Essay

Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction

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Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine. At its inception in 1945, Justice Black called the minimum contacts test "vague," "uncertain," and "confusing."¹ Supreme Court cases in the intervening years have amplified that ambiguity. More than forty years after Justice Black's comments, federal appellate judges echo his criticism, complaining that the test is composed of "gestalt factors"² and describing its application as "more an art than a science."³ In short, the minimum contacts test's criteria are confused, its purposes perplexing, and its results often unpredictable.⁴

To remedy this situation, some scholars have proposed significant changes in the test, such as abandonment of many of the factors currently

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1. *International Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (opinion of Black, J.).

2. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 209 (1st Cir. 1994).

3. *Donatelli v. National Hockey League*, 893 F.2d 459, 468 n.7 (1st Cir. 1990).

4. For a critical assessment of the Supreme Court's handling of the minimum contacts doctrine, see Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 7 (1989), which states that "since *International Shoe* the Supreme Court has had a difficult time defining when an assertion of jurisdiction is consistent with 'fair play and substantial justice.'" Not all commentators, however, would agree that the minimum contacts doctrine is as ambiguous and incoherent as I claim. For an assessment that finds order in the Court's minimum contacts cases, see JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* §3.10, at 120 (2d ed. 1993).

used in minimum contacts analysis.⁵ However sound such advice may be, the Supreme Court has ignored it. Rather than discarding any of the test's factors, the Court has regularly added new factors in a process of gradual accumulation, each addition aggravating the test's ambiguity and complexity.

In this Essay, I suggest several steps to improve the Supreme Court's approach to minimum contacts analysis. Though they necessitate some modification of current doctrine, these steps require neither radical alteration of the test's current factors nor abandonment of any of its purposes. I propose a new way of looking at the Court's minimum contacts analysis that better explains and integrates the factors, temporal perspectives, and purposes that presently figure in the analysis. My approach draws on criminal law, analogizing a state's imposition of the burdens of jurisdiction to its imposition of a criminal sanction. It sees the minimum contacts doctrine as driven by two goals—individual desert and social utility—with quite different temporal orientations and criteria. This approach uses one group of factors that adopts an *ex post* viewpoint looking back to the time before initiation of litigation (for example, the defendant's past conduct and mental state) to assess whether the defendant *deserves* imposition of the burden of the forum's exercise of jurisdiction. It collects in a second group factors that adopt an *ex ante* viewpoint looking forward to the time after initiation of the litigation (for example, efficiency and party convenience) and uses them to determine whether the forum's exercise of jurisdiction will prove *socially useful*.

While Part I asks the Court to reconsider the impulses behind the minimum contacts factors it already uses, Parts II, III, IV, and V argue that the Court should change how it handles those factors. In Part II, I suggest a way to restate the purposes animating the minimum contacts doctrine. In Part III, I examine the Court's chaotic treatment of mental state in its minimum contacts cases and suggest that its jurisprudence may be improved through the use of clearer distinctions among various types of mental state, greater consistency in identifying the focal point of the mental state inquiry, and the adoption of a purely objective standard.

Like criminal punishment imposed by the state on an individual, which can range in severity from probation to capital punishment, the burden a state imposes on a defendant when it requires her to defend away from home can vary dramatically in severity. In Part IV, I maintain that the Court

5. See, e.g., Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137-42 (1981) (arguing for a test based on inconvenience to the defendant, burden on the plaintiff, and the state's interest in adjudicating the controversy); Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. REV. 729, 811-12 (1988) (advocating an abandonment of the test's prospective factors).

needs to recognize the significance of the wide variability in the potential severity of this burden by requiring *proportionality*, as it does with criminal punishment, between the degree of burden imposed on the defendant and the degree of justification required by the minimum contacts test. In other words, the minimum contacts test should openly adopt a relative rather than an absolute standard, a sliding scale in which the degree of justification required varies in direct proportion to the degree of burden imposed. Such a proportionality requirement would compel the Court to examine in detail the practical impact on the defendant of the forum's assertion of jurisdiction, something it does not presently do.

An important remaining issue is how to integrate desert and utility, with their distinct perspectives and criteria, into a single minimum contacts test. In Part V, I address this issue and argue that the Supreme Court's failure to acknowledge and address the basic tension between desert and utility is a primary source of incoherence in its minimum contacts cases. I urge the Court to address this issue openly and to use some form of mixed theory to balance the tension that can arise between desert and utility, as scholars have done to accommodate a similar tension between desert and utility in criminal law. In Part V, I propose a possible mixed theory that I suggest makes the best sense of the ingredients found in current minimum contacts doctrine.

I. DESERT AND UTILITY

This Essay claims that substantive criminal law concepts such as desert, mens rea, and proportionality offer a vantage point from which to gain a fresh perspective on why the minimum contacts doctrine seems so muddled and how it might be clarified. It relies on a seemingly implausible analogy—a comparison that at first blush seems more arbitrary than apt. We are accustomed to using these criminal doctrines to grapple with issues such as the death penalty and the imposition of harsh prison terms on drug offenders. Initially, it seems a bit awkward to draw on them in addressing less dramatic issues such as the appropriateness of requiring a New York Audi dealer to defend a tort action in Oklahoma or a Michigan Burger King franchisee to defend a breach of contract action in Florida. If one is to choose an area of substantive law from which to bootleg ideas to aid minimum contacts doctrine, civil subjects such as tort or contract law would seem more fitting.⁶

6. For explorations of analogies between minimum contacts doctrine and the laws of contract and tort, see Brilmayer, *supra* note 4; and Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 92-93.

Indeed, there are good reasons to be wary of a comparison between criminal law and minimum contacts. The criminal law doctrines discussed in this Essay are substantive, while minimum contacts is quintessentially procedural. These criminal doctrines are used to determine the imposition of criminal liability. The minimum contacts test, by contrast, does not directly address the ultimate imposition of liability, either criminal or civil. It simply controls whether an individual may be exposed to potential civil liability by being required to participate in a lawsuit. Finally, substantive criminal law doctrines and the minimum contacts test exist and function in two distinct legal arenas, criminal and civil. They share some common features, such as the same evidence rules, but they also have many important differences, such as the ultimate sanctions available and distinct burdens of proof.

Despite these seeming incongruities, and perhaps in large measure precisely because of them, these comparisons between minimum contacts doctrine and criminal law demonstrate the need to look in a fresh way at a doctrine quite familiar in its failings. The novel and seemingly arbitrary connection between criminal law doctrines and minimum contacts goes to the heart of the Supreme Court's fumbling in its minimum contacts cases. It reveals an uncanny and instructive resemblance between the assessment of substantive criminal liability and the procedural calculus involved in determining a just and pragmatic approach to state court jurisdiction over nonresident defendants.

