

*The Action Bias in American Law:
Internet Jurisdiction and the Triumph of Zippo Dot Com*

by

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Introduction

American law reflects the stories we tell ourselves about who we are as a nation. To illustrate the effect of America's stories on the law, I identify and describe in this essay a particular characteristic of American law: an "action bias" – a propensity to bestow disproportionately greater legal significance upon affirmative acts than on failures to act – and I argue that this bias reflects, in turn, a powerful myth at the core of the self-image of the United States, a myth I call the "Immigrant's Tale."

I will begin with a particular and remarkable instance of the action bias by considering the career of an exceedingly important, albeit somewhat obscure federal district court decision: *Zippo Manufacturing Company v. Zippo Dot Com*,¹ the case that formulated the framework now used almost universally in the determination of personal jurisdiction in Internet cases.

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¹ 952 F. Supp. 1119 (W.D. Pa. 1997).

Of course, the development of the Internet has challenged the law as new technologies typically do. Usually the problem is whether to revise old legal doctrines in order to deal more adequately with the new reality or to develop specially tailored new doctrines. With the Internet, however, this usual problem intersects with a vigorous debate over whether the Internet is simply a new tool for achieving old objectives in our familiar world or a new and strange world altogether.² For if it is the latter, questions about what the law should look like are complicated by questions such as whether the idea of law even makes sense in cyberspace.

One important piece of this puzzle was the issue of how to determine personal jurisdiction in cases involving the Internet. I say “was” because this question has largely been resolved, and its resolution was swift and decisive. In the mid-1990’s the doctrinal question seemed up for grabs, with competing tests vying for dominance in the marketplace of judicial ideas. In short order, however, one particular framework – that announced in *Zippo Dot Com* – rapidly achieved preeminence. On the face of it, this is surprising since the approach had no obvious logical or policy advantage over its competitors. In this essay I want to try to understand the quick and far reaching triumph of *Zippo Dot Com*. Why did that happen, and what does it mean?

²E.g., compare David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996), with Jack Goldsmith, *Against Cyberanarchy*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998).

By 1996, the year before *Zippo Dot Com* was decided, issues regarding the proper test for personal jurisdiction in Internet cases were being raised with increasing frequency. The following hypothetical problem illustrates what the debate was about:

Jack maintains a personal site on the World Wide Web from his home computer in New York City. The site includes various family photographs, some of Jack's poetry, several political diatribes, and a section entitled "X-Girlfriends," in which he discusses various women he has been involved with. Jack's Web site can be visited by anyone in the world with access to the Internet.

One of Jack's former girlfriends is Brie, whom Jack dated when they were both attending college in New York. After graduation, Brie moved several times to various places and is currently living in Fargo, North Dakota, where she operates a small business. Jack and Brie have not been in contact with one another since her move; Jack does not know that Brie currently lives in North Dakota; and Jack has neither traveled to North Dakota nor had dealings with anyone in that state.

One day Brie received a phone call from her friend Colby. Colby also lives and works in Fargo. Bored at her job that afternoon, Colby had "Googled" Brie's name on her office computer and followed various links that took her to Jack's Web site. When Colby read his "X

Girlfriends” entries, she discovered that Jack had made several scandalous assertions about Brie’s personal life. When Brie heard from Colby about the nature of these assertions, she visited Jack’s Web site herself, read the relevant entries, and thereupon contacted a lawyer, who filed a defamation suit against Jack in a North Dakota state court. The court must decide whether it can assert personal jurisdiction under a North Dakota statute that authorizes the exercise of long-arm jurisdiction to the extent permitted by the due process clause of the fourteenth amendment.

The starting place for the court’s inquiry, of course, is the “minimum contacts” test of *International Shoe Co. v. Washington*,³ which famously announced that a state court may constitutionally assert long-arm jurisdiction over a party to a dispute only if that party has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁴ In a series of cases adding nuance to this doctrine, the Supreme Court clarified that the contacts in question are those that show that the party has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”⁵ and that the party

³ 326 U.S. 310 (1945).

⁴ *Id.* at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

⁵ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

“should reasonably anticipate being haled into court there.”⁶ So has Jack “purposefully avail[ed himself] of the privilege of conducting activities within [North Dakota]”? Should he “reasonably anticipate being haled into court there”?

What is interesting about Jack’s case is that while he did not direct his Internet activities specifically toward North Dakota, he undoubtedly understood that his Web page could be accessed from any place, and it was in North Dakota that his remarks about Brie had their defamatory effect. Is this enough to subject Jack to the jurisdiction of a North Dakota court?

Within a nine-month span during 1996-1997, two federal district courts formulated distinct approaches to jurisdiction in cases involving Internet activities that framed the debate for virtually all succeeding cases throughout the country. The analyses proposed by *Inset Systems, Inc. v. Instruction Set, Inc.*⁷ and *Zippo Manufacturing Company v. Zippo Dot Com*⁸ would likely generate opposite results in Brie’s suit against Jack. In brief, *Inset Systems* supports jurisdiction on the ground that Jack’s Web page was “designed to communicate with people . . . in every state;” by contrast, *Zippo Dot Com* opposes jurisdiction on the ground that Jack’s activities are essentially “passive” within the territory of North Dakota, depending on individuals within that state to take the initiative to access his site.

⁶ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297(1980).

⁷ 937 F. Supp. 161 (D. Conn. 1996).

⁸ 952 F. Supp. 1119 (W.D. Pa. 1997).

In Section I of this essay, I will examine these competing approaches in more detail, but my main concern in that Section is to chronicle the rapid emergence of the test formulated in *Zippo Dot Com* as the overwhelmingly dominant framework now used by American courts. That is, my interest is not to take sides in the now largely concluded debate; as I expect to demonstrate, each approach has important and evident virtues. Rather, I am interested in understanding why *Zippo Dot Com* triumphed so quickly and decisively. Precisely because each approach has its virtues, one might have anticipated a long struggle among various courts – with some aligning with *Inset System*, some with *Zippo Dot Com*, and some developing a hybrid as the analytical framework of choice for determining jurisdiction in Internet cases. So the question I want to ask is, Why did the *Zippo Dot Com* test achieved such a swift and nearly universal appeal over its competitor, the *Inset Systems* test?

To get at this question, I will develop two ideas. In Section III will describe an “action bias” in American law; again, this is the propensity of American legal doctrine to bestow disproportionately greater legal significance to affirmative acts than to failures to act. In Section III, I will describe a traditional story, the “Immigrant’s Tale,” that, with several important variations, has become central to the dominant conception of what defines the United States. Reversing directions, I will argue in Section IV that the law’s action bias is understandable in terms of the national self-

conception illustrated by the Immigrant's Tale, and in Section V that the test for personal jurisdiction formulated in *Zippo Dot Com* is understandable as a particular instantiation of the action bias and, ultimately, of the values exemplified in the Immigrant's Tale.

In developing this analysis, I will focus largely on the due process dimension of personal jurisdiction analysis. That seems the obvious approach since the judicial treatment of the constitutional parameters of personal jurisdiction post-*Pennoyer v. Neff*⁹ has been articulated exclusively in due process terms. Still, it bears remembering that any extraterritorial projection of state power over individuals will raise issues both of fairness toward those individual *and* of comity toward the other states that have interests in the dispute (especially the states in which the individuals are physically located or are domiciled). The assertion of long-arm jurisdiction is no exception.¹⁰ Notwithstanding the United States Supreme Court's claim that modern personal jurisdiction cases are concerned exclusively with due process and not with the relationship among states,¹¹ federalism continues to play a significant role in personal jurisdiction analysis.¹² Consequently, the exercise

⁹ 95 U.S. 714 (1877).

¹⁰ *World-Wide Volkswagen*, 444 U.S. at 292. *See infra* Section VI.

¹¹ *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

¹² *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (identifying among the relevant considerations when applying the "minimum contacts" test "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared

of long-arm jurisdiction over Jack raises both due process issues regarding the fairness of subjecting Jack to the authority of a North Dakota court in that particular state and federalism issues regarding the proper respect owed New York by North Dakota. So while the discussion in this essay will emphasize the due process dimension of the problem, Section VI offers a “Postscript” that relates a second story, the “Sovereign’s Tale,” and through that story suggests how the *Zippo Dot Com* test also resonates with our traditional understanding of the federalism dimension of personal jurisdiction doctrine.

