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Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency

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What difference does it make, for purposes of asserting personal jurisdiction, that a defendant has substantive legal ties with other parties concededly subject to a court's jurisdiction? What effect do such affiliations have on the constitutional limits contained in the "minimum contacts" test¹ of "fair play and substantial justice"?² In some situations, they apparently makes no difference. If a defendant's biological parent is subject to jurisdiction in a forum, it does not automatically subject the defendant to suit, even though the parent-child relationship is a legal as well as biological one. In other situations, a legal relationship does have jurisdictional significance. If a *corporate* defendant's parent is subject to suit, this may enhance the forum's ability to bring the corporate subsidiary before its courts.

The increased importance of juridical entities in substantive law has made such jurisdictional questions increasingly significant. Assume, for example, that a corporate subsidiary operates a chemical manufacturing plant in another country, and an accident at that installation creates

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1. For a general discussion of the minimum contacts test, see Brilmayer, *How Contacts Count*, 1980 SUP. CT. REV. 77.

2. The "fair play and substantial justice" test is taken, of course, from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

enormous tort liability.³ The injured parties may prefer to bring suit in the home state of the parent, perhaps because of the more favorable substantive law or perhaps because of the American system of contingent fees. Can the subsidiary be sued in the United States, assuming that it has no American contacts other than its American corporate parent? If suit were brought in the subsidiary's home state, would jurisdiction over the American parent be appropriate? What standards ought to apply?

We posit three methods by which substantive legal relations may affect the jurisdictional balance. First, the legal relationship may be such that it is reasonable to *attribute* the jurisdictional contacts of one party to the other. Thus, the contacts that permit jurisdiction over the first party may count against the second, establishing jurisdiction over that party also. Second, the legal relationship between two apparently separate entities may be such that in reality the two entities are one; their separate identities are *merged*. The contacts of the first defendant are also contacts of the second because there is in reality only one defendant. Third, under some circumstances, the party over which there is jurisdiction may be *substituted* for a party over which there is not. The plaintiff can simply choose to sue the affiliated party over which jurisdiction concededly exists. These three theories—*attribution*, *merger*, and *substitution*—explain how in some circumstances, jurisdiction over a legally related entity can satisfy the constitutional minimum contacts test of the due process clause. A series of Supreme Court cases illustrate the contexts in which these issues arise.

I BACKGROUND

No case, apparently, has considered the general relevance of substantive legal relations for personal jurisdiction. Specific instances, however, have been considered on a case-by-case basis. In particular, several older precedents considered the problem in the context of the corporate parent-subsidiary relationship. Because the leading case is *Cannon Manufacturing Co. v. Cudahy Packing Co.*,⁴ this line of precedents is sometimes referred to as the "*Cannon doctrine*".⁵ In that case, Cannon sued Cudahy, a Maine corporation, in North Carolina. The defendant replied that it was not "doing business" in the state, as the then-current jurisdictional test required.⁶ Process had been served in North Carolina upon an

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3. The example is modeled on the litigation arising out of the Bhopal incident. Union Carbide has been sued in the United States, while it is unclear whether its Indian subsidiary would be subject to suit here.

4. 267 U.S. 333 (1925).

5. See, e.g., P. BLUMBERG, *THE LAW OF CORPORATE GROUPS* 43-47 (1983) (discussing *Cannon doctrine*).

6. *Cannon*, 267 U.S. at 334-35.

agent of the Cudahy Packing Company of Alabama, over which jurisdiction concededly existed. The argument for jurisdiction was based on merger—that the two entities should be treated as one.⁷ Brandeis conceded in the opinion that

[t]hrough ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other States.⁸

Yet because the corporations were different legal entities, the assertion of jurisdiction was not allowed.

The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws. . . . The corporate separation, though perhaps merely formal, was real.⁹

The Court cited precedents for the proposition that “such use of a subsidiary does not necessarily subject the parent corporation to . . . jurisdiction.”¹⁰

For several reasons, the current authority of *Cannon* might be in doubt. First, the opinion did not clearly state the basis for its holding. Brandeis seemed to deny that any constitutional questions were presented¹¹ and to suggest that the problem was that no state law or congressional act authorized jurisdiction.¹² But at the same time, the language quoted above seems to reflect some “natural law” of corporations asserting that formally separate corporations must always be treated as separate. Second, the constitutional limitations on state court jurisdiction have been drastically revised since 1924. In particular, since *International Shoe Co. v. Washington*,¹³ “presence” has no longer been an important test for amenability to suit. If *Cannon* is an artifact of the

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7. *Id.* at 335.

8. *Id.*

9. *Id.* at 335, 337.

10. *Id.* at 336 (citing *People's Tobacco v. American Tobacco Co.*, 246 U.S. 79 (1918); *Peterson v. Chicago, R.I. & P. Ry.*, 205 U.S. 364 (1907); *Conley v. Mathieson Alkali Works*, 190 U.S. 406 (1903)).

11. *Id.* (“No question of the constitutional powers of the State, or of the federal Government, is directly presented.”).

12. *Id.*

13. 326 U.S. 310 (1945).

"presence" test, it possibly has been superseded. For these reasons, and others,¹⁴ it is commonly argued that *Cannon* has no constitutional relevance today, if indeed it ever did.¹⁵

On the other hand, it is plausible that to the extent *Cannon* ever had constitutional significance, and it has been cited as constitutional authority,¹⁶ its significance has not been eroded inerey because other aspects of the jurisdictional standard have changed. There are really two separate jurisdictional questions. *International Shoe* primarily addressed one of them, the issue of what type and quantity of contacts between the forum and the defendant suffice for jurisdiction. In this respect, *International Shoe* superseded the presence and doing business tests applied in *Cannon*. But *Cannon* also dealt with a second question—whether contacts of a quantity and type that would admittedly suffice for jurisdiction were really the defendant's contacts. In post-*International Shoe* terms, *Cannon* held that a subsidiary's contacts were not automatically a parent's contacts. Whether this is actually the rule is, however, unclear. *International Shoe* did not address this issue, except tangentially in rather different circumstances,¹⁷ and did not purport to overrule *Cannon*. The Supreme Court has yet to consider explicitly the effect of the "fair play and substantial justice" standard on *Cannon*-type problems. The lower courts are understandably confused about how the two lines of cases fit together.¹⁸

Several recent cases have implications for the jurisdictional relevance of legal affiliations with an entity subject to suit. The first is *World-Wide Volkswagen Corp. v. Woodson*.¹⁹ Attempting to obtain juris-

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14. See P. BLUMBERG, *supra* note 5, at 43-47.

15. See *id.* at 45-46 (citing 2 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 4.25 (2d ed. 1981); A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 112-18 (1959)).

16. See, e.g., *Consolidated Textile v. Gregory*, 289 U.S. 85, 88 (1933). *Gregory*, while citing *Cannon*, also relied upon other cases that explicitly mentioned due process, such as *International Harvester v. Kentucky*, 234 U.S. 579, 582 (1914) ("The Harvester Company appeared and moved to quash the return [of an indictment], substantially upon the ground that service had not been made upon an authorized agent of the company and that the company was not doing business within the State of Kentucky, and it set up that any action under the attempted service would violate the due process and commerce clauses of the Federal Constitution.").

See also *Harris v. Deere & Co.*, 223 F.2d 161 (4th Cir. 1955); *Crow Tribe of Indians v. Mohasco Indus.* 406 F. Supp. 738 (D. Mont. 1975); *Wireline, Inc. v. Byron Jackson Tools*, 239 F. Supp. 955 (D. Mont. 1964).

17. In *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945), the salesmen's activities in Washington supplied the necessary contacts with International Shoe Co. for jurisdiction. This decision exemplified attribution, as the court noted in *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2186 n.22 (1985).

18. See *Finance Co. of Am. v. Bankamerica Corp.*, 493 F. Supp. 895 (D. Md. 1980); *Crow Tribe of Indians v. Mohasco Indus.* 406 F. Supp. 738 (D. Mont. 1975); *Deere & Co. v. Walls*, 148 So. 2d 529 (Fla. Dist. Ct. App. 1963).

19. 444 U.S. 286 (1980).

diction over an out-of-state automobile dealer, the plaintiff argued that the dealer chose to become part of a nationwide network of automobile distributors located partly within the forum state. The majority did not address this argument seriously, although one dissent found it persuasive.²⁰ If accepted, the argument would suggest that other links between defendants and business within the forum also ought to be relevant to jurisdiction. However, the Court's rejection of the argument suggests at least that some more intimate legal relationship must be found.

More interesting, and more seriously advanced, was an argument in *World-Wide Volkswagen's* companion case, *Rush v. Savchuk*.²¹ The substantive legal relation in *Rush* was a contractual arrangement between the defendant in an automobile accident case and his insurer. The insurer was admittedly subject to jurisdiction in the forum, since it did business there. The plaintiff sought to obtain jurisdiction over the defendant by attachment of the insurer's obligation to defend the insured. As in *World-Wide Volkswagen*, the plaintiff argued that a legal relationship with an entity concededly subject to suit provided an adequate basis for jurisdiction. The Court rejected the argument, holding that minimum contacts had to be shown for *each* individual defendant.²²

A subsequent case considered the relevance of legal affiliations in the jurisdictional context more directly. It may amount, in fact, to an explicit revival of the *Cannon* doctrine. In *Keeton v. Hustler Magazine, Inc.*,²³ suit was brought against a corporation, its holding company, and that company's stockholder. While the Court upheld jurisdiction against the corporation, a publisher, it remanded on the question of jurisdiction over the other parties.

No effort had been made to show minimum contacts between those parties and the forum directly; only minimum contacts with the publisher had been shown. The Court both cited precedents that had relied upon *Cannon*²⁴ and reiterated *Rush's* caution that minimum contacts with each of the defendants must be shown.²⁵ Furthermore, *Keeton* clearly rested on constitutional and not state statutory grounds.²⁶ The opinion did not indicate, however, that the parent-subsidiary relationship

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20. *Id.* at 314 (Marshall, J., dissenting) ("[J]urisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.").

21. 444 U.S. 320 (1980).

22. *Id.* at 332.

23. 465 U.S. 770 (1984). One of the authors was counsel of record for the defendant in this case.

24. *Id.* at 781 n.13 (citing *Consolidated Textile v. Gregory*, 289 U.S. 85 (1933), *Peterson v. Chicago R.I. & P. Ry.*, 205 U.S. 364 (1907)).

25. *Id.*

26. It is well understood since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), that federal courts are not free to reexamine state decisions of "general common law". In *Hustler Magazine*, the state

necessarily would be irrelevant on remand, nor that formal corporate separation might not be disregarded in appropriate instances.

In an even more recent case, the Court noted the jurisdictional significance of substantive relationships, but declined to address it. In *Burger King Corp. v. Rudzewicz*,²⁷ a franchise agreement negotiated in Michigan to operate a Michigan fast food restaurant gave rise to litigation in Florida. The franchisor's base of operations was in Florida, and several facts connecting the dispute to Florida led the Court to uphold jurisdiction.²⁸ In a footnote, the Court mentioned a connection with the forum that had been discussed by the appeals court: MacShara, the cofranchisee of the defendant, Rudzewicz, had traveled to Florida to attend Burger King University. The Eleventh Circuit found this fact irrelevant to Rudzewicz's contacts to Florida because the two cofranchisees had never formed a partnership and had signed the franchise contract in their individual capacities.²⁹

The Supreme Court, in contrast, noted that the two cofranchisees later jointly formed a corporation. Furthermore, the two were required to decide which one of them would make the necessary trip to Florida, and Rudzewicz participated in the decision that MacShara would be the one to go. The Court explained: "We have previously noted that when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party, . . . at least where he is a 'primary participan[t]' in the enterprise and has acted purposefully in directing those activities."³⁰ Nevertheless, the Court found sufficient other contacts between Rudzewicz and Florida, concluding that they "need not resolve the permissible bounds of such attribution."³¹

This case law is at best fragmentary. The cases show that a substantive legal relationship with a party over which jurisdiction exists is not automatically sufficient to establish jurisdiction. But the persistent and occasionally approving attention to arguments based on substantive relations suggests that under certain circumstances such arguments might be successful. The overall picture is not very informative. One can only conclude that legal relations are sometimes relevant and sometimes not relevant.