On reflection, the resonance between these two seemingly disparate areas of law is not so surprising. Both areas deal with the exercise of government power over an individual and the need to resolve a tension between the one and the many, the individual and the state. The resemblance in legal doctrines responding to these common issues reflects not only shared intuitions about how government should treat individuals but also the application of general philosophical viewpoints that may be applied to many legal rules, not just those dealing with criminal punishment and jurisdiction. Both criminal desert theory and minimum contacts doctrine, for example, emphasize a reciprocity between the benefits received by an individual from a government and the burdens that a government may legitimately impose on an individual. This shared focus simply reflects the application in two quite different contexts of what political philosophers describe more generally as a "benefaction principle."⁷ And the competitions one finds between desert and utility in criminal law and minimum contacts are simply instances of the rivalry one finds in moral philosophy and law between deontological, rights-oriented

7. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 363 (1990).

perspectives and consequentialist, utilitarian perspectives.⁸ The advantage of analogizing to criminal law is that these tensions are more dramatically and clearly illustrated and our moral intuitions about desert and proportionality more clearly developed in the criminal than in the jurisdictional setting.

A. *Current Doctrine*

To assess my argument for the explanatory power of the criminal law analogy in clarifying the muddle of minimum contacts doctrine, it is necessary first to examine that muddle. To help my civil procedure class track the minimum contacts test's expansion, I ask them to keep a cumulative list of factors that the Court claims to use in determining the validity of a state court's assertion of jurisdiction over a nonresident defendant. When finished, the list typically looks like this:

FIGURE 1. MINIMUM CONTACTS ANALYSIS

CURRENT FACTORS	
Defendant's Conduct	Location of Witnesses
Benefits to Defendant	Defendant's Mental State
Relation of Claim to Defendant's Conduct	Effects of Defendant's Conduct
Defendant's Interest	Conduct of Intervening Actors
• <i>Convenience</i>	Judicial System's Interest
Plaintiff's Interests	• <i>Efficiency</i>
• <i>Convenience</i>	States' Shared Interest
• <i>Effective relief</i>	• <i>Furthering social policies</i>
Forum's Interests	Other Nations' Interests
• <i>Providing forum to citizen</i>	• <i>Procedural and substantive policies</i>
• <i>Regulating defendant</i>	Federal Government's Interest
	• <i>Foreign policy</i>

This motley assortment of factors—ranging from the mental state of the defendant to foreign policy—presents a challenge to the construction of a coherent minimum contacts test. Grouping these jumbled factors by temporal viewpoint helps give them some coherence. Factors such as the

8. For a description of competing intrinsic and instrumental approaches to due process, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 663 (2d ed. 1988).

defendant's conduct and mental state reflect a retrospective (i.e., ex post) viewpoint that looks back from the initiation of the lawsuit. Others factors such as efficiency and the plaintiff's convenience reflect a prospective (i.e., ex ante) viewpoint that looks forward from initiation of the lawsuit. Regrouped according to temporal viewpoint, the factors appear as follows:

FIGURE 2. CURRENT FACTORS SORTED BY VIEWPOINT

RETROSPECTIVE	PROSPECTIVE
Defendant's Conduct	Defendant's Interest
Defendant's Mental State	• <i>Convenience</i>
Effects of Defendant's Conduct	Plaintiff's Interests
Benefits to Defendant	• <i>Convenience</i>
Relation of Claim to Defendant's Conduct	• <i>Effective relief</i>
Conduct of Intervening Actors	Forum's Interests
	• <i>Providing forum to citizen</i>
	• <i>Regulating defendant</i>
	Location of Witnesses
	Judicial System's Interest
	• <i>Efficiency</i>
	States' Shared Interests
	• <i>Furthering social policies</i>
	Other Nations' Interests
	• <i>Procedural and substantive policies</i>
	Federal Government's Interest
	• <i>Foreign policy</i>

How does one explain and integrate the use of so many disparate factors and two quite different temporal perspectives? As the following brief review of the history and current state of the minimum contacts doctrine reveals, the Court's minimum contacts cases fail to answer this question satisfactorily. Ultimately, they leave unresolved two basic issues: (1) the test's requirements; and (2) the test's purposes. The remainder of Part I addresses the test's requirements. Part II turns to the test's purposes.

B. *The Test's Requirements*

1. *A History of Accumulation*

Those who find more coherence than confusion in minimum contacts doctrine often describe its history as an evolution⁹ and refinement¹⁰ of the test. In my view, however, the Supreme Court's succession of minimum contacts cases reveals a process more aptly described as accumulation than evolution or refinement. Evolution and refinement suggest not just change but improvement.¹¹ Though the test has clearly grown more complex over the years, its murkiness and the constant criticism to which it has been subjected suggest that this complexity has hampered rather than improved the test. Evolution and refinement also convey a sense of leaving something behind, shedding inferior adaptive traits, distilling out imperfections.¹² Unlike the automobile, the design of which evolved from a state of crudeness to refinement as it abandoned the carburetor for fuel injection and drum for disk brakes, the minimum contacts test is like an old house whose owners continually added furniture over the years without discarding any old items.

*International Shoe Co. v. Washington*¹³ provides the foundation for the test's accumulation of factors. Using an almost exclusively ex post viewpoint, that opinion focuses primarily on the defendant's past conduct, referred to as its "activities,"¹⁴ such as employing forum residents, renting forum property, and shipping products to the forum. It mentions other retrospective factors, such as forum-related benefits received by the defendant and the relation between the defendant's conduct and the plaintiff's claim, but gives them scant attention. *International Shoe* contains only a trace of a prospective component. It states that an "estimate of the

9. See, e.g., William J. Knudsen, Jr., Keeton, Calder, Helicopteros and Burger King—*International Shoe's Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 831 (1985) ("[T]he doctrine of *International Shoe* is not set in marble; it has continued to evolve . . ."); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 86 (1987) (referring to the "evolution of the 'minimum contacts' doctrine").

10. See, e.g., FRIEDENTHAL ET AL., *supra* note 4, § 3.11, at 127 (using the title "Refinements of the Basic Standard: The Requirement of a Purposeful Act and Foreseeability" to describe the section dealing with the history of minimum contacts from *McGee v. International Life Insurance Co.* through *Asahi Metal Industry Co. v. Superior Court*); RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 707 (2d ed. 1995) (stating in reference to the Court's minimum contacts cases from *World-Wide Volkswagen Corp. v. Woodson* through *Asahi* that "[a]s [the Court] decides more cases, it refines the minimum contacts standard").

