

MEETING EXPECTATIONS: TWO PROFILES FOR SPECIFIC JURISDICTION

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INTRODUCTION

The array of decisions in *Gator.com v. L.L. Bean*¹ is a recent illustration of the complexity and confusion that plague the doctrine of personal jurisdiction. Contending with one of the most pressing issues concerning the doctrine, the Ninth Circuit in *Gator* was faced with deciding the scope of authority that should arise from L.L. Bean's purposeful, but limited, contacts with California. The facts of the case posed an interesting twist on the typical personal jurisdiction scenario. The plaintiff, *Gator.com* ("Gator"), was a software distributor that develops software to monitor Internet purchasing patterns. The software (sometimes referred to as "spyware" or "adware") was distributed to consumers' computers (often without the consumer's knowledge or consent) when a consumer made a purchase over the Internet. The software tracked the consumer's Internet purchases and monitored the Web sites that were visited. When the software recognized the Web site of a target store, it "display[ed] a pop-up window offering a discount coupon for a competitor."² The case involved a *Gator* software product that identified L.L. Bean ("Bean") as a target company.³ When Bean learned that it was a target company and that the software was offering Eddie Bauer coupons to individuals who visited the Bean Web site, Bean sent a cease and desist letter to *Gator*. *Gator* responded by filing a declaratory judgment action to establish the legality of its software. *Gator* filed the action in its home forum of California and sought to hail Bean across the country to litigate the issue.⁴ Not surprisingly, Bean moved to dismiss the case for lack of personal jurisdiction, arguing that while it regularly sells products to California residents, these contacts are not sufficient to hail it into a federal court in California to litigate the intellectual property and unfair competition issues raised by *Gator*'s software products. The United States District Court agreed with Bean and dismissed the case for lack of specific or general jurisdiction.⁵

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1. No. C01-01126 MEJ, 2001 U.S. Dist. Lexis 19737 (N.D. Cal. Nov. 21, 2001), *rev'd*, 341 F.3d 1072 (9th Cir. 2003), *vacated by, reh'g, en banc, granted*, 366 F.3d 789 (9th Cir. 2004).

2. *Gator.com Corp.*, 341 F.3d at 1075.

3. *Id.*

4. *Id.* Bean is incorporated and has its principle place of business in Maine.

5. *Id.*

The Ninth Circuit reversed the district court decision, holding that Bean was subject to general jurisdiction in California, largely on the basis of a finding that it maintained a “virtual store” in California through its interactive Web site.⁶ Several months later, however, the Ninth Circuit vacated its decision and ordered a rehearing en banc.⁷ After the parties briefed the issue and the en banc court heard oral argument, the parties reached a settlement agreement and the court dismissed the appeal as moot, leaving the parties and legal community without an answer to this pressing issue.⁸

While the Bean case represents one of the most recent examples of the inconsistency found in personal jurisdiction cases, it is not the only such example.⁹ These cases, and many others, illustrate that the doctrine of personal jurisdiction is largely in a state of disarray. Notwithstanding the murkiness of the minimum contacts doctrine,¹⁰ the Supreme Court has signaled no major changes in the basic structure of personal jurisdiction doctrine.¹¹ As noted by Professor Moore, “[t]he dictates of minimum contacts are so deeply imbedded in the jurisprudence of personal jurisdiction as to make their abandonment

6. *Id.* at 1079. Other factors included non-Internet sales to California residents, soliciting business in California and serving the market in California. *Id.* at 1078.

7. *Gator.com Corp. v. L.L. Bean, Inc.*, 366 F.3d 789 (9th Cir. 2004).

8. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125 (9th Cir. 2005) (en banc).

9. *See Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1200 (4th Cir. 1993) (rejecting general jurisdiction where 2% of total sales were in forum; rejecting specific jurisdiction because product liability suit did not “arise out of the defendant’s activities in the forum”); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction where 13% of total revenues occurred in the forum; specific jurisdiction not argued); *Mich. Nat’l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465-66 (6th Cir. 1989) (holding defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan); *Provident Nat’l Bank v. Cal. Fed. Sav. & Loan Assoc.*, 819 F.2d 434, 437-38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to .083 of its total loan portfolio, plus other contacts, was sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued); *Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052-53 (W.D. Wash. 1995), *aff’d*, 78 F.3d 602 (Fed. Cir. 1996) (unpublished table decision) (rejecting general jurisdiction where 3% of total sales occurred in forum; rejecting specific jurisdiction over patent infringement claim where the defendant sent letters into the forum threatening litigation for infringement in part because the letters had no substantive bearing on the infringement issue).

10. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 320 (2002) (asserting that “our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today” and as such we must reevaluate the theoretical foundation for personal jurisdiction).

11. Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 598 (2001) (noting that there is little likelihood of changing the basic doctrinal framework, no matter how “architecturally grotesque” it may be).

unrealistic.”¹² Thus, the challenge is to provide meaningful criteria for the application of the basic doctrinal framework that has been the law of the land since *International Shoe*.

In an effort to provide doctrinal guidance, this Article suggests that we should focus attention on refining the scope and limits of specific jurisdiction, thereby avoiding the temptation to dilute the standards for general jurisdiction. Part I of the Article describes the existing framework of personal jurisdiction and Part II elaborates on the problem that exists in differentiating between general and specific jurisdiction. Part III then describes and critiques the leading theories which attempt to define the scope of specific jurisdiction and concludes that while each theory offers insight into the problem, none of them offers a comprehensive definition of the scope of specific jurisdiction that is appropriate for every factual scenario. Recognizing that the Due Process Clause strives to provide defendants with the ability to predict and control their jurisdictional exposure, Part IV suggests that the scope of jurisdiction arising from a particular forum contact should approximate the defendant’s expectation that it might be haled into that forum for an occurrence that it could anticipate arising from the forum contacts. The Article then suggests that a critical aspect of a defendant’s expectation of jurisdiction depends upon whether the defendant’s contacts with the forum are limited in time and purpose (“episodic contacts”) or whether the defendant has created an ongoing and systematic relationship with the forum (“systematic contacts”).¹³ Finally, the Article provides a profile for determining the scope of specific jurisdiction for each of these types of contacts and discusses various applications of the profile.

I. THE *INTERNATIONAL SHOE* FRAMEWORK OF PERSONAL JURISDICTION

In 1945, the Supreme Court radically changed the doctrine of personal jurisdiction to incorporate what has become known as the minimum contacts doctrine. The premise of the doctrine is concisely stated in one sentence from the Court’s opinion in *International Shoe Co. v. Washington*:

[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.”¹⁴

Although the Court provided no specific criteria to define “traditional notions of fair play and substantial justice,” it offered several jurisdictional landmarks to help courts navigate the uncertain waters.¹⁵ First, a state may never exercise

12. *Id.*

13. This Article assumes that there is a category of ongoing and systematic contacts which are not substantial enough to justify general jurisdiction.

14. 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

15. *Id.* at 316-17; Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General*

jurisdiction over a defendant who has no contacts, ties, or relations to the state.¹⁶ Second, if a defendant has one or more contacts with a state, the state may be able to subject the defendant to jurisdiction for suits arising out of or relating to the forum state contacts.¹⁷ Third, if a defendant maintains continuous and substantial contacts with a state, the state will likely be permitted to exercise jurisdiction over the defendant for claims that arise out of or are connected to the contacts, and the state may even be able to exercise jurisdiction over the defendant for claims that are entirely unrelated to the forum state activities.¹⁸

Nearly a quarter of a century after *International Shoe*, two celebrated Harvard Law School professors refined the doctrine by theorizing that every assertion of personal jurisdiction could be neatly classified into one of two distinct categories, which they coined “general jurisdiction” and “specific jurisdiction.”¹⁹ Their theory immediately caught the attention of the legal community as an analytically appealing means of providing a framework for an otherwise untethered minimum contacts doctrine. Applications of the theory snaked their way through the appellate process until ultimately culminating with the Supreme Court’s endorsement in 1984:

[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or relating to the defendant’s contacts with the forum, the State is exercising “specific jurisdiction” over the defendant.

....

When a State exercises personal jurisdiction over a defendant in a suit

Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?, 48 CASE W. RES. L. REV. 559, 564 (1998).

16. *Int’l Shoe*, 326 U.S. at 316.

17. *Id.* at 316-17.

18. *Id.* Since the *International Shoe* case, the Court has stated that the defendant’s minimum contacts must be considered in light of other factors to determine whether the exercise of jurisdiction fits within the overall notion of “fair play and substantial justice.” Relevant factors for determining the reasonableness of jurisdiction include “the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “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.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). In *Burger King*, the Court explained that

[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Id.

19. Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966).

not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.²¹

Today, the terms specific jurisdiction and general jurisdiction are as ubiquitous as the phrase minimum contacts.

Notwithstanding the universal acceptance of the concepts of general and specific jurisdiction, the ensuing four decades have proven that the distinction between specific and general jurisdiction is anything but neat. Like the elusiveness of the horizon, as one approaches the point that distinguishes specific jurisdiction from general jurisdiction it becomes apparent that no clear demarcation exists.

In 1988, two leading scholars attempted to define the distinguishing characteristics of general and specific jurisdiction.²² Their articles debated the appropriate scope of general and specific jurisdiction and, although they did not agree, each author offered a thorough analysis of the issue and thoughtful suggestions for how the Supreme Court might proceed in developing a coherent doctrine of personal jurisdiction. Now, after turning the page on a new century, the legal community is no closer to resolving this conundrum than we were in 1988.²³ Many legal scholars thought that the Court would finally address the issue when it accepted certiorari in *Carnival Cruise Lines v. Shute*, only to be disappointed when the Court dodged the minimum contacts issue by enforcing a flimsy forum selection clause hidden in the small print of a form contract.²⁴ One can only hope that the Supreme Court has not issued its final word on the subject and that it is merely waiting for the appropriate case to answer some of the nagging questions that exist regarding the personal jurisdiction doctrine.

II. THE PROBLEM: DEFINING THE SCOPE OF SPECIFIC JURISDICTION

The distinction between general and specific jurisdiction rests upon the idea that unlimited contacts will give rise to unlimited jurisdiction and limited contacts will give rise to limited jurisdiction.²⁵ In order to maintain the integrity of the distinction between general and specific jurisdiction, one must consider

21. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984).

22. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter Brilmayer, *Related Contacts*]; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

23. Several other articles have been written on the relatedness requirement of specific jurisdiction but the legal community has reached no consensus on the appropriate standard. See, e.g., Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994); Mark Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement*, 50 WASH. & LEE L. REV. 1265 (1993).

24. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

25. The Supreme Court has not defined clearly the characteristics of general jurisdiction and therefore the author uses the phrase "unlimited contacts" to loosely refer to the substantiality requirement that must be satisfied for general jurisdiction.

two factors: (1) how “unlimited” or substantial must a defendant’s forum contacts be to justify general jurisdiction²⁶ and (2) how “limited” is the scope of specific jurisdiction that arises out of a defendant’s purposeful, but limited, contacts with a forum? These questions are easily blurred together in factual scenarios where a defendant has a significant (but not overwhelming) amount of contact with a forum and is haled into the forum for a cause of action that is only marginally related to the forum contacts. A sampling of federal circuit court opinions reveals that in such circumstances there is significant disagreement on the requirements for general and specific jurisdiction.²⁷ This Article seeks to respond to this problem by more clearly defining the scope of specific jurisdiction, thereby resisting the temptation to dilute the requirements of general jurisdiction.

III. A CRITIQUE OF THE EXISTING THEORIES OF RELATEDNESS

Since the Supreme Court adopted the minimum contacts doctrine over fifty years ago, the Court has never fully elaborated on the standard that should be applied to determine the scope of specific jurisdiction. Rather, the Court has loosely stated that a cause of action must “arise out of,” “relate to” or be “connected with” the defendant’s forum contacts.²⁸ Notwithstanding the Court’s lack of direction—or possibly because of it—lower courts and commentators have struggled to give meaning to the nexus requirement. Following is a discussion of the leading theories on what the nexus requirement entails. In an effort to compare and contrast the theories, each of the theories will be applied to the following hypotheticals:

- **Car Accident Hypothetical:** Driver, a citizen of New York, commutes to and from his office in Connecticut every work day. Additionally, he regularly travels through Connecticut, Massachusetts, and New Hampshire to reach his summer home in Maine. On one such occasion, while driving through Massachusetts, he hits Pedestrian, a citizen of Connecticut. Where is Driver subject to specific personal jurisdiction for this accident?²⁹

26. While the Supreme Court has not expressly defined the quantum of contacts that is necessary for general jurisdiction, a number of scholars have asserted forcefully that general jurisdiction should be interpreted narrowly. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81 (discussing the limited number of situations that should give rise to general jurisdiction) [hereinafter Brilmayer, *How Contacts Count*]; Twitchell, *supra* note 22, at 633; von Mehren & Trautman, *supra* note 19, at 1137 (citations omitted) (general jurisdiction has been grounded in “three types of relationship between the defendant and the forum: his domicile or habitual residence; his presence; and his consent”).