In sum, my thesis is a broad one: I want to suggest, by examining the particular example of personal jurisdiction in Internet activity cases, that the development of legal doctrine through judicial decisions reflects the stories we tell ourselves about who we are as a people and what we stand for as a culture. This thesis has direct implications for an important practical question: What makes a legal argument persuasive? Lawyers often treat legal argumentation as being overtly about the techniques of interpreting precedent and legislation, about conflicts among competing public policies, and perhaps about clashes among moral values. Latent determinants of a successful argument might include the personal preferences of individual judges, the personal goals of individual legislators, legislative capture by interest groups, the current political atmosphere, and so forth.

interest of the several States in furthering fundamental substantive social policies”).

What I want to add to this list is the suggestion that the success of a legal argument may have much to do with whether that argument resonates with pervasive and deeply held understandings of what kind of community we are and wish to be. Like the myths of all cultures, our stories express that collective self-understanding. And like the myths of all cultures, our stories infiltrate and shape our norms and our social and political institutions, including law. The Immigrant's and Sovereign's Tales are among the stories we tell ourselves as a culture; the action and territory biases in American law are their manifestations; and the triumph of one particular legal argument – *Zippo Dot Com's* “sliding scale” test – is a consequence.

I

The Triumph of *Zippo Dot Com* (Part 1)

Central to appreciating the jurisdictional issue in the hypothetical litigation between Brie and Jack is a question that has puzzled courts over the years: whether a bad effect within a geographic location is itself sufficient to satisfy the “minimum contacts” test. In the defamation context, the United States Supreme Court held in *Calder v. Jones*¹³ that the Florida authors (a reporter and his editor) of an allegedly libelous article published in a nationally circulated newspaper could be sued in California where the victim

¹³ 465 U.S. 783 (1984).

of the libel lived and worked. Unlike the hypothetical Jack, the *Calder* defendants knew that the victim resided there. The Court found that

California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.¹⁴

But the Court was clearly influenced by more than just the location of the “effects.” It went on to observe that defendants wrote and edited an article

that they knew would have a potentially devastating impact upon respondent. *And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the [publication] has its largest circulation.* Under the circumstances, petitioners must “reasonably anticipate being haled into court there” to answer for the truth of the statements made in their article.¹⁵

Consequently, the Court concluded,

In this case, petitioners are primary participants in an alleged wrongdoing *intentionally directed at a California resident*, and jurisdiction over them is proper on that basis.¹⁶

¹⁴ *Id.* at 788-789.

¹⁵ *Id.* at 789-790 (emphasis added). *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)(state where allegedly libelous magazine article circulated can assert jurisdiction even though plaintiff lives elsewhere when tort has occurred in forum state and defendant has “continuously and deliberately exploited the [forum] market”)

¹⁶ *Id.* at 790 (emphasis added).

While Jack’s Web site generated a tortious effect in North Dakota, it is difficult to say that the defamation was “intentionally directed at a [North Dakota] resident” in the *Calder* sense. Jack’s ignorance of Brie’s North Dakota residence and his ignorance of who specifically was accessing his Web page make his conduct more analogous to a manufacturer who places his product in the “stream of commerce,” only to have it cause injury in some forum downstream. Here, the Supreme Court’s signals have been ambiguous.

In *World-Wide Volkswagen v. Woodson*,¹⁷ the Court cited with apparent approval¹⁸ the Supreme Court of Illinois’s decision in *Gray v. American Radiator & Standard Sanitary Corp.*,¹⁹ holding an Ohio manufacturer of valves that were ultimately integrated into boilers made by a Pennsylvania company liable for injuries caused by a defective valve to an Illinois purchaser of one of the boilers. The requisite minimum contacts were satisfied in *Gray* by the valve manufacturer’s knowledge that the boilers incorporating its valves were being sold nation-wide. Accordingly, the valve manufacturer could expect that its product would find its way to Illinois and would benefit from that fact. In *Asahi Metal Industries*²⁰ the Court split on this issue. A four-Justice plurality took the position that “placement of a product into the stream of commerce, without more,” was insufficient to

¹⁷ 444 U.S. 286 (1980).

¹⁸ *Id.* at 297-98.

¹⁹ 176 N.E.2d 761 (Ill. 1961).

²⁰ 480 U.S. 102 (1987).

constitute activity “purposefully directed toward the forum State”;²¹ four other Justices approved generally the “stream of commerce” basis for personal jurisdiction, but found the assertion of jurisdiction in the instant case unfair for other reasons.²²

Again, the terms for applying these principles to Internet activity were set by a pair of federal district court cases decided in the mid-1990’s. In April 1996, the United States District Court for the District of Connecticut decided *Inset Systems*. The claim in that case was that the Massachusetts defendant’s internet domain address (“INSET.COM”) infringed on the Connecticut plaintiff’s trademark. Defendant had no physical presence in Connecticut and did not conduct regular business there; accordingly, defendant argued that the minimum contacts needed to support jurisdiction in a Connecticut court were lacking. In response, the court observed that advertising on the Internet is

designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI [Instruction Set, Inc.]

²¹ *Id.* at 112.

²² *Id.* at 116-21 (Brennan, J. concurring). The ninth concurring Justice took no position on the “stream of commerce” question. *Id.* at 121-22 (Stevens, J. concurring).

has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

The court concludes that since ISI purposefully directed its advertising activities toward this state on a continuing basis since March, 1995, it could reasonably anticipate the possibility of being hailed into court here.²³

The analogy with the “stream of commerce” theory used in *Gray* is straightforward. If one intentionally launches a harm-producing “product,” knowing and benefiting from that fact that it can find its way into any state, there is no unfairness in holding that individual accountable in the state where the harm occurs. Accordingly, since Jack’s Web page was “designed to communicate with people . . . in every state” and since “once posted on the Internet [it was] available continuously to any Internet user,” the *Inset Systems* approach suggests that Jack may well have the requisite minimum contacts with North Dakota for that state’s court to assert jurisdiction over him.

The case for the *Inset Systems* approach, with its stream-of-commerce resonance, seems especially powerful in light of the Internet’s peculiar characteristics. Traditional personal jurisdiction doctrine is fundamentally tied to territorial considerations.²⁴ However, a pervasive characteristic of

²³ *Inset Systems*, 937 F. Supp. at 165.

²⁴ See *infra* Section VI.

Internet activity is territorial indeterminacy.²⁵ Like conversations via cell phone, individuals can communicate over the Internet without having any idea or any means of determining where each participant is located in space. By contrast, communication using land-line telephones, mail, telegraph, etc. substantially depend upon the recipient of the communication being at a particular, identifiable place.

Similarly, when Internet users access Web sites, it is unclear just where those pages “are.” Jack’s Web page is presumably stored on the server of some Internet Service Provider but where that server is located may be unknown not only to Brie and Colby, but even to Jack. Moreover, the precise electronic path that connects Brie to Jack’s Web page is determined *ad hoc* by the architecture of Internet.²⁶

Thus, at the moment when Brie is defamed by the reading of Jack’s “X-Girlfriends” page, the only readily determinable geographic element of that defamation is the location of the reader – that is, the location of the defamatory effect. Since Jack is likely uninvolved in the process when his Web page is accessed, he is in a position analogous to the valve manufacturer in *Gray*. Having shipped the defective valves to the boiler producer, who subsequently determined the subsequent distribution of the boilers, the valve

²⁵ See, e.g., Johnson & Post, *supra* note 2. But see, Goldsmith, *supra* note 2.

²⁶ HowStuffWorks.com, *How Routers Work* (visited March 9, 2006) <<http://computer.howstuffworks.com/router.htm>>.

manufacturer lost control over whether and when its valves would cause “effects” in any particular state.

It is, therefore, not accidental that the approach of *Inset Systems* resonates so strongly with stream-of-commerce theory, as used in cases like *Gray*. In an important sense, that theory is just the further working out of a point made by the Supreme Court in *McGee v. International Life Ins. Co.*,²⁷ when it observed that the “nationalization of commerce,” coupled with new transportation and communication technology, had reduced the importance of state borders for the purpose of determining personal jurisdiction in commercial cases.²⁸ This idea presaged the progressive irrelevancy of territory in jurisdictional analysis, culminating in the analysis used *Inset Systems*. And while Brie’s case against Jack is not commercial, *McGee*’s core insight of *McGee* applies: The significance of territory is a relic of an era when human interactions and government regulation of human interactions were largely local. In an era when actors like Jack can harm others without either party knowing where the other is located, tying a court’s authority to adjudicate the dispute to whether Jack had intentionally directed his harmful conduct toward a particular geographic place might seem, to put it charitably, a little quaint.