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statute in question had been interpreted to reach the limits of the federal constitution. 465 U.S. at 774 n.4.

27. 105 S. Ct. 2174 (1985).

28. For instance, payments were to be made in Florida and a choice of law clause in the contract specified Florida law. *Id.* at 2178.

29. *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1513 n.14, *rev'd sub nom.* *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

30. *Burger King*, 105 S. Ct. at 2186 n. 22. (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

31. *Id.*

While the opinions offer little helpful general reasoning, they form the parameters within which a general theory can be built. Moreover, these cases do indicate both the breadth of the problem and a common underlying fact pattern. In each of them, one entity is subject to jurisdiction, a second arguably is not, and the plaintiff seeks to use the affiliation between the two to establish jurisdiction that would otherwise not exist. In *Cannon* and *Hustler*, the affiliation relied upon was the parent-subsidiary relationship.³² In *Rush*, the affiliation was a contractual agreement for indemnification and provision of a legal defense.³³ In *World-Wide Volkswagen*, the affiliation was the legal relationship among franchised dealers within a nationwide system for selling and servicing automobiles.³⁴ In *Burger King*, the two defendants were part of a common business venture.³⁵

We commence discussion of this common analytical pattern by considering the specific example of jurisdiction based upon the parent-subsidiary relationship between two corporations. It is the clearest example to visualize, and the large number of lower court cases raising the question³⁶ suggests that it is also the example of greatest current importance.

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32. *Cannon*, 267 U.S. at 335; *Hustler*, 465 U.S. at 781 n.13.

33. 444 U.S. at 328.

34. 444 U.S. at 314 (Marshall, J., dissenting).

35. 105 S. Ct. at 2186 n.22.

36. See, e.g., *Quarles v. Fuqua Indus.*, 504 F.2d 1358 (10th Cir. 1974) (parent corporation has a separate corporate existence and is treated separately from a subsidiary absent circumstances justifying the disregard of the separate corporate status of each entity); *Boryk v. De Havilland Aircraft Co.*, 341 F.2d 666 (2d Cir. 1965) (mere ownership of stock in New York subsidiary does not subject foreign parent to jurisdiction in New York); *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) (ownership of subsidiary by a foreign corporation does not by itself make the foreign corporation subject to suit); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962) (state may assert personal jurisdiction over a foreign parent corporation where wholly owned subsidiary-distributor sold items for parent and parent assisted in promoting sales); *Harris v. Deere & Co.*, 223 F.2d 161 (4th Cir. 1955) (no jurisdiction over foreign parent corporation based on service of process on wholly owned domestic subsidiary); *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949) (mere ownership of domestic subsidiary by foreign parent not of a substantial enough character for assertion of jurisdiction over foreign parent); *Bellomo v. Pennsylvania Life Co.*, 488 F. Supp. 744 (S.D.N.Y. 1980) (where subsidiary created for tax purposes and there is no other basis for distinguishing between parent and subsidiary, personal jurisdiction over the foreign parent is permissible); *Roorda v. Volkswagenwerk, A.G.*, 481 F. Supp. 868 (D.S.C. 1979) (personal jurisdiction over foreign parent permissible where it exercises intimate and complete control of domestic subsidiary); *DCA Food Indus. Inc. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574 (S.D.N.Y. 1979) (personal jurisdiction over parent permissible where subsidiary acted as a department of the foreign parent); *Energy Reserves Group v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978) (personal jurisdiction permissible where wholly owned domestic subsidiary did business in forum on behalf of foreign parent); *W. Clay Jackson Enter. v. Greyhound Leasing & Fin.*, 431 F. Supp. 1229 (D.P.R. 1977) (personal jurisdiction permitted over foreign parent where domestic subsidiary acted as agent and alter ego of parent); *Top Form Mills, Inc. v. Sociedad Nationale Industria Aplicaciones Viscosa*, 428 F. Supp. 1237 (S.D.N.Y. 1977) (personal jurisdiction permissible where subsidiary acted as agent of foreign parent); *Stoeck v. American Honda Motor Co.*, 429 F. Supp. 763 (D. Neb. 1977) (parent did not so dominate subsidiary that subsidiary could be treated as an agent for service of process); *Crow Tribe of Indians v. Mohasco Indus., Inc.*, 406 F.

As the succeeding sections will show, the principles at issue are analogous when jurisdiction based on other legal affiliations is at issue.

II JURISDICTION AND THE PARENT-SUBSIDIARY RELATIONSHIP

There are many possible permutations of the due process problem of parents and subsidiaries. To simplify, take a parent corporation, *P*, which is based in one state, Pennsylvania, and a subsidiary, *S*, based in South Dakota. Our discussion will assume that only these two states and these two corporations are involved. Of course, the relationship of the corporations may be more complicated than that between a wholly owned subsidiary and its parent. There may be partial ownership, or the two corporations might both be subsidiaries of the same corporation, or there may be other attenuating circumstances in the relationship. Another possible complication is the precise meaning of "Pennsylvania corporation"—*P* might be incorporated there, have its principal place of business there, or have other extensive affiliations with the state. For purposes of this example assume that *P* is sufficiently local that it is subject to suit in Pennsylvania generally, on any cause of action regardless of where it arose.³⁷ The same holds true for *S* in South Dakota.

Another complication is whether jurisdiction is sought over the parent by virtue of jurisdiction over the subsidiary, or vice versa. Initially, we examine the former question, leaving the latter to be developed as a corollary. We know that *P* can be sued in Pennsylvania; that is a consequence not of *P*'s relationship with *S*, but of the fact that Pennsylvania is *P*'s home base. The only situation where *P*'s relationship with *S* becomes crucial is where the forum can obtain jurisdiction over *S* but not

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Supp. 738 (D. Mont. 1975) (formal separation between parent and subsidiary enough to defeat personal jurisdiction under *Cannon*); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975) (where parent and subsidiary exchanged officers, employees, and directors and subsidiary distributed parent's products, sufficient control existed to hold parent subject to jurisdiction for subsidiary's contacts); *Freeman v. Gordon & Breach, Science Publishers Inc.*, 398 F. Supp. 519 (S.D.N.Y. 1975) (parent exercised sufficient control over subsidiary that parent could be held subject to jurisdiction for subsidiary's contacts with the forum); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975) (personal jurisdiction over foreign parent permissible where it exercised sufficient control over domestic subsidiary); *McPheron v. Penn Central Transp. Co.*, 390 F. Supp. 943 (D. Conn. 1975) (wholly owned holding company and parent sufficiently separate so that no personal jurisdiction over foreign parent permitted).

37. For example, extensive affiliations with a state not amounting to incorporation or principal place of business might still give rise to jurisdiction where the cause of action arose elsewhere. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952). For a discussion of the difference between general and specific jurisdictions, see Brilmayer, *supra* note 1, at 80-88; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

over *P* apart from its relationship with *S*. That means that the issue arises when South Dakota is the forum.

A. *Jurisdiction Over the Parent Based on Jurisdiction Over the Subsidiary*

Even if we focus on a suit against *P* brought in South Dakota, still more variations are possible. In particular, there are two main questions: (1) Where did the cause of action arise? (2) Who is the principal defendant, *P* or *S*? By where the cause of action arose, we mean where the injury or the activities leading up to it occurred, although obviously this is not an unproblematic notion.³⁸ By principal defendant, we mean the defendant that is primarily liable as a substantive matter, the one against which suit unproblematically can be brought. These different situations are reflected in the two-by-two matrix in Figure 1 representing the two possibilities as to where the cause of action accrued, and the two possibilities as to the identity of the primary defendant.

FIGURE 1
CAN *P* BE SUED IN SOUTH DAKOTA?

		-----where action arose----->	
		<i>A</i>	<i>B</i>
		in the forum (South Dakota)	outside the forum (Pennsylvania)
identity of primary defendant	1.	Party over whom jurisdiction is sought (parent) <i>A</i> ₁ (easy case)	<i>B</i> ₁ (Cannon)
	2.	Party over whom jurisdiction already exists (subsidiary) <i>A</i> ₂ (Hustler)	<i>B</i> ₂

Column *A* includes all the cases where the injury complained of is located in the forum. South Dakota is attempting to assert only specific jurisdiction over *P* in those cases. By contrast, column *B* represents cases

38. This is well illustrated, of course, by the difficulties the concept has engendered in the context of choice of law. For a general critique, see B. CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* (1963).

in which South Dakota is attempting to assert general jurisdiction over *P*. Specific jurisdiction is jurisdiction over a cause of action that arose within the state, while general jurisdiction involves a relationship between the forum and the defendant giving the forum power to litigate any cases that the defendant may be party to, regardless of where those cases arose. This difference is crucial in that a substantially greater quantum of contacts is necessary to establish general jurisdiction than to establish specific jurisdiction. Thus, it is easier to get jurisdiction in column *A* than column *B*.

When a cause of action arises in South Dakota, either *P* or *S* may be the primary defendant. The interesting problems arise in *A*₂ where *S* is the primary defendant—that is, *S* engaged in the activities that led to a suit against *S* and *P*. Permutation *A*₁ is not interesting because jurisdiction over *P* exists regardless of its relationship with *S*.³⁹ In that scenario, *P* directly caused the harm in South Dakota without using *S* as the primary actor, which establishes an adequate basis for asserting jurisdiction over *P* directly.⁴⁰ *P*'s relationship with *S* is unlikely to add substantially to this important contact with South Dakota unless *P*'s relationship with *S* has some bearing on the substantive dispute in question.

The other possibility is that a cause of action arises outside of South Dakota, in Pennsylvania. If the cause of action arises in Pennsylvania, the injury does not count as a contact for jurisdiction over *P* in South Dakota even if *P* is the primary defendant, simply because an injury in Pennsylvania is not a contact with South Dakota at all. Because the injury itself is not a jurisdictional contact with the forum, it does not matter for jurisdictional purposes which corporation was primarily responsible for it.

However, the identity of the primary defendant will matter for substantive purposes. Row 2, where *S*, the South Dakota subsidiary, is the primary defendant, includes all the cases in which the plaintiff will face substantive problems of attributing liability to *P*, the Pennsylvania parent, in addition to any difficulties in establishing jurisdiction over *P*. This is so because the plaintiff is attempting to sue an entity that is not primarily liable for the injury but is at most only liable for the activities of another entity. *Cannon Manufacturing Co. v. Cudahy Packing Co.*⁴¹ falls under category *B*₁ because the parent was the primary defendant, the one causing the injury to the plaintiff, and because the cause of action did not

39. The main exception would be cases where the harm was insufficiently foreseeable. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). For a discussion of the peculiar foreseeability problems of substantive relations, see *infra* text accompanying notes 167-75.

40. For instance, a single contact may be sufficient where it gives rise to the cause of action. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

41. 267 U.S. 333 (1925).

arise in the forum.⁴² *Keeton v. Hustler Magazine, Inc.*,⁴³ in contrast, falls under category A_2 because the subsidiary was the primary defendant and the injury occurred in the forum.⁴⁴ Cases in column A , where the cause of action arises in the forum, South Dakota, are easier cases for plaintiffs to gain jurisdiction than cases in column B , where the cause of action arises out of state. Cases in row 1, where P is the primary defendant, are easier cases to prevail on the merits against P than cases in row 2.