27. See *supra* note 9 for a sampling of circuit court opinions on specific and general jurisdiction.

28. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

29. The author has adopted this hypothetical from a similar one used by Professor Brilmayer to illustrate her theory of substantive relevance. See Brilmayer, *Related Contacts*, *supra* note 22,

- Product Liability Hypothetical: New York Company distributes its widgets in every state in the country. It sends a defective product into Pennsylvania where Consumer, a citizen of Ohio, purchases the product. Consumer takes the product to his home in Ohio where he suffers serious injuries caused by the defect. Where is Company subject to specific personal jurisdiction for this injury?³⁰
- Hotel Drowning Hypothetical: Hotel located in Hong Kong sends direct mail solicitation to the 500 largest companies in the United States offering a discounted rate for corporate employees traveling to Hong Kong for business. Massachusetts Company responds to the discount offer and enters into an agreement to receive a discount based upon a minimum number of overnight stays at Hotel per year. Employee of Company thereafter contacts Hotel from Massachusetts and makes reservations to stay at Hotel for a business trip. While staying at Hotel, Employee drowns in Hotel pool. Assuming that Hotel has similar arrangements with U.S. companies in other states as well as Massachusetts, where is Hotel subject to specific personal jurisdiction for this accident?³¹

A. *The Substantive Relevance Test and the Proximate Cause Test*

One of the leading theories on the relatedness requirement suggests that a defendant's purposeful forum contact will give rise to specific jurisdiction over a controversy if the contact is substantively relevant to the resolution of the controversy. This test, frequently referred to as the substantive relevance test, defines the scope of jurisdictional authority according to the legal framework that is at issue, granting specific jurisdiction only if the defendant's forum contact provides evidence of one or more elements of the underlying claim. Professor Lea Brilmayer, a leading proponent of this theory, offers the following description:

A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact. In contrast, an occurrence in the forum State of no relevance to a totally domestic cause of action is an unrelated contact, a purely jurisdictional allegation with no substantive purpose.³²

at 1445.

30. The author has adopted this hypothetical from the facts of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

31. This hypothetical is loosely based upon the facts of *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996).

32. Brilmayer, *How Contacts Count*, *supra* note 26, at 82 (citation omitted); *see also* Brilmayer, *Related Contacts*, *supra* note 22, at 1452 (coining the phrase "substantive relevance"). Professor Brilmayer describes her substantive relevance test in two forms: a weaker version and a stronger version. The weaker version asks whether one who is "telling the story" of the event giving

In essence, this test uses the applicable substantive law as the defining criteria for relatedness.³³

The substantive relevance test encompasses another frequently cited test which confers specific jurisdiction when a defendant's forum contact is a proximate cause of the plaintiff's cause of action. Proximate cause is comprised of two considerations: (1) was the defendant's action a cause in fact of the plaintiff's injury and (2) if the defendant's action was a cause in fact of the injury, does the law impose legal responsibility on the defendant for the injury?³⁴ Although the concept of proximate cause is generally associated with tort actions, a similar legal question is posed in every civil claim because civil liability requires a determination that the defendant's conduct caused an injury to the plaintiff for which a legal right of recovery exists.³⁵ As such, the substantive relevance test encompasses what some courts have referred to as the proximate cause test because both tests consider whether the defendant's purposeful contacts justify the imposition of legal responsibility on the defendant for the plaintiff's injury.³⁶

rise to the litigation would necessarily describe the forum contact—in other words are the contacts with the forum central to the plot of the legal assertions being made? Brilmayer, *Related Contacts*, *supra* note 22, at 1453. The stronger version of substantive relevance defines the relevant contacts as those that are linked to the applicable substantive law such that the forum conduct makes “a difference in the dispute's legal treatment.” *Id.* at 1455-56.

33. Professor Brilmayer loosens the standard slightly by suggesting that “one need not make a full-fledged choice of law determination: one need merely consider the laws reasonably vying for application.” Brilmayer, *Related Contacts*, *supra* note 22, at 1456.

34. PROSSER AND KEETON ON TORTS § 42 (5th ed. 1984). Determining whether a defendant should bear legal responsibility for a given action requires an evaluative conclusion that is not “factual” in the ordinary sense that one might determine who, what, where or when an event occurred. *Id.*

35. Although the substantive relevance test is theoretically broader than the proximate cause test, in practice the two tests are nearly equal. For example, in a negligence case the substantive relevance test could theoretically be satisfied if the defendant's forum conduct forms evidence of duty, breach, causation, or injury (whereas the proximate cause test would only be satisfied if the defendant's forum conduct forms evidence of causation). But, in any given case, evidence of duty or breach is only relevant to the case if it is causally linked to the plaintiff's injury. Thus, if the defendant's conduct gave rise to a duty which it breached in the forum, jurisdiction would arise only if the breach *caused* the plaintiff's injury (if the breach was unrelated to the plaintiff's injury it would be substantively irrelevant). Similarly, evidence that the plaintiff suffered the injury in the forum would not alone justify specific jurisdiction because jurisdiction must rest upon the defendant's purposeful conduct toward the forum, not the place where the plaintiff ultimately suffered the effects of the defendant's conduct. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

36. *See, e.g., Nowak*, 94 F.3d at 715 (“Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation. Certainly, jurisdiction that is premised on a

1. *Car Accident Hypothetical*.—Applying the substantive relevance test to the car accident, Driver (defendant) would be subject to specific personal jurisdiction in Massachusetts because his purposeful contact with Massachusetts is central to Pedestrian's legal claim. Driver created a purposeful contact with Massachusetts by driving on the roads in the state and the facts surrounding the Massachusetts accident will make a difference to the outcome of the case because they provide evidence that his negligence was the proximate cause of Pedestrian's injury. Thus, Driver has substantively relevant contacts with Massachusetts that would justify allowing a court in Massachusetts to exercise personal jurisdiction for the accident. But are there other jurisdictions that might give rise to specific jurisdiction?

Pedestrian could argue that Connecticut is an appropriate jurisdiction because Driver regularly benefits from using Connecticut roads and highways to commute to and from his office, to his summer home in Maine and, more specifically, Driver used the Connecticut highway to reach Massachusetts immediately prior to hitting Pedestrian. First, it would seem that although Driver regularly uses the Connecticut roads and highways to commute to his office and summer home, these contacts have nothing to do with the Massachusetts accident and therefore are not substantively relevant to this cause of action. The only contact that is arguably relevant to Pedestrian's injury would be the fact that Driver passed through Connecticut on his way to Massachusetts on the occasion that gave rise to the accident with Pedestrian. This fact, however, would not ring the bell under a substantive relevance test because it does not provide evidence of one of the elements of Pedestrian's legal claim: duty, breach, causation, or injury. Thus, Driver's contacts with Connecticut would not justify specific jurisdiction over Pedestrian's claim under the substantive relevance test.

Pedestrian could also argue that New Hampshire or Maine are appropriate jurisdictions to hear the claim because Driver regularly traveled through New Hampshire to reach his home in Maine and intended to reach both forums on this trip.³⁷ The substantive relevance test would reject jurisdiction in these forums, however, for reasons similar to those that caused us to reject jurisdiction in Connecticut. Any prior trips through New Hampshire to reach Maine are not relevant to Pedestrian's claim and Driver's intent to drive through New Hampshire to reach Maine has no bearing on the outcome of the case because it does not provide evidence of an element of Pedestrian's negligence claim. Thus, Driver's contacts with New Hampshire and Maine are not substantively relevant to Pedestrian's claim.

2. *Product Liability Hypothetical*.—Applying the substantive relevance test to the product distribution case, the New York Company (defendant) would be

contact that is a legal cause of the injury underlying the controversy—i.e., that forms an 'important, or [at least] material, element of proof; in the plaintiff's case'—is presumably reasonable, assuming, of course, purposeful availment.") (citation omitted).

37. See *Cornelison v. Chaney*, 545 P.2d 264, 267-68 (Cal. 1976) (upholding jurisdiction over a truck driver who was involved in an accident in Nevada because the truck driver regularly delivered goods in California and was bound for California at the time of the accident in Nevada).

subject to specific jurisdiction in Pennsylvania because its purposeful contacts with Pennsylvania are central to Consumer's (plaintiff) argument that Company should bear legal responsibility for Consumer's injury. Company knowingly sent its products into Pennsylvania to be sold to consumers and the evidence of duty, breach, and causation will focus on Consumer's purchase of the allegedly defective product. Under these circumstances the substantive relevance test would be satisfied.

Among the other states where Company distributes its products, Ohio seems to present the strongest connection to Consumer's claim. Company, however, would not be subject to jurisdiction in Ohio under the substantive relevance test. Although Company purposefully availed itself of the benefit of doing business in Ohio by regularly shipping its products into Ohio, and although one of its products caused Consumer's injury in Ohio, the particular product that caused Consumer's injury was not one that was sent by Company into Ohio. Without a causal link between Company's actions in Ohio and Consumer's injury, Company's Ohio contacts are irrelevant to the outcome of the dispute and thus not sufficient for specific jurisdiction under the substantive relevance test.³⁸

3. *Hotel Drowning Hypothetical*.—Under the substantive relevance test, Employer, or, more accurately, the Employee's family (plaintiff) may be able to argue that Hotel's contacts with Massachusetts are sufficient to subject it to specific jurisdiction in Massachusetts for a breach of contract claim. In proving breach of contract, the plaintiff would have to establish: (1) a contract; (2) the terms of the contract (specifically that Hotel promised to provide safe accommodations to Employee); and (3) a breach (a failure to provide safe accommodations which precipitated the accident in the pool).³⁹ In proving the existence and terms of the contract, Employee's family would attempt to show that Hotel reached into Massachusetts to solicit business, it negotiated discount arrangements with various Massachusetts corporations, and pursuant to one such discount arrangement, Employee contacted Hotel from Massachusetts and made a reservation to visit Hotel. Even if the safety of the accommodations was never expressly discussed, Employee's family could argue that the terms of the contract implicitly included a promise of safe accommodations. Thus, if the court is willing to consider the facts surrounding the creation of the contract, Employee's family would be able to argue that Hotel's solicitation efforts provide evidence

38. It is interesting to note that although Consumer's case will focus on evidence showing that Company's product caused injury to Consumer in Ohio, an Ohio injury is not sufficient to satisfy the substantive relevance test for specific jurisdiction in Ohio. The minimum contacts doctrine requires that jurisdiction be based upon the defendant's purposeful contacts with the forum, not on plaintiff's contacts with the forum. Thus, although one of Company's products caused Consumer's injury in Ohio, Company did not send the offending product to Ohio; it sent the product to Pennsylvania and Consumer transported it to Ohio where she suffered the injury.

39. See *Milner Hotels v. Norfolk & W. Ry.*, 822 F. Supp. 341, 344 (S.D. W. Va. 1993), *aff'd*, 19 F.3d 1429 (4th Cir. 1994) (unpublished table decision) (discussing breach of contract agreeing to provide safe and clean hotel accommodations).

of some elements of their claim.⁴⁰

Hotel would not be subject to specific jurisdiction in Massachusetts for a tort claim asserting that it was negligent in failing to provide safe accommodations. Under a negligence claim, Hotel's Massachusetts contacts would have to be relevant to proof of duty, breach, causation, or injury. These elements would be proven by the facts surrounding the drowning in Hong Kong. The fact that Hotel reached into Massachusetts and solicited Massachusetts corporations to send their employees to stay at Hotel is irrelevant to the evidence of negligence at the facility. Thus, under a strict application of substantive relevance, Hotel may be subject to specific personal jurisdiction for breach of contract but would not be subject to jurisdiction for negligence, even though both claims arise out of the same injury.⁴¹

4. *Pros and Cons of Substantive Relevance.*—By linking the jurisdictional question with the substantive legal questions to be resolved in a suit, the substantive relevance test provides analytical clarity, predictability, and efficiency. The test minimizes the recurrent criticisms of the minimum contacts doctrine by providing a framework for plaintiffs to make informed decisions about where to file suit while, at the same time, providing notice to defendants of the likely jurisdictional exposure that they will face as a result of their forum conduct. Systemic efficiency is enhanced to the extent that plaintiffs are less likely to file suit in improper jurisdictions, defendants are more likely to waive their objections to personal jurisdiction where analysis clearly shows the objection to be futile and courts are able to make jurisdictional determinations consistently and expeditiously.

Notwithstanding these benefits, the substantive relevance test imposes stricter limits on the reach of specific jurisdiction than the Supreme Court has endorsed to date. In *International Shoe Co. v. Washington*, the Court described the relationship between a defendant's forum activities and its jurisdictional exposure as a type of *quid pro quo*:

to the extent that a [defendant] exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or *are connected with* the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly

40. Under these circumstances, the facts surrounding the solicitation are tangentially relevant to an element of a claim and thus allow one to argue substantive relevance. However, if substantive relevance requires that the evidence be material to the outcome of the dispute, the evidence of solicitation will not be sufficient to confer specific jurisdiction.

