threat to the full exercise of freedom of expression. Furthermore, if indeed the Supreme Court is retrenching the doctrine of liberal summary judgments in libel actions against the media,[172] the press, particularly smaller newspapers, may steer wide of any controversial commentary where "actual malice" could be alleged.

Since neither *Sullivan*'s actual malice standard nor the application of traditional jurisdictional formulas sufficiently protect against the chilling effect of libel actions on the public's right to know, something more is needed. To include First Amendment considerations into the jurisdictional formula would not impermissibly violate traditional doctrines. The minimum contacts test was never meant to be a rigid formula; rather, the requisite contacts of a defendant with a forum should vary depending on the measure of values affected by the exercise of power.[173] First Amendment values are often necessarily affected by courts' assertion of power in actions against nonresident newspapers; therefore, courts should consider the First Amendment ramifications of any assertion of jurisdiction.

Indeed, the spirit of *World-Wide Volkswagen* sanctions this approach with its emphasis on the conduct and the connection of the defendant with the forum state. Surely when the defendant is a newspaper, the First Amendment implications of its conduct should be examined. Furthermore, *World-Wide Volkswagen* states that one of the factors to be considered in the jurisdictional equation is "the shared interest of the several States in furthering" fundamental substantive social policies.[174] If substantive social policies are to be considered, then

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not enough to insure that jurisdiction will be asserted consistently with the notions of fair play and substantial justice when the defendant is a foreign newspaper.

170. 444 U.S. at 294.

171. *See* note 13 and accompanying text *supra*.

172. *See* note 80 and accompanying text *supra*.

173. *See, e.g., In re*: Northern Dist. of Cal. "Dalkon Shield" IUD Products Liab. Litig., 526 F. Supp. 887, 909 (N.D. Cal. 1981); Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts, supra* note 49, at 230.

174. 444 U.S. at 292.

the constitutional "policy" of freedom of expression guaranteed by the First Amendment, and the possibility of injury to First Amendment interests, also should be considered.[175]

Therefore, when the defendant in a libel action is a nonresident newspaper, the inquiry must go beyond whether or not there has been purposeful availment and beyond the defendant's expectations of where it might conceivably be sued. Specifically, the inquiry should be whether the defendant's contacts with and activities in the forum are such as to "ameliorate the fear that the prospect of litigation might limit the circulation of information to which the public is entitled."[176] If a court determines that it is more likely than not that a newspaper will sever its connections with the forum rather than undergo the risk of being called there to defend suit, thus depriving the residents of their First Amendment right to know, the court should not assert jurisdiction over that defendant.

The next question, then, is at what point should a court ask itself whether or not a newspaper defendant's contacts are sufficient to ameliorate the fear that the prospect of litigation might limit the circulation to which the public is entitled. Should this issue be considered as part of the court's application of the jurisdictional formulas of *International Shoe* and *World-Wide Volkswagen*, or after the existence of jurisdiction has been established, when the court, in its discretion, is determining whether or not to exercise that power, in effect, a constitutional species of *forum non conveniens*?[177]

Under the first approach, a court would calculate the amount of the defendant's contacts, including the extent of its purposeful availment and how foreseeable it was that the defendant would be haled into the courts of the forum.[178] The court would then ask whether or not asserting jurisdiction over the particular defendant would comport with fair play and substantial justice, weighing and balancing the con-

175. This view has the support of Justice Brennan. Although he sympathized with the plaintiff in his dissenting opinion in *World-Wide Volkswagen*, Justice Brennan implied that if a defendant can show that injury to a constitutionally protected interest would result from being forced to go to a particular forum, the defendant should not have to appear there. 444 U.S. at 312 (Brennan, J., dissenting).

176. Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).

177. The latter method was the approach used by the second circuit in Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967). Note the dissent by Justice Medina. *Id.* at 184-85 (Medina, J., dissenting). *See* notes 129-38 and accompanying text *supra*.

178. For a chronicle of the types of contacts and factors courts generally examine when making a jurisdictional determination in libel actions against nonresident newspaper defendants, see Scott, *Jurisdiction Over The Press: A Survey and Analysis*, 32 FED. COM. L.J. 19 (1980).

flicting interests of the defendant, the plaintiff, and the state in the controversy.[179] It is at this point that the court should determine whether or not the amount of contacts is sufficient to offset the possibility of any chilling effect caused by the defendant limiting circulation. If the court determines that it is more likely than not that the defendant would sever its connections with the forum rather than undergo the risk of being called there to defend suits, then the contacts are not sufficient to provide jurisdiction.

Under the second approach, a court would follow the procedure used in *Buckley v. New York Post Corp.*,[180] by making a traditional examination of the amount of contacts and fairness of asserting jurisdiction. If the court found there were sufficient minimum contacts for it to assert jurisdiction, then, under *International Shoe*, it would have power over the newspaper defendant. If the court found that the likely effect of asserting jurisdiction would be the newspaper's ceasing to circulate in distant forums, it would choose not to *exercise* its jurisdiction.

The first of these two approaches is the better one. It requires that the First Amendment be a central part of the jurisdictional analysis, and does not relegate a constitutional right to a trial court's discretion. This latter consideration is especially important since appellate courts seldom reverse trial courts' discretionary rulings, while decisions based on constitutional law merit *de novo* review.

While the "institutional" press is likely to have weighty enough contacts for a court to assert jurisdiction without fear of a resulting "chilling effect," smaller, independent newspapers rarely, if ever, will have such contacts. The inconvenience to the libeled plaintiff and the interest of the forum state in protecting an injured individual is far outweighed by the collective interest of the state's citizenry in free and unfettered receipt of information. "In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."[181]

179. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

180. 373 F.2d 175 (2d Cir. 1967).

181. Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977).