Concrete examples illustrating these fact patterns suggest conditions under which assertion of jurisdiction is appropriate. As already noted, A_1 , where P is the primary defendant in a cause of action arising in the forum, South Dakota, probably will be easy even without reference to the substantive affiliation between P and S .⁴⁵ Next consider pattern A_2 . There the subsidiary has performed some action in the forum giving rise to legal liability. Can the parent be sued in South Dakota? It seems that P at least should be subject to suit in the forum if it directed S to engage in the activities giving rise to S 's liability there. After all, had P hired an individual outside the corporation to engage in such activities in South Dakota, P would have been amenable to suit if the contractor had then caused injury in the course of carrying out those activities.⁴⁶ This is the general principle of attribution, alluded to in *Burger King Corp. v. Rudzewicz*⁴⁷ and employed in the context of a relationship between parent and subsidiary. The parent-subsidiary relationship is simply the vehicle by which the parent caused the subsidiary to carry out its own wishes, which then lead to injury.

Cases B_1 and B_2 , where the causes of action arise outside the forum, are more difficult because South Dakota must establish general jurisdiction. It has general jurisdiction over S , as we hypothesized at the outset. In order to get general jurisdiction over P , however, it must show continuous and systematic contacts with P . These contacts are unlikely to be shown by the simple fact that P owns assets—that is, stock in S —in South Dakota.⁴⁸ Instead, the plaintiff may try to establish jurisdiction over P by arguing that S and P are in reality the same company. Had S been a branch or division, jurisdiction over P would have been appropriate.

42. The *Cannon* opinion did not mention where the contract for cotton sheeting was entered into.

43. 465 U.S. 770 (1984).

44. According to the Court's reasoning, the injury also occurred in every other state, since it was an intangible injury to reputation and the magazines were circulated nationwide. *Hustler Magazine*, 465 U.S. at 777.

45. See *supra* text accompanying note 40.

46. See *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2186 n.22 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

47. *Id.*

48. Cf. *Schaffer v. Heitner*, 433 U.S. 186 (1977) (stock ownership not adequate basis for jurisdiction over corporate derivative suit against management).

ate.⁴⁹ The plaintiff may argue that *P* and *S*'s relationship is more similar to that of branches or divisions within a corporation than that of distinct corporations. If the two entities are really the same, all of *S*'s local activities are also contacts that *P* has with the forum. Since these contacts suffice to establish jurisdiction over *S*, they also will suffice to establish jurisdiction over *P*.

These two methods for establishing jurisdiction involve showing either that the absent parent instigated the subsidiary's local activities or that the absent parent and the subsidiary are in fact a single legal entity. The first method we call *attribution*, the second *merger*. They are obviously similar in that both involve disregarding separate entity status and shifting responsibility for the subsidiary's actions onto the parent. The difference between attribution and merger lies in the extent of this shifting of responsibility. Under the attribution theory, only the precise conduct shown to be instigated by the parent is attributed to the parent; the rest of the subsidiary's actions still pertain only to the subsidiary. The two corporations remain distinct entities. If merger is shown, however, all of the activities of the subsidiary are by definition activities of the parent. Merger requires a greater showing of interconnectedness than attribution, but once shown, its scope is broader. Under both theories, the parent is declared responsible for in-state activities of the subsidiary, but in attribution the responsibility results from causing a separate legal entity to act while in merger there is no separate legal entity at all.

We have illustrated attribution in case *A*₂, where a foreign parent is subject to suit in a cause of action arising in the forum in which the domestic subsidiary is the primary defendant. We also have illustrated merger in cases *B*₁ and *B*₂, where the cause of action arises outside the forum. But merger might be an available theory in *A*₂, and attribution an available theory in *B*₁ and *B*₂. Though it must be hard to prove, merger might be used in *A*₂, where the subsidiary caused harm in the forum, because the two corporations might not have separate entity status. For example, there might be reasons, such as undercapitalization, to disregard the formal corporate boundaries, in which case jurisdiction over the parent would follow automatically.

Conversely, attribution might be used to support general jurisdiction in cases *B*₁ and *B*₂, where the cause of action arises outside the forum. If enough of the subsidiary's activities are attributable to the parent, such continuous and systematic activity in the forum (even though performed through a separate corporate entity) might subject the parent to general jurisdiction. Even though the subsidiary's formal entity status might be recognized, the parent may have transacted enough business in the forum

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49. See, e.g., *DCA Food Indus. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574 (S.D.N.Y. 1979).

through its subsidiary that general jurisdiction over the parent would be appropriate.

B. Jurisdiction Over the Subsidiary by Virtue of Jurisdiction over the Parent

This discussion has been framed in terms of jurisdiction in South Dakota over the parent, *P*, a Pennsylvania corporation, based upon its affiliation with the subsidiary, *S*, a South Dakota corporation. Our analysis changes only slightly when jurisdiction over *S* is sought on the grounds of its relation with *P*. The relevant question is: Can *S* be sued in Pennsylvania? Comparable permutations occur because the two relevant questions remain the same:

(1) Where did the cause of action arise? (2) Who is the primary defendant? These issues determine whether specific or general jurisdiction is sought, and thus the quantum of contact that must be shown. Figure 2 shows a matrix of these permutations.

FIGURE 2
CAN *S* BE SUED IN PENNSYLVANIA?

		<i>A</i> <i>B</i>	
		-----where action arose----->	
		in the forum (Pennsylvania)	outside the forum (South Dakota)
identity of primary defendant			
1.	Party against whom jurisdiction is sought (subsidiary)	<i>A</i> ₁ (easy case)	<i>B</i> ₁ (Bhopal)
2.	Party against whom jurisdiction exists (parent)	<i>A</i> ₂	<i>B</i> ₂

As in the previous discussion, if merger can be shown, *S* is subject to suit because of *P*'s contacts with the forum, Pennsylvania. Legal identity of two superficially distinct entities is a symmetric relationship; to say that *S* is identical with *P* means also that *P* is identical with *S*. In any situation where merger would allow jurisdiction over *P* in South Dakota based on its affiliation with *S*, merger would allow jurisdiction over *S*

based on its affiliation with *P*. Thus, where the merger theory is used, it does not matter whether the in-state corporation is the parent or the subsidiary.

Where attribution is the theory, a nearly identical result ensues. If *P* is engaged in substantial forum activities, or in less substantial activities that give rise to the legal injury in the forum, the test is whether *P*'s actions were attributable to *S*. The standard for attribution should be the same. The standard is less likely to be satisfied, however, because a subsidiary ordinarily engages in activities at its parent's request rather than vice versa. Consequently, the parent-subsidiary relationship is asymmetric in that the parent controls the subsidiary to a greater degree than the subsidiary controls the parent. Thus, while the attribution test is the same, the legal relationship between the parties will be less probative of whether the absent defendant controlled the activities taking place in the forum. Still, the fact of a corporate relationship may help to show the subsidiary's control over the parent's activities in that the parent may be inclined to further the interests of its subsidiaries in many situations and therefore to act at their behest.

With the notions of merger and attribution in mind, we can refine the questions that should have been asked in *Cannon* and *Hustler Magazine*. First, are the parent and subsidiary really separate entities or should all of the subsidiary's connections with the forum be counted as connections between the parent and forum as well? In other words, should their formal independent entity status be observed, or should the two entities be merged? Second, were the particular activities in which the subsidiary engaged in the forum attributable to the parent, even assuming that separate entity status ought to be respected? If so, were these activities substantial enough to support jurisdiction, given that the necessary quantum of activity varies with the activity's relationship to the cause of action?

The notions of merger and attribution have obvious parallels to substantive law. The issue of jurisdictional merger is comparable to the corporate law question of piercing the corporate veil. Where two corporations do not maintain the requisite formal separation, a legal liability ascribed to one may be satisfied against the other.⁵⁰ This theory of substantive liability can be contrasted with a narrower theory of substantive liability, which corresponds to our category of attribution. If a corporation incites or motivates another to engage in actionable conduct, it may be liable for its responsibility in causing the harm. The two corporations are not declared to be identical for all purposes; their separate entity status is preserved. The actions of one are attributed to the other

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50. See N. LATTIN, *THE LAW OF CORPORATIONS* § 18, at 86-87 (2d ed. 1971).

only for the limited purpose of finding liability for particular acts. The precise relationship between these substantive law doctrines and the jurisdictional notions of merger and attribution will be discussed at greater length below.⁵¹

III

BEYOND THE PARENT-SUBSIDIARY RELATIONSHIP

Merger is a direct consequence of the parent-subsidiary relationship, and cannot be exported beyond that relationship into the context of jurisdiction over human beings. Two human beings, no matter how closely connected, cannot be declared identical to one another. Only with abstract juridical entities, such as corporations,⁵² can two entities be deemed merged into one. In fact, not all corporations are susceptible to merger; it is only when there is some ownership relationship that the law will pierce the corporate veil. With natural persons and many other juridical entities, it is impossible to merge a defendant beyond the court's jurisdiction with a defendant within the court's jurisdiction. In this respect, the parent-subsidiary problem is a special case.

The attribution theory, in contrast, applies to other legal affiliations as well as to the parent-subsidiary relationship. A defendant may motivate or help another defendant to commit acts in the forum. In the parent-subsidiary context, the ownership relationship was the vehicle through which assistance or motivation was achieved. But substantive law recognizes other affiliations with comparable consequences. Two such affiliations are the principal-agent relationship and the relationship between coconspirators. Another is a cluster of affiliations loosely grouped under the heading of "vicarious liability".⁵³

In addition to attribution, there are situations where one defendant may be substituted for another. Again, the common fact pattern includes one defendant concededly subject to jurisdiction and a second arguably beyond the forum's reach. In such circumstances, it may be possible to sue the first defendant even though the cause of action runs more appropriately against the other. One example is the direct action statute,

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51. See *infra* Part IV.

52. Partnerships also might be merged, although the facts that would lead one to do so are hard to imagine. Similarly, two conspiracies might be merged if they had some common nucleus. Note that only two comparable entities (e.g., two conspiracies or two corporations) can be merged, while attribution is possible between different sorts of entities.

53. While we will not discuss vicarious liability at length, it fits within the attribution approach in the same way as does agency. For example, some states impose civil liability upon social hosts who serve liquor to inebriated guests who thereafter commit torts. An automobile rental agency may be liable for the torts of the driver. Conceptually, these are similar to agency relationships in that the secondary defendant is held liable for the torts of the primary defendant. For discussion of some such cases, see *infra* Part IV, Section B.

which allows suit against the insurer instead of the named insured. We will discuss the various attribution theories first, before turning to the mechanism of substitution.

A. Attribution: Agency and Principal

*Parke-Bernet Galleries, Inc. v. Franklyn*⁵⁴ exemplifies the theory of attribution in the principal-agent context. In March of 1967, Robert Franklyn, a California art collector, received a catalogue of art from the well-known New York auctioneer Parke-Bernet Galleries. Dr. Franklyn became interested in one of the paintings listed, *Les Baigneurs* by Roger de la Fresnaye, and wrote to the gallery submitting a bid for the forthcoming auction. On the day before the auction, he contacted the gallery by phone and requested that "telephonic communication be established between myself and [Parke-Bernet] during the course of the bidding"⁵⁵ so that he might participate. This conversation was confirmed by telegram. Dr. Franklyn's written bid was the highest for *Les Baigneurs* and during the auction he also submitted by phone the high bid on a painting by Paul Klee.⁵⁶

When Dr. Franklyn did not respond to Parke-Bernet's bill for ninety-six thousand dollars, Parke-Bernet brought suit in New York. Probably few observers of the personal jurisdiction case reports would have had sympathy for his defense of lack of jurisdiction; neither did the New York Court of Appeals. The court upheld jurisdiction under the New York long-arm statute providing jurisdiction over "'any nondomiciliary . . . who, in person or through an agent . . . transacts any business within the state' as to any cause of action arising from such transaction."⁵⁷

Although treated as a matter of statutory construction, the case illustrates attribution in the context of principals and agents. The court first noted that it might well be argued that the defendant, on his own initiative, projected himself into the auction room by actively participating in the bidding.⁵⁸ For this reason, Dr. Franklyn might be said to have transacted business "in person" in New York. However, the court also provided an important second rationale—that there would be substantial basis for jurisdiction even if the personal participation were disregarded. The Parke-Bernet employee who assisted in placing bids was considered the defendant's agent during the auction. Although still a Parke-Bernet

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54. 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

55. *Id.* at 15, 256 N.E.2d at 507, 308 N.Y.S.2d at 338.