41. One could argue that the doctrine of pendent personal jurisdiction would provide a basis for exercising jurisdiction over the tort claim because it arises out of the same nucleus of operative fact as the contract claim. See Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J.1619, 1630-32 (2001) (explaining the doctrine of pendent personal jurisdiction in relation to traditional minimum contacts cases).

be said to be undue.⁴²

If the Court intended to require that a defendant's contacts form the legal cause of the plaintiff's claim, it should not have referred to a mere "connection" between the claim and the defendant's activities within the state. As written, the Court's decision implies that even when a defendant's contacts do not give rise to the plaintiff's claim, the plaintiff's claim still may be sufficiently "connected with the [defendant's] activities in the state" to justify specific jurisdiction.⁴³

The hotel drowning hypothetical illustrates the underinclusive nature of the substantive relevance test. The substantive relevance test likely would exclude from consideration Hotel's purposeful solicitation of business in Massachusetts because it is not evidence of an element of Employee's family's claim for relief. Yet, solicitation of business in a forum arguably falls within the Court's notion of a *quid pro quo*—if a defendant reaches out to citizens of a forum and entices them into a business transaction, the defendant should be required to answer for claims arising out of the transaction in the forum where it solicited the sale. Recognizing that strict adherence to a substantive relevance/proximate cause standard may be unnecessarily restrictive in some instances, the Court of Appeals for the First Circuit has held that a defendant's solicitation of a Massachusetts business provided "a meaningful link" between the defendant and the harm suffered outside the forum.⁴⁴ Characterizing its holding as a "slight loosening of [the proximate cause] standard," the court stated:

When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.⁴⁵

Thus, strict adherence to the substantive relevance test would preclude the exercise of jurisdiction in situations that would otherwise appear to satisfy the policy concerns of the doctrine.⁴⁶

An additional criticism of the substantive relevance test is that while the test provides clarity and predictability because it is dependant upon the elements of the plaintiff's claim, it places unnecessary emphasis on the content of substantive

42. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (emphasis added).

43. *Id.*

44. *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996).

45. *Id.* at 915-16.

46. While the *Nowak* court limited its holding to the particular facts of that case, the court noted that other fact patterns could be found to meet the basic criteria of foreseeability and thus provide a basis for further loosening of the proximate cause standard. *Id.* at 716.

law and on pleading requirements. Justice Brennan expressed this criticism of the substantive relevance test in his dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, noting that, “[l]imiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant’s contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State.”⁴⁷ A strict application of substantive relevance will sometimes lead to the conclusion that a defendant is subject to specific jurisdiction for some claims arising out of a given factual scenario but not other claims arising out of the same scenario. The drowning hypothetical illustrates this problem because specific jurisdiction arguably exists over the breach of contract claim but not over a tort claim, despite both claims arising out of the same accident. The Court of Appeals for the Fifth Circuit rejected a strict substantive relevance test in *Prejean v. Sonatrach, Inc.* in favor of a looser “but for” test, noting that “[l]ogically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a ‘but for’ causative factor for the tort since it brought the parties within tortious ‘striking distance’ of each other.”⁴⁸

Finally, the substantive relevance test contradicts the notion of flexibility inherent in the minimum contacts philosophy of “fair play and substantial justice.” Substantive relevance provides clarity and predictability but also excludes from consideration contacts that may be relevant to the overall fairness of asserting jurisdiction. For example, a strict application of substantive relevance would not consider the totality of circumstances surrounding a defendant’s relationship with a forum but rather would focus on only those contacts that will have an impact on the outcome of the case.⁴⁹ Considering the product liability hypothetical, Company will be shielded from jurisdiction in Ohio by a strict application of substantive relevance even though: (1) it regularly sends its product into Ohio and benefits from sales to Ohio citizens; (2) the product at issue in the particular case allegedly malfunctioned in Ohio; and (3)

47. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting) (“For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action ‘did not ‘arise out of,’ and [is] not related to,’ that training. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the court would concede that the specific jurisdiction of the Texas courts was applicable.”) (alterations in original) (internal citation omitted).

48. *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A Aug. 1981).

49. See William M. Richman, Review Essay, 72 CAL. L. REV. 1328, 1340 (1984) (reviewing ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* (1983) (critiquing the substantive relevance test); see also Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465, 1469 (1988) (explaining that the cost of substantive relevance test is flexibility, fairness to plaintiff, and state power).

Consumer suffered injury in Ohio. Although the specific goods that Company sent to Ohio are admittedly irrelevant to Consumer's evidence of negligence, these contacts are relevant to the defendant's expectation of suit in the forum. Rejecting jurisdiction under these circumstances would allow form to trump substance: a defendant, who otherwise would be subject to jurisdiction in Ohio for an injury caused by its allegedly defective product sold in Ohio, would be able to shield itself from jurisdiction in Ohio because this plaintiff happened to purchase this particular product in another state.⁵⁰ Company's contacts with Ohio should not be excluded from consideration merely because they are not the proximate cause of Consumer's injury, particularly in light of the continuous and substantial nature of those contacts.

B. The "But For" Causation Test

This classic test for determining cause-in-fact requires one to compare the actual facts of a dispute as they occurred with what might have occurred, hypothetically, if the defendant had acted differently or not at all.⁵¹ If the plaintiff's injury would not have occurred in the absence of the defendant's forum contact, the defendant's forum contact will be considered a "but for" cause of the claim and thus specific jurisdiction would exist under this test.⁵² The "but for" test is much broader than the proximate cause test because it allows a court to consider any necessary antecedent to the plaintiff's injury, not just those actions by the defendant for which the law imposes responsibility. The "but for" test looks beyond the immediate cause of the plaintiff's claim and considers the "cause of the cause."⁵³ The Ninth Circuit, which has expressly adopted the "but for" test, considers "whether the 'entire course of events . . . was an uninterrupted whole which began with, and was uniquely made possible by, the [defendant's forum] contacts."⁵⁴

To the extent that the "but for" test allows one to consider the "cause of the cause," the test may have an extraordinarily broad reach. For example, if a lawyer is sued on a legal malpractice claim, should he be subject to specific jurisdiction in the forum where he went to law school on the theory that his law degree is a "but for" cause of the suit?⁵⁵ What about the jurisdiction where he

50. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (dicta) (implying that Audi and Volkswagen of America would be held subject to specific personal jurisdiction in Oklahoma based upon facts similar to those presented in the product liability hypothetical).

51. PROSSER & KEETON ON TORTS, *supra* note 34, § 41.

52. *Alexander v. Circus Circus Enters., Inc.*, 939 F.2d 847, 853 (9th Cir. 1991), *rev'd*, 972 F.2d 261 (9th Cir. 1992) (reversing on other grounds).

53. *Maloney*, *supra* note 22, at 1280.

54. *Alexander*, 939 F.2d at 853 (quoting *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 384 (9th Cir. 1990)).

55. *Rose*, *supra* note 23, at 1572 (making a distinction between historical and "but for" cause).

was born because he could not have become a lawyer but for being born? While most would agree that these jurisdictions are too remotely related to the malpractice claim to form a basis for specific jurisdiction, a basic “but for” analysis seems to suggest that these forums would be acceptable. To avoid this overly broad interpretation of the test, one must consider that one uses this test to determine whether a forum is sufficiently connected to a claim to justify its involvement in adjudicating the claim. If one considers a fact to be a “but for” cause of the claim, then one must consider whether the location of the fact helped give rise to the claim or whether the fact could have occurred elsewhere and still given rise to the claim. If changing the location of the fact would not affect the occurrence of the dispute, then the fact is merely a historical cause of the dispute and not a true “but for” cause.

The distinction between historical cause and “but for” cause may be illustrated by the above malpractice example. In that case, the place where the defendant went to law school is a historical cause of the claim, but not a “but for” cause because, if the defendant had not attended law school in one location, he likely would have attended law school elsewhere.⁵⁶ If the defendant had attended law school in another jurisdiction, he still would have been in the position to provide legal advice to the plaintiff and thus still would have been sued. Similarly, if the defendant had not been born in one location, one must assume that he would have been born elsewhere (and he would have attended law school and provided legal services to the plaintiff). Thus, although the defendant’s birth and his law degree “caused” the malpractice claim, the location of these events is not a “but for” cause of the claim, rather, it is merely an historical cause.⁵⁷

1. *Car Accident Hypothetical.*—Applying the “but for” test to the hypothetical car accident case, Driver would be subject to specific personal jurisdiction in Massachusetts because Pedestrian’s injury would not have occurred “but for” Driver’s purposeful contact with Massachusetts on his way to Maine.⁵⁸ Driver availed himself of the privilege of using Massachusetts

56. *Id.*

57. There are other situations where the “but for” doctrine may prove difficult to apply. For example, where a defendant engages in similar conduct in multiple locations and the conduct gives rise to similar injuries to the plaintiff in each of these locations, it may be difficult to say that the defendant’s conduct in one of those jurisdictions is the “but for” cause of the entire injury to the plaintiff. Similarly, when a plaintiff suffers injury that results from the cumulative effects of several different actions, it may be difficult to determine which action, if any, is the “but for” cause of the injury. *See id.* at 1570-71.

58. Massachusetts is a true “but for” cause of the accident because if one assumes that Driver drove through upstate New York instead of entering Massachusetts, Driver and Pedestrian would not have had an opportunity to come into “contact” with one another and thus, this accident would not have occurred. One could compare this analysis with one concerning the location where Driver purchased the car that he was driving at the time of the accident. If one assumes that Driver purchased the car in Connecticut, one must consider whether Connecticut is a historical cause of the accident or a “but for” cause of the accident. Under these facts, Connecticut would not be a “but for” cause of the accident because Driver could have purchased the car in another forum and

roadways and his alleged negligent conduct took place in Massachusetts. As this contact was a direct cause of Pedestrian's injury, the nexus requirement would be satisfied.

Pedestrian could argue that specific jurisdiction exists in Connecticut because Driver availed himself of the privilege of using Connecticut roadways and that this contact was a link in the chain of causation that led to Driver's presence in Massachusetts at the time of the accident. While Driver's passage through Connecticut may be a "cause of the cause" of the claim, none of Driver's alleged negligent conduct took place in Connecticut and Pedestrian was not injured in Connecticut.⁵⁹ If one accepts the distinction between historical cause and "but for" cause, Driver's contact with Connecticut would be considered a historical cause of the accident because Driver could have reached Massachusetts without ever entering Connecticut. Thus, while traveling through Massachusetts was a "but for" cause of the accident, traveling through Connecticut was merely a historical cause.⁶⁰ If, on the other hand, one rejects the distinction between historical cause and "but for" cause, Connecticut, as well as countless other potential jurisdictions, would have a basis to assert specific jurisdiction.⁶¹

2. *Product Liability Hypothetical*.—Applying the "but for" test to this hypothetical, Company would be subject to specific jurisdiction in Pennsylvania because it purposefully availed itself of the privilege of conducting business in Pennsylvania and Consumer (plaintiff) would not have purchased the product that caused his injury if Company had not sent it into the forum. Indeed, Company's Pennsylvania contacts are not an attenuated cause of the cause of the accident; they are a proximate cause of the accident.

still have been involved in the accident in Massachusetts. The fact that Driver purchased the car in Connecticut would not be sufficient to justify specific jurisdiction under the "but for" test.

59. To the extent that the test looks exclusively at events in the chain of causation, it opens the door to many other possible jurisdictional locations. For example, if Driver had been traveling from Florida to Maine, instead of from New York to Maine, Driver's contacts with each of the states that he passed through prior to reaching Massachusetts might be a "but for" cause of the accident and a possible forum for litigating the dispute surrounding the Massachusetts accident.

60. This distinction between historical cause and "but for" cause would present an interesting situation if Driver's route to Maine *required* him to travel through certain states, but allowed some choice on whether to travel through other states. Presumably, the states that he had to travel through would be deemed "but for" causes of the accident, but states where he could have avoided entry by traveling elsewhere would be only historical causes of the accident.

61. Driver's other contacts with New Hampshire (his regular use of New Hampshire highways to reach his summer home and his intention to use the New Hampshire highway on this occasion) would be insufficient to justify jurisdiction under the "but for" test because Driver's previous use of New Hampshire highways is not a link in the causal chain relating to this accident. Further, Driver's mere intention to use the New Hampshire highways on this occasion would be too speculative to count as a purposeful contact under the minimum contacts doctrine. Even if Driver continued his trip to Maine after hitting Pedestrian and traveled through New Hampshire, subsequent forum contacts cannot be a factor in the "but for" analysis because the injury had already occurred by the time Driver reached New Hampshire and Maine.