And yet, nine months after *Inset Systems*, the United States District Court for the Western District of Pennsylvania decided *Zippo Dot Com*.

²⁷ 355 U.S. 220 (1957).

²⁸ *Id.* at 222-23; see *Hanson*, 357 U.S. at 250-251.

Another trademark infringement case, the court saw the application of the “minimum contacts” test to Internet activity as follows:

[O]ur review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.²⁹

²⁹ *Zippo Dot Com*, 952 F. Supp. at 1124 (citations omitted).

Applying this “sliding scale,” the court found that defendant’s activities were sufficiently interactive in nature (customers accessing its Web site could not only obtain information, but could exchange data and apply for services with the company) to establish in conjunction with other activities the requisite minimum contacts. In the process, the court characterized *Inset Systems* as representing “the outer limits of the exercise of personal jurisdiction based on the Internet,” implying that the Web site involved in *Inset Systems* fell decidedly toward the “passive” end of the “sliding scale,” where we would expect also to find Jack’s personal Web page. Accordingly, if “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site,” we might well expect the “sliding scale” test to protect Jack from being haled before a North Dakota court.

Rather than taking the *Inset Systems* approach and reconceiving personal jurisdiction doctrine to reflect the technological realities of the Internet, *Zipco Dot Com* reflects the belief that jurisdiction doctrine from the pre-Internet era can be employed in a way that does justice to that reality. Accordingly, *Zipco Dot Com*’s “sliding scale” framework carries forward the concern in *Burger King* for determining whether “contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’

with the forum State.”³⁰ It recalls the *Hanson* Court’s framing of the question: Did defendant “purposefully avail[himself] of the privilege of conducting activities in the within the forum State, thus invoking the benefits and protections of its laws.” As another court that adopted the “sliding scale” test put it, the issue from this point of view is whether there has been an “express aiming at the forum state”³¹

My purpose in detailing the analyses in *Inset Systems* and *Zippo Dot Com* is simply to suggest that these two cases represent different, but altogether plausible and defensible understandings of *International Shoe*’s “minimum contacts” doctrine as applied to legal disputes associated with so-called passive Web sites like Jack’s. Accordingly, there are policy reasons for favoring either approach over the other – reasons discussed by the various courts that have explicitly chosen between the competing analyses³² and by the various scholars who have explored the ins and outs of personal jurisdiction doctrine as applied to internet activity.³³

And so, one might have expected an extensive struggle between these two analytical frameworks in the marketplace of judicial ideas – a struggle

³⁰ *Burger King*, 471 U.S. at 475 (emphasis in original), quoted in *Zippo Dot Com*, 952 F. Supp at 1123.

³¹ *Pavlovich v. Superior Court*, 58 P.3d 2, 12 (Cal. 2002).

³² *E.g.*, *Barrett v. Catacomb Press*, 44 F. Supp. 2d 717, 724-27 (E.D. Pa. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416-19 (9th Cir. 1997); see, *Pavlovich*, 58 P.3d at 6-10.

³³ *E.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 412-20 (2002); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKLEY TECH. L.J. 1345, 1360-79 (2001).

that might have been won by either approach. But there was little struggle. In short order, the “sliding scale” test achieved utter dominance. Today it is difficult to find a court that uses the *Inset Systems* analysis. Even recent decisions of Connecticut’s federal District Court, while not overruling *Inset Systems*, have tended to distinguish or soften its approach.³⁴

Yet, even as courts succumbed to the seemingly irresistible appeal of *Zippo Dot Com*, there was some a certain resignation, even embarrassment, at this capitulation. In an especially thoughtful opinion, the Fourth Circuit recognized that the rejected approach of *Inset Systems* in fact made considerable sense. Its observations are worth quoting at length:

Applying the traditional due process principles governing a State's jurisdiction over persons outside of the State based on Internet activity requires some adaptation of those principles because the Internet is omnipresent--when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person

³⁴ American Wholesalers Underwriting, Ltd. v. American Wholesale Insurance Group, Inc., 312 F.Supp.2d 247 (D. Conn. 2004)(distinguishes *Inset Systems*); Divicino v. Polaris Industries,129 F.Supp.2d 425 (D. Conn. 2001)(softens *Inset Systems* approach); Edberg v. Neogen Corp., 17 F.Supp.2d 104 (D. Conn. 1998)(distinguishes *Inset Systems*); E-Data Corp. v. Micropatent Corp., 989 F.Supp. 173 (D. Conn.1997)(distinguishes *Inset Systems*); Cody v. Ward, 954 F.Supp. 43 (D.Conn. 1997)(distinguishes *Inset Systems*). *But see*, Pavia v. Club Med, Inc., 1998 WL 229912 (D. Conn. March 30, 1998)(follows *Inset Systems*).

to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.

But under current Supreme Court jurisprudence, despite advances in technology, State judicial power over persons appears to remain limited to persons within the State's boundaries and to those persons outside of the State who have minimum contacts with the State such that the State's exercise of judicial power over the person would not offend traditional notions of fair play and substantial justice. *See Hanson [v. Denckla]*, 357 U.S. at 250-51, 78 S.Ct. 1228 (noting that “it is a mistake to assume that [the technological] trend heralds the demise of all restrictions”). But even under the limitations articulated in *International Shoe* and retained by *Hanson*, the argument could still be made that the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received. Under this argument, the electronic transmissions “symbolize those activities ... within the state which courts will deem to be sufficient to

satisfy the demands of due process.” *Int’l Shoe*, 326 U.S. at 316-17, 66 S.Ct. 154. But if that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.

In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet. That thought certainly would have been considered outrageous in the past when interconnections were made only by telephones. *See, e.g., Stover v. O’Connell Assocs., Inc.*, 84 F.3d [132 (4th Cir. 1996),]at 137 (finding a defendant’s “occasional telephonic requests for information from Maryland-based investigation services” to be insufficient to subject the defendant to personal jurisdiction in a Maryland court). But now, even though the medium is still often a telephone wire, the breadth and frequency of electronic contacts through computers has resulted in billions of interstate connections and millions of interstate transactions entered into solely through the vehicle of the Internet. The convergence of commerce and technology thus tends to push the analysis to include a “stream-of-commerce” concept, under which each

person who puts an article into commerce is held to anticipate suit in any jurisdiction where the stream takes the article. But the “stream-of-commerce” concept, although considered, has never been adopted by the Supreme Court as the controlling principle for defining the reach of a State's judicial power. *See generally Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).³⁵

There is a defensive tone in the Fourth Circuit’s argument – a sense of leaning against the wind, resisting the obvious implications of a technology that threatens to render highly problematic, if not obsolete, the geographic limitations of traditional personal jurisdiction doctrine – implications acted on by the court in *Inset Systems*.

My question then is, why the rapid and overwhelming triumph of *Zippo Dot Com*?³⁶ It’s *eventual* success might be understood as an

³⁵ *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712-13 (2002).

³⁶ Some might maintain that this characterization as, at best, an exaggeration. Indeed, Michael Geist detected a movement away from the *Zippos Dot Com* test, beginning in the latter part of 1999, and by 2002, he argued,

Numerous judgments reflect that courts in the United States moved toward a broader, effects-based approach when deciding whether or not to assert jurisdiction in the Internet context. Under this new approach, rather than examining the specific characteristics of a website and its potential impact, courts focused their analysis on the actual effects that the website had in the jurisdiction. Indeed, courts are now relying increasingly on the effects doctrine established by the United States Supreme Court in *Calder v. Jones*.

instance of conservative allegiance to a venerable, if somewhat musty analysis from the doctrine's past, or it might be rationalized in pragmatic terms.³⁷

However, neither of these explanations accounts for the speed of *Zippo Dot Com*'s triumph. I will argue that the overwhelming appeal of *Zippo Dot Com*'s interactive-passive distinction lies significantly in its resonance with a pervasive "action bias" in American law: the propensity of American legal

Geist, *supra* note 33, at 1371-72. I have suggested in the text that the doctrine of *Calder v. Jones* in fact anticipates the *Zippo Dot Com* test. However, even more to the point of Geist's concern, most of the cases he identifies as distancing themselves from the *Zippo Dot Com* analysis nevertheless invoke that framework and explain how the particular facts under consideration fit into it. As an example, the case that Geist points to as especially critical of *Zippo Dot Com*, *Millenium Enterprises, Inc. v. Millenium Music, LP*, 33 F. Supp.2d 907 (1999), still makes use of the *Zippo Dot Com* analysis and criticizes the approach of *Inset Systems* because it lacks "the principle that a defendant must "purposefully direct" its activities at or take 'deliberate action' in or create 'substantial connection' with the forum state so as to provide 'fair warning' that such activities may subject defendant to jurisdiction in a distant forum," *id.*, at 922, which raises almost exactly the point being explored in this essay.