56. *Id.* at 15-16, 256 N.E.2d at 507, 308 N.Y.S.2d at 338-39.

57. *Id.* at 16, 256 N.E.2d at 507, 308 N.Y.S.2d at 339 (referring to N.Y. CIV. PRAC. R. 302(a)(1) (Consol. 1963)).

58. *Id.* at 18, 256 N.E.2d at 508, 308 N.Y.S.2d at 340.

employee, he had been "loaned" to Franklyn at the time of the auction, and "[a] servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower."⁵⁹ Since the defendant had transacted business in New York through an agent, the court held that jurisdiction existed.

Parke-Bernet Galleries falls under category A_2 of the matrix set out earlier, reproduced here in Figure 3 to reflect the principal-agent relationship. As with the earlier version of the matrix, cases in column A , where the cause of action arises in the forum, are easier for jurisdictional purposes, and cases in row 2 provide the plaintiff with substantive as well as jurisdictional difficulties. In *Parke-Bernet Galleries* the cause of action arose in the forum, and the agent was the immediate cause of the activities giving rise to the litigation. Here, as in the parent-subsidiary context, asserting jurisdiction is no problem when the activities in the forum both gave rise to the litigation and were brought about by the principal, acting through the agent. Attribution makes jurisdiction proper.

As indicated in the Figure 3, *National Equipment Rental v. Szukhent*⁶⁰ and *Bryant v. Finnish National Airline*⁶¹ exemplify category B_1 . In *Szukhent*, a transaction centered principally in Michigan⁶² was the basis for a suit brought in New York. By contract, the defendants had agreed to appoint a New York resident as their agent for service of process in the event of suit.⁶³ The Supreme Court upheld jurisdiction. In *Bryant*, the defendant's activities in Paris injured the plaintiff, who brought suit in New York alleging that the defendant maintained an office in that city. Because employees in the New York office were "doing business" on Finnish National Airline's behalf, the New York Court of Appeals sustained jurisdiction in accordance with the New York long arm statute.⁶⁴

It is widely accepted that attribution of an agent's behavior is appropriate in jurisdictional analysis.⁶⁵ In particular, corporations are juridi-

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59. *Id.* at 19, 256 N.E.2d at 509, 308 N.Y.S.2d at 341 (quoting *Hartell v. T.H. Simonson & Son Co.*, 218 N.Y. 345, 349, 113 N.E. 255, 256 (1916)).

60. 375 U.S. 311 (1964).

61. 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

62. The contract purported to establish that the transaction was entered into in New York. *Szukhent*, 375 U.S. at 313 n.3.

63. The agent, in fact, was an employee of the plaintiff's in New York. *Id.* at 317. An interesting issue, dealt with briefly *infra* at text accompanying notes 106-08, concerns whose law determines whether such an appointment ought to be effective.

64. It is an open question whether *Bryant* survives *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), not because of the problem of attribution but because of the one of needed quantum of contacts for general jurisdiction.

65. See, e.g., *Marsh v. Kitchen*, 480 F.2d 1270, 1272-73 (2d Cir. 1973) (false arrest action in New York against Missouri defendants dismissed for lack of jurisdiction where defendants never entered New York and officers in New York were not agents of defendant); *Wilshire Oil Co. v. Riffe*,

FIGURE 3
SUIT AGAINST PRINCIPAL

		A	B
		-----where cause of action arose----->	
		in the forum	outside the forum
	<i>identity of primary defendant</i>		
1.	Party over whom jurisdiction is sought (principal)	A_1 (easy case)	B_1 (<i>Szukhent and Bryant v. Finnish National Airline</i>)
2.	Party over whom jurisdiction exists (agent)	A_2 (<i>Parke-Bernet</i>)	B_2

cal entities that can act only through agents.⁶⁶ An identical attribution analysis therefore applies, although it uses the formal concepts of principal and agency instead of the formal relationship of parent and subsidiary. The in-state party is the agent of the out-of-state defendant over whom jurisdiction is sought if the out-of-stater has control over the local in-stater based on a contractual or employment relationship. The local's activities then may be attributed to the out-of-stater, and the contacts

409 F.2d 1277, 1281-82 (10th Cir. 1969) (corporation's action against two former nonresident employees dismissed for lack of jurisdiction where neither defendant engaged in activities in forum state sufficient to permit jurisdiction); *United States v. Montreal Trust Co.*, 358 F.2d 239, 244 (2d Cir.) (nonresident manager of nonresident corporation who had personal agents in New York is subject to jurisdiction under New York long-arm statute for action concerning transactions of the agents), *cert. denied*, 384 U.S. 919 (1966); *Felicia, Ltd. v. Gulf Am. Barge, Ltd.*, 555 F. Supp. 801, 805-06 (N.D. Ill. 1983) (Florida partnership properly subject to jurisdiction in Illinois in action for breach of contract where contract was entered into by specific partners acting as agents of the partnership); *Arcata Graphics Corp. v. Murrys Jewelers & Distrib., Inc.*, 384 F. Supp. 469, 472 (W.D.N.Y. 1974) (defendant Delaware corporation subject to jurisdiction in New York where merchandising association representing defendant acted in New York); *Sparrow v. Goodman*, 376 F. Supp. 1268, 1271 (W.D.N.C. 1974) (principal may be subject to jurisdiction on account of the acts of an agent acting within the scope of his authority); *City of Philadelphia v. Morton Salt Co.*, 289 F. Supp. 723, 725 (E.D. Pa. 1968) (foreign corporation that does a substantial portion of its business through a domestic distributor may be subject to jurisdiction where it controlled some of the distributor's business decisions); *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393, 398 (E.D.S.C.) (defendant foreign corporation subject to jurisdiction in South Carolina due to presence of a distributor in South Carolina), *aff'd*, 349 F.2d 60 (4th Cir. 1965); *La Porte Heinekamp Motor Co. v. Ford Motor Co.*, 24 F.2d 861, 864 (D. Md. 1928) (defendant motor company subject to jurisdiction in Maryland due to presence and activities of an agent in Maryland though defendant was not "doing business" in Maryland).

66. *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 804 (1948).

thus assigned to the out-of-stater are assessed against the jurisdictional standard. Whether few or many contacts are required depends upon whether the cause of action arose from the in-state activities.

Also, as with attribution based upon the parent-subsidiary relationship, it is more plausible to impute the contacts of the agent to the principal than vice versa. Agents act on behalf of their principals, to whom their activities are attributed. In some circumstances attribution might work the other way, so that the principal might perform an action at the request of the agent. Normally, however, control is assymetric, so that it will be easier to show jurisdiction over the principal based upon the agent's actions than the converse.

B. Attribution and Conspiracy

Jurisdiction based on conspiracy theory is a relatively new phenomenon. Although the first allegation of jurisdiction based on civil conspiracy dates back to the 1940's,⁶⁷ it was not until the 1970's that this method of jurisdictional attribution became prevalent.⁶⁸ Its legitimacy has been the focus of a number of recent articles.⁶⁹

The basic premise of civil conspiracy is the tort law principle that a conspirator is legally responsible for all acts of his coconspirators in furtherance of the conspiracy.⁷⁰ This principle is generally accepted.⁷¹ The act of conspiring, itself, does not give rise to civil liability.⁷² Rather, civil conspiracy doctrine provides means to hold liable for plaintiff's injury all those who acted in concert with the principal defendant.⁷³ A conspirator who performs an act in furtherance of the conspiracy does so as a general agent of his or her coconspirators.⁷⁴ The question posed here is whether this "agency" relationship should result in jurisdiction over the coconspirators. Plaintiffs have argued that because coconspirators act as agents of one another for purposes of substantive liability, the acts of a coconspirator in the forum should be attributed to other coconspirators

67. *Giusti v. Pyrotechnic Indus.*, 156 F.2d 351 (9th Cir.), *cert. denied*, 329 U.S. 787 (1946).

68. See, e.g., *Grove Press, Inc. v. Angleton*, 649 F.2d 121 (2d Cir. 1981); *Lott v. Burning Tree Club, Inc.*, 516 F. Supp. 913 (D.D.C. 1980); *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y.), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980); *Professional Investors Life Ins. Co., v. Roussel*, 445 F. Supp. 687 (D. Kan. 1978); *McLaughlin v. Copeland*, 435 F. Supp. 513 (D. Md. 1977); *Mandelkorn v. Patrick*, 359 F. Supp. 692 (D.D.C. 1973).

69. See Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983); Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984).

70. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 46, at 323-24 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

71. *Id.*

72. See *McLaughlin v. Copeland*, 435 F. Supp. 513, 525 (D. Md. 1977).

73. *Id.*

74. Althouse, *supra* note 69, at 235 (citing *Rutledge v. Electric Hose & Rubber Co.*, 327 F. Supp. 1267, 1274 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975)).

and therefore jurisdiction over one should create jurisdiction over all.⁷⁵

Hyde v. United States,⁷⁶ a criminal case, illustrates the approach. The defendants, along with their attorney, had conspired in California to defraud the federal government of lands in California and Oregon. Their attorney performed acts in furtherance of the conspiracy in Washington, D.C. The Supreme Court held that these acts conferred jurisdiction in the District of Columbia courts over all of the indicted conspirators, even though there had been no showing that the defendants had any other contacts with the District of Columbia.⁷⁷

In civil cases, reactions to conspiracy allegations have been more varied and uncertain. A very conservative approach was taken in *Kipperman v. McCone*.⁷⁸ The plaintiff brought a class action against the United States and a number of federal officials alleging that they had unlawfully opened her mail. Personal jurisdiction was sought based on conspiracy principles.⁷⁹ The court held that jurisdiction must be premised upon forum-related acts *personally* committed by the nonresident.⁸⁰ *Mandelkorn v. Patrick*⁸¹ illustrates the opposite end of the spectrum. The court there held that if the plaintiff's complaint alleges both an actionable conspiracy and substantial acts in furtherance of the conspiracy in the forum, jurisdiction is proper.⁸²

Most courts follow an intermediate approach that uses attribution based on conspiracy principles in a case-by-case analysis.⁸³ One example is *Turner v. Baxley*.⁸⁴ There, the court held that an act done in furtherance of the conspiracy alone is insufficient to assert personal jurisdiction over a nonresident conspirator.⁸⁵ The court required additionally that the nonresident know or have reason to know that the conspiracy would have an effect in the state.⁸⁶

Courts have struggled to find some basis for holding the attribution of in-state activities reasonable. While they have differed on the question of whether the legal relationship between coconspirators suffices, they all

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75. Althouse, *supra* note 69, at 235; see also *Guisti v. Pyrotechnic Indus.*, 156 F.2d 351 (9th Cir.), *cert. denied*, 329 U.S. 787 (1946).

76. 225 U.S. 347 (1912).

77. *Id.* at 363-64.

78. 422 F. Supp. 860 (N.D. Cal. 1976).

79. *Id.* at 873.

80. *Id.* at 873 n.14.

81. 359 F. Supp. 692 (D.D.C. 1973). It should be noted that this case might be anomalous because the defendant in *Mandelkorn* failed properly to controvert the conspiracy allegation. *Id.* at 695.

82. *Mandelkorn*, 359 F. Supp. at 695.

83. See Althouse, *supra* note 69, at 242.

84. 354 F. Supp. 963 (D. Vt. 1972).

85. *Id.* at 977.