Would the “but for” test justify the assertion of jurisdiction in other forums where Company distributes its products? There is little question that Company purposefully avails itself of the privilege of conducting business in every state in the country for the benefit of reaping financial reward from sales in each forum, and the exercise of this privilege creates a level of jurisdictional exposure in each forum. Under the “but for” test, however, specific jurisdiction over Consumer’s claim would not extend to any of these forums because Company’s contacts in states other than Pennsylvania are not links in the chain of causation that led to this Consumer’s injury. Company would not even be subject to specific jurisdiction in Ohio because the accident did not result from one of the products that Company sent to Ohio. As there is no link in the causal chain, Company’s purposeful contacts with Ohio are irrelevant under a “but for” test.⁶²

3. *Hotel Drowning Hypothetical.*—Applying the “but for” test to this hypothetical, Hotel (defendant) would be subject to specific jurisdiction in Massachusetts for either a contract or tort action because Hotel reached into Massachusetts to solicit business from the Massachusetts Company, and because this solicitation caused Employee (plaintiff) to contact the hotel for a reservation, ultimately placing Employee at the pool where she drowned.⁶³ There is no question that the solicitation was a link in the causal chain that led to the drowning, but is it a true “but for” cause? If Hotel had not solicited sales from companies located in Massachusetts, Employee would have been less likely to choose Hotel for her stay in Hong Kong. Thus, one could argue that since the chain of events could have been altered if Hotel had not reached out to solicit business in Massachusetts, Hotel’s Massachusetts contacts are a “but for” cause of the accident and Hotel would be subject to jurisdiction in Massachusetts pursuant to the “but for” test.⁶⁴

4. *Pros and Cons of the “But For” Test.*—By allowing courts to consider the “cause of the cause” of a claim, the “but for” test generously opens the jurisdictional analysis to any fact that forms a link in the causal chain leading to the claim, thus expanding the reach of specific jurisdiction and limiting the problem of underinclusiveness. The substantive relevance test and the “but for” test both reject specific jurisdiction in the absence of any causal link between the defendant’s forum contacts and the plaintiff’s claim, thus producing similar

62. One might argue that specific jurisdiction would be appropriate in the forum(s) where the defective widget was made or where component parts for the defective widget were made because Consumer’s injury would not have occurred “but for” these events.

63. Application of the “but for” test depends upon a causal link between Hotel’s solicitation of business and Employee’s decision to stay at Hotel. If Hotel had merely advertised its facility in a newspaper that circulated in Massachusetts, the jurisdictional significance of the contact might be debatable. For example, in order to establish the causal link between the advertisement and the accident, Employee would have to show that she saw the advertisement and that it impacted her decision to visit the hotel.

64. Although Hotel also solicited and entered into discount arrangements with companies in other states, these contacts would not give rise to specific jurisdiction for the drowning accident because they are not links in the chain of causation for this accident.

results with regard to jurisdictions which have no causal connection to the claim. The divergence in the two tests lies in the perimeter of the analysis. While the substantive relevance test strictly limits the analysis to the facts that provide evidence of the elements of the substantive law, the “but for” test focuses on the factual events that give rise to the legal dispute, thereby extending the inquiry to consider the details that generated the situation culminating with the claim.

The hotel drowning hypothetical aptly illustrates this advantage of the “but for” test over the substantive relevance test. Under the substantive relevance test, Hotel’s purposeful solicitation of business in Massachusetts would be ignored in the jurisdictional analysis because it is not evidence of duty, breach, causation, or injury. Under the “but for” test, on the other hand, the jurisdictional analysis would include the fact that Hotel purposefully reached into Massachusetts to initiate a financially rewarding relationship with Employee’s Massachusetts employer, without which Employee might never have visited Hotel. Regardless of whether the dispute is characterized as a breach of contract or a tort, regardless of the particular pleading requirements that might be applicable, and regardless of the elements of the applicable law, the “but for” test would allow the court to exercise jurisdiction over the defendant based upon its conduct in reaching into the state.

Notwithstanding the flexibility that is offered by focusing on the factual event rather than the elements of the applicable law, the “but for” test may be criticized for failing to provide a clear rule to determine when a “contributing” factor is too remote to be jurisdictionally significant, thus creating a concomitant overinclusiveness problem. While it is possible to limit the broad reach of the “but for” test by excluding from consideration factors that are merely historical causes of the claim, distinguishing between these two categories of causation is largely based upon speculation. The car accident hypothetical illustrates some of the difficulty that exists in differentiating historical cause and “but for” cause. Although it was clear that Driver’s contact with Massachusetts was a “but for” cause of the accident, the defendant’s contacts with other forums raised difficult questions. For example, Driver chose to drive through Connecticut even though he could have taken a different route that would have avoided passage through Connecticut. Should the court assume that Driver’s contact with Connecticut was merely a historical cause of the accident because he could have hypothetically reached the location of the accident without entering Connecticut, or should the court consider the factors that led to Driver’s decision to travel through Connecticut? (What if it was possible for the defendant to take a route that avoided Connecticut, but this route was much longer and thus not a probable route for Driver to choose—would Connecticut now become a “but for” cause of the accident?)⁶⁵

65. What if Driver had recently had his brakes repaired in Vermont? If the brakes were a contributing factor in the Massachusetts accident, would a court determine that Driver’s decision to have his brakes repaired in Vermont is a “but for” cause of the accident or merely a “historical cause”? He certainly could have had his brakes fixed elsewhere but one would not know if the accident still would have occurred. These questions illustrate the tremendous difficulty that arises

Finally, although the “but for” test is broader and more flexible than the substantive relevance test, to the extent that both tests invoke the notion of causation, they arguably impose stricter limits on the reach of specific jurisdiction than the Supreme Court has imposed to date. The notion of “fair play and substantial justice,” which is inherent in the minimum contacts doctrine, does not necessarily exclude the possibility of exercising jurisdiction in a forum where the defendant has contacts that are “connected” to the claim but are not a contributing factor to the claim.⁶⁶ The product liability hypothetical illustrates this limitation. Company would not be subject to personal jurisdiction in Ohio under the “but for” test, notwithstanding the fact that the Court has implied that the exercise of jurisdiction under similar circumstances could be constitutionally acceptable.⁶⁷

C. *Sliding Scale Test*

Professor William M. Richman has advanced an appealing theory of personal jurisdiction which places specific and general jurisdiction on opposite poles of a sliding scale continuum and suggests an inverse relationship between the quantity of defendant’s forum contacts and the relatedness of those contacts with the plaintiff’s cause of action. Professor Richman suggests, “[a]s the quantity and quality of the defendant’s forum contacts increase, a weaker connection between the plaintiff’s claim and those contacts is permissible; as the quantity and quality of the defendant’s forum contacts decrease, a stronger connection between the plaintiff’s claim and those contacts is required.”⁶⁸ Richman rejects the notion that jurisdiction can be cabined into two, or even three, discrete categories and he candidly states that the area in between specific and general jurisdiction includes “variations and gradations [that] are too numerous to catalogue.”⁶⁹ He suggests that some of the factors that one might consider in determining the fairness of asserting jurisdiction in the gray area between general and specific jurisdiction should include: the benefit that the defendant has obtained from the forum, the foreseeability of some type of litigation in the forum, the lack of inconvenience to the defendant, and whether the defendant initiated the relationship with the forum.⁷⁰

when one must determine what likely would have happened if an earlier link in the chain of causation was altered.

66. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

67. *Id.* In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), the Court implied that Audi and Volkswagen of America would be subject to jurisdiction in Oklahoma for a defective vehicle that they distributed in New York because Audi and Volkswagen served the Oklahoma market either directly or indirectly.

68. See Richman, *supra* note 49, at 1345.

69. *Id.* at 1340.

70. *Id.* at 1345. In *Davis v. Baylor University*, 976 S.W.2d 5, 9 (Mo. Ct. App. 1998) (internal citation omitted), the Court of Appeals of Missouri stated that it was applying

a balancing test akin to the “sliding scale” approach . . . [pursuant to which] there are

1. *Car Accident Hypothetical*.—Applying the sliding scale test to the car accident hypothetical, Driver would be subject to specific personal jurisdiction in Massachusetts because Driver's forum contact is very closely related to the cause of action. Driver initiated a relationship with the state of Massachusetts and benefitted from the use of the forum's roads. While using the roads, Driver caused the accident that is the subject of Pedestrian's lawsuit. Even if Driver's only contact with Massachusetts was on this single occasion, there is a very strong connection between Pedestrian's claim and Driver's purposeful contact with the forum, thus, the sliding scale test would be satisfied.

Pedestrian could argue that Connecticut is also an appropriate jurisdiction because Driver has numerous contacts with Connecticut: his office is located in Connecticut, (presumably he spends a significant amount of his time in the forum), he regularly uses Connecticut roads to commute to his office and to his summer home, and, more specifically, Driver used the Connecticut highway to reach Massachusetts immediately prior to hitting Pedestrian. Is this sufficient to justify an assertion of specific jurisdiction under the sliding scale test? On the one hand, Driver has more contacts with Connecticut than he has with Massachusetts; the contacts with Connecticut occur on a regular basis, and at least some of the contacts involve the same type of conduct (driving) that gave rise to the accident which is the subject of Pedestrian's suit. On the other hand, there is a weaker connection between Pedestrian's claim and Driver's Connecticut contacts—the only causal connection being that Driver passed through Connecticut on his way to Massachusetts immediately prior to the

five factors to be considered: the nature and quality of the contacts with the forum state, the quantity of the contacts with the forum state, the relation of the cause of action to the contacts, the interest of the forum state in providing a forum for its residents, and the convenience to the parties. The first three factors are of primary importance, while the last two are of secondary importance.

In applying this test, however, the court failed to state how the quantity and quality of the defendant's contacts affected the required relationship between the cause of action and the contacts. The court held that Baylor University was subject to specific personal jurisdiction in Missouri based on its efforts to recruit the plaintiff, Tyrone Davis, to play basketball at the school in Texas. *Id.* at 14. The defendant's contacts with the forum included: written correspondence sent to the plaintiff in Missouri, telephone calls to the plaintiff in Missouri, and numerous visits to Missouri to meet with the plaintiff. *Id.* at 13. The court held that these contacts were sufficient to give rise to personal jurisdiction for breach of contract and fraudulent misrepresentation relating to statements "that the school ran an honest program" made while recruiting the plaintiff in Missouri, but not subject to jurisdiction for other claims alleging tortious interference with contractual relations, outrageous conduct, false light defamation, consumer protection violations, or conspiracy to the extent that these claims did not concern the alleged misrepresentation of "an honest program" which occurred in Missouri. *Id.* at 13-14. Notably, although the court stated that the university sent its agents to Missouri to recruit the plaintiff on a total of ten occasions and "from 1989 to 1996, Baylor representatives made thirty-two trips to Missouri for the purpose of recruiting basketball players," *id.* at 27, the court failed to explain how this quantity of contact affected the nexus requirement under the so-called "sliding scale" test.

accident (a contact that was deemed insufficient under the “but for” and substantive relevance tests).

One could argue that under the sliding scale test this would be sufficient to confer specific personal jurisdiction because the larger quantity of contacts with Connecticut compensates for the more attenuated connection between Pedestrian’s claim and the forum contacts. But is this fair? Could Driver foresee being hailed into court in Connecticut for an automobile accident that occurred in Massachusetts? Although Driver initiated his regular and ongoing contact with Connecticut and benefitted from the relationship, the sliding scale test does not present clear guidelines to determine if a situation such as the one presented by this hypothetical satisfies the nexus requirement or not.⁷¹

The analysis would be complicated further if one were to consider filing the suit in Maine. Driver regularly uses Maine roads to get to his summer home and in fact owns a home in the forum. While the connection between Pedestrian’s claim and Driver’s Maine contacts is relatively weak, the argument for jurisdiction is strengthened by the ownership of real estate in the forum (real estate which was the intended destination of the trip that gave rise to the accident in Massachusetts). But is ownership of property in Maine sufficiently connected to Pedestrian’s claim to justify the assertion of specific jurisdiction in Maine? Does Maine present a stronger or weaker argument for the assertion of specific personal jurisdiction than Connecticut where Driver owns no real estate but where he commutes to work on a daily basis? What policy rationale could one offer for distinguishing between the exercise of jurisdiction in Connecticut, New Hampshire, or Maine under these facts?⁷² This hypothetical illustrates that while

71. One might consider whether Driver would be subject to specific personal jurisdiction in New Hampshire because that is where he was headed at the time the accident took place and he has traveled through the forum on other occasions. For example, Driver has fewer contacts with New Hampshire (driving through the forum on his way to his summer home), than Driver does with Connecticut, and Pedestrian’s claim is arguably not as related to the New Hampshire contacts as it is to the Connecticut contacts because he traveled through Connecticut immediately prior to the accident in Massachusetts. Thus, one might be able to conclude that New Hampshire has a weaker case for specific jurisdiction than Connecticut would have, but there is still no criteria by which one can determine whether this combination of factors is sufficient to confer specific jurisdiction.