Perhaps most telling, in the five years since the appearance of Geist's article, courts have continued to invoke the *Zippo Dot Com* framework. Indeed, in just the first two months of 2006, at least three federal and state appellate courts did so. See, *Inc. v. Imago Eyewear Pty, Ltd., Slip Copy*, 2006 WL 348148 (6th Cir. Feb. 14, 2006); *Fenn v. Mleads Enterprises, Inc.*, 2006 WL 306645 (Utah Feb 10, 2006); *Karstetter v. Voss*, 2006 WL 279377 (Tex.Ct. App.Feb 07, 2006).

³⁷ See, e.g., Geist, *supra* note 33, at 1370 ("**Error! Main Document Only.**The widespread approval for the Zippo test should come as little surprise. The uncertainty created by the Internet jurisdiction issue led to a strong desire for a workable solution that provided a fair balance between the fear of a lawless Internet and one burdened by over-regulation. The Zippo test seemed the best available alternative. This is particularly true in light of the *Inset* line of cases, which illustrated that the alternative might well be the application of jurisdiction by any court, anywhere.")

doctrine to assign legal duties as the consequences of active, as opposed to passive, behavior. The remainder of this essay will define and give examples of this action bias, offer a hypothesis to explain the action bias, and argue that the “sliding scale” test of *Zippo Dot Com* is constructed out of the basic elements preferred by the action bias.

II

The Action Bias in American Law (Part 1)

Zippo Dot Com links the establishment of minimum contacts to affirmative action. All Internet Web sites that are accessed by individuals operating their computers in the forum state establish contacts with the forum by virtue of such access. In this sense, Jack has contacts with North Dakota when his defamatory writings are read by Colby and Brie. However, the “sliding scale” analysis of *Zippo Dot Com* suggests that these contacts might be insufficient for establishing the personal jurisdiction of a North Dakota court because Jack’s Web site is “passive.” By contrast, interactive Web sites do create legally sufficient contacts.

This differential treatment of interactive and passive Internet activity is consistent with an enormous number of doctrines throughout the law that similarly predicate legal obligations on active rather than to passive

conduct.³⁸ Legal duties in American law are generally duties that impose limits on action or duties that do not come into being until one has acted. We see this again and again in fields as diverse as the law of crimes, torts, contracts, and federal income taxation.

Consider, for example, criminal law. § 2.01 of the Model Penal Code reflects prevailing doctrine regarding criminal liability for active versus passive behavior:

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

. . .

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

(a) the omission is expressly made sufficient by the law defining the offense; or

³⁸ The bias is less pronounced with respect to rights. Many important rights protect passive activity. For example, various constitutional rights pertaining to the rights of persons when confronted with a police investigation include the and extensive right not to cooperate with police searches and the right to not be forced to incriminate oneself. To some degree, this protection of passivity through the allocation of rights can be seen as the correlative of the law's imposition of duties for active conduct. More generally, however, the hypothesis for the action bias that will be developed in the text applies to the creation of legal obligations, rather than the designation of legal rights.

(b) a duty to perform the omitted act is otherwise imposed by law.³⁹

The gist of this provision is that criminal liability presumptively attaches only to active behavior that violates declared standards of conduct; passive behavior is presumptively insulated from liability. Only when an affirmative duty to act is expressly imposed by law can the failure to act lead to criminal guilt. Thus, the failure to file an income tax return or (for males) the failure to register with the Selective Service are crimes because of laws expressly requiring these actions.

Situations governed by § 2.01(3)(b) are especially revealing in this regard. Classic examples involve homicide. If I fail to rescue an unconscious eleven-year-old stranger from a shallow pool of water, I am presumptively not criminally liable when she subsequently drowns.⁴⁰ On the other hand, if the unconscious child is my eleven-year-old daughter, I would be liable for her death. The difference is that the law has “otherwise imposed” on me a duty of care with respect to my daughter, whereas it has not done so for the stranger. By contrast, if I act affirmatively to kill another – by shooting, stabbing, poisoning, drowning, etc – it does not matter whether the victim is a stranger or my daughter.

³⁹ MODEL PENAL CODE § 2.01(1), (3) (Proposed Official Draft 1962).

⁴⁰ It should be noted that there is no problem with causation in such a case. The Model Penal Code’s definition of causation and requirements of proximity between conduct and result are satisfied in this hypothetical problem. *See, id.*, § 2.03(1)(a), (3)(b).

The duties “otherwise imposed” that can support criminal liability for passively causing death tend to be triggered by affirmative action. The four traditional sources of such duties – statute, contract, status, and the taking of affirmative steps to assist⁴¹ – usually require some sort of affirmative act. Thus, if I had affirmatively acted to adopt the eleven-year-old stranger, I would have then through that action acquired legal obligations toward her, which I would violate if I refused to rescue her from the shallow pool.

A less preposterous and increasingly frequent instance of this distinction has to do with euthanasia. “Active euthanasia” (i.e., taking affirmative action to kill someone who is suffering) subjects the actor to possible prosecution; by contrast, “passive euthanasia” (e.g., terminating life support such as a ventilator) does not.⁴² However, the analysis becomes much more complicated if one acts affirmatively to establish a special, legal duty-imposing relationship with the suffering individual (for instance, by becoming his doctor).⁴³ Again, the law prohibiting homicide applies presumptively to affirmative killing behavior. It presumptively does not apply to passive killing behavior.

Even when passive behavior is criminalized, the penalty may be less severe than its active counterpart. Thus, the act of filing a false tax return is punished as a federal felony. By contrast, the failure to file a tax return

⁴¹ *E.g.*, *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962).

⁴² *E.g.*, *Barber v. Superior Court*, 147 Cal. App. 3d 1006 (1983).

⁴³ *See, e.g., id.* at 1017-19.

altogether is a misdemeanor even though the burden on the government's collection of owed taxes is arguably more burdened by an intentional failure to file than by an intentionally inaccurate filing.⁴⁴

Similar differential treatment occurs in torts and contracts. For example, tort liability is imposed for affirmatively inflicting harm, but often there is none for passively causing harm – for instance, failing to rescue.⁴⁵ The law of fraud and misrepresentation in both torts and contracts has developed from a basic distinction between affirmative lies – say, about the condition of goods offered for sale – which are actionable, and the failure to disclose the true condition of goods, which generally is not.⁴⁶ While these developments have generated certain exceptions that impose an affirmative duty to speak, they nevertheless leave the presumptive permissibility of silence in place.

Interesting examples of this propensity to allocate disproportionate legal obligations to affirmative action comes from the federal taxation of wealth. Generally speaking, active acquisition of wealth is taxed at higher

⁴⁴ Compare I.R.C. § 7203 (failure to file a return is a misdemeanor punishable by a fine of up to \$25,000 and imprisonment for up to 1 year), *with id.* § 7206 (willful filing of a false return is a felony punishable by a fine of up to \$100,000 and imprisonment of up to 3 years). I thank Alice Abreu for this example.

⁴⁵ Christopher H. White, Note & Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U.L. REV. 507, 510-19 (2002).

⁴⁶ Compare RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981), *with id.* § 161. Compare RESTATEMENT (SECOND) OF TORTS § 525 (1965), *with id.* § 551. I thank Eleanor Myers for these examples.

rates than passive acquisition. Thus, earned income is taxed, but gifts and inherited wealth are largely untaxed.⁴⁷ Stock dividends, which are not themselves the product of action, but are derived from the action of acquiring ownership shares in a corporation, are taxed but at a substantially lower rate than is earned income.⁴⁸

All of these examples illustrate the tendency of the action bias to impose legal duties as a consequence of action and, conversely, to immunize passive conduct from legal obligation even when that passivity generates effects similar to those caused by action. In this sense, the “sliding scale” test of *Zippo Dot Com* reflects the action bias. Causing bad effects in the forum state through an interactive Web site will generate sufficient contacts to support the obligation to answer for those effects in the forum’s courts – that is, to support the forum’s assertion of personal jurisdiction. Causing the same bad effects through a passive site will likely not generate the requisite minimum contacts.

Of course, there is no intrinsic property of law that demands the action bias. As is well known, continental Europe has a long tradition of imposing legal liability for harm-causing inaction.⁴⁹ So what accounts for this action bias in American law?

⁴⁷ I.R.C. § 102 (excluding gifts and inheritances from income).