11. See, e.g., THE AMERICAN HERITAGE DICTIONARY 471, 1039 (2d college ed. 1982) (defining "evolution" as "a gradual process in which something changes into a different and usually more complex or better form" and "refine" as "to free from coarse characteristics . . . [t]o become free of impurities").

12. See *id.*

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

14. *Id.* at 314-15, 320.

inconveniences” to the defendant from trial in the forum is “relevant” to the reasonableness of the exercise of jurisdiction.¹⁵ But the opinion makes no effort to estimate those inconveniences or otherwise to apply this prospective factor in approving the State of Washington’s exercise of jurisdiction.¹⁶

The factors mentioned in *International Shoe*, displayed graphically, are as follows:

FIGURE 3. *INTERNATIONAL SHOE* FACTORS

RETROSPECTIVE	PROSPECTIVE
Defendant’s Conduct Benefits to Defendant Relation of Claim to Defendant’s Conduct	Defendant’s Interest • <i>Convenience</i>

2. *New Factors, Shifting Viewpoints*

Five years after *International Shoe*, a minimum contacts case seldom mentioned in civil procedure casebooks or academic commentary, *Travelers Health Ass’n v. Virginia ex rel. State Corporation Commission*,¹⁷ foreshadowed two persistent problems in minimum contacts doctrine: the unexplained addition of new factors and the inconsistent shifting of temporal viewpoint. As in *International Shoe*, the opinion in *Travelers* considers retrospective factors such as the conduct of the defendant insurance company. But unlike *International Shoe*, it blends ex post and ex ante viewpoints and gives equal attention to prospective factors never mentioned in *International Shoe*, including the forum’s interest in regulating the defendant’s conduct, the plaintiffs’ inconvenience in using an alternate forum, and the likely location of witnesses.¹⁸ Justice Black, author of the *Travelers* opinion, complained in a separate opinion in *International Shoe* that the minimum contacts test’s criteria were “vague.”¹⁹ In *Travelers*, Justice Black exploited that vagueness to add several new factors without acknowledgment or justification. All Justice Black had to say about these new factors was that some of them “have been given great weight in

15. *Id.* at 317.

16. *See id.* at 310-26.

17. 339 U.S. 643 (1950).

18. *See id.* at 648-49.

19. 326 U.S. at 323 (opinion of Black, J.).

applying the doctrine of *forum non conveniens*.”²⁰ The following graphic illustrates the minimum contacts factors after *Travelers*.

FIGURE 4. FACTORS AFTER *TRAVELERS*

RETROSPECTIVE	PROSPECTIVE
Defendant's Conduct Benefits to Defendant Relation of Claim to Defendant's Conduct	Defendant's Interest • <i>Convenience</i> Plaintiff's Interest • <i>Convenience</i> Forum Interests • <i>Regulating defendant</i> Location of Witnesses

From *International Shoe* to *Travelers*, then, the Court shifted temporal viewpoint. It also added new factors without admitting that it was doing so, justifying the additions, relating them to any underlying purpose, or attempting to assimilate the new factors with those found in *International Shoe*. And by adding prospective factors taken from the doctrine of *forum non conveniens*, the Court created redundancy and blurred the distinction between that doctrine and the minimum contacts test.

Seven years later, a pair of oft-cited minimum contacts cases continued this pattern of unexplained accumulation. *McGee v. International Life Insurance Co.*²¹ resembles *Travelers* in its reliance on a blend of retrospective and prospective viewpoints and its use of the prospective factors introduced by *Travelers*. But *Hanson v. Denckla*,²² decided just six months after *McGee*, returns to a predominantly ex post perspective and a focus on conduct that is reminiscent of *International Shoe*. *Hanson* focuses almost exclusively on the defendant's lack of conduct connected to the forum, stating that the minimum contacts issue “is resolved in this case by considering the *acts* of the trustee.”²³

Hanson also adds a new retrospective factor. In describing the conduct required to establish minimum contacts, Chief Justice Warren wrote that what is “essential in each case” is “some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the

20. 339 U.S. at 649.

21. 355 U.S. 220 (1957).

22. 357 U.S. 235 (1958).

23. *Id.* at 254 (emphasis added).

forum State.”²⁴ It is not clear from the opinion whether Justice Warren intended to treat the defendant’s mental state as a distinct factor, since elsewhere in the *Hanson* opinion he mentioned only conduct—using words such as “activity” and “act” or “acts”—without referring to an accompanying mental state. Nonetheless, this passage gave rise in later cases to the “purposeful availment” requirement²⁵ and added the defendant’s mental state to the list of minimum contacts factors. Again, a new factor was added to the test without acknowledgment, justification, or integration.

The Court continued in later cases to shift temporal viewpoint. Though the decisions mention both retrospective and prospective factors, an *ex post* viewpoint dominates cases such as *World-Wide Volkswagen Corp. v. Woodson*²⁶ and *Burger King Corp. v. Rudzewicz*.²⁷ In *Asahi Metal Industry Co. v. Superior Court*,²⁸ by contrast, the resolution of the minimum contacts issue turns on prospective factors. Unable in *Asahi* to muster a majority on the adequacy of the retrospective components, the Court for the first time resolved a case on purely prospective grounds.²⁹ Thus, in the roughly forty years from *International Shoe* to *Asahi*, the Court transformed the prospective side of the minimum contacts formula from a single factor of little apparent significance in *International Shoe* to multiple factors capable on their own, as in *Asahi*, of defeating a state’s exercise of jurisdiction.

The pattern of casually adding new factors—both retrospective and prospective—repeats in other cases, resulting in the cumulative list that appears in Figures 1 and 2 above. *Calder v. Jones*,³⁰ for example, added an “effects” test³¹ to the retrospective side, emphasizing the past effects in the forum of the defendant’s conduct.³² *Asahi* added “the procedural and substantive policies of other nations” and the “Federal Government’s

24. *Id.* at 253 (emphasis added).

25. See, e.g., FRIEDENTHAL ET AL., *supra* note 4, § 3.11, at 129 (“In both [*Kulko v. Superior Court* and *World-Wide Volkswagen*] the Court . . . places in the foreground the *Hanson* requirement that the defendant purposefully avail himself of the state’s benefits.”).

26. 444 U.S. 286 (1980).

27. 471 U.S. 462 (1985).

28. 480 U.S. 102 (1987).