72. See Richman, *supra* note 49, at 1345; *supra* notes 68-70 and accompanying text. The additional criteria suggested by Professor Richman offer little assistance in clarifying the defendant’s jurisdictional exposure in each of the potential jurisdictions. For example, the defendant initiated his contact with each of the potential jurisdictions, he benefitted from the contacts with each jurisdiction, and he could foresee being sued in each forum (although arguably not for an accident that occurred in Massachusetts). To the extent that these criteria suggest that the defendant would be subject to jurisdiction in all of the potential jurisdictions, the sliding scale test could be criticized as watering down the standard for specific jurisdiction and general jurisdiction.

The analysis may be further complicated by other unrelated contacts. For example, suppose that Driver frequently calls L.L. Bean in Maine to purchase clothes and sporting goods which are mailed to his home in New York. Would these contacts be counted on the sliding scale continuum?

the sliding scale test is intuitively appealing, it does not offer a clear or predictable rule for determining the existence of specific personal jurisdiction.

2. *Product Liability Hypothetical*.—Applying the sliding scale test to this hypothetical, Company (defendant) would likely be subject to specific personal jurisdiction in Pennsylvania because it chose to send its product into Pennsylvania and profited from the sale there. More specifically, a proximate causal link exists between Company's distribution of the allegedly defective product in Pennsylvania and the injury that occurred in Ohio. Regardless of the quantity of products that Company distributes in Pennsylvania, Consumer's cause of action is very closely related to Company's distribution efforts in Pennsylvania.

As an Ohio citizen, Consumer would likely want to file the suit in Ohio rather than in Pennsylvania. Under the sliding scale test, Consumer could argue that because Company regularly ships a large quantity of products to Ohio, Company has a sufficiently strong relationship to the state to allow Ohio to exercise specific jurisdiction over it for this claim even though the claim does not arise out of a product Company sold in Ohio. Once again, the difficulty with the sliding scale is that it offers little or no criteria by which one may determine if the quantity and quality of a defendant's contacts justify the easing of the "relatedness" standard to cover this claim. Taking the analysis one step further, if the sliding scale test gave rise to specific jurisdiction in Ohio, would it also give rise to specific jurisdiction in any other jurisdiction where Company distributes its product? If so, what about jurisdictions where Company distributes products other than the type that injured Consumer, such as nearly identical products of a different model or different products serving the same general market?⁷³

3. *Hotel Drowning Hypothetical*.—Applying the sliding scale test to the hotel drowning hypothetical, one must first consider the quantity of Hotel's contacts with each potential jurisdiction. Here, Hotel (defendant) has solicited discount contracts with the 500 largest companies in the United States and has entered into contracts with Employee's company in Massachusetts. Focusing on

If so, should these contacts justify a looser relationship between Driver's contacts and Pedestrian's cause of action? If not, how can one determine which contacts belong on the continuum and which ones must be excluded?

73. In *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002), the Court of Appeals for the Sixth Circuit held that a Washington company in the business of registering Internet domain names was subject to personal jurisdiction in Ohio for a claim brought by an Ohio citizen alleging trademark violations. The court held that the defendant purposefully availed itself of doing business in Ohio by "maintaining a Web site on which Ohio residents can register domain names and by allegedly accepting the business of 4,666 Ohio residents." *Id.* at 874. Additionally, the court noted that these contacts were "at least marginally related" to the plaintiff's trademark claims because both the Ohio contacts and the plaintiff's claim "stem from [the defendant's] operation of the [defendant's] website." *Id.* at 875. Although the court did not expressly rely upon the sliding scale test, it appears that the court was willing to accept a weak nexus in part because of the quantity of business that the defendant had reaped from Ohio citizens and the fact that the injury occurred in Ohio.

Massachusetts, a court applying the sliding scale test would have to place Hotel along the jurisdictional spectrum by determining the number of contracts that Hotel has solicited and entered into with Massachusetts companies and the level of activity that has occurred pursuant to the contracts.⁷⁴ While one can easily see that Hotel's contacts with Massachusetts are not at either extreme end of the spectrum, it is difficult to determine where in the middle of the spectrum Hotel should fall. For example, should Hotel's placement on the continuum be considered relative to the contacts that it has with other forums,⁷⁵ relative to its overall income flow,⁷⁶ or relative to some other factors?⁷⁷

Even if one assumes that Hotel's contacts with Massachusetts place it somewhere in the middle of the spectrum, one then must determine if the contacts are sufficiently related to Employee's accident in Hong Kong to justify subjecting Hotel to jurisdiction in Massachusetts. One could argue that jurisdiction is appropriate because Hotel initiated the contacts with Massachusetts by offering a discount arrangement to Massachusetts employers, it benefitted from the additional business generated by these discount arrangements, and it could foresee the possibility of an employee of a Massachusetts Company being injured while staying at Hotel. Additionally, there is a causal link, albeit not a proximate one, between the solicitation in Massachusetts and Employee's family's cause of action. Thus, although the sliding scale test does not provide a definitive answer to whether jurisdiction would be allowed in Massachusetts, it seems that Massachusetts presents a fairly strong argument for Employee's family to assert.

Taking this analysis one step further, one could make an argument for jurisdiction in every forum where Hotel solicited and entered into discount arrangements with corporate employers. In each of these jurisdictions, Hotel initiated the contacts, benefitted from the contacts, and could foresee the contacts giving rise to an injury. The only factor that distinguishes Massachusetts from every other jurisdiction where Hotel solicited business is the causal link between the solicitation in Massachusetts and this Employee's injury. While one must concede that Employee's family's cause of action is more closely related to Hotel's contacts with Massachusetts than with Hotel's contacts to other forums, it is unclear how the sliding scale test would balance the quantity of contacts with

74. This analysis could become more difficult if Hotel has other unrelated contacts with Massachusetts and/or has been soliciting business in Massachusetts through various methods over an extended period of time. For example, it is unclear if the sliding scale test would consider Hotel's solicitation activities that occurred before or after this accident (but prior to filing the complaint).

75. For example, if Hotel earns more revenue from discount contracts that it solicited in New York than it does from discount contracts that it solicited in Massachusetts, Hotel would be closer to the general jurisdiction end of the spectrum for New York than for Massachusetts.

76. In placing Hotel along the spectrum, one could calculate the revenue from discount contracts with companies in each state as a percentage of Hotel's overall annual income.

77. For example, one might compare Hotel's forum contacts with other cases in the forum where defendants have or have not been held subject to personal jurisdiction.

each jurisdiction against the relatedness of the cause of action. For example, if Hotel had significantly greater income generated from discount contracts with New York companies than it did from Massachusetts companies, would New York become a viable forum for this suit even in the absence of a causal link between Hotel's New York contacts and this cause of action?

4. *Pros and Cons of the Sliding Scale Test.*—Recognizing the basic inverse relationship between the two categories of jurisdiction, the sliding scale test links the concepts of specific and general jurisdiction by placing them on the same spectrum and allowing them to melt together in the middle. The simplicity of the concept is intended to offer the benefit of avoiding “an excessively conceptualistic analysis of the notion of claim-relatedness.”⁷⁸

Notwithstanding the intrinsic appeal of this theory, the sliding scale test has an inherent tendency to dilute the requirements of both specific and general personal jurisdiction.⁷⁹ The underlying rationale of general jurisdiction rests largely upon the notion that if a defendant's ties with a forum are so significant that the defendant resembles an “insider,” the defendant should expect to be sued in the forum for any dispute.⁸⁰ The underlying rationale of specific jurisdiction is also predicated largely upon the concept of expectation, such that if a defendant purposefully directs its conduct toward a forum, the defendant should foresee being hailed into the forum for claims that relate to the defendant's forum activity. Both specific and general jurisdiction provide defendant with control over its jurisdictional exposure by allowing the defendant to anticipate the consequences of its decision to conduct activities in the forum. To the extent that the sliding scale test attempts to blend the concepts of general and specific jurisdiction together, it severely weakens the defendant's ability to anticipate the jurisdictional consequences of its conduct. The sliding scale test considers all of a defendant's contacts with a forum in determining the appropriate level of relatedness that must exist between a claim and a defendant's contacts. Thus, if a defendant has a significant quantity of dissimilar contacts with a forum, the sliding scale test would allow the defendant to be sued in the forum for any cause of action that is loosely related to any of its forum contacts. In other words, the defendant would have to compensate for the large quantity of contacts that it has with the forum by giving up some of its ability to predict what types of claims it may be sued for in the forum. This tradeoff does not fulfill the underlying goals of either general or specific jurisdiction.

Moreover, the sliding scale fails to consider the temporal distinction that exists between the contacts that are considered for purposes of general jurisdiction and specific jurisdiction.⁸¹ General jurisdiction rests upon a defendant's “continuous and systematic” forum contacts at the time that a suit is filed; specific jurisdiction, on the other hand, traditionally rests upon a

78. See Richman, *supra* note 49, at 1345.

79. See Simard, *supra* note 15, at 570.

80. *Id.* at 567-71.

81. *Id.* at 581.

defendant's forum contacts at the time the events at issue in the litigation arose.⁸² The sliding scale test blurs this temporal distinction by placing all of a defendant's contacts on a single continuum. The likely effect of this blurring is to increase the time frame from which defendant's contacts will be counted for jurisdictional purposes, pushing the defendant further along the continuum toward general jurisdiction and resulting in a decrease in the required relatedness that must be found between the contacts and the cause of action.

In addition to the theoretical difficulties that arise under the sliding scale test, the hypotheticals illustrate the practical difficulties that arise in applying the rule. In the car accident hypothetical, how should a court compare the quantity and quality of Driver's contacts with Connecticut, New Hampshire, and Maine? Is Driver's ownership of real estate in Maine more or less significant than his continuous and ongoing use of the Connecticut roadways? In the product liability hypothetical, how should the court evaluate Company's contacts with forums where it distributes a large quantity of products that are similar but not identical to the one that injured Consumer? Is the profit earned in each forum more or less important than the nature of the product or the number of sales in that state? In the hotel drowning hypothetical, how should the court assess Hotel's relationship with each state where it has solicited discount contracts? Once a court analyzes a defendant's quantity and quality of contacts with a forum, how then does the court correlate the appropriate level of relatedness—in other words, how does the relatedness requirement change in relation to a change in quantity or quality of contacts from one forum to another? These questions illustrate only a few of the issues that will arise in the application of the sliding scale test of personal jurisdiction. It seems that while this model attempts to avoid the difficulty of an "excessively conceptualistic" approach to claim relatedness, it may raise far more difficult questions than it resolves.

D. Similarity Test

Possibly the most lenient standard of relatedness that has been suggested to date is a similarity of contacts test which compares a defendant's contacts in one forum with its contacts in a different forum. Under this test, a defendant's contacts in forum A may form a basis for specific jurisdiction in forum A if these contacts are similar to defendant's contacts in forum B which gave rise to the dispute that is the subject of the litigation.⁸³ The similarity theory arises out of dicta in *World-Wide Volkswagen* in which the Court implied that Audi and Volkswagen would have been subject to personal jurisdiction in Oklahoma for the alleged defects in the automobile that the plaintiff purchased in New York. Specifically, the Court stated:

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome

82. *Id.*

83. See Brillmayer, *How Contacts Count*, *supra* note 26, at 82-88.

litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.⁸⁴

While the Court suggests that reliance upon similar contacts in different forums may be an acceptable foundation for specific jurisdiction in certain circumstances, it is important to observe the conditions highlighted by the Court that would have made the application of such a test appropriate.

First, the Court does not suggest that isolated contacts in a forum will be sufficient to confer jurisdiction pursuant to a similarity of contacts theory. Rather, the defendant regularly availed itself of the privilege of conducting activities in the forum. Second, the Court emphasizes that the injury that is the subject of the plaintiff's suit occurred in the forum, thus recognizing the forum's interest in protecting its citizens. Third, implicit in the quoted language is a finding that the forum contacts are sufficiently similar to the contacts that gave rise to the cause of action that it would be fair to expose the defendant to jurisdiction.

The fairness issue is directly related to the defendant's expectation of jurisdiction. Specific jurisdiction rests upon the notion that when a defendant conducts activity in a forum, the defendant is able to anticipate being haled into the forum for injuries that arise out of the forum conduct. The similarity of contacts theory expands upon this notion of expectation by recognizing that if a defendant conducts similar activities in several different locations the defendant has a similar expectation of jurisdictional exposure in all of those locations. Recognizing jurisdiction in one of the locations where the defendant had an expectation of suit may only be considered fair if the contacts in the forum are very similar to the contacts elsewhere that actually gave rise to the cause of action. Thus, the similarity of contacts theory depends heavily upon a clear definition of what contacts will be considered sufficiently similar to expose the defendant to jurisdiction.