⁴⁸ I.R.C. § 1(h). I thank Alice Abreu for both of the examples in this paragraph.

⁴⁹ See, e.g., *White*, *supra* note 45, at 510 n.16. (“Duty to rescue laws are longstanding in many European nations. Portugal adopted the first such long

III

The Immigrant's Tale

I have argued elsewhere that the inevitable choices that must be made in the shaping of a community's legal doctrine define the character of that community.⁵⁰ Furthermore, I have suggested that in making those choices about law, it is important for a community to maintain at least a rough continuity with the choices made in the past.⁵¹ Also linked to the care and maintenance of a community's self-definitions are its myths, the stories that members of the community tell themselves about their past.⁵² And many of the stories that are part and parcel of the self-identity of the United States⁵³

in 1867. The Netherlands, Finland, and Italy all enacted similar legislation in the nineteenth century, and most of the other countries of continental Europe did so in the early to middle twentieth century.”)

⁵⁰ Richard K. Greenstein, *The Three Faces of ORPP: Value Clashes in the Law*, 54 LA. L. REV. 95 (1993).

⁵¹ Richard K. Greenstein, *Why the Rule of Law?* 66 LA. L. REV. 63 (2005).

⁵² See, e.g., RICHARD HUGHES, *MYTHS AMERICA LIVES BY* (2003); LAUREL T. ULRICH, *THE AGE OF HOMESPUN: OBJECTS AND STORIES IN THE CREATION OF AN AMERICAN MYTH* (2001).

⁵³ I do not mean to suggest, of course, that there is a simple American self-identity or that all members of the American polity share a single understanding of what the United States is “about.” I do mean to suggest that there is a traditional and even dominant understanding of the nation's history and character that is transmitted officially (through public education and other governmental activities) and informally through routine social interactions.

narrate the adventures of a stock character,⁵⁴ whom I will call the Immigrant.

The basic story of the Immigrant's Tale is that of leaving an old home to come to a new home. In the traditional version of this story, the new home is America, and the reasons for coming to America are diverse. They include flight from poverty or persecution, but also more affirmative desires for a better life and for adventure.⁵⁵

⁵⁴ The use of "stock stories" as a tool for legal analysis was first suggested by Gerald Lopez in 1984:

Human beings think about social interaction in story form. We see and understand the world through "stock stories." These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing. When we face choices in life, stock stories help us understand and decide; they also may disguise and distort. To solve a problem through persuasion of another, we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story--one that moves that person to grant the remedy we want.

Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984)(citations omitted).

⁵⁵ Evidence that the Immigrant Tale is a story about the dominant American culture is, of course, the fact of the slave trade. The story of African Americans is not illuminated by the Immigrant's Tale. Insofar as successful assimilation by individuals and groups into the mainstream of American society means internalizing the mainstream stories, African-Americans would have to adopt a perspective that fundamentally denies their particular history. This is, arguably, one more example of the "double-consciousness" described by W.E.B Dubois. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK*, in *THREE NEGRO CLASSICS* 214-15 (Avon Books 1965) (1903). It may also be an important piece of the not-yet-solved problem of race in American society.

The Immigrant must cross a boundary to reach the new home, and this boundary crossing is fraught with some danger. In the traditional version, the crucial boundary is the border surrounding the United States, and the danger may be physical, but is more often political: i.e., rejection and deportation. Thus, entering the United States through Ellis Island or by crossing the Rio Grande River is a source of dramatic incidents in many tellings of the Immigrant's Tale.

Upon successful arrival, the Immigrant must create a new home. In the traditional version, the Immigrant might eventually assimilate into existing American communities. Or the Immigrant might join with other Immigrants in creating a subcommunity that is contained within or must interact with larger, already existing American communities.⁵⁶ Or the Immigrant might join with other Immigrants in creating self-contained and self-sufficient communities.⁵⁷

Two variations of the Immigrant contribute importantly to the self-definition of the United States. One is the Pilgrim. Pilgrims are among the original foreign settlers in America who left their European homes, often in response to religious persecution, to establish a new home on the North American continent. The dangerous boundary that had to be traversed was the Atlantic Ocean, and the communities founded by the Pilgrims were often new and largely autarkic communities.

⁵⁶ For example, the ethnic "neighborhoods" of many large American cities.

⁵⁷ For example, the Amish communities in Ohio and Pennsylvania.

The second important variation is the Pioneer. The Pioneer was something of an internal Immigrant, who left an American home (typically in the eastern part of the United States) and traveled west in search of adventure, wealth, and so forth. The dangerous boundary separated the civilization of the eastern United States from the unsettled wilderness of the West. The new home might be one previously established by previous Pioneers (Californian communities in many of these stories) or a brand new home carved out of the wilderness.

It is important to note that stories about Immigrants, Pilgrims, and Pioneers⁵⁸ are largely tales about ordinary people. These are not the stories of America's heroes or larger-than-life villains; rather, they concern the proletarians, merchants, farmers, ranchers, and adventurers who formed the American polity and the various communities it comprises. In this sense, the Immigrant is a peculiarly American character. It is not that other nations have not had Immigrants; the point rather is that in most other countries the Immigrant is an outsider who either remains an outsider or is absorbed into the indigenous population. By contrast, America's indigenous population, native American Indians, has from the outset been cast in the role of outsider. It is the newcomers, the Immigrants, who are regarded in the

⁵⁸ In the remaining text, the terms "Immigrant" and "Immigrants" refer alternatively to the traditional immigrants who come to the United States from another country and to the collective group of Immigrants, Pilgrims, and Pioneers. The particular contexts should make clear which meaning is being employed.

historical consciousness of the United States as the core population, and the identities of these ordinary folks – as German-Americans, Chinese - Americans, Italian-Americans, Irish-Americans, Mexican-Americans, and the like – are unavoidably linked to the old homes that they or their Immigrant ancestors left.

What is noteworthy about the Immigrant story for our purposes is that the acquisition of citizenship in a community and the assumption of the political and social obligations that go with that citizenship are matters of choice. The Immigrant chooses to leave home, to cross the dangerous boundary, and to establish a new home. And thus the social obligations that come with being a part of a community are a function of those choices.

This notion that individuals acquire social obligations by choice contrasts with some of the most venerable political ideas in Western thought. In Ancient Greek political theory, for example, individuals do not choose to be part of a community. For Aristotle, a human being's essential nature, rationality, required political communities to flourish: "Man is by nature a political animal."⁵⁹ Thus, humans do not choose to join communities; rather, communities are necessary to become fully human.⁶⁰

English political theory of the Enlightenment, on the other hand, conceived of the moral justification for political society as resting on an

⁵⁹ ARISTOTLE, *POLITICA* 1253^a (Benjamin Jowett, trans., Random House 1947).

⁶⁰ "The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing . . ." *Id.*

implicit contract.⁶¹ This contract, importantly, is a logical, not an historical foundation. That is, the “agreement” described in the writings of Hobbes and Locke that converted human society from a state of nature to a polity is hypothetical and serves as a philosophical construct that confirms moral legitimacy on the constraints imposed by civil society on the “natural rights” of individuals. English political philosophy of the Enlightenment thereby gives moral priority to the individual, in contrast with, say, Aristotelian theory, which gives moral priority to the community.

On the other hand, American history is liberally sprinkled with actual written agreements that defined the political contours of civil society: the Mayflower Compact, the Declaration of Independence, the Constitution, among others. As well, membership in American society is generally understood to be a matter of choice – not only for the Immigrant/Pilgrim/Pioneer, but even for those who are born and remain within the settled United States.⁶² Put another way, while social contract

⁶¹ The classic English texts explicating the social contract are THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* ch. 13-17 (Michael Oakeshott ed., Collier Books 1962) (1651); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* *passim* (Thomas P. Peardon, ed., The Bobbs-Merrill Co., Inc. 1952) (1690).

⁶² The traditional American label for the integration of an individual into a particular political community is citizenship or domicile. As the *Restatement(Second) of Conflict of Laws* indicates, while everyone has a “domicil of origin” at birth, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 14 (1969), a “domicil of choice may be acquired by a person who is legally capable of changing his domicil.” *Id.* § 15. The two requirements of establishing such a “domicil of choice” is understood to be within the control

theory gives priority to the individual as an abstract proposition, American political theory continues to regard the relationship of each actual individual and the community as anchored in choice. The obligations I have to the United States and to the Commonwealth of Pennsylvania and to the City of Philadelphia can all be traced back to my choices; conversely, in the absence of the requisite choices, I would be to a remarkable degree insulated from political duties.