29. See *id.* at 113-16. In *Asahi*, the Court began its consideration of the prospective factors by listing them as follows:

We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”

Id. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

30. 465 U.S. 783 (1984).

31. *Id.* at 787 n.6; see also MARCUS ET AL., *supra* note 10, at 727-28.

32. See *Calder*, 465 U.S. at 789.

interest in its foreign relations policies” to the prospective side.³³ The Court’s expansion of factors has increased the indeterminacy and manipulability of the test. With more factors and no principle to guide or constrain its choice, the Court has greater freedom to choose one or more factors to determine the outcome—for example, conduct in *International Shoe*, effects in *Calder*, and inconvenience in *Asahi*. If the test in its indeterminacy can be compared to a shell game, over the years the Court has introduced more and more shells of which to keep track.

3. *Retrospective Justice vs. Prospective Utility*

As this brief survey of the Supreme Court’s minimum contacts cases demonstrates, a central problem in making sense of current minimum contacts doctrine is the lack of a clear foundation to anchor and explain its amorphous conglomeration of factors and use of different temporal viewpoints. I suggest grounding the test in two principles: desert and utility. Desert anchors and explains the retrospective factors; utility anchors and explains the prospective factors. These principles give each cluster of factors a unifying focal point and provide the entire minimum contacts test with two distinct focal points. Explicit articulation of these principles also helps reveal the latent tension in personal jurisdiction between individual desert and collective utility, a tension current minimum contacts doctrine masks. A brief explanation of the source of this approach aids in understanding it.

Different philosophical paradigms compete to explain the underlying purposes of criminal and tort law. One paradigm, to which I refer as retrospective justice, looks to the past, focuses on individual actors, and uses noninstrumental moral criteria. This viewpoint, which in criminal law is often labeled “just deserts,” sees retribution as the proper driving force behind criminal punishment.³⁴ On this view, criminals should be punished because they deserve it based on past wrongdoing, not because punishment may provide some future benefit to society (such as reducing future crime) by incapacitating or deterring criminals. Just deserts uses a retrospective point of view and metes out punishment in proportion to the defendant’s crime. This calculation is based on criteria of individual accountability such as the blameworthiness reflected in the defendant’s conduct and mental state. In tort law, the retrospective justice paradigm is often called

33. *Asahi*, 480 U.S. at 115.

34. See, e.g., G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 70-73 (T.M. Knox trans., Oxford Univ. Press 1958) (1821); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100-01 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179 (Ferdinand Schoeman ed., 1987); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

“corrective justice.”³⁵ Like the retributivists in criminal law, corrective justice proponents use a retrospective viewpoint, looking back at the respective moral rights and responsibilities of individual actors, to determine the distribution of tort liability. In both criminal law and torts, the retrospective justice paradigm is essentially historical, seeking to achieve what is “just”—and to prevent what is “unjust”—based on moral intuitions about past events and the roles of particular individuals in those events.

The competing viewpoint, to which I refer as the prospective utility paradigm, looks to the future rather than the past. It focuses on the interests of society rather than on the rights or responsibilities of individuals and uses instrumental rather than moral criteria. It sees criminal law as an instrument to advance society’s interests and metes out punishment according to whether that punishment will be socially useful. For example, if crime prevention is the criminal justice system’s primary goal, then punishment is justified if it reduces future crime through deterrence, rehabilitation, or incapacitation.³⁶ This viewpoint also sees tort law as an instrument for achieving various collective social goals such as deterrence or cost-spreading.³⁷ In both criminal law and torts, the prospective utility paradigm is essentially predictive rather than historical, seeking what will be useful to society in the future rather than the just treatment of individuals based on the past.

In the seeming chaos of the accumulation of factors and shifting temporal viewpoints found in the minimum contacts cases, one can perceive crude versions of both the retrospective justice and the prospective utility paradigms at work on the task of justifying a state’s assertion of jurisdiction over a nonresident defendant. The retrospective component of the minimum contacts doctrine may be viewed as corresponding to the retrospective justice paradigm in that it seeks to justify the imposition of

35. See, e.g., Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 LAW & PHIL. 371 (1982); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77 IOWA L. REV. at i (1992); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

36. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Clarendon 1996) (1789); Johannes Andenaes, *Deterrence*, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 591, 592 (Sanford H. Kadish ed., 1983); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43 (1996).

37. See, e.g., GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

jurisdiction based on past events, focuses on the individual, and finds relevance in its appeal to society's moral intuitions about personal responsibility and accountability. Similarly, the prospective component of the minimum contacts test may be viewed as corresponding to the prospective utility paradigm in that it looks forward, approaches jurisdiction as an instrument for achieving social goals, and finds its relevance in its appeal to society's sense of pragmatism.

I suggest bringing these competing paradigms out of the shadows so that minimum contacts doctrine can benefit from the structure, order, and explanatory power they provide. Bringing these frameworks into the light will also help to address directly the problems that they may raise, including their potential incompatibility.

4. *Desert and Minimum Contacts' Retrospective Component*

Why should retrospective factors such as an out-of-state defendant's past conduct or mental state have any bearing on the validity of a state exercising jurisdiction over the defendant? Why not simply measure the validity of jurisdiction according to prospective factors, such as party convenience or efficient use of judicial resources?

Though retrospective factors provided the original building blocks for minimum contacts analysis, the case law does not explicitly answer these questions. *International Shoe* brings a realist attitude to the notions of "presence" and "consent" that had dominated jurisdictional analysis prior to the minimum contacts doctrine, treating them as formalist abstractions and looking beyond them to the underlying "contacts."³⁸ But *International Shoe* does not press further to ask why the contacts themselves are significant. Nor has the Court offered any explicit explanation of their significance in later cases. In retrospect, the Court seems simply to have replaced the formalist abstractions of presence and consent with a different abstraction: contacts.

38. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Regarding presence, the Court stated:

To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

Id. at 316-17. Regarding consent, the Court stated:

True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. . . . But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.

Id. at 318.

The Court's failure to explain the relevance of the retrospective factors to jurisdictional validity may be explained by the intuitive appeal such factors have to our sense of "fairness" or "justice." Their relevance may seem so obvious as to make it unnecessary to articulate explicitly the reasoning that underlies that sense of relevance. In teaching civil procedure, for example, I have found that retrospective factors such as the conduct and mental state of the defendant and effects caused by the defendant in the forum strongly appeal to many students as highly relevant in justifying a state's assertion of jurisdiction over a nonresident. But it is often difficult for those students, as it has been for the Justices of the Supreme Court, to articulate the basis for that intuition other than in abstract terms such as justice and fairness. This combination of intuitive appeal and difficulty in articulating the basis for that appeal resonates with my observations of the experience of students of criminal law in confronting retribution and related nonconsequentialist views toward the purposes of criminal law. Students in my criminal law class routinely find it relatively easy to articulate the prospective, utilitarian purposes of punishment—deterrence, incapacitation, and rehabilitation—that treat punishment as an instrument for advancing social utility by reducing future crime. But despite their considerable appeal to many students, the articulation of nonconsequentialist rationales for punishment often proves elusive.