86. See Althouse, *supra* note 69, at 245-46 (citing *Turner*, 354 F. Supp. at 977).

clearly have been engaged in analyses of attribution. The relevant considerations in the conspiracy context are no different from those in the agency context; the crucial factors are the same. The conspiracy cases, however, highlight that attribution is not so easy to determine. Is it fair automatically to impute the activities of one coconspirator to another? Under certain circumstances, reasonable persons will disagree about how to apply the standard. The courts then must find or fashion a test for separating cases where attribution is appropriate from those where it is not. This same exercise also may be necessary when attribution analysis is applied to borderline cases involving a parent-subsidiary or principal-agent relationship.

C. Substitution

Before turning to a more exhaustive examination of the precise contours of attribution, it is useful to describe the substitution method of using substantive relations to establish jurisdiction. In certain circumstances a defendant over whom jurisdiction concededly exists may be substituted for a defendant over whom jurisdiction arguably does not exist. Substitution is different from both merger and attribution. Merger is appropriate where the entities are legally identical, and attribution is appropriate where activities of one are also the responsibility of the other. Substitution provides neither that the entities are identical, nor that they are responsible for each other's actions. The plaintiff simply abandons the effort to obtain jurisdiction over the absent defendant, choosing to sue the defendant who is present instead.

The most prominent example of substitution in the jurisdictional context is the so-called "*Seider* jurisdiction."⁸⁷ A typical *Seider*-type case involves a primary defendant who purchases an automobile insurance policy from the secondary defendant. The insurer is concededly subject to jurisdiction in the forum because it does business there. Jurisdiction over the primary defendant would be easy if the accident had occurred within the forum. But assume a resident files suit based upon a cause of action that did not arise within the forum. The suit could not be maintained in the forum without a finding of general jurisdiction over the defendant. For general jurisdiction the plaintiff must prove that the defendant's contacts were "systematic and continuous."⁸⁸ If the primary defendant's only contact with the forum were the purchase of an insurance policy with a company that does business there, it would be insufficient for general jurisdiction. If, however, the court were to focus instead on the insurance company, jurisdiction would be valid because the com-

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87. See *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

88. *International Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1945); see also J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 3.10, at 125 (1985).

pany does business in the forum. The legitimacy of so doing, obviously, was the issue in *Rush v. Savchuk*.⁸⁹

There are several ways to attempt to shift the focus to the contacts of the insurance company. The first would be to try to obtain jurisdiction over the primary defendant by either of the methods already described—attributing to him or her the insurer's contacts or merging the two into a single entity. The focus would be on the insurer's contacts *as contacts also of the insured*. *Rush* held that the contacts of the insured and the insurer ordinarily could not be aggregated or attributed to the named defendant.⁹⁰ As the Court pointed out, the insured was not responsible for where the insurance company did business.⁹¹

Another possibility is to shift the substantive liability to the defendant that has the jurisdictional contacts, rather than shifting the jurisdictional contacts to the party with the substantive liability. The plaintiff's goal is to locate a defendant who has both jurisdictional contacts and substantive liability. Shifting the substantive liability fulfills this goal equally as well as shifting jurisdictional contacts. But in *Rush* the plaintiff was not allowed to substitute the insurance company as the sole defendant. The Court maintained that the insured was the real party in interest,⁹² despite insistence by the dissent that only the insurance company would feel the impact of the suit.⁹³

Were *Rush* the whole story, it might bode ill for substitution as a jurisdictional theory. But *Rush* suggested an exception, and courts have taken advantage of it. In *Rush* the Court pointed out that the forum did not have a direct action statute for domestic purposes; the jurisdiction used its "judicially created direct action statute" only to obtain jurisdiction.⁹⁴ In at least one case since *Rush*, *Puerto Rico v. S.S. Zoe Colocotroni*,⁹⁵ jurisdiction has been upheld under a direct action statute that applied to domestic and foreign causes of action alike. In that case, an oil tanker ran aground on a reef near Puerto Rico. As the ship attempted to get off the reef, it dumped its oil. Oil that floated ashore caused extensive damage. The court used the direct action statute to substitute parties and allowed the action to proceed.⁹⁶

In conjunction with *Rush*, *S.S. Zoe Colocotroni* suggests that domestic substantive law provides the key to substitution. Substitution can be authorized only by the appropriate kind of domestic substantive legisla-

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89. 444 U.S. 320 (1980).

90. *Id.* at 331-32.

91. *Id.* at 329.

92. *Id.* at 331.

93. *Id.* at 333-34 (Stevens, J., dissenting).

94. *Id.* at 330-31 nn.18-19.

95. 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

96. *Id.* at 667-70.

tion. Indeed, it is hard to imagine how substitution might proceed without some substantive rule. If jurisdiction does not exist as to the primary defendant, what is the source of the right simply to switch defendants? A plaintiff cannot simply pick a second defendant from the air, and decide that he or she would be a good party to sue because he or she is subject to the forum's jurisdiction. Thus, a substantive theory that ties the secondary defendant into the case is needed.

Another example illustrates how substitution turns on domestic substantive law. Assume that the plaintiff was injured by medical malpractice and wishes to sue both doctors involved in her surgery. If the two defendants are joint tortfeasors, the plaintiff has a choice about which one to sue. As a jurisdictional matter, she is free to choose to sue only the defendant over whom jurisdiction is available (although this may not be a wise litigation strategy), rather than traveling to a forum in which jurisdiction is available over both. This would be true even if, as a factual matter, it seemed more likely that the absent doctor actually caused the harm.⁹⁷ However, she *cannot* choose instead to sue the hospital simply because jurisdiction over it is possible, unless the hospital is potentially substantively liable.

From this perspective, substitution turns upon a question of local substantive law, which specifies who is a proper party to the suit. Substantive law specifies the two doctors as appropriate defendants. Substitution *has* to be a matter of substantive law, because there must be some basis for shifting the substantive liability to the party over whom jurisdiction concededly exists. *Rush* suggests that, at least in the substitution context, only a bona fide domestic substantive rule will suffice. The so-called "judicially created direct action statute" that it invalidated was defective in that it created a quasi-substantive rule whose only purpose was to expand the forum's jurisdiction. Thus, quasi-substantive doctrines created for jurisdictional purposes are not good enough for jurisdiction by substitution.

The same issue of whether a quasi-substantive rule will suffice arises in the context of merger and attribution. Piercing the corporate veil is a substantive law concept that parallels the merger theory of jurisdiction. Agency law and conspiracy law, similarly, deal with attribution for substantive purposes. Like substitution, these rules have important substantive characteristics. One cannot simply link together defendants capriciously so that a defendant not otherwise subject to the forum's power is tarred with the same jurisdictional brush as those who are. There must be some reason to link them together; some rule that specifies

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97. See RESTATEMENT (SECOND) OF TORTS § 882 (1977); PROSSER & KEETON, *supra* note 70, § 47, at 327-28 (5th ed. 1984).

that the defendants may be treated as a unit or their activities imputed to one another.

This raises an important question: Can only bona fide substantive rules, and not quasi-substantive jurisdictional expedients, be employed to gain jurisdiction? In addition, to what degree should jurisdictional rules be limited by the precise contours of analogous substantive law? Is merger analysis constrained by substantive veil-piercing doctrine? Is attribution constrained by substantive laws regulating agency, conspiracy, vicarious liability, and the like? These questions will be addressed in the next section.

IV

SOURCE AND CONTENT OF ATTRIBUTION, MERGER, AND SUBSTITUTION

To this point, we have been purposefully vague about the precise source of the requirements for merger, attribution, and substitution. Are they state or federal standards? Courts have not addressed this deeper issue, although some mention related issues in passing.⁹⁸ Typically, courts treat interpretation of these jurisdictional requirements as issues of first impression, for which no source need be found.

Cannon Manufacturing Co. v. Cudahy Packing Co.,⁹⁹ for example, seemed to proceed on self-evident first principles about corporate formalities and corporate separateness.¹⁰⁰ Perhaps because concepts such as agency and veil piercing feel so familiar, or perhaps because national law schools encourage us to think in such terms, it seems possible to think about such questions as though there were some "general common law" to consult for answers. But there is no general common law. These doctrines vary in their precise contours from state to state, and it is necessary to ascribe a source if only to resolve such conflicts. Only by identifying a source will we know which precedents are authoritative, and only then can we decide difficult borderline cases about whether the substantive legal relationship supports jurisdiction.

Consider the example of corporate veil piercing as a basis for juris-

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98. See, e.g., *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964). The Court considered the issue of whether state or federal law defined agency for purposes of FED. R. CIV. P. 4(d), which provides for service of process upon "an agent authorized by appointment . . . to receive service of process." *Id.* at 316. The Court relied upon "well settled general principles of the law of agency," and noted that it dealt with a *federal* rule (apparently suggesting that a uniform federal definition was appropriate), but it suggested that state law would not invalidate the agency. *Id.* In dissent, Justice Black discussed the issue more directly, arguing that whether an agency had been created should be determined under state law, and that the applicable state law did not support a finding that an agency had been created. *Id.* at 320 (Black, J., dissenting).

99. 267 U.S. 333 (1925).

100. See *supra* text accompanying notes 8-9.

diction. Suppose South Dakota seeks to establish jurisdiction over the absent parent, *P*, for a cause of action that arose in another state, based upon the local activity of the subsidiary, *S*. In applying the merger notion of jurisdiction, the issue is whether *P* and *S* are really "the same" legal entity. This issue is analogous to the substantive law issue of piercing the corporate veil of *P*. But veil-piercing law varies from state to state. Where undercapitalization is a basis for veil piercing, for example, states are likely to differ on what counts as undercapitalization.¹⁰¹ In borderline areas, judgments about whether separate identity can be maintained are likely to conflict.

The substantive relations that enter into due process calculations are primarily a matter of the law that creates the cause of action, usually state law.¹⁰² The due process clause does not itself create notions of agency, conspiracy, and the like. Federal constitutional law moderates the affirmative efforts of states to assert power; it is not the source of the assertion of power in the first instance.¹⁰³ Furthermore, there are no *a priori* or empirical theories that authoritatively connect local acts of one individual to another individual outside the state or that categorize a series of activities as caused by a single abstract entity such as a corporation or a conspiracy. Only normative theories perform that function in law, and such theories are created by the states and not by the limits contained in the federal constitution.

It is virtually a cliché that federal law interstitially builds upon substantive relations created by the states.¹⁰⁴ This is as true with the due process limits on personal jurisdiction as with any other interface between state and federal law. Most obviously, a state defines the substantive dispute, which has unavoidable ramifications for whether jurisdiction can be asserted. As the discussion of substitution and the direct action example demonstrate, a state's choice about whom to make liable affects the jurisdictional questions. In addition, when a state specifies the elements of the cause of action, it specifies the events out of which the case arises. This has ramifications for whether "the cause of action arises out of events in the forum," and thus whether continuous and systematic contacts must be shown.¹⁰⁵ It is to be expected that the state law would

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101. See N. LATTIN, *supra* note 50, § 15, at 77 (no hard and fast rules to test adequacy of corporate capitalization).

102. There may be different definitions of the scope of a corporation for purposes of federal substantive causes of action. See, for instance, the intra-enterprise conspiracy doctrine for federal antitrust law. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

103. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-30 (1978).

104. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

105. Brilmayer, *supra* note 1 (arguing that a case "arises out of" contacts with the forum only if those contacts are of substantive relevance to the cause of action); see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 427 & n.5 (1984).

be the immediate source of attribution, merger, and substitution law, because states already have substantive laws performing analogous functions. To treat these substantive relations as a matter of federal law would require development of a parallel body of law governing agency, partnership, corporations, conspiracies, and so forth.