1. *Car Accident Hypothetical*.—Applying the similarity of contacts theory to the car accident, one must start from the premise that Driver would be subject to jurisdiction in Massachusetts because his purposeful contact with Massachusetts was the cause of the accident there.⁸⁵ Next one must consider

84. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Deckla*, 357 U.S. 235, 253 (1958)).

85. In applying the similarity test, one must first consider what contacts gave rise to the dispute at issue in order to determine what contacts are sufficiently similar to serve as an alternate basis for specific jurisdiction. In this sense, the similarity test is somewhat "parasitic" upon other

whether Driver had similar contacts with other jurisdictions that would serve as a basis for specific jurisdiction.

One could argue that Driver's contacts with Connecticut are very similar to his contacts with Massachusetts because he drove through both Connecticut and Massachusetts on his way to his summer home in Maine. To the extent that the basis of jurisdiction in Massachusetts is that Driver made a deliberate decision to drive on the roads of Massachusetts and thus accepted the risk of suit there, one could argue that Driver accepted a similar risk of suit when he decided to drive through Connecticut.

If the court were to accept the similarity of contacts theory in this situation and hold that Connecticut was a reasonable jurisdiction for this claim, one could argue that the contacts that gave rise to the cause of action—driving on the highways in Massachusetts—are also similar to the contacts that Driver had with each of the states that he drove through on his way to Maine, including states like New Hampshire and Maine, if he continued his trip after the accident. Indeed, one could argue that the contacts that gave rise to the cause of action are similar to the contacts that Driver has with any state he has ever driven in, either before or after the accident.

If the similarity of contacts test is accepted without limitation, each of these forums would be a potential jurisdiction to litigate the claim arising out of the Massachusetts accident. Under these circumstances, the similarity of contacts test would greatly expand the reach of specific personal jurisdiction as currently known and significantly reduce a defendant's ability to limit his jurisdictional exposure. If one considers the limitations implied by the Court in *World-Wide Volkswagen*, however, the similarity test becomes somewhat more manageable. First, since Pedestrian's injury occurred in Massachusetts and it was caused by Driver's conduct in Massachusetts, one could argue the similarity of contacts test is not intended to apply in this situation. This case is distinguishable from the facts of *World-Wide Volkswagen*, where the plaintiff's injury occurred in Oklahoma as a result of defendant's actions in New York; in the car accident hypothetical the conduct that caused the injury took place in the same jurisdiction as the resulting injury.

Second, one could argue that the similarity of contacts theory is not intended to broaden the scope of specific jurisdiction to those jurisdictions where Driver only travels occasionally. This limitation would rule out most of the suggested jurisdictions except possibly Connecticut, where Driver regularly commutes to work.

Finally, one might argue that even Connecticut is not an appropriate jurisdiction because the similarity of contacts test is tailored to the specific factual context involved in stream of commerce cases. In stream of commerce cases, a defendant continuously reaches out to multiple forums by regularly distributing its products for sale. The continuous nature of the relationship creates an ongoing expectation of the possibility of being sued in any of the forums where the products are being distributed. The car accident hypothetical,

on the other hand, does not create the same kind of continuous expectation of suit in Connecticut. Rather, on each occasion that Driver chooses to drive on the roads in Connecticut, he has an expectation that if his conduct in the state gives rise to an accident he will be sued in the state. Once he safely leaves the state, however, his expectation of being sued there ends until the next time that he chooses to drive on the roads of Connecticut.

2. *Product Liability Hypothetical*.—Applying the similarity of contacts test to this hypothetical, again one must start from the premise that Company would be subject to specific jurisdiction in Pennsylvania because the cause of action arose from Company's efforts to serve the Pennsylvania market. Next, one may consider whether Company's contacts with other forums are sufficiently similar to its contacts with Pennsylvania to justify extending the reach of specific jurisdiction beyond Pennsylvania.⁸⁶ If the Supreme Court's dicta in *World-Wide Volkswagen* is accepted, Ohio would present a likely jurisdiction for application of the similarity of contacts test. The facts of this hypothetical are analogous to those presented in *World-Wide Volkswagen* because, in both situations, the defendants placed their product into the stream of commerce for distribution in multiple locations, and the product was purchased by the plaintiff in one location and brought to a different location by the plaintiff where it caused injury. The exercise of jurisdiction in Ohio under these circumstances appears to satisfy all of the limitations alluded to by the Court: the injury occurred in Ohio; Company regularly distributes its products in Ohio; and Company's contacts with Ohio are very similar to its contacts with Pennsylvania.⁸⁷

3. *Hotel Drowning Hypothetical*.—In applying the similarity of contacts theory to the facts of this hypothetical, one must first determine a forum where specific personal jurisdiction would exist as a baseline before one may consider whether other similar contacts would provide additional jurisdictional choices. Applying the substantive relevance theory to determine a baseline jurisdiction, one may argue that the facts surrounding Hotel's solicitation of business from Employee's employer is substantively relevant and that Massachusetts is an appropriate jurisdiction for a breach of contract suit. Applying the "but for" test would lead to the conclusion that Hotel would be subject to specific jurisdiction

86. The extent of similarity or difference among the products distributed in different jurisdictions might affect Company's expectation of suit in those jurisdictions and therefore offer a basis to reject the application of the similarity of contacts test.

87. One might take the above analysis a step further and suggest that the similarity of contacts test would support the assertion of jurisdiction in any state in the country because Company purposefully serves the market for its widgets in every state. To the extent that jurisdiction may be based solely on similar contacts, Company's relationship with Pennsylvania, Ohio, and all of the other states would be very similar—Company regularly distributes similar or identical products in each state. This interpretation of the similarity test would not expand the number of jurisdictions in which Company may be sued (Company has jurisdictional exposure in every forum that it distributes its products), nor would it expand the number of suits that may be brought against Company (the number of suits brought against defendant would remain the same, plaintiff would just have more choices of where to bring the suit).

in Massachusetts because it purposefully reached out to Massachusetts by soliciting business from employers in the state. Finally, applying the sliding scale test for relatedness to this factual scenario, one would have to consider the quantity and quality of Hotel's contacts with Massachusetts and the relationship between the solicitation and the accident that occurred in Hong Kong.⁸⁸

If one assumes that Massachusetts is the most likely baseline jurisdiction under any of the tests, then one must consider whether the similarity of contacts test would suggest other possible jurisdictions. One could argue that Hotel has solicited business and entered into similar corporate discount contracts in many forums, thus creating a regular stream of customers from each forum. Additionally, as long as the corporate discount agreements are sufficiently similar, Hotel has an expectation of suit in any of the jurisdictions where it solicited business through such discount contracts.⁸⁹

4. *Pros and Cons of Contacts Test.*—The similarity of contacts test is most suited for application in stream of commerce cases where fungible products are distributed widely. As illustrated in the product liability hypothetical, corporations that regularly place their products into the stream of commerce for distribution and sale in many different locations have a continuous expectation of suit in any of those locations. The fungibility of the products and the wide scale nature of the distribution allow corporations to make generalized distribution plans for large quantities of product to be distributed in many different locations without regard to the ultimate destination of any particular product or the identity of its purchaser. The defendant cannot predict which particular products will prove to be defective or where such defects will manifest themselves. Rather, the defendant may only predict that a certain percentage of the overall pool of products will be defective.

Thus, the defendant must plan for the contingency of litigation in all of the jurisdictions where it distributes its product by obtaining insurance and passing the associated costs on to all consumers. Limiting specific jurisdiction to the single jurisdiction where the defendant actually sent the defective product which caused the plaintiff's injury fails to recognize the reality of the defendant's jurisdictional expectation. The similarity of contacts test acknowledges that in a stream of commerce case the defendant's contacts with each of the forums where it distributes similar products are as fungible as the products themselves.

The similarity of contacts test does not apply well in situations where the

88. See *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996) (holding that personal jurisdiction exists in Massachusetts).

89. The only difficulty with applying the similarity of contacts test in this case is the fact that the injury arose in Hong Kong, not in any of the states where Hotel solicited business. If one accepts the limitations implied by the Court in *World-Wide Volkswagen*, no forum would satisfy the requirements of the similarity test because Employee's injury did not arise in any of the potential forums. This case is distinguishable from the facts of *World-Wide Volkswagen* where the defendant's conduct in New York led to the plaintiff's injury in Oklahoma. Here, the defendant's conduct in Massachusetts led to the plaintiff's injury in Hong Kong, thus weakening any forum state's interest in adjudicating the dispute.

defendant's relationship with a forum is not ongoing and continuous. For example, Driver in the car accident hypothetical would be subject to jurisdiction in Massachusetts because he purposefully chose to drive in the state and thus accepted the risk of suit if he caused an accident there. If Driver could be subject to suit in any jurisdiction where he had "similar" contacts, he could arguably be hailed into any state where he has ever driven for the purpose of litigating the Massachusetts accident. Unlike the stream of commerce situation, however, each instance of driving on the roads of a jurisdiction is a separate episode for which Driver accepts the risk of being sued for events that arise while he is driving in the state. Once Driver safely leaves a state without causing any harm, the risk of being sued in the state evaporates. Thus, unlike the stream of commerce situation where the defendant continuously sends fungible products into multiple forums and therefore must continuously expect the possibility of being sued in any of those forums, here Driver's expectation of suit begins and ends with the occurrence of the factual episode.

Finally, the similarity of contacts test poses several practical difficulties. The primary difficulty in applying this test is determining how similar the defendant's contacts in one forum must be to contacts in a different forum. In the product liability hypothetical, for example, if Company distributes fifty different makes/models/styles of a widget, should one measure the similarity of the contacts with each forum according to the make, model, or style of the product distributed, a more general view of the function of the product, the time frame within which the distribution took place, or according to some other variable?

The similarity problem also exists outside of the stream of commerce example. As illustrated in the car accident hypothetical, Driver could be deemed to have "similar" contacts in every forum that he drove through on the trip that culminated in the accident at issue in the lawsuit, or taken one step further, he could be deemed to have "similar" contacts with any forum that he has ever driven in. If one argues that some of these contacts are not sufficiently similar to the contacts with Massachusetts to justify the exercise of jurisdiction for the Massachusetts accident, how does one define the distinguishing characteristics to allow differentiation between those contacts that are similar and those that are not?

A related problem that arises in applying the similarity test is the need for a baseline jurisdiction from which to compare the defendant's contacts with other forums. In other words, before one can determine if the defendant's contacts with Forum A are sufficient to justify jurisdiction, one must be able to compare them with the contacts in Forum B where the defendant would be subject to jurisdiction. The need for a baseline jurisdiction illustrates that the similarity test could not be the sole test for determining specific jurisdiction; it can only be a test that is applied in conjunction with another test for the purpose of expanding the reach of jurisdictional exposure.

The following is a chart which illustrates the application of the four tests in each of the hypotheticals and the forums which likely would have specific jurisdiction under each of the tests:

	1. Car Accident Hypothetical	2. Product Liability Hypothetical	3. Hotel Drowning Hypothetical
Substantive Relevance/Proximate Cause Test	Massachusetts	Pennsylvania	Massachusetts (possibly for contract action; not for tort)
“But For” Causation Test	Massachusetts Connecticut?	Pennsylvania	Massachusetts
Sliding Scale Test	Massachusetts Connecticut? New Hampshire? Maine?	Pennsylvania Ohio? Other states where product is sold?	Massachusetts Other states where Hotel solicited sales?
Similarity Test	Massachusetts = baseline Other states where Driver has driven?	Pennsylvania = baseline Other states where product is sold?	Massachusetts = baseline Other states where Hotel solicited sales?

This chart illustrates several interesting facts. First, the substantive relevance/proximate cause test is the least ambiguous and most restrictive of the tests analyzed, authorizing specific jurisdiction in the fewest number of forums. Second, the forums which satisfied the substantive relevance test also satisfied the requirements of the three other tests, suggesting that if a defendant’s conduct in the forum is substantively relevant to the claim, the forum should have specific jurisdiction to adjudicate the resulting dispute. Third, the remaining tests (“but for,” sliding scale, and similarity) seem to indicate that although the substantive relevance test provides a clear and predictable tool for determining specific jurisdiction, in certain instances it may be desirable to expand the reach of personal jurisdiction beyond the strict confines of the substantive relevance rule.

IV. TWO PROFILES OF SPECIFIC JURISDICTION: EPISODIC CONTACTS VS. SYSTEMATIC CONTACTS

The analysis of the existing theories of relatedness in the previous section illustrates that none of the theories completely responds to the purposes and goals of the minimum contacts doctrine. This section draws upon the strengths and weaknesses of these theories and suggests that the scope of specific jurisdiction should depend upon whether a defendant’s forum contacts are limited in time and purpose (episodic specific jurisdiction) or whether a defendant’s forum contacts are ongoing and systematic (systematic specific jurisdiction).