The Queen v. Dudley & Stephens,³⁹ the classic lifeboat cannibalism case, provides a good example. Shipwrecked on the open sea in a small boat for twenty-five days, Thomas Dudley and his crew had little food and water and no appreciable chance of rescue. Dudley prayed for forgiveness, then slit the throat of the cabin boy who lay near death at his feet. Sustained by the boy's body and blood until rescued, Dudley was later condemned to hang, pardoned, and then used by generations of law professors to explore why criminal law punishes.

In discussing *Dudley*, I try to force students to grapple with nonutilitarian justifications for punishment by arguing that there may be no future utility in punishing Dudley. Incapacitation, specific deterrence, and rehabilitation do not carry much weight, one may argue, since Dudley, who was generally a law-abiding person, was unlikely to be in the same situation again. General deterrence may also carry little weight. Future sailors caught in the same sort of life-or-death predicament Dudley faced might well be unaware of Dudley's fate. They might also be beyond the reach of deterrence, incapable of rational calculation, or, even if they do calculate rationally, likely to choose the possibility of later punishment—even capital punishment—over immediate death by starvation.

39. 14 Q.B.D. 273 (1884).

While the usefulness of punishing Dudley is certainly debatable, many students express a strong moral conviction that Dudley should be punished regardless of utility, but they struggle to articulate the basis for that judgment. Often they will say that “justice” demands that Dudley be punished regardless of future utility because he purposefully took another’s life—that is, because of his conduct, his mental state, and the resulting death he caused. As these students read further in the casebook, they usually embrace the retrospective justice paradigm and begin to articulate moral notions of desert, blame, and personal responsibility as the latent ideas behind what they earlier described simply as “justice.”

In my civil procedure class, which students take in the second semester of the first year just after finishing criminal law, I ask students to compare justifying a government’s exercise of power in imposing jurisdiction on an individual in a civil case to a government’s exercise of power in imposing criminal punishment. What if a court, rather than sentencing Dudley to death, had imposed on him the burdens of traveling to a distant location to defend a civil suit? What, I jokingly ask, if Dudley had been condemned to travel to Florida to engage in franchise litigation with a powerful multinational corporation such as Burger King?⁴⁰ How would the criminal law justify such an admittedly bizarre punishment? How would that justification differ from the justification one finds for imposition of the same burden under the minimum contacts test? Under one modern mixed theory of punishment with which many students are familiar from criminal law, the punishment would have to be both useful to society and deserved by the individual.⁴¹

This juxtaposition of criminal law and civil procedure sheds an interesting light on the Court’s minimum contacts cases. The retrospective factors of the minimum contacts test, used to constrain government power to impose jurisdictional burdens in the civil arena, bear a striking resemblance to criminal law doctrines used to constrain government power in the criminal arena. The minimum contacts test’s conduct factor parallels criminal law’s *actus reus* requirement. The mental state and effects factors are analogous to *mens rea* and resulting harm elements in the criminal law, used both to limit and to grade criminal liability. By allowing intervening actors in the stream of commerce (such as consumer purchasers of a product) to insulate a defendant from the imposition of jurisdiction, the minimum contacts test’s retrospective component resembles the criminal

40. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (requiring the defendant—an individual franchisee—to travel from Michigan to Florida to defend against Burger King’s claims of breach of a franchise agreement).

41. See, e.g., MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 237 (1984) (“[T]he popular form of mixed theory . . . asserts that punishment is justified if and only if it achieves a net social gain and is given to offenders who deserve it.”).

law's treatment of subsequent actors who insulate from liability earlier actors in the chain of causation.

The retrospective component's use of benefits to the defendant from contacts with the forum to justify the imposition of jurisdictional burdens does not have a direct analog in criminal law doctrine, but a similar concern about reciprocity of benefits and burdens appears in the theoretical literature on retribution. In *International Shoe*, Justice Stone addressed the benefits enjoyed by a foreign defendant from its contact with the forum, stating that:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.⁴²

In rationalizing the practice of criminal punishment, Herbert Morris, a well-known criminal law theorist usually associated with the "just deserts" school, posits an equilibrium of benefits and burdens among the members of society similar to the reciprocity of benefits and obligations Justice Stone described.⁴³ The burdens emerge when citizens restrain themselves from actions that interfere with the rights of others, and the reciprocal benefits lie in freedom from interference by others. A criminal act by one member of society upsets this equilibrium. In Morris's view, "[j]ustice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt."⁴⁴ In both jurisdiction and criminal law, then, an individual can be said to deserve the imposition of government burdens—whether in the form of punishment or subjection to jurisdiction—if she has received reciprocal benefits from that government.⁴⁵

I do not wish to overstate the parallels between criminal law and the retrospective component of the minimum contacts test; nor do I wish to exaggerate their significance. Clearly, imposing criminal punishment on an innocent person is an injustice of a different order from imposing civil jurisdiction on an undeserving nonresident defendant. Nonetheless, I do

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

43. See HERBERT MORRIS, ON GUILT AND INNOCENCE 33-34 (1976).

44. *Id.* at 34.

45. See Kogan, *supra* note 7, at 363 (discussing the grounding of such reciprocity in a political "benefaction principle"); see also Brilmayer, *supra* note 4 (discussing such reciprocity in terms of social contracts).

think these parallels are more than coincidental and that they provide insight into why the retrospective factors seem so intuitively appealing in assessing the validity of jurisdiction. Both jurisdiction and criminal punishment present the potential use of government power to coerce individual citizens in the name of collective utilitarian goals such as reduction of crime or efficient adjudication of cases. In both contexts, we seek to limit this potential government coercion of individuals with constraints based on the common moral intuition, expressed in the "retrospective justice" paradigm, that an individual can appropriately be coerced by government to advance collective ends only if the individual deserves that coercion. Our notion of desert draws on ideas of accountability that in turn derive from notions of free will and choice. Herbert Packer, for example, has written that the rationale for the criminal law's actus reus requirement rests in part on notions of culpability and that

[a]mong the notions associated with the concept of "culpability" are those of free will and human autonomy. . . . It is important, especially in a society that likes to describe itself as "free" and "open," that a government should be empowered to coerce people only for what they do and not for what they are.⁴⁶

If an individual has made choices—to act, to cause results or effects, to receive benefits—then it is just to require that individual to answer for those choices.⁴⁷ In criminal law, one is held to answer by receiving punishment. In the jurisdictional context, one is held to answer by having to respond to a lawsuit.