The idea of choice, which is central to the Immigrant Tale, has several elements. The first of these is intentionality. The leaving of the old home to establish the new one is purposeful. The crossing of the dangerous boundary emphasizes this aspect of the Immigrant's voyage by showing that for the Immigrant, the establishment of a new home entails risks knowingly incurred.⁶³

A second element is the exercise of control through human perseverance and ingenuity. The Immigrant, the Pilgrim, and the Pioneer generally arrive at the destination with few material resources and must set about subduing a hostile environment. Whether that environment is the

of the individual. The first of these requirements is physical presence in the chosen place. *Id.* §§ 15, 16. However, presence "under physical or legal compulsion" does not satisfy this requirement. *Id.* § 17. The second requirement is the subjective intention "to make that place his home for the time at least." *Id.* § 18.

My colleague Craig Green observes that this traditional identification of domicile with individual choice is reflected in the slogan: "America – Love it or leave it!"

⁶³ *But see supra* note 55.

indifferent urbanism of Manhattan or the hostile wilderness of Plymouth Rock or the Great Plains, the Immigrant must use judgment, skill, and hard work to survive and flourish.

This emphasis on gaining control over the Immigrant's environment, in turn, implicates the third element: action. The tradition of Western European theorizing on human mastery over the world has emphasized two primary modes of exercising control. The most ancient is the invocation of divine assistance;⁶⁴ the second is the exercise of human reason.⁶⁵ While various stories of Immigrants, Pioneers, and especially Pilgrims might have their spiritual dimensions, these accounts are not primarily about religion or reason; they are largely about action – vigorous, sometimes heroic activity that overcomes the obstacles and creates the new home.

The Immigrant Tale, therefore, is a narrative in which the individual's place in the world is not determined by the ordering of reason, deities, class, fortune, and so forth; rather, the individual affirmatively makes his or her

⁶⁴ The Hebrew Bible (Old Testament) is replete with well-known examples of this tradition – for instance, *Joshua* 10:12-13:

On the day the Lord gave the Amorites over to Israel, Joshua said to the Lord in the presence of Israel: "O sun, stand still over Gibeon, O moon, over the Valley of Aijalon." So the sun stood still, and the moon stopped, till the nation avenged itself on its enemies, as it is written in the Book of Jashar. The sun stopped in the middle of the sky and delayed going down about a full day.

⁶⁵ In the West, this tradition dates back to the Ionian philosophers in the sixth and fifth centuries B.C. and continues through to the science of today.

place. By attributing success to active, hard work, the story is one of earned prosperity. It is, in short, a story redolent of traditional American values.⁶⁶

IV

The Action Bias in American Law (Part 2)

The bias toward predicating legal obligations on active rather than passive conduct reflects the values central to the Immigrant story. In general terms, that story is about participation in a political community. The individual joins or creates a political community through intentional action that has as its goal mastering the environment to create a home.

If community affiliation is a function of individual choice, then we might think that legal obligations are triggered by intentional affiliating action. That is, by choosing to affiliate with a political community, we assume legal duties toward that community and toward its members. They are, as it were, the *quid pro quo* for the benefits of this chosen affiliation.

The action bias translates this general point into the definition of particular legal duties. By actively inserting ourselves into the community, we presumptively take on particular obligations appropriate to that action. Conversely, when we remain passive with respect to the community, we are presumptively free of obligation. Put another way, when we choose to interact

⁶⁶ For a discussion of the work of novelist Horatio Alger, whose novels illustrated a belief in the power of individual character to overcome adversity see Stefan Kanfer, *Horatio Alger: The Moral of the Story* (visited 2/18/06) http://www.city-journal.org/html/10_4_urbanities-the_moral.html.

with the community, that interaction will be governed by law that imposes limits on and, thus, potential liability for our conduct; however, when we choose not to interact, the law imposes little or no liability for the consequences of that passivity.⁶⁷

Consider once again homicide as paradigmatic of the action bias. You will recall the example: If I fail to rescue an unconscious eleven-year-old stranger from a shallow pool of water, I am presumptively not criminally liable when she subsequently drowns. On the other hand, if the person in the water is my eleven-year-old daughter, I would be liable for her death. The difference is that the law has “otherwise imposed” on me a duty to care for my daughter, whereas it has not done so for the stranger. By contrast, if I act affirmatively to kill another – by shooting, stabbing, poisoning, drowning, etc – I am presumptively liable for that person’s death, irrespective of whether the victim is a stranger or my daughter.

My shooting of a person is an action that reveals my intention both with regard to the act of shooting and its socially unacceptable consequences

⁶⁷ As noted earlier, the Immigrant’s Tale is a story that resonates with the histories of certain groups, but not to others, including African Americans and Native American Indians. *See supra* note 55 and text accompanying note 58. Accordingly, the centrality of action in determining one’s legal rights and obligation associates the action bias with dominant groups, precisely the groups most able to shape the law. Put bluntly, at various points in our history, African Americans, Native Americans, women, and others have been disabled from determining their legal identities through the active assertion of will; in fact, those identities have been largely imposed against their will by the prevailing legal regime (e.g., slave codes, “treaties” with the Indian Nations, coverture, the World War II internment of Japanese Americans living on the west coast of the United States).

(whether what is intended is killing, wounding, or frightening). Moreover, it reflects an attempt to aggressively gain control over another through violence. By contrast, my passive behavior of refusing to rescue the drowning stranger asserts no control over another. Moreover, my intention expressed through this behavior is clear with regard to the refusal, but ambiguous with regard to the consequences of that refusal. (Is harm intended, or do I just want to avoid getting involved, or am I trying to get somewhere in a hurry?)

We can look at this from a somewhat different perspective. The Immigrant's story is about leaving home, crossing a dangerous boundary, and establishing a new home through one's active conduct; that is to say, it is a story about altering the *status quo*. Of the various homicides described above, my passive behavior of refusing to rescue a stranger, insofar as my unambiguous intentions are concerned, maintains the *status quo*, whereas my shooting of anyone alters the *status quo*. Similarly, my adoption of the eleven-year-old stranger would intentionally alter the *status quo*. My legal duty to refrain from deadly conduct tracks this point: Conduct that alters the *status quo* leads to liability for resulting death; by contrast, conduct that leaves the *status quo* in place does not support criminal liability, even if death results.

In sum, the Immigrant's story is a narrative about dramatic, intentional, *status quo*-altering behavior. More specifically, it is a narrative about acting to insert oneself into a new political community or to create such

a community. The action bias predicates legal duties on intentional, *status quo*-altering behavior. More specifically, the action bias predicates certain legal duties on affirmative acts of affiliation with a political community. Among this set of legal duties is that of submission to the jurisdiction of the community's courts. That is the thrust of personal jurisdiction doctrine as traditionally understood, and that is the thrust of the "sliding scale" test of *Zippo Dot Com*.

V

The Triumph of *Zippo Dot Com* (Part 2)

In the Immigrant's Tale, the individual joins or creates a political community through intentional action. This intentional affiliating action, in turn, triggers legal obligations. That is, by choosing to affiliate with a political community, we assume legal duties toward that community and toward its members. Among these legal duties is that of submission to the jurisdiction of the community's courts.

We see in the traditional understanding of personal jurisdiction doctrine all the key features of this narrative and the consequent action bias in American law. Consider the Supreme Court's pronouncement in *Hanson v. Denckla*:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with

the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.⁶⁸

Here are requirements that defendant affiliate with the forum (“invoking the benefits and protections of [the forum’s] laws”), that the affiliating conduct be intentional (“purposeful avail[ment]”), and that the affiliating conduct be active (“conducting activities”). Moreover, we see that an important reason for requiring intentional and active affiliating conduct is to establish that defendant (not others) be in control of the affiliating contacts (“unilateral activity of [others] cannot satisfy the requirement of contact with the forum State”).⁶⁹ This assertion of control by means of intentional action confers on defendant’s contacts with the forum a quality that makes the forum’s assertion of jurisdiction over defendant consistent with “traditional notions of fair play and substantial justice.”

⁶⁸ *Hanson*, 357 U.S. at 253.