The basic requirements of minimum contacts are well established: (1) the defendant must have purposeful contacts with the forum; and (2) the contacts must be related to the cause of action that is the subject of the jurisdictional

inquiry.⁹⁰ In *Burger King*, the Court emphasized the importance of these criteria in providing defendants with the ability to predict and control their jurisdictional exposure, stating that:

individuals have “fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,” . . . the Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”⁹¹

A defendant exercises control over its jurisdictional exposure at the time that it decides whether to reach out to a forum state. It is at this time that the defendant must consider whether the “benefit” of the contact is worth the “burden” of answering to potential claims in the jurisdiction. In calculating the jurisdictional burden, the defendant will anticipate the factual consequences that could arise from its forum conduct, and the possible causes of action that might flow from such consequences. Thus, the “jurisdictional burden” of contacting the forum should approximate the defendant’s expectation that it might be haled into that forum for any cause of action that it could anticipate arising from its forum contacts.⁹²

This Article suggests that a critical aspect of the defendant’s expectation of jurisdiction depends upon whether the defendant contacts the forum for a limited time and purpose (episodic contact) or whether the defendant creates an ongoing systematic relationship with the forum (systematic contact). Episodic contacts are singular in nature, meaning that the defendant makes a decision to reach out to a forum for a particular purpose and the contact ends upon the completion of the purpose. A defendant may engage in a series of episodic contacts, but each contact remains a discrete, independent episode that is not dependent upon the existence of any other contact. Systematic contacts, on the other hand, involve a series of similar contacts that are dependent upon, and arise from, an ongoing relationship that exists between the defendant and the forum. Systematic

90. A finding of minimum contacts must be accompanied by a consideration of whether the exercise of jurisdiction would be fair and reasonable in light of the circumstances of the case. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

91. *Id.* at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

92. Justice Brennan has asserted that basing jurisdiction on the defendant’s ability to foresee jurisdiction merely begs the question because a defendant cannot anticipate jurisdiction until the law declares the criteria for asserting jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 311 n.18 (Brennan, J., dissenting). Although this assertion is superficially appealing, it fails to recognize that whenever an individual acts, in his own home forum or elsewhere, that individual must anticipate the consequences of his action and the possibility of being sued for an injury that arises out of the consequences of his action. If the individual acts in his home forum, the jurisdictional question is easy (he is subject to general jurisdiction). If he chooses to act outside of his home forum, he should expect to answer for the consequences of his actions in the forum where he acted.

contacts require little individualized decision making because once the defendant establishes the ongoing relationship, the contacts flow until a decision is made to end the relationship.

A. Episodic Specific Jurisdiction

When a defendant makes a decision to contact a distant forum for a limited time and purpose, that is engage in an episode, the defendant must analyze whether the benefit of the contact is worth the jurisdictional burden that will result from the contact. In gauging the jurisdictional burden of any forum episode, the defendant must anticipate: (1) that its forum conduct may give rise to factual consequences that could be the subject of litigation in the forum; and (2) that when its forum episode ends, the jurisdictional exposure associated with that episode will be fixed and determinable.⁹³ The first of these considerations is somewhat speculative, requiring the defendant to consider all of the possible consequences that could reasonably flow from his or her forum conduct. At this time, the defendant will not necessarily be able to anticipate the details of his or her jurisdictional exposure (such as who will be injured by the defendant's conduct, what the cause or extent of injury is likely to be, or the amount of damages that might be sought), but it should be able to anticipate the basic parameters of a claim that might arise, i.e., a story that might provide the basis for a potential legal claim. For a defendant considering an episodic contact with a forum, the second consideration provides a more definite gauge of the potential jurisdictional exposure. Although the defendant cannot anticipate how, or even whether, its forum conduct will give rise to a specific claim (because the conduct has not occurred at the time that the defendant must make this judgment), the defendant can anticipate the point in time when its contact with the forum will end (when the purpose of the episode is complete) and thus can anticipate that when the episode is complete its jurisdictional exposure will be limited to events that arose out of the episode. For example, at the time that a defendant decides to engage in a forum episode, it should have the assurance that if its forum episode ends without giving rise to facts that are the subject of future litigation, then the jurisdictional exposure associated with this forum contact will evaporate. Alternatively, if the forum episode gives rise to facts that are the subject of future litigation, then the jurisdictional burden should be limited to answering to the claims that arise out of the episode.

Thus, when a defendant engages in episodic conduct in a forum, a court should determine the scope of specific jurisdiction by asking: (1) what factual consequences could the defendant anticipate would arise from its forum conduct; and (2) did any of those anticipated consequences actually occur as a result of the forum conduct? If the defendant's forum conduct would have allowed the defendant to expect the factual consequences that actually resulted from the episode, specific jurisdiction should exist. This test would subsume the

93. In other words, once the episode is complete the defendant should be able to rely upon the actual events that occurred rather than speculating about what might have occurred.

substantive relevance test, but potentially extend to a broader category of cases. Thus, if the defendant's contacts are substantively relevant to the plaintiff's claim, the claim would fall within the scope of specific jurisdiction. Moreover, even if the defendant's contacts are not substantively relevant to the plaintiff's claim but the defendant could have anticipated the facts that actually resulted from its forum conduct, then specific jurisdiction should exist.

In the car accident hypothetical, Driver made a decision to drive through Massachusetts on his way to Maine. This contact would be considered an episodic contact because Driver engaged in the contact for the purpose of reaching Maine on this particular occasion, the contact had a clear beginning and ending point, and the decision to travel through Massachusetts was independent of other contacts with Massachusetts—it was not one of a series of contacts arising from a systematic relationship with Massachusetts. Prior to engaging in this episode in Massachusetts, Driver could anticipate the possible consequences of his conduct: he could be involved in a car accident in the forum, or he could drive safely through the forum without incident. While he could not anticipate all of the details of a potential claim against him,⁹⁴ Driver could rely on the fact that his jurisdictional exposure would be limited to claims that arose out of this episode in Massachusetts. If this forum episode ended without causing an injury in the state, Driver's jurisdictional exposure for this contact would end; alternatively, if this forum episode caused an injury in the state, Driver could be sued for that injury, but not for a similar injury that he caused driving through another forum on a different occasion. The substantive relevance test would likely be satisfied here because Driver's forum conduct will be evidence of Pedestrian's claim.

Alternatively, suppose a citizen of New York calls a citizen of Massachusetts at his office in Boston to solicit business. If the Massachusetts citizen then travels to New York where the parties negotiate and execute a contract, could the Massachusetts citizen file suit for breach of the contract in Massachusetts on the basis that the New York citizen (defendant) solicited the business in the forum? Under a strict substantive relevance test, the fact that the defendant called the plaintiff in Massachusetts is not relevant to proof of the breach of contract. Under the suggested approach, a court would consider: (1) whether the defendant could foresee that its solicitation could give rise to a contract; and (2) whether the solicitation did in fact give rise to the contract that is the subject of the action. Applying this test, the court would have to consider the facts surrounding the solicitation, to determine whether the contact was sufficiently detailed to allow the defendant to anticipate the resulting business contract.

B. Systematic Specific Jurisdiction

When a defendant engages in systematic contacts with a forum, it makes a decision to maintain an ongoing relationship with the forum, typically (although

94. Driver could not anticipate who the plaintiff would be, where or how the accident would take place, or the extent of damages.

not necessarily) a commercial relationship, pursuant to which individual contacts are intended to flow routinely. The defendant exercises control over its jurisdictional exposure at the time that it chooses to create the ongoing forum relationship (as opposed to at the time that each individual contact arises) because it is at this time that the defendant can evaluate whether the benefit of the forum relationship is worth the associated jurisdictional burden. When a defendant makes a decision to engage in an ongoing systematic relationship with a forum, it can anticipate that its conduct with the forum may give rise to factual consequences that could be the subject of litigation in the forum. As with episodic contacts, the defendant will not necessarily be able to anticipate the details of its jurisdictional exposure (the who, what, or where), but it should be able to anticipate the basic skeleton of a story that could provide the basis for a potential legal claim.

Unlike when a defendant engages in episodic contacts and can anticipate the end of each episode, when a defendant engages in ongoing systematic contacts it does not anticipate an end to the flow of contacts. Rather, the defendant is seeking a long-term relationship with the forum and thus must anticipate long-term jurisdictional exposure. At any time during the existence of the systematic relationship, the defendant expects that individual contacts will flow from the relationship and thus must expect that these contacts may give rise to factual consequences that could be the subject of litigation in the forum.

Under these circumstances, limiting jurisdiction to a particular contact is an inappropriately narrow gauge of the jurisdictional burden. Although each individual contact will have an end point, the defendant cannot expect that its jurisdictional exposure will be limited to causes of action that arise out of each individual contact because as one contact ends, the defendant is expecting—indeed hoping—that the series of contacts will continue. In other words, because the flow of contacts is continuous, the jurisdictional expectation must be continuous. When the defendant creates an ongoing systematic relationship with a forum, it accepts a broader scope of jurisdiction in exchange for the ongoing benefits that flow from the relationship. Thus, while a defendant maintains such an ongoing, systematic relationship with a forum, the contours of specific jurisdiction should be defined according to the characteristics of the overall relationship with the forum. Defendants must anticipate that their jurisdictional exposure remains open to any claim that could result from the ongoing series of contacts within the systematic relationship.

The product liability hypothetical poses an excellent example of a defendant engaged in ongoing systematic contacts with many forums. Specifically, Company has created distribution channels pursuant to which Company sends a steady flow of its products into many forums. Company's contacts are not episodic because once the distribution relationships are established, Company will routinely continue to send products into each forum. At the time that the New York Company decided to distribute its products in every state in the country, it could anticipate that its widgets could cause injury to a consumer in any one of the forums where it chose to distribute the product. It could not anticipate which widget would be the subject of litigation or where such an injury would arise; thus, it had to expect jurisdictional exposure in every forum that it

distributed widgets. Under the facts of the hypothetical, the substantive relevance test would inappropriately limit the scope of specific jurisdiction to Pennsylvania because the product that allegedly caused Consumer's injury actually was distributed by Company in Pennsylvania. This Article suggests that systematic specific jurisdiction for Consumer's claim should extend to any forum where Company distributes widgets as long as the cause of action is one that Company would have anticipated as being within the category of claims that could arise from its sales of widgets.⁹⁵

The hotel drowning hypothetical poses another example of a defendant engaged in a systematic relationship with the forum. When Hotel sent its direct mail solicitation to companies all over the United States, it sought to create an ongoing relationship with the states where these companies were located. Once these relationships were established, Hotel intended to derive an ongoing flow of business from each forum. Specifically, in deciding to enter into a discount contract with the Massachusetts Company, Hotel could evaluate whether the benefit of the relationship was worth the jurisdictional burden that would arise from the relationship. In evaluating the jurisdictional burden, the defendant could anticipate that the contract would create an ongoing relationship with Massachusetts which would give rise to a flow of visitors to Hotel in Hong Kong (indeed this is what Hotel hoped for), and that any one of these visitors could be injured while staying at Hotel.⁹⁶ Thus, when Hotel reached out to Massachusetts, it could be subject to jurisdiction in Massachusetts for a suit brought by Employee who traveled to Hotel as a result of the discount contract and suffered an injury while on the premises.⁹⁷

95. Under the suggested analysis, Consumer could assert systematic specific jurisdiction over the New York Company in every state where it distributes widgets because Company's ongoing relationship with each of these forums requires it to expect that any of the widgets that it distributes in these forums could cause injury and thus be the subject of litigation. It would not matter that Consumer's injury occurred in Ohio because the type of claim that Consumer is bringing is within the scope of claims that Company must anticipate in each of the forums. To the extent that a plaintiff seeks to file suit in a state that has little or no connection to the claim, a defendant may seek to transfer the case pursuant to 28 U.S.C. § 1404 or § 1406 (2000).

96. Hotel could not anticipate which visitor would be injured, how an injury might arise, or even the extent of the injury, but Hotel could anticipate that one of the employees who visited the hotel pursuant to the terms of the discount arrangement could be injured while on the premises of the hotel property.