One might object to using desert as a justification for jurisdiction on the ground that it inappropriately presupposes wrongdoing on the part of a defendant. Imposition of jurisdiction, after all, is simply one step in an action that may or may not find the defendant to be a wrongdoer. Moreover, some conduct that may support imposition of jurisdiction, such as interstate commercial activity, is precisely the sort of activity government encourages. The notion of desert, however, is not necessarily pejorative. Rather than being inherently positive or negative, desert is a relational quality that exists between a person and something earned by or owed to that person. One may deserve, for example, a reward or a reputation, a promotion or a prison term. As these examples illustrate, desert can have positive or negative implications depending on what it is that the person is

46. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74 (1968).

47. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting) ("People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared to answer for it there . . .").

said to deserve.⁴⁸ This duality is captured in the definition of desert as either “a reward or punishment deserved or earned by one’s qualities or acts.”⁴⁹

In addition to desert’s positive and negative forms, this same definition illustrates that desert depends on a retrospective assessment of criteria closely associated with an individual, such as the person’s “qualities or acts,” and presents a sharp contrast to the sort of predictive, collective cost-benefit analysis that drives the notion of utility. One may deserve a reward for having returned a lost pet, a reputation for dishonesty by having cheated, a job promotion by having done one’s job well, or a prison term by having stolen someone else’s money. In each of these examples, the quality of desert as something earned or owed based on an individual’s past conduct remains the same, though what is deserved and the precise basis for desert differs in each. I argue that a defendant may similarly be viewed as deserving the burdens of jurisdiction based on the minimum contacts retrospective factors without implying anything negative, much less wrongdoing.

My aim in transplanting the notion of desert from its familiar surroundings in criminal law into the law of personal jurisdiction is not to capture the negative implication of wrongdoing that desert carries in the criminal context. Rather, I seek to draw on the sense of desert that transcends particular contexts and speaks more generally to the relational nature of something earned by or owed to an individual on the basis of criteria such as past conduct and mental state. Desert as used in the criminal law is simply a vivid illustration of this general sense. I also wish to borrow from criminal law the rich blend of criteria—such as conduct, mental state, and result—that it uses to determine desert. In criminal law, we move from these factors to a finding of desert by an inference labeled “culpability.” In jurisdiction, I suggest an analogous but not identical inferential step from the minimum contacts retrospective factors to a finding of desert, an inference more appropriately and neutrally labeled one of responsibility rather than culpability.⁵⁰

48. See GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 96 (1996) (“The striking feature of desert . . . is that it comes in both positive and negative forms. We earn money and we earn punishment. We are both praised and blamed for our actions. When rewards and penalties are just, we say that we deserve them.”).

49. WEBSTER’S THIRD NEW DICTIONARY OF THE ENGLISH LANGUAGE 610 (1986).

50. See Brilmayer, *supra* note 6, at 89 (“[I]mposition of legal burdens on the defendant is reasonable only if the defendant was somehow *responsible* for those occurrences.” (emphasis added)); cf. *World-Wide Volkswagen*, 444 U.S. at 311 (Brennan, J., dissenting) (“People should understand that they are held *responsible* for the consequences of their actions and that in our society most actions have consequences in other states.” (emphasis added)).

5. *Utility and Minimum Contacts' Prospective Component*

Why should prospective factors such as efficiency, party convenience, or impact on foreign policy play a role in the minimum contacts test? Why not use only retrospective factors such as past conduct to measure the validity of jurisdiction as the Court did in *International Shoe*? Though the Supreme Court has steadily increased the number and importance of the prospective factors over the years, as with the retrospective factors it has provided no explicit justification for including them in minimum contacts analysis other than saying that they are a function of "reasonableness" or "fairness."

As with the retrospective factors, the Court's failure to articulate explicitly the relevance of the prospective factors to jurisdictional validity may be explained by the intuitive appeal of factors such as efficiency and convenience to our sense of pragmatism. Just as we want legal rules to be intrinsically just, we also want them to be useful and practical. That jurisdictional rules should operate efficiently and be concerned with party convenience may appear so self-evident that it might seem unnecessary to articulate a justification for incorporating such factors into minimum contacts analysis. As George Fletcher has written, "[t]he most common mode of moral reasoning in the Anglo-American tradition is cost/benefit analysis—the 'balancing' of competing advantages and disadvantages of adopting particular courses of action. As the argument goes, all legal decisions (by individuals as well as courts) should be judged according to their consequences."⁵¹ This tendency toward instrumental thinking is reinforced in approaching civil procedure issues such as jurisdiction by the inherently instrumental nature of procedural law, which is often viewed as simply a means for enforcing substantive law.⁵²

I find, as Fletcher suggests, that the arguments most readily accessible to my students, both in criminal law and civil procedure, are ones geared toward instrumental value based on future consequences. In contrast to their gradual appreciation of nonconsequentialist arguments such as those based on desert, students need little prompting to recognize utilitarian arguments; the problem, rather, is how to contain their enthusiasm for these arguments. In my view, the history of the minimum contacts test, in particular the

51. FLETCHER, *supra* note 48, at 144.

52. See, e.g., BLACK'S LAW DICTIONARY 1203-04 (6th ed. 1990) (defining procedure as "the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 697 (2d ed. 1995) ("Procedural law . . . consists of the rules by which one establishes one's rights, duties, liberties, and powers—either by litigation or otherwise. . . . [I]n civil law and procedure, *substantive law* defines the rights and duties of persons, while *procedural law* defines the steps in having a right or duty judicially defined or enforced.").

growth of the prospective component, reveals that the Supreme Court has had a similar problem corralling its enthusiasm for prospective utility.