⁶⁹ The centrality of control in is emphasized by two wrinkles in the traditional doctrine of presence. The “minimum contacts” test is itself derived by analogy from the older doctrine of presence: that a court presumptively has jurisdiction over a defendant who is present within the forum state. *See, International Shoe*, 326 U.S. at 318; *see also*, *Pennoyer v. Neff*, 95 U.S. 714 (1877). However, courts have developed two important exceptions to the sufficiency of presence: Jurisdiction will not be asserted by a court when defendant’s presence within the jurisdiction as the result of duress, *see, e.g.*, *Croucher v. Croucher*, 200 N.E.2d 854 (Ill. Ct. App. 1964), or fraud, *see, e.g.*, *Blandin v. Ostrander*, 239 Fed. 700 (2d Cir. 1917). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82 (1969). That is, when defendant’s affiliation with the forum is not voluntary – not fully within the control of defendant – the affiliating contacts will not support jurisdiction.

And while fairness would obviously support jurisdiction over claims arising out of those specific contacts,⁷⁰ a defendant whose affiliating activities are “continuous” and “substantial” might well be subject to jurisdiction “on causes of action arising from dealings entirely distinct from those activities.”⁷¹ This distinction within personal jurisdiction doctrine between “specific” and “general” jurisdiction⁷² both underscores and adds nuance to the idea that legal obligations arise out of intentional affiliations with a political community. Different kinds of contacts with the forum indicate different levels of intended affiliation. Someone driving through a state seems to intend a highly transient affiliation, while someone operating a business within a state expresses the intention to become an enduring and integral part of the community.⁷³

We can now see why the “sliding scale” test of *Zippo Dot Com* might have wide appeal among courts considering the constitutional limits on personal jurisdiction in cases arising out of Internet activities: It resonates exquisitely with the action bias.

⁷⁰ *International Shoe*, 326 U.S. at 319.

⁷¹ *Id.* at 318.

⁷² The origin of these terms is Arthur Taylor von Mehren and Philip A. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

⁷³ For other ways of understanding the distinction see William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328, 1336, 1345 (1984) (review essay) (distinction anchored in considerations of fairness); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77 (distinction anchored in considerations of sovereignty).

The court's articulation of the test focuses on the two ends of the scale. At one end is the "passive Web site that does little more than make information available to those who are interested in it."⁷⁴ Such a site, the court tells us "is not grounds for the exercise of personal jurisdiction."⁷⁵ Why not? Because we are looking for action on the part of defendant in affiliating with the forum. Defendant must have "reached out" and thereby "originated and maintained contacts" with the forum for jurisdiction to be permissible.⁷⁶ The passive site does not involve such reaching out. On the contrary, the contacts with the forum are initiated by forum Internet users who access defendant's Web site. This "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."⁷⁷ That is, characterizing defendant's Web site as "passive" indicates defendant's lack of control over who accesses the site and, consequently and, therefore, over what states are impacted by the information contained on the site.

Jack's Web site is passive in this sense, and accordingly it might seem odd to conclude that Jack has "purposefully avail[ed himself] of the privilege of conducting activities" in North Dakota simply because Colby and Brie and, perhaps, others in that state had connected to his Web site. Notwithstanding

⁷⁴ *Zippo Dot Com*, 952 F. Supp. at 1124.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1125 (discussing *Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y.1996)).

⁷⁷ *Hanson*, 357 U.S. at 253.

the appreciable effects that Jack's Web page had in North Dakota, the fact is that he has little control over from whom and, more to the point, from where his page is accessed. Seen through the lens of the action bias, this lack of control over the contacts that connect defendant to the forum subverts the justification for imposing a legal obligation of submission to the jurisdiction of the forum's courts.

At the other end of the sliding scale we find "situations where a defendant clearly does business over the Internet." Through such Web sites, defendant engages in specific transactions with a specific individual located in a specific state. Here we seem to have the kind of intentional and active affiliation with the forum demanded by the action bias. In such instances, "[i]f the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper."⁷⁸

Of course, this analysis avoids coming to grips with what we have seen to be a characteristic quality of the Internet is precisely that it enables individuals to transact with one another without either knowing where the other is geographically located. In short, the geographic indeterminacy discussed earlier applies just as much to interactive sites as to passive sites.

Consider, for example, a Web-based commercial transaction: say, the purchase on-line of a computer from a New York retailer by a North Dakota

⁷⁸ *Zippo Dot Com*, 952 F. Supp. at 1124

customer. The exchange of information between the customer and the computer seller's Web site will likely involve no human being besides the customer. The location of the server on which the seller's Web site is stored will likely be unknown to the consumer. The geographical location of the consumer (the eventual forum) will likely be unknown to any human being in the seller's company until the order has been placed. It is certainly the case that the subsequent sending of the computer to the forum state will be responsive to the customer's initial contact; however, a defendant's activity directed toward the forum in response to contacts initiated by someone other than defendant has been held not to be indicative of the "purposeful avail[ment] . . . of the privilege of conducting activities in the forum state" required to support personal jurisdiction.⁷⁹ And yet, the Ninth Circuit, for instance, found that such Web-based retail transactions supplied a predicate for asserting jurisdiction under the "sliding scale" test.⁸⁰

Hence, the triumph of *Zippo Dot Com*'s "sliding scale" test is difficult to justify analytically in the sense that the test fails to address the peculiarities of the Internet that render problematic the traditional territorialist underpinnings of personal jurisdiction doctrine. Moreover, it is difficult to justify in terms of policy. Why should conduct that has identifiable harmful effects within a jurisdiction escape adjudication by the courts of that state?

⁷⁹ See, e.g., *Hanson*, 357 U.S. at 252-253; *Kulko v. Superior Court*, 436 U.S. 84, 93-94 (1978).

⁸⁰ *Gator Com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079-80 (9th Cir. 2002).

Why should a lack of intentional connection with the territory of the forum count against jurisdiction when activities in cyberspace are by their very nature territorially indeterminate? The continued dominance of the “sliding scale” test suggests the power of the action bias over such analytical and policy concerns.

VI

Postscript: The Sovereign’s Tale

The Immigrant’s Tale can itself be subsumed under a larger narrative, epitomized by the motto on the Great Seal of the United States: “*e pluribus unum*.” The conventional story of America includes the idea that it is a whole formed by the coming together of many individual pieces. The Immigrant’s story is one aspect of that notion. Americans often refer to their country as “a nation of immigrants.” The idea is that true Americans (or the ancestors of true Americans) come from elsewhere, having left their homes to create new homes in America. (Again, it is, for this reason, not surprising that the only Americans who are actually native – who are not immigrants or their descendants – have been perpetual political and cultural outsiders throughout the nation’s history.) This understanding that we are “one” formed by the coming together of “many” is a source for the continuous tension between a vision of America in which the identity of each individual in terms of that former home is preserved and celebrated (the phenomenon of

the hyphenated American) and a vision of America as a “melting pot,” in which the individual, immigrant identities dissolve into a homogeneous American unity.

A second aspect of “*e pluribus unum*” might be called the “Sovereign’s Tale.” It is a political story of a single nation being formed out of individuated sovereignties – the states – which retain aspects of their original sovereignty. This story not only depicts a powerful, sometimes violent tension between state and national authority, but describes a complex and problematic relationship among the states themselves, as they seek to accommodate their simultaneous independence and interdependence.

The impact of this story on the development of personal jurisdiction is central to the most famous decision in that doctrine’s history: *Pennoyer v. Neff*.⁸¹ That case invalidated Oregon’s assertion of personal jurisdiction over an individual located and domiciled in California. The Supreme Court’s rationale was nicely summarized a century later:

Mr. Justice Field's opinion for the Court focused on the territorial limits of the States' judicial powers. Although recognizing that the States are not truly independent sovereigns, Mr. Justice Field found that their jurisdiction was defined by the principles of “public law” that regulate the relationships among independent nations. The first of those principles was “that every State possesses exclusive

⁸¹ 95 U.S. 714 (1877).

jurisdiction and sovereignty over persons and property within its territory.” The second was “that no State can exercise direct jurisdiction and authority over persons or property without its territory.” . . . Thus, “in virtue of the State’s jurisdiction over the property of the non-resident situated within its limits,” the state courts “can inquire into that non-resident’s obligations to its own citizens . . . to the extent necessary to control the disposition of the property.” . . . The Court recognized that if the conclusions of that inquiry were adverse to the non-resident property owner, his interest in the property would be affected. . . . Similarly, if the defendant consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State. But any attempt “directly” to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.⁸²

Pennoyer anchored its analysis in federalism principles, rather than in due process, for the simple reason that the fourteenth amendment’s due process clause was not yet in effect at the time of the juridical events being challenged in the case. Nonetheless, dicta in the case suggested that the extra-territorial assertion of jurisdiction would violate due process norms,⁸³

⁸² *Shaffer v. Heitner*, 433 U.S. 187, 197 (1977)(citations omitted).