What, then, is the proper role of federal law? There are several possibilities. One is that the state might simply do exactly as it pleases, developing a set of state law rules to guide decision on such jurisdictional questions concerning legal relations among legal entities. This seems unacceptable, however. If jurisdictional issues turned entirely on what a state chose to do or what a state thought was right, there would be no constitutional limits whatsoever. A state could proclaim one party to be the agent of another in any circumstance whatsoever, regardless of whether there was any substantive or factual connection between them at all.¹⁰⁶

Under such an approach, the state might model legislation after the early nonresident motorist statutes. Those statutes proceeded by way of a fiction that a nonresident using the highways had consented to a state official's acting as an agent for service of process.¹⁰⁷ Such statutes were upheld, at least when the state official actually was required to provide notice to the nonresident defendant.¹⁰⁸ But could the state by analogy simply deem a state official an "agent" for service of process over all nonresidents, whether the accident occurred within the state or not, or for that matter in breach of contract as well as tort cases? Naturally not; if there are not contacts sufficient for assertion of jurisdiction, the state should not be able to use the agency terminology in this kind of bootstrap operation.

This example may seem fanciful; states probably would not attempt such maneuvers. The question remains, however: what would happen if they did? Furthermore, states have advanced somewhat comparable, if less egregious, arguments. *Rush v. Savchuk*¹⁰⁹ is an example. In *Rush* the plaintiff essentially argued, among other things, that the defendant and his insurer could be treated as a single entity because of their functional identity of interests.¹¹⁰ The substantive contractual relationship

106. One author seems to suggest this approach. See P. BLUMBERG, *supra* note 5, at 46 (suggesting that no constitutional issues are presented when jurisdiction over a subsidiary is proposed on the basis of the contacts of a parent). Blumberg does not appear to believe that there are no limits whatsoever since he proposes an analysis of enterprise liability. However, his assertion that there are no constitutional limits suggests that these guides are a matter of state law only.

107. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

108. *Id.*; see also *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (statute invalidated that did not require notice to the nonresident defendant, even though actual notice was received in the case).

109. 444 U.S. 320 (1980).

110. *Id.* at 331. See *supra* text accompanying notes 92-93, arguing that the plaintiffs' basis for jurisdiction might be interpreted either as merger (the two defendant's contacts could be

was urged as an adequate basis for merger.¹¹¹ The Court rejected the attempted conflation on the grounds that the defendant was a separate party and the insurance company's contacts could not reasonably be attributed to him.¹¹² Thus, the Court did not allow the state unlimited freedom. On the other hand, it wasn't entirely clear about the source of the limits, either.

A second possible way to define the role of state and federal law is to treat the issue as one of state law but not to allow the state to alter its substantive law in order to expand its jurisdictional reach. A state would be obliged in jurisdictional situations to rely on the substantive law it uses in ordinary domestic occurrences. For example, when a state attempted to assert jurisdiction based on piercing of the corporate veil, the relevant standard would be the state's corporate law of veil piercing. When it employed an agency theory, allegation of jurisdictional agency would have to satisfy the ordinary substantive law standards of agency. "Quasi-substantive" rules, such as the one appointing the secretary of state an agent for service of process, could not be used to expand the scope of a state's power to situations where jurisdiction would not otherwise exist.

If state law supplied the relevant standard, there would nevertheless be a federal issue involved. If the state attempted to depart from the ordinary substantive-law standard, federal limitations would be violated. This is a common pattern in situations where the federal Constitution protects rights originally defined by state law. For instance, the federal protection of "property" in the due process clause presumes a definition of what constitutes property; this definition is typically supplied by state law.¹¹³ Yet the state may not alter the definition of state-created rights in order to defeat a federal constitutional claim.¹¹⁴ Similarly, states may not alter their procedural rules when federal rights are at stake. Discriminatory treatment of federal rights is unconstitutional, and the Supreme Court will review a state law decision to determine whether it has a substantial basis in state law.¹¹⁵

This approach is least intrusive on state prerogatives while simulta-

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aggregated), attribution (the insured was responsible for the insurer's choice to do business in the forum) or substitution (the substantive focus was shifted to the party over whom jurisdiction existed).

111. *Id.* at 329.

112. *Id.* at 332.

113. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 500-05 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]. For application of this concept to conflict of laws, see Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 *MICH. L. REV.* 1315 (1981).

114. See generally Monaghan, *Of "Liberty" and "Property"*, 62 *CORNELL L. REV.* 405 (1977).

115. See generally, *HART & WECHSLER*, *supra* note 113, at 531-38.

neously imposing some due process limitations. It does not require the federal courts to create a new substantive law of attribution, substitution, or merger; it merely requires them to use state concepts neutrally when deciding jurisdictional issues. Furthermore, this approach respects the power of the state to determine the underlying substantive party structure of the dispute. Yet it still allows for federal oversight to protect the due process rights of the parties. The advantages of this approach must be evaluated, however, by comparison with a final possible way to define the source of jurisdictional standards.

That final possibility would involve developing a body of federal constitutional law defining the nexus that parties must have before the substantive legal relationship obtains jurisdictional significance. To return to an earlier example, there might be federal constitutional law concerning undercapitalization for determining whether to pierce the corporate veil. In some respects, this situation may be an accurate depiction of what happened in *Cannon Manufacturing Co. v. Cudahy Packing Co.*¹¹⁶ When the Supreme Court sets out self-evident first principles, it is in reality establishing federal law. This federal law would establish limits beyond which the state court definitions of attribution, substitution, and merger could not go.

While the state law model of attribution, substitution, and merger regards quasi-substantive rules as the evil to be eradicated, this federal law model explicitly endorses quasi-substantive rules of federal origin. These federal quasi-substantive rules might be either more lenient or more restrictive than parallel state substantive rules. Where they are more lenient, these rules would allow states to depart from their usual domestic rules of attribution, substitution, and merger, and to establish jurisdiction in accordance with the federal quasi-substantive standard. Where they are more restrictive, they would truncate the reach of state domestic law. A closer look at these two possibilities suggests problems with federal rules, regardless of whether they are more lenient or more restrictive. We argue, therefore, that due process should take into account only bona fide state substantive relations, and that it should truncate such substantive relations only in certain limited circumstances.

A. *When the Federal Standard Is More Lenient*

Judicial movement towards a more lenient federal standard has been most pronounced in the context of the parent-subsidiary relationship. Perhaps because it has been misinterpreted, and in many cases because it has been thought superseded,¹¹⁷ the *Cannon* doctrine has been severely

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116. See *supra* text accompanying notes 11-12.

117. See, e.g., *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 490 (D. Kan. 1978).

eroded by the lower courts.¹¹⁸ In moving away from the traditional *Cannon* doctrine towards a more liberal jurisdictional merger analysis, lower courts have gone in many different directions. Many, if not most, no longer feel compelled to follow any particular standard in their analysis of the parent-subsidiary relationship.¹¹⁹ The merger standards applied today range from the *Cannon* doctrine in its strictest form¹²⁰ to the very lenient "enterprise theory" of the corporate relationship.¹²¹

The most common and least radical departure from the strictly formalistic analysis of *Cannon* is the "day-to-day control" exception.¹²² Under this modern revision of the *Cannon* doctrine, the subsidiary must maintain day-to-day control over its enterprise if the parent is to avoid jurisdiction.¹²³ If the parent disturbs the subsidiary's control over its daily operations, the parent and subsidiary are merged and treated as one entity for the purpose of asserting jurisdiction. This exception requires more than control of the subsidiary through broad general policies. As one would expect, however, the court has a lot of discretion in defining what constitutes day-to-day control.¹²⁴

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118. See *Roorda v. Volkswagenwerk, A.G.*, 481 F. Supp. 868 (D.S.C. 1979), and cases cited therein.

119. See *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 440 (1st Cir. 1966) (interrelationship of corporations, detailed supervision, and control can make a foreign corporation liable for the jurisdictional contacts of another corporation); *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 140 (5th Cir. 1964) (substantial control of a domestic corporation provides a basis for jurisdiction over a foreign corporation); *Roorda v. Volkswagenwerk, A.G.*, 481 F. Supp. 868, 870-71 (D.S.C. 1979) (foreign corporation liable for the contacts of a domestic corporation where the foreign corporation exercised many direct and indirect controls and the domestic corporation was the sole importer of the foreign corporation's products); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 850 (S.D. Fla. 1975) (court will look at the totality of incidents of control, substantiality of sales, expectations of foreign corporation, use of a subsidiary as a "mere conduit," and subsidiary's role in the parent's integrated world operations); *Fisher v. First Nat'l Bank*, 338 F. Supp. 525, 530 (S.D. Iowa 1972) (subsidiary's acting as an agent for foreign parent will make parent liable for the subsidiary's jurisdictional contacts); *Griffin v. Air South, Inc.*, 324 F. Supp. 1284, 1287 (N.D. Ga. 1971) (substantial degree of control may subject a corporation to jurisdiction on the basis of the contacts of its distributor); *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393, 398 (E.D.S.C. 1965) (foreign corporation's control of a domestic corporation is sufficient to make the foreign corporation liable for the jurisdictional contacts of the domestic corporation).

120. See, e.g., *Berkman v. Ann Lewis Shops*, 246 F.2d 44, 48 (2d Cir. 1957) (separate corporate entities were not merely principal and agent in one organization); *Harris v. Deere & Co.*, 223 F.2d 161, 162 (4th Cir. 1955) (despite the control exercised by the parent, the subsidiary maintained its status as a separate corporate entity, justifying dismissal on the authority of *Cannon*); *McPherson v. Penn Central Transp. Co.*, 390 F. Supp. 943, 956 (D. Conn. 1975) ("Connecticut courts would strictly apply the *Cannon* principle of formalism . . .").

121. See, e.g., *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1334-35 (E.D.N.Y. 1981).

122. See P. BLUMBERG, *supra* note 5, at 60-62.

123. *Id.* at 62; see also *Quarles v. Fuqua Indus.*, 504 F.2d 1358, 1364 (10th Cir. 1974); *Crow Tribe of Indians v. Mohasco Indus.*, 406 F. Supp. 738, 742 (D. Mont. 1975); *Cinocca v. Baxter Laboratories*, 386 F. Supp. 644, 645 (E.D. Okla. 1974); *Frito-Lay, Inc. v. Proctor & Gamble Co.*, 364 F. Supp. 243, 249 (N.D. Tex. 1973).

124. See *supra* notes 120-22.

More radical courts have rejected the *Cannon* doctrine completely.¹²⁵ The courts taking this approach generally apply an enterprise theory to determine whether the assertion of jurisdiction is legitimate.¹²⁶ The enterprise theory looks to the degree of economic integration between parent and subsidiary, ignoring the legal boundaries between them. Under this theory, merger occurs when the parent and subsidiary are part of a common enterprise that relies on the efforts of both entities to carry out a common plan.¹²⁷ Courts applying this standard have considered many different factors as significant to the analysis of whether a common enterprise in fact exists. Some significant factors are:¹²⁸

1. whether the subsidiary is financially dependent on the parent;¹²⁹
2. whether the subsidiary is not an independent decisionmaking body;¹³⁰
3. whether the subsidiary's administrative organization is incomplete;¹³¹
4. whether the parent and subsidiary project an integrated posture to the public;¹³²
5. whether the parent and subsidiary interchange information, personnel, and group resources;¹³³ and
6. whether the parent and subsidiary present consolidated tax returns and/or annual reports.¹³⁴

A recent case that illustrates the complicated enterprise approach to jurisdictional merger is *Bulova Watch Co. v. K. Hattori & Co.*¹³⁵ Bulova, a New York corporation, filed suit against Hattori, a Japanese corporation, alleging unfair competition, disparagement, and conspiracy to raid the plaintiffs marketing staff. Hattori owned 100% of the stock of Seiko Corporation, a subsidiary which admittedly did business in New York.

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125. See *infra* notes 129-35.

126. For a discussion of "economic integration" as a basis for jurisdiction over related business entities, see P. BLUMBERG, *supra* note 5, at 67-71.

127. *Id.* at 67.

128. *Id.* at 67-71 (listing these factors as important).