A comparison of minimum contacts' prospective factors and criminal law's prospective purposes highlights the difficulties inherent in a utilitarian approach to minimum contacts. The instrumental purposes of the criminal law are usually listed as deterrence, incapacitation, and rehabilitation. There is plenty of potential for conflict among them. A harsh prison sentence, for example, may generally deter and incapacitate but be counterproductive in terms of rehabilitation.⁵³ But the various purposes share the common goal of advancing a particular form of social utility—crime reduction. In fact, one commentator describes criminal law as having only one prospective purpose—crime reduction—and views deterrence, incapacitation, and rehabilitation as simply three different means of pursuing that purpose.⁵⁴

Minimum contacts' prospective factors, by contrast, are more plentiful and more difficult to integrate than the prospective purposes of criminal law. The current list, set forth in Figure 2, features eight such factors, some with multiple subcategories, and there is no sign that the Supreme Court will not continue to add new ones. Reading through its minimum contacts cases, one gets the sense that the Supreme Court has never encountered a social objective to which it was unwilling to harness the minimum contacts doctrine. Unlike the goal of crime reduction, which provides a unifying focal point for criminal law's prospective purposes, the only goal that unifies prospective minimum contacts factors such as efficiency and foreign policy is the highly abstract notion of social utility.

In addition, application of some of the prospective factors seems enormously complicated and raises questions that neither courts nor parties to lawsuits seem particularly competent to resolve. Some factors, such as the relative convenience to plaintiff and defendant of litigation in the forum and the location of witnesses, are straightforward. But assessing a lawsuit's impact on foreign policy, by contrast, seems quite difficult. Indeed, the foreign policy of the United States is often a complex web of poorly articulated and conflicting goals. In *Asahi*, for example, it is unclear

53. See, e.g., Lawrence M. Friedman & George Fisher, *Some Thoughts About Crime and Punishment*, in *THE CRIME CONUNDRUM* 1, 3 (Lawrence M. Friedman & George Fisher eds., 1997).

[P]risons may have disastrous side effects. Today's inmates call them "crime colleges"; the eighteenth and nineteenth centuries used the term "seminaries of vice." There seems to be little doubt that prisons breed crime. Inmates are recruited into a social system that fits them for careers in crime and for little else. Of course, prisons also "cure" crime in the sense that they deter some criminals and, through incapacitation, stop some crime from happening.

Id.

54. See Alfred Blumstein, *The Search for the Elusive "Common Principle,"* 82 NW. U. L. REV. 43, 44 (1987).

whether allowing Japanese companies to be sued in U.S. courts advanced or obstructed foreign policy toward Japan. Is a court competent to resolve these questions, which are usually seen as the exclusive province of the executive branch of the federal government? Admittedly, foreign policy will play a role in a relatively small number of minimum contacts cases. But consider the factor of the “shared” interests of the fifty states in advancing their social policies. How is a court to inform itself about what those policies are, given that they will doubtless be numerous and conflicting? How is it to calculate and measure the impact of assertion of jurisdiction on those policies? These strike me as vastly more complicated tasks than those presented by other prospective factors such as efficiency, party convenience, and the location of witnesses.

Articulating utility as the driving force behind the prospective factors will not solve all these problems, but it at least provides a common—though fairly abstract—focal point that distinguishes the prospective factors from those found in the retrospective component.

II. THE PURPOSES OF THE MINIMUM CONTACTS TEST

Why does the Supreme Court concern itself with limiting the reach of state jurisdiction? What underlying purposes drive the minimum contacts test? The desert and utility framework set forth in Part I aids in critically examining how the Court answers these questions.

Early cases such as *International Shoe*, *Travelers*, and *McGee* do not elaborate on the policies behind the minimum contacts test; they simply say it is based on due process. But starting with *Hanson*, a number of the Court’s decisions specifically mention two possible purposes: (1) protecting the individual defendant from the burdens of jurisdiction; and (2) maintaining an appropriate balance of power among the states in our federal system of government.⁵⁵ This Part will examine these two purposes in more detail.

A. *Protecting the Individual Defendant*

The Court has expressed concern over protecting individual defendants from government imposition of the burden of defending away from home. *Hanson*, for example, speaks of the minimum contacts test as “a guarantee

55. *Burger King*, *World-Wide Volkswagen*, and *Hanson* all discuss both of these purposes. See *Burger King*, 471 U.S. at 471-72, 472 n.13 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). *World-Wide Volkswagen* and *Hanson* adopt both purposes, while *Burger King* adopts only the first and appears to abandon the second. Compare *Burger King*, 471 U.S. at 472 n.13, with *World-Wide Volkswagen*, 444 U.S. at 291-94, and *Hanson*, 357 U.S. at 251.

of immunity from inconvenient or distant litigation.”⁵⁶ *World-Wide Volkswagen* says one of the test’s functions is that it “protects the defendant against the burdens of litigating in a distant or inconvenient forum.”⁵⁷ And the defendant’s inconvenience in defending away from home has often been mentioned as a prospective factor in minimum contacts cases since *International Shoe*.⁵⁸

These statements of purpose about protecting the individual are both overstated and incomplete. They say that the purpose of the minimum contacts test is to immunize and protect defendants from distant and inconvenient litigation. Yet under the test the Court actually approves the imposition on defendants of distant and inconvenient litigation, as long as they have sufficient contacts with the forum. The minimum contacts test was not, for example, a guarantee of immunity from inconvenient, distant litigation for the defendants in *Calder* or *Burger King*. In apparent contradiction of *Hanson’s* and *World-Wide Volkswagen’s* promises of immunity and protection from inconvenient, distant litigation, the Court approved imposition of inconvenient, distant litigation in both cases. In *Calder*, Florida residents were required to defend in California.⁵⁹ In *Burger King*, a Michigan resident was required to defend in Florida.⁶⁰

As *Calder* and *Burger King* reveal, *Hanson’s* and *World-Wide Volkswagen’s* statements of purpose are overstated in their categorical promise of protection from distant and inconvenient litigation. The test’s protection is, in fact, selective, immunizing some defendants from distant, inconvenient litigation but not others. A more accurate statement of the function of the minimum contact tests is to *distinguish* defendants who are immunized from the burdens of out-of-state litigation from defendants who are not.

The statements of purpose found in *Hanson* and *World-Wide Volkswagen* fail to convey the selective nature of the minimum contacts test’s protections and to reveal either the basis for this selection or the relevance of the test’s various factors to that selection. If the purpose of the test were solely to prohibit the imposition of inconvenient and distant litigation, the test would use only an ex ante point of view to assess whether the future litigation is “inconvenient and distant” and, if so, to prohibit it. Why does the test look back to retrospective factors in making this decision? Why does it use prospective factors other than distance and

56. *Hanson*, 357 U.S. at 251; see also *World-Wide Volkswagen*, 444 U.S. at 292 (describing the Due Process Clause as a “guarantor against inconvenient litigation”).

57. *World-Wide Volkswagen*, 444 U.S. at 292. *Burger King* describes the test’s function as protecting “an individual liberty interest” in not being subject to the forum’s judgment. *Burger King*, 471 U.S. at 471-72.