⁸³ *Pennoyer*, 95 U.S. at 732-33.

and subsequent personal jurisdiction cases seemed to focus exclusively on that clause.

Since the 1945 decision in *International Shoe* with its emphasis on “traditional notions of fair play and substantial justice,” the Court’s pronouncements on the status of *Pennoyer*’s state sovereignty rationale have been, to put it mildly, inconsistent. A decade after *International Shoe* the Court asserted in *Hanson v. Deckla* that

restrictions on the personal jurisdiction of state courts . . . are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.⁸⁴

But in 1977 the Court suggested in *Shaffer v. Heitner* that with the decision in *International Shoe*,

the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.⁸⁵

⁸⁴ *Hanson*, 357 U.S. at 251 (emphasis added).

⁸⁵ *Shaffer*, 433 U.S. at 204.

Three years later, the Court seemed committed to accommodating both dimensions of the doctrine, insisting in *World-Wide Volkswagen v. Woodson* that

[the ‘minimum contacts’ test] can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁸⁶

The following year came another flip-flop, with the Court declaring that modern personal jurisdiction cases, including *World-Wide Volkswagen*, are concerned exclusively with due process and not with the relationship among states.⁸⁷ And yet, three years after that, the Court applied the “minimum contacts” test by means of a multi-factor analysis that included consideration of “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies” and the “shared interest of the several States in furthering fundamental substantive social policies.”⁸⁸

This back-and-forth on the role of state sovereignty in defining the constitutional limitations on the exercise of personal jurisdiction⁸⁹ should not

⁸⁶ *World-Wide Volkswagen*, 444 U.S. at 292.

⁸⁷ *Insurance Corp. of Ireland*, 456 U.S. at 702 n.10 (1982).

⁸⁸ *Burger King*, 471 U.S. at 477.

⁸⁹ Part of the conceptual difficulty lies in the post-*Pennoyer* tradition of discussing the constitutional dimensions of personal jurisdiction doctrine

surprise us. Just as the Immigrant's Tale is a source of the tension between the "hyphenated American" and the "melting pot" visions of the United States, the Sovereign's Tale generates its own tension between states' rights and national unity. And just as the explicitly invoked due process clause encapsulates the tension of the Immigrant's Tale, so the shadow -clause of the personal jurisdiction cases – the full faith and credit clause – embraces the political tension of the Sovereign's Tale.⁹⁰

Moreover, as the Immigrant's Tale illuminates the action bias in American law and the instantiation of that bias in the popular "sliding scale" test for personal jurisdiction, so we might expect the Sovereign's Tale, as a reflection of fundamentally important political values, to cast its own light on the seemingly inevitable triumph of *Zippo Dot Com*.

exclusively in terms of due process. The natural constitutional home for a discussion of the federalism dimension is the full faith and credit clause. U.S. CONST. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.") See Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HAST. L.J. 855, 860-61 (1987). In contrast to the courts' treatment of personal jurisdiction, analysis of the constitutional limits on choice of law has historically invoked both of these clauses, thereby providing a vocabulary on which to distinguish fairness considerations from those having to do with relations among the states. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (decided under the due process clause); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932) (decided under the full faith and credit clause); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) (decided under both the due process and full faith and credit clauses). In recent times, the United States Supreme Court has conflated the two inquiries so as to dampen the value of these distinct vocabularies. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Justice Stevens's concurring opinion focuses on just this problem. *Id.* at 320-32 (Stevens, J., concurring).

⁹⁰ See discussion in *supra* note 89.

Again, my interest is not to debate whether thinking about sovereignty in the context of Internet activity makes sense,⁹¹ any more than I am concerned with whether the action bias makes sense in that context. I want to simply suggest that an analogue to the action bias can be found in what might be called the “territory mystique.” The idea that our states are analogous to nations and that state borders consequently matter pervades the law. In personal jurisdiction doctrine, the mystique most clearly manifests itself in the “minimum contacts” test.

Put simply, “minimum contacts” have no necessary relationship to the fundamental fairness required by the due process clause.⁹² One can easily depict situations in which requiring a party to litigate in a jurisdiction with which that individual has no contacts, minimum or otherwise, is in no way unfair. Why, then, require contacts between the party and the forum? The answer appears to be a residual territorialism left over from the pre-due process days of *Pennoyer v. Neff*. An important source of that residue is the territory mystique, and the background story is the Sovereign’s Tale.

This residual territorialism does not require the intentionality and control that are hallmarks of the action bias. At its most extreme, the territory mystique can even overwhelm the action bias in personal

⁹¹ For examinations of this normative question see Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951 (2005); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

⁹² See, e.g., Greenstein, *supra* note 89, at 878-80.

jurisdiction doctrine and support jurisdiction when no intentional contact with the forum exists. Thus, for instance, a party has been held subject to the jurisdiction of a state by being served with process while flying over that state as a passenger on a commercial airplane.⁹³

Rather, what the territory mystique requires is some activity that connects the individual with the geographic territory of the state. Such activities may include the individual's physical presence within the state's borders at the moment that the court asserts its power through service of process (the *Pennoyer* paradigm), past activity of the individual within the state that generates the claim before the court (the *International Shoe* paradigm), and some status or past activity that integrates the individual into the state's political community (citizenship/domicile being paradigmatic).⁹⁴ A somewhat late development in personal jurisdiction doctrine constitutes a fourth kind of sufficient contact with the forum: activity beyond the state's territorial borders that causes harmful effects within the borders of the state.⁹⁵

Interestingly, and perhaps not surprisingly, for the last of these – projecting harmful effects into the state – to support personal jurisdiction, it helps that the conduct producing the harm has been “expressly aimed” at the

⁹³ *Grace v. MacArthur*, F. Supp. 442 (E.D. Ark. 1959).

⁹⁴ *See Milliken v. Meyer*, 311 U.S. 457 (1947).

⁹⁵ *E.g.*, *Calder v. Jones*, 465 U.S. 783 (1984).

forum.⁹⁶ The Sovereign's Tale helps us make sense of this. If states are analogous to nations, then when Nation A's territory suffers harm as the result of the activities of Nation B outside of A's borders, we might expect as a matter of diplomacy that A would discriminate between harm that was inadvertent (say, B's communication satellite falls to earth and lands in A) and harm that was "expressly aimed" at A by B (say, B lobbs a ballistic missile at A). Among American states these diplomatic expectations of comity and mutual accommodation are constitutionalized through the requirement of full faith and credit. In the context of personal jurisdiction, then, the farther defendant's contacts with the forum stray from the *Pennoyer* paradigm of physical presence, the weaker the apparent influence of the territory mystique and the stronger the demands of the action bias (including intentionality and control).

Jack's defamatory Web page caused harmful effects inside North Dakota through activity outside that state. The territory mystique should be weak in such a situation, thereby requiring that Jack's defamation be "expressly aimed" at North Dakota in order to justify North Dakota jurisdiction. *Zippo Dot Com*'s "sliding scale" test discriminates between passive and interactive sites in just this way, requiring the court to ask

⁹⁶ *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir.1998); see *Calder*, at 789. *But see* *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)(utilizing the kind of "stream of commerce" analysis discussed in *supra* notes 17-22 and accompanying text).

whether Jack’s site was “passive” (i.e., not directed toward any particular geographic place) or “interactive” (i.e., actively engaged with persons located at identifiable places).

Conclusion

Law is a rhetorical art; the central task of lawyers is to persuade. One way of thinking about what makes a doctrinal argument persuasive is to look at how debates surrounding difficult questions of law have stabilized and been resolved by courts over time. And looking at the career of *Zippo Dot Com* suggests that one thing that might make a particular argument persuasive is its resonance with our collective aspirations.

If we think of ourselves as a nation of immigrants and, more generally, of a nation in which individual initiative counts for both merit and blame, then a doctrine of personal jurisdiction that emphasizes defendant’s intentional and active affiliation with the forum might seem a more fitting test than one which predicates jurisdiction on the chance occurrence of deleterious effects within the forum. And if we think of ourselves as a nation of states – distinct political entities defined by their geographic borders – then a doctrine of personal jurisdiction that seeks to capture extraterritorial behavior aimed at causing harm inside the forum’s borders might seem similarly attractive.

Looking through these lenses of the action bias and the territory mystique, a North Dakota court might easily conclude that Jack's particular harm causing conduct fails to connect directly with North Dakota's community concerns. If so, Brie's argument will fail to persuade, and Jack will escape the long-arm jurisdiction of the court.