97. The Massachusetts Employee would also be able to acquire systematic specific personal jurisdiction over the Hong Kong Hotel in any state where Hotel solicited similar discount contracts because in each of these forums Hotel would have an expectation that its conduct in entering into this type of systematic relationship could give rise to jurisdiction for this type of claim. Notwithstanding the apparent breadth of jurisdictional authority that would arise from ongoing, systematic contacts, this is still well short of the authority conferred by general jurisdiction. For example, absent additional facts, systematic specific jurisdiction in Massachusetts would not extend to a claim relating to a disgruntled employee of Hotel, or a claim relating to breach of a contract for food supplies for Hotel, or even a claim by a plaintiff who was injured at Hotel if that plaintiff

C. Pros and Cons of Episodic and Systematic Specific Jurisdiction

By distinguishing between episodic and systematic contacts as a basis for specific jurisdiction, this Article suggests a new approach for defining the contours of specific jurisdiction that more accurately meets the constitutional purpose of the doctrine and avoids many of the problems that are associated with the existing theories for defining specific jurisdiction. This approach is based upon the basic distinction that a defendant who engages in a single episode in a forum, or a series of finite episodes, should have a narrower expectation of jurisdictional exposure than a defendant who engages in an ongoing, systematic relationship with a forum. By tailoring separate criteria for defining the limits of episodic and systematic specific jurisdiction, the approach suggested herein is able to capture many of the advantages of the existing theories while avoiding some of the practical and theoretical disadvantages. For example, many of the benefits of the substantive relevance test (i.e., analytical clarity, predictability, and efficiency) will be accomplished under the approach suggested in this Article because the tests for episodic and systematic jurisdiction will be satisfied by contacts that are substantively relevant to the claim. In recognition that flexibility is an important component of the minimum contacts philosophy of “fair play and substantial justice,”⁹⁸ however, the criteria for defining episodic and systematic jurisdiction are not woodenly limited to the elements of the applicable substantive law. As such, the criteria for both categories of specific jurisdiction suggested herein provide sufficient flexibility for courts to look at the facts that contributed to the situation at issue in a lawsuit, whether those facts are substantively relevant or not, thereby avoiding undue reliance upon local pleading rules or the vagaries of particular substantive laws.

The test for episodic specific jurisdiction bears some similarity to the “but for” test in that it expands the reach of specific jurisdiction to include consideration of facts that might not be substantively relevant to the suit, but which played a role in generating the situation that culminated in the claim.⁹⁹ The criteria for episodic jurisdiction, however, are not as loosely defined as the “but for” test and thus provide more guidance for determining when a “contributing” factor is too remote to be jurisdictionally significant. For example, when one applies the “but for” test to the car accident hypothetical, it is unclear if Driver’s decision to drive through Connecticut was a “but for” cause of the accident in Massachusetts or merely a historical cause of the accident.¹⁰⁰ Applying the criteria for episodic jurisdiction, one would ask: (1) could Driver anticipate that his decision to drive through Connecticut could lead to an accident in Massachusetts, and (2) did Driver’s conduct in Connecticut give rise to the

arrived at Hotel without being enticed by an ongoing, systematic discount arrangement similar to the contract that existed between Hotel and the Massachusetts Company.

98. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

99. *See supra* text accompanying notes 51-57.

100. *See supra* text accompanying notes 58-61.

Massachusetts accident? In answering these questions, it is important to note that the relevant “episode” is defined according to Driver’s forum conduct, not the overall trip on which Driver was embarking. Thus, although Driver was on a trip to Maine when he traveled through Connecticut and Massachusetts, his relationship with each forum is a separate jurisdictional episode. Applying these criteria to the jurisdictional question, Driver would anticipate that his decision to drive through Connecticut could give rise to an accident in Connecticut or that he might leave Connecticut without causing an accident. Putting aside the chronological relationship between his episodes in Connecticut and Massachusetts on this trip, there is no link between how he drove in Connecticut and the accident in Massachusetts. Moreover, when Driver’s episode in Connecticut ended without causing an accident (the episode ended at the time he left Connecticut, not at the time that he arrived at his ultimate destination in Maine), Driver should have the assurance that his jurisdictional exposure for this Connecticut episode had evaporated.

In addition to identifying the criteria for episodic jurisdiction, this Article suggests that a defendant who engages in ongoing, systematic contacts with a forum should be subject to broader jurisdictional exposure than someone who engages in more limited conduct. This distinction picks up on the theoretical appeal of the sliding scale concept but provides more specific criteria for defendants to anticipate their jurisdictional exposure. Unlike the sliding scale test—which requires courts to weigh all of a defendant’s forum conduct together (whether similar or dissimilar to the conduct that gave rise to the claim)—the criteria for systematic jurisdiction avoids the “piling on phenomenon” and focuses on the defendant’s expectation of the factual consequences that might arise from his or her contacts. Moreover, the test for systematic jurisdiction avoids one of the most difficult determinations inherent in the sliding scale test: if a defendant has a little more contact than another defendant, how much less related may the claim be to those contacts? Systematic jurisdiction avoids this difficulty because any defendant engaged in an ongoing, systematic relationship with a forum will be subject to the same criteria for determining the scope of jurisdictional authority (i.e., defined according to the factual consequences that the defendant could anticipate arising from its systematic relationship with the forum).

While the profiles for specific jurisdiction suggested in this Article offer numerous advantages over existing theories for defining specific jurisdiction, the criteria for applying episodic and systematic jurisdiction are not unambiguous. The test requires courts to consider the factual consequences a defendant “should expect” to arise from its forum contacts and then determine whether a specific cause of action fairly fits within the defendant’s expectation of jurisdiction. In order to maintain a legal standard that hinges upon notions of “fair play” and “substantial justice,” however, one must accept the reality that there is no black letter rule that will unambiguously define jurisdiction in every situation. Rather, the profiles presented herein are intended to provide a framework that will guide courts to make consistent judgments based upon the factual context of each case.

Particular applications of the profiles suggested herein may pose more difficulty than others. For example, consider a defendant who offers products for

sale via the Internet. Ordinarily, a defendant would have to invest time and/or money to reach out to a particular forum to create an ongoing, systematic relationship that will give rise to subsequent individual contacts. Prior to investing the time or money for such a relationship, the defendant has the opportunity to evaluate the jurisdictional burden that will be generated by the relationship. The Internet, however, removes much of the need to reach out to a particular forum. Rather, a defendant need only create a Web site in order to solicit sales anywhere in the world, thereby largely obviating the investment of time or money to create a relationship with a particular forum. Should such a Web site create a systematic relationship with every forum that may access the site? If the Web site does not create a systematic relationship with every forum that may access the site, should one consider every sale that arises from a Web site a single episode, even though the defendant must maintain an ongoing expectation of suit in any forum where it continuously solicits sales (arguably any forum that may access the site)? This ambiguity highlights an important, and unavoidable, fact: the minimum contacts test is fact intensive. Rather than expecting to subject every defendant who conducts Internet business to the same scope of jurisdictional exposure, one must take a closer look at the context of each situation to determine whether a defendant's contacts should be characterized as episodic or systematic jurisdiction. For example, to characterize the defendant's relationship with each forum where it has Internet customers, one might consider: (1) the history of the relationship with each potential forum (whether the defendant has experienced a regular flow of contacts with the forum from which it might anticipate that contacts with that forum will be ongoing); (2) whether the Web site is active, interactive, or passive;¹⁰¹ and (3) whether the defendant has reached out to the particular forum to solicit customers and/or to supplement its Internet contacts. Thus, while the categories of episodic and systematic jurisdiction will not resolve all of the ambiguity inherent in making difficult jurisdictional decisions, the overall framework that is suggested herein will help to provide courts and litigants with guidance for making these determinations.

101. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (citations omitted), the court described a sliding scale test for determining jurisdiction based upon Internet activity in a forum:

[T]he 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. . . . 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 . . . a defendant has simply posted information on an Internet Web site which is accessible to [forum resident] users The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

D. A Case Study: Gator.com v. L.L. Bean

To illustrate how the framework set forth in this Article may help to resolve difficult jurisdictional questions, one might reconsider *Gator.com v. L.L. Bean*.¹⁰² As noted in the Introduction, Gator filed a declaratory judgment action against Bean in a federal court in California. Gator argued that its software product did not violate Bean's intellectual property rights and did not violate competition laws. Bean moved to dismiss the complaint for lack of personal jurisdiction on the ground that: (1) its contacts with California were not substantial and continuous enough to give rise to general jurisdiction; and (2) its California contacts did not give rise to the plaintiff's cause of action, thus failing the requirements for specific jurisdiction.

Bean's contacts with California may be summarized as follows: total sales to California residents approximated 6% of the company's total sales (this is an aggregate of sales resulting from the Web site, catalogues, and the toll free telephone number);¹⁰³ a substantial mailing list of California residents to whom Bean mailed a substantial number of catalogues; direct email solicitation to California residents; a substantial number of on line accounts for California residents; marketing efforts which included California; and numerous California vendors from whom the company purchased its supplies.¹⁰⁴

Applying these facts to the ideas presented herein, the author of this Article would first suggest that this case does not meet the standard for general jurisdiction. It is easy to resort to general jurisdiction in difficult personal jurisdiction cases, but the thesis of this Article rests upon the notion that general jurisdiction should be limited to those situations where the defendant is akin to an insider in the forum.¹⁰⁵ Here, Bean is not incorporated in California, it does not have an address in California, and it has not consented to jurisdiction. Thus, the analysis should focus on whether specific jurisdiction may be exercised under these facts.

If one accepts the premise of this Article, the next step would be to determine if Bean's contacts with California are episodic or systematic. Bean's sales history in California has been significant (6% of total sales) and the company has no reason to believe that its sales in California will change significantly (more or less) in the future. At the completion of each sale, Bean does not anticipate that its relationship with California is complete, but rather it hopes that its sales within the forum will continue. Indeed, by regularly sending catalogues and email solicitations into the forum and by including California in its ongoing marketing efforts, Bean has established a system from which it expects sales

102. *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003), *vacated by, reh'g, en banc, granted*, 366 F.3d 789 (9th Cir. 2004).

103. *Id.* at 1078. Bean conceded that its Web site was interactive and the court characterized the site as a "sophisticated virtual store in California."

104. *Id.*

105. See Brilmayer, *How Contacts Count*, *supra* note 26, at 80-81; Twitchell, *supra* note 22, at 633; Von Mehren & Trautman, *supra* note 19, at 1137.

from California to flow. Thus, one may conclude that Bean has a systematic relationship with California, and therefore it should expect that its jurisdictional exposure in California would include any lawsuit concerning factual consequences that might arise from this relationship.

Applying the profile for systematic specific jurisdiction, Bean should anticipate being sued in California for consequences that might arise from the sale of its product. The facts of this case, however, do not involve a cause of action regarding a sale of products—quite to the contrary, the cause of action focuses on the legality of Gator's attempt to divert potential Bean customers away from Bean's Web site, thereby preventing California residents from transacting with Bean. Herein lies the difficult part of the analysis. Based upon Bean's overall marketing/sales relationship with residents of California, could Bean anticipate that it might be sued in California regarding the legality of a software program that is intended to interfere with the execution of a transaction between a California resident and Bean? For several reasons, it seems that this cause of action should be deemed beyond the scope of systematic specific jurisdiction. First, looking at Bean's non-Internet sales/marketing contacts (catalogues, toll free telephone number, etc), it is fairly easy to determine that Bean would not expect these contacts to give rise to an occurrence involving the Gator software program. Specifically, since the program attempts to divert Internet sales, it would have no impact on sales made via other means (for example via telephone). Therefore, if Bean's only contacts with California were non-Internet related, there would be no expectation of jurisdiction for this type of occurrence and no systematic specific jurisdiction for the declaratory judgment action filed by Gator. Second, looking at the Internet sales activity, it is important to note that the sequence of events that leads to each diversion of a customer begins long before the customer goes to the Bean Web site. The Gator program is distributed to an individual's computer during a prior transaction and that program automatically executes itself while the customer is visiting the Bean site. Although the Bean Web site is interactive, the Gator program attempts to divert the customer from the site before there is a chance for any interaction or exchange of information. At this point in the sequence of events, Bean has done nothing to avail itself of this Internet sale. Both episodic and systematic jurisdiction must rest upon the purposeful conduct of the defendant, not the unilateral activity of a third party. This scenario is well beyond the factual consequences that Bean would anticipate arising from its marketing efforts to California residents and thus systematic specific jurisdiction should fail in this situation.

CONCLUSION

The minimum contacts doctrine is based upon the notion that the exercise of jurisdiction over a defendant is fair if the defendant has the ability to predict and control its jurisdictional exposure. Yet, the Supreme Court has neglected to clearly define the criteria by which courts are to define the scope of either general or specific personal jurisdiction, leading to a blurring of the concepts and disagreement among courts and scholars as to the appropriate contours of both

types of jurisdiction. This Article focuses on defining the scope of specific jurisdiction to accurately reflect the purpose of the doctrine and suggests that it is a mistake to assume that all assertions of specific jurisdiction may be defined according to a single set of criteria. Rather, the purpose of specific jurisdiction is best achieved by creating two profiles of specific jurisdiction, episodic specific jurisdiction and systematic specific jurisdiction. These profiles would share the basic characteristics of specific jurisdiction (conferring limited jurisdictional authority) while also recognizing that the scope of specific jurisdiction should depend upon whether the defendant expects its forum conduct to be of a finite nature or whether the defendant intends to create an ongoing, systematic relationship with the forum.