129. See *Boryk v. deHavilland Aircraft Co.*, 341 F.2d 666, 668 (2d Cir. 1965); *DCA Food Indus. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574, 585 (S.D.N.Y. 1979); *Bland v. Kentucky Fried Chicken*, 338 F. Supp. 871, 876 (S.D. Tex. 1971).

130. See *Finance Co. of Am. v. BankAmerica Corp.*, 493 F. Supp. 895, 907 (D. Md. 1980); *Bland v. Kentucky Fried Chicken*, 338 F. Supp. 871, 877 (S.D. Tex. 1971).

131. See *Finance Co. of Am. v. BankAmerica Corp.*, 493 F. Supp. 895, 907 (D. Md. 1980); *DCA Food Indus. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574, 585 (S.D.N.Y. 1979).

132. See *DCA Food Indus. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574, 584 (S.D.N.Y. 1979); *Handlos v. Litton Indus.*, 304 F. Supp. 347, 350-51 (E.D. Wis. 1969).

133. See *Tokyo Boeki (U.S.A.), Inc., v. S.S. Navarino*, 324 F. Supp. 361, 364-65 (S.D.N.Y. 1971).

134. Although commonly cited as one factor relied on in the decision to merge, this reliance is misplaced because the presentation of consolidated financial statements is usually required by generally accepted accounting principles. P. BLUMBERG, *supra* note 5, at 70 n.16.

135. 508 F. Supp. 1322 (E.D.N.Y. 1981).

The court upheld jurisdiction, using a "common sense appraisal" of the economic relationship between the parent and the subsidiary.¹³⁶ It found both general and specific jurisdiction by virtue of this quasi-substantive legal relationship.

The court first addressed whether Hattori was doing business in New York so that general jurisdiction might be proper. Since Hattori itself was not doing business in New York as an independent entity, a finding it was doing business there required the merger of parent and subsidiary corporations.¹³⁷ Through a complicated economic analysis of the relationship between Hattori and Seiko, the court determined that jurisdiction could be exercised over Hattori.¹³⁸ The court distinguished complex multinational corporations within its jurisdiction from those beyond its jurisdiction by using the following criteria:¹³⁹ (1) the maturity of the organization,¹⁴⁰ (2) the nature of the subsidiary's function (e.g., sales vs. manufacturing),¹⁴¹ and (3) the range of the subsidiary's product line.¹⁴²

Utilizing these quasi-substantive criteria, the court held that jurisdictional merger was appropriate.¹⁴³ It ignored any legal distinctions between Hattori and Seiko because "[r]eal rather than formal relationships must be considered."¹⁴⁴ The court found decisive Hattori's practice of marketing and expanding through its subsidiaries. Therefore, the court merged Hattori and Seiko for jurisdictional purposes,¹⁴⁵ holding Hattori subject to the general jurisdiction of the New York courts.¹⁴⁶

Bulova also illustrates the application of a quasi-substantive standard to attribution. The court found that specific jurisdiction was appropriate under New York's long arm statute.¹⁴⁷ In so finding, the court attributed the subsidiary's behavior, which was the focus of the suit, to its nonresident parent. Again, the court's method looked to the economic realities of the case. It stated "[t]he formal trappings of agency are not as important as the realities of the situation."¹⁴⁸ The court based its decision to attribute Seiko's acts to Hattori on the fact that the parent

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136. *Id.* at 1327.

137. *Id.* at 1333.

138. *Id.* at 1335-45.

139. P. BLUMBERG, *supra* note 5, at 96-97.

140. *Bulova*, 508 F. Supp. at 1337.

141. *Id.* at 1336.

142. *Id.*

143. *Id.* at 1340-45.

144. *Id.* at 1340.

145. *Id.* at 1341.

146. *Id.* at 1345.

147. *Id.* at 1347.

148. *Id.* at 1345 (quoting *Louis Marx & Co. v. Fuji Seiko Co.*, 453 F. Supp. 385, 390 (S.D.N.Y. 1978)).

was informed of the subsidiary's actions.¹⁴⁹

The *Bulova* court's rejection of a formalistic approach in favor of a commonsense one based on economic realities has some immediate appeal. So does the argument made by other courts that reliance on domestic standards of veil piercing would allow out-of-state corporations to evade jurisdiction by manipulating entity status. These courts have sought to avoid the evil of elevating form over substance. Thus, so the argument goes, it should make no difference whether the local corporate actor is set up as a division of the parent corporation or as an independent corporate subsidiary. Such functionally irrelevant considerations should have no jurisdictional significance.

There are two primary flaws in this reasoning. First, and most obviously, the very object of limited liability for corporations is to elevate form over substance. The authoritative organs of state lawmaking, whether legislative or judicial, already have decided to rely on artificialities rather than realities in corporate law. Corporations are legal fictions, created for the precise purpose of allowing individuals to separate themselves from liability created by their commercial enterprises. It is puzzling, therefore, that formalities are thought relevant in one context but not the other.

Second, the fact that substantive law, if applied to the jurisdictional context, would allow the defendant to manipulate amenability to suit is not necessarily bad. Again, the substantive purpose of limited liability is precisely to allow such "manipulation". Moreover, allowing some latitude for individuals to determine the legal consequences of their actions may be particularly desirable for jurisdictional purposes. The Court has stated that one of the purposes of the law of jurisdiction is to give defendants an opportunity to predict and control the states in which they will be subject to suit.¹⁵⁰ But the question ought not to be whether the defendant is protecting itself from suit. Instead, the question should be whether the defendant in so protecting itself is undermining or furthering the underlying policies. For instance, a defendant might protect itself from substantive tort liability by taking precautions in the manufacture of its products so that no injury ever occurs. This is hardly a cause for complaint. Similarly, there is not necessarily a legitimate complaint simply because the out-of-state defendant abstains from in-state activities in order to avoid the forum's jurisdiction.

In contrast to the *Bulova* approach, which allows quasi-substantive rules with little or no qualifications, a court might be required to justify treating a party differently for jurisdictional purposes than for local sub-

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149. *Id.* at 1346.

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

stantive purposes. Even under the most minimal constitutional standard of scrutiny, differences in treatment must be subject to some reasonable explanation.¹⁵¹ The apparent explanation in the jurisdictional context is simply that it is not in the forum's selfish interests to extend this benefit to out-of-state corporations at the expense of local plaintiffs seeking to sue. But the easily perceived interest of the state in asserting jurisdiction at the expense of outsiders is not a reason to acquiesce in its desires. It may always be rational to promote local interests by discriminating against outsiders, but this does not mean that there is a legitimate state interest sufficient to make such a policy constitutional.¹⁵²

Some authors have argued explicitly that states ought to be constitutionally authorized to use quasi-substantive rules when deciding jurisdictional cases because the policies behind jurisdiction and substantive law of corporations are very different.¹⁵³ They perceive substantive limitations on liability as a means to encourage investment by protecting individual shareholders. They argue, therefore, that these substantive standards should not apply strictly to jurisdictional analysis because many jurisdictional cases involve parent corporations or holding companies instead of individual shareholders.¹⁵⁴ This rationale fails, however, because no distinction is typically made between individual and corporate shareholders in the domestic substantive context.¹⁵⁵

Another arguable difference is that the jurisdictional rules implicate not only the usual substantive policies but also the desire to provide a forum for claims against out-of-state defendants. But the state also has an interest in providing recovery for plaintiffs in purely domestic cases, yet it subordinates this interest to the policy of limited liability. Furthermore, it is not clear that a simple interest in asserting jurisdiction ought to be given extra weight. That position seems to beg the question. *Of course* the state has demonstrated an interest in providing a forum; the existence of a state long arm statute reveals a preference for providing a forum. Yet this interest does not mean that the state should be allowed to adjudicate the case solely because it wishes to. As the Court has

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151. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 994-95 (1978).

152. *Metropolitan Life Ins. v. Ward*, 105 S. Ct. 1676 (1985) (promotion of domestic business by discrimination against out-of-state corporations is not a legitimate state purpose).

153. See, e.g., P. BLUMBERG, *supra* note 5, at 74 (maintaining that the use of veil piercing in the jurisdictional context "involves very different considerations" than veil-piercing in substantive law); E. LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS: A STUDY IN STOCKHOLDERS' LIABILITY* 61 (1936); Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 14 (1925) (relationship between parent and subsidiary for jurisdictional purposes is "entirely different" than for substantive liability).

154. P. BLUMBERG, *supra* note 5, at 76.

155. See, e.g., *id.* at 5-6; H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES*, 355 (3d. ed. 1983); N. LATTIN, *supra* note 50, at 72; see also 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 41, at 388 (rev. ed. 1983).

stated, the question is the minimum contacts of and fairness to the defendant.¹⁵⁶ The state's unilateral desire to expand its jurisdiction as far as it can is not a good reason to allow it to do so.

In fact, this argument supports the opposite conclusion, namely that the state ordinarily should be held to its usual substantive standards in its jurisdictional analysis. Domestic law is formulated after consideration of the opposing interests. In formulating jurisdictional standards, however, the state is unlikely to be moved by the interests of the out-of-state defendants. Most of the opponents to expansion of jurisdiction will be out-of-state enterprises, yet that group is not in a position to influence the legislature.¹⁵⁷ This is a typical problem of interstate discrimination, and the typical solution, of course, is to carefully scrutinize discriminatory rules. Outsiders and insiders must be treated alike because insiders had a voice in the political process.¹⁵⁸

Admittedly, there may be circumstances that warrant a difference in treatment. Sometimes the policies underlying jurisdiction legitimately vary from those underlying substantive law. Or, the possibilities for manipulation might be shown to be much greater than in the substantive context, leading to a greater need to curb defendant control through formal entity status.¹⁵⁹ However, the due process clause requires that differences in treatment be explained. A court should offer such an explanation any time it feels tempted to ignore domestic law and apply a quasi-substantive rule instead.

B. When the Federal Standard is More Restrictive

For a federal quasi-substantive standard to allow greater leeway for states to assert long arm jurisdiction than would state domestic law is only the first of two possibilities. A federal standard also might be more restrictive, either generally or in some applications. This possibility has

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156. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (jurisdiction may be impermissible because of fairness even if state has strong interest in allowing recovery).

157. Virtual representation is discussed in J. ELY, *DEMOCRACY AND DISTRUST* 82-87 (1980).

158. For applications of this nondiscrimination principle to conflict of laws, see Brilmayer, *supra* note 113, at 1325-26; Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 833 (1983).

159. An interesting comparison arises in the area of jurisdiction to tax. Formal corporate boundaries may be disregarded under the "unitary-business" theory, which restricts manipulation of corporate boundaries for tax avoidance purposes. See *F.W. Woolworth Taxation Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982). This practice seems to violate the principle against discriminatory treatment of jurisdictional issues. In fact, however, the example supports the principle, since sovereigns characteristically disregard entity boundaries in domestic situations to reduce tax avoidance. See, e.g., 3 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶¶ 79.1-79.5 (1981).

some advantages, but situations in which federal quasi-substantive standards should thus truncate state domestic policies are rare.

Cannon itself has been read to require a strict formalistic jurisdictional analysis, regardless of whether a more lenient standard would be applied in the substantive context.¹⁶⁰ In *McPheron v. Penn Central Transportation Co.*,¹⁶¹ a train passenger brought a personal injury action in Connecticut against a rail transportation company and its parent corporation, a nonresident holding company. Applying the *Cannon* doctrine, the court held jurisdiction inappropriate, and refused to apply Connecticut's more lenient substantive veil-piercing standard.¹⁶² Another court held that attribution could never be sufficient grounds to assert jurisdiction.¹⁶³ It noted in dictum that "the court believes that personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction."¹⁶⁴

Restrictive federal standards like those discussed above seem *prima facie* inappropriate. The most telling objection is that they might truncate the proper substantive reach of a suit. Since state substantive law would allow merger or attribution over residents, the state has a legitimate interest in allowing the suit to proceed against a similarly situated nonresident. For example, assume that under the relevant substantive rules, the corporate veil would be pierced and the parent corporation held liable. Assume also that the only way to obtain jurisdiction would be by merging the parent and subsidiary into one entity. If the federal jurisdictional standard does not allow merger in such a case, a substantively proper defendant cannot be made party to the suit. In such cases, the state's substantive interest in allowing the litigation to go forward arguably ought to be given some weight in the jurisdictional analysis.

While such state interests form the most telling objection to federal quasi-substantive standards, they should not be overstated. It will not always be the case, for one thing, that the jurisdictional issue anticipates the merits. For instance, if the parent is primarily liable and the cause of action accrued outside the state, jurisdiction might be sought based upon the in-state actions of a subsidiary. This would be a case of general juris-

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160. See *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292, 296-97 (6th Cir. 1964); *McPheron v. Penn Central Transp. Co.*, 390 F. Supp. 943, 953-54 (D. Conn. 1975). But see *Quarles v. Fuqua Indus.*, 504 F.2d 1358 (10th Cir. 1974).

The *Cannon* case makes no reference to the state substantive law of corporations and thus arguably establishes a federal quasi-substantive law of corporations.

161. 390 F. Supp. 943 (D. Conn. 1975).

162. *Id.* at 954.

163. *Kipperman v. McCone*, 422 F. Supp. 860 (N.D. Cal. 1976).

164. *Id.* at 873 n.14.

diction by merger. The argument would be that the entities should be treated as one. In such circumstances, the merger question is relevant only at the jurisdictional stage, not at the substantive stage. The plaintiff is suing the party who is primarily liable, namely the parent. There is no need to pierce the corporate veil if the plaintiff is content to sue only the parent. But there is still a need to establish identity at the jurisdictional stage, since the parent has no contacts of its own with the forum. In terms of the earlier matrix, it is only cases of type A_2 , where the domestic subsidiary is the primary defendant in a cause of action arising in the forum, that the jurisdictional and substantive problems are exactly analogous.¹⁶⁵

Further, there are some legitimate reasons for federal restrictions of state substantive standards. Since state interests do not automatically trump considerations of fairness to the defendant,¹⁶⁶ jurisdiction cannot automatically be based on state substantive law. Due process standards require both *foreseeability* and *purposefulness*.¹⁶⁷ It is possible that these requirements of constitutional fairness will not be met even though the domestic substantive standards of attribution, merger, or substitution are satisfied. This problem has arisen in conspiracy cases.¹⁶⁸ For example, jurisdiction might be predicated upon the actions of a coconspirator in the forum, even though it was unforeseeable to the other conspirators that their comrade would travel to the forum and commit acts there.¹⁶⁹ Such cases offer problematic examples of the effect that local rules regulating substantive relationships have when they are transposed into multi-state cases.

In balancing state interests against the defendant's interests in foreseeability and fairness, it is worth noting that these two considerations rarely come into conflict. There are several reasons for this fact. First, there are foreseeability limitations on the choice of law process.¹⁷⁰ If the forum attempts to use an idiosyncratic and expansive attribution or

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165. In cases A and B , substantive veil-piercing is unnecessary because the parent is primarily liable. In case B_2 the parent must be shown to be substantively liable through attribution or veil piercing. However, the analysis will not necessarily be the same as the jurisdictional attribution or veil-piercing analysis because what is being attributed will vary. In the jurisdictional context, the contacts are ascribed to the defendant, but in case B_2 these contacts are not the focus, since the dispute arose outside the forum.

166. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

167. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court stated that mere foreseeability is not the test for personal jurisdiction. *Id.* at 286. Rather, the test also involves whether the defendant should anticipate being haled into court in the forum, and whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum state." *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

168. See *supra* text accompanying notes 78 & 84.

169. *Mendelkorn v. Patrick*, 359 F. Supp. 692 (D.D.C. 1973). Other courts have refused to go so far. See *supra* notes 83-84.

170. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318 n.24 (1981).

merger rule in the context of the jurisdictional determination, it involves a choice of law decision that must pass muster like any other. If the forum asserts jurisdiction based upon an aberrant substantive rule of attribution, then it must show that the application of this rule was foreseeable. In one case, albeit an old one, the Supreme Court analyzed choice of law of vicarious liability in similar terms.¹⁷¹ Similarly, before a state can substitute parties and establish jurisdiction under even a bona fide direct action statute, it must have an adequate basis for applying its direct action statute to the transaction.¹⁷²

Second, foreseeability and purposefulness are problems that do not arise with substitution or merger, but only with attribution. A bona fide substantive rule of substitution that constitutionally can be applied to the defendant as a choice of law matter will not fail for reasons of foreseeability. In substitution, one defendant has been subject to jurisdiction all along; the other defendant (over whom jurisdiction is problematic) is simply dropped from the dispute. As long as there is a constitutionally permissible suit against the defendant over whom jurisdiction exists, there are no foreseeability (or other) objections based on due process. Substitution is a matter of local substantive law, pure and simple. Foreseeability is not an issue in the merger situation for a somewhat different reason. If, for example, it appears that a subsidiary is in reality no more than a division of its parent, then any action that the subsidiary takes is automatically foreseeable by the parent because the action is taken by the parent itself. The two entities are identical; what is foreseeable by one is foreseeable by the other. Thus, attribution is the only context in which foreseeability is an issue because only in that case are there two separate defendants, one of which may not have foreseen the possible liability for certain acts of the other. Neither merger nor substitutions involve two separate defendants.

Most substantive rules that are used for attribution purposes, however, already have elements of both foreseeability and control that satisfy due process requirements. For example, agents are supposed to act on behalf of their principals, and actions totally beyond the expectations of a

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171. See *Young v. Masci*, 289 U.S. 253 (1933). In *Young*, one New Jersey domiciliary granted another express or implied permission to take his car to New York, where it was subsequently involved in an accident injuring a New Yorker. New York law, unlike New Jersey's, did not recognize the New Jersey owner's immunity for loaning the car. The Court reasoned that by giving the borrower permission to take the car to New York, the defendant was agreeing to subject himself to New York law. Such permission made the application of New York law clearly foreseeable. Cf. *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938) (husband, a New York resident that had never been to Florida, held liable for wife's tort under the common law rule even though New York law had abolished the common law rule).

172. Two examples of an adequate basis are where the accident occurs in the state and where the insurance policy was issued there. See *Watson v. Employers Liab.*, 348 U.S. 66 (1954) (choice of law issue in direct action against insurer).

principal probably have exceeded the scope of the agency.¹⁷³ Regarding conspiracies, an act is not attributable to coconspirators unless it is in furtherance of the conspiracy. Purely private actions of one of the conspirators do not give rise to liability of the coconspirators.¹⁷⁴

The foreseeability provided by attribution in the substantive context explains why existence of such bona fide substantive relations is usually enough to satisfy due process standards. *World-Wide Volkswagen* typifies foreseeability problems. Jurisdiction was denied where the defendant sold an automobile to the plaintiff, who drove it into another state where the injury occurred. In a superficial sense, this situation is similar to one in which the defendant's employee drives the car to another state and injures the plaintiff there. In both cases, another human being, whose actions might have been unpredictable, caused the car to be moved to another state, where injury occurred. In the employer-employee hypothetical, however, agency attribution probably would make jurisdiction permissible.

The employer-employee case differs from *World-Wide Volkswagen* in that, as an agent of the defendant, the hypothetical employee was subject to the defendant's instructions. Even if the defendant did not actually instruct the employee to drive to another state, the defendant employer still had an opportunity to control the employee's behavior. In particular, the defendant had an opportunity to define the scope of the employment relationship and explicitly to prohibit the agent from driving the car across state lines. This option obviously is not available when the defendant sells the car; the buyer, as owner of the car, is no longer under the defendant's control in any way. Thus the buyer's actions are not attributable to the seller.¹⁷⁵

The substantive relations that have been used for attribution purposes are ones that exhibit at least this minimal element of control—that the defendant could have prevented the harm, narrowly defined the scope of the agency, or extricated him or herself from the conspiracy. Other substantive legal relationships that lack such elements of control have not been used for jurisdictional purposes. For instance, although the buyer and seller in *World-Wide Volkswagen* had a legal relationship, it did not give rise to jurisdiction. Similarly, as we mentioned in the introduction to this paper, the parent-child relationship does not automati-

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173. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

174. For example, if two defendants conspired to defraud an individual, and one of the defendants injured the plaintiff in an automobile accident, the other defendant would not be liable for the automobile accident unless the accident somehow had been connected with the plan to defraud. See Althouse, *supra* note 69, at 243-44.

175. Cf. *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957) (seller not subject to law of state into which buyer drove after seller made efforts to ensure that car would not leave county).

cally give rise to jurisdiction over the child, although the corporate parent-subsidiary relationship may. The reason is that a child and a parent do not necessarily have control over one another. In contrast, those situations in which the parent-child relationship does demonstrate control—because, for instance, the parent is responsible for the actions of a minor child—may give rise to jurisdiction.

State substantive law of attribution is important for jurisdictional purposes when it demonstrates purposefulness or control. The domestic rules of agency, conspiracy, and vicarious liability are adequate bases for jurisdiction only to the extent that underlying constitutional policies are satisfied. As legal doctrines, agency, conspiracy, and vicarious liability have proven useful for jurisdictional purposes precisely because they capture intuitions about fairness and responsibility as a substantive matter.

However, it is not always true that every aspect of these substantive doctrines will satisfy the underlying policies. Control is not the only rationale for rules of attribution. Another policy also shapes the contours of these substantive doctrines: loss distribution. A typical vicarious liability rule, for instance, provides that a victim of a drunk driving accident may sue the bartender who sold liquor to an inebriated driver. This rule is partially based on the idea that the bartender has acted wrongfully, and is thus appropriately responsible for injury that he or she caused. In part, though, the rationale of this rule is that the inebriated driver may be judgment-proof, and the bar is a more reliable source of compensation for the innocent injured party, especially given the likelihood of insurance.

Because such considerations may underlie loss shifting, residual federal scrutiny is required when a substantive doctrine is advanced as a basis for jurisdiction.¹⁷⁶ Loss shifting is not an adequate basis for jurisdiction because it is acceptable to shift losses only to persons within the state's legitimate scope of authority. Since the bar, the bar's insurance company, and the bar's other customers are not within the forum's jurisdiction, a loss-shifting rationale is impermissible. There is a federal limit, namely foreseeability, on the extent to which even a bona fide substantive rule can be used to attribute activities. This is not a limit that the states have frequently transgressed. Perhaps because substantive intuitions are structured by substantive requirements of fairness, control, and responsibility, contacts rarely have been counted against defendants in inappropriate situations.

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176. See Brilmayer, *supra* note 1, at 95 (discussing loss-shifting as inadequate basis for jurisdiction).

CONCLUSION

If states adhere to the requirements of their own domestic law and avoid quasi-substantive reasoning, due process problems with using legal relations as a basis for jurisdiction will be minimal. The main problem occurs when a state seeks to impose a more onerous standard of responsibility upon out-of-state defendants in the jurisdictional context than upon local defendants in the substantive context. The distinctive policies underlying jurisdiction do not make a more expansive quasi-substantive standard appropriate, however. On the contrary, to the extent that different standards should be used for jurisdictional than for substantive purposes, these standards should be more restrictive, not more lenient.

There are two prongs to the inquiry into personal jurisdiction based upon substantive legal relations. First, there is a state law requirement: jurisdiction must be based upon a bona fide substantive rule and not a quasi-substantive expedient. If the state would exonerate a defendant of substantive responsibility in analogous domestic situations, it should recognize a comparable jurisdictional defense. Second, even a legitimate state interest must be balanced against a purely federal consideration of fairness and foreseeability. Some substantive relations satisfy this standard and others do not. Personal jurisdiction is appropriate only in the former, that is, only in relations that rise to the level of fair play and substantial justice.