58. See *supra* text accompanying note 15.

59. See *Calder v. Jones*, 465 U.S. 783, 785-86, 791 (1984).

60. See *Burger King*, 471 U.S. at 466, 487.

inconvenience to the defendant? The Court's cases do not explicitly answer these questions.

Viewing desert as the animating purpose of the retrospective component fills in some of these gaps. Rather than simply asserting without qualification that the test "protects" or "immunizes" defendants from "inconvenient or distant litigation," the test's purposes could be stated more fully and clearly as protecting a defendant from *undeserved* burdens resulting from the forum's exercise of jurisdiction. This revised statement of purpose brings two improvements. First, it openly acknowledges that the rule operates selectively. Second, it clearly sets forth desert as the retrospective criterion for that selection.

B. Federalism

The use of federalism—the concern that states “not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”⁶¹—has waxed and waned in the Court's descriptions of the purposes of the minimum contacts test. *International Shoe* seemed to replace territorial sovereignty, which had previously been the lodestar of personal jurisdiction,⁶² with the minimum contacts test.⁶³ Both *Hanson* and *World-Wide Volkswagen*, however, say that federalism still plays a role in personal jurisdiction by including it as one of the dual purposes of the minimum contacts test, suggesting that *International Shoe*'s minimum contacts test had supplemented rather than replaced the jurisdictional doctrine that preceded it.⁶⁴ But two years after *World-Wide Volkswagen*, the

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

62. For the leading case on territorial sovereignty, see *Pennoyer v. Neff*, 95 U.S. 714 (1877). See also FRIEDENTHAL ET AL., *supra* note 4, § 3.3, at 98.

[In *Pennoyer*, Justice Field] based his theory on two interrelated “principles of public law”: first, “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory;” and second, “that no state can exercise direct jurisdiction and authority over persons or property within its territory.” Thus, each state would be exclusively powerful over the persons and property inside its borders and absolutely powerless over all persons and property outside those borders.

Id. (citations omitted).

63. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Court wrote: [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

Id.

64. *Hanson* states that the minimum contacts test's restrictions are “more than a guarantee of immunity from inconvenient or distant litigation.” *Hanson*, 357 U.S. at 251. They are also “a consequence of territorial limitations on the power of the respective States.” *Id.* Similarly, *World-Wide Volkswagen* states that the test has two purposes: “It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *World-Wide Volkswagen*, 444 U.S. at 292.

Court downplayed federalism as one of the test's purposes,⁶⁵ and five years later, the Court apparently abandoned it in a footnote in *Burger King*.⁶⁶ The current and future status of federalism as one of the test's purposes is subject to debate.⁶⁷

The inclusion of federalism as one of the minimum contacts test's purposes leads to a number of theoretical and practical problems. The Due Process Clause is the constitutional basis of the minimum contacts test;⁶⁸ it is difficult to reconcile concern about balance of power among states with that clause's text and history, both of which focus on the impact of the exercise of government power on individuals rather than on other governments.⁶⁹ Similarly, federalism is inconsistent with the notion that an individual can waive the protections afforded by the minimum contacts test.⁷⁰

Unlike the burden of having to defend a lawsuit in a distant state, which is relatively easy to grasp, it can be hard on a practical level to see one state's exercise of jurisdiction over a sister state's citizen as a serious threat to our federal system. The United States' national fabric has become so tight and interstate activity, including the appearance of citizens of one state in the courts of another, has become so common that one state's exercise of jurisdiction over the citizen of another state seems entirely consistent with—rather than antithetical to—the current realities of the federal system. And at a time when states are concerned with the growing size of their

65. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, Justice White stated for the Court:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States.

....

...The restriction on state sovereign power...however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

456 U.S. 694, 702 n.10 (1982).

66. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985) ("Although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" (citation omitted)).

67. Compare Kogan, *supra* note 7, at 262-70 (arguing that federalism is an important aspect of the debate about personal jurisdiction), with Redish, *supra* note 5, at 1120 (arguing for the abandonment of federalism as an underlying purpose of the minimum contacts test).

68. See *International Shoe*, 326 U.S. at 311, 316.

69. See Redish, *supra* note 5, at 1115.

70. See *Insurance Corp. of Ireland*, 456 U.S. at 702 n.10.

courts' caseloads,⁷¹ is it clear that a defendant's home state is likely to feel slighted if the forum pays the cost of resolving plaintiff's claim?

It is also hard to grasp federalism's contribution to minimum contacts analysis. *Hanson* and *World-Wide Volkswagen*, which advance federalism as one of the test's purposes, do not seem markedly different from *Burger King*, which rejects federalism, at least not in a way that can be linked to acceptance or rejection of federalism. And the Court has never stated precisely how the minimum contacts test gives expression to federalism.

Adopting the desert and utility framework described in Part I will not resolve the problems raised by federalism. But, as outlined in Part V, a mixed theory built on this framework allows for federalism to find explicit expression in the minimum contacts test.

C. Utility

The purpose of advancing prospective utility is apparent in the Supreme Court's minimum contacts cases. Yet unlike the goals of protecting the individual defendant and federalism, the Court never explicitly identifies it as a concern animating the minimum contacts test. Nonetheless, a utilitarian sensibility about the usefulness of the forum state's exercise of jurisdiction pervades many passages in its minimum contacts cases, such as *International Shoe*'s reference to "fair and orderly administration of the laws" as a purpose of the Due Process Clause.⁷² The Court's steady expansion of the prospective factors used in the minimum contacts test, reviewed above and enumerated in Figure 2, also indicates increasing concern with assessing the future usefulness of a forum's exercise of jurisdiction. Will it be efficient? Will it make pragmatic sense in terms of witness location? Will it advance the forum's interest in providing a forum for one of its citizens or regulating the defendant's conduct? Will it help the states advance their shared social policies? How will it affect the federal government's foreign policy interests? Each of these questions looks to the consequences of the exercise of jurisdiction and views the exercise of jurisdiction as an instrument to be evaluated in light of those consequences.

The Court's vocabulary can mask this fairly obvious concern with utility. For example, the Court sometimes uses the terms "reasonableness"⁷³ or "fairness"⁷⁴ in contexts that make it clear that the

71. For a critical review of the perceived "litigation explosion" that has caused this concern, see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

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

73. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

74. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

real concern is utility. The use of the term "fairness" to describe an ex ante inquiry into utility is particularly confusing because fairness is commonly used to express values at odds with utility.⁷⁵

Articulating utility as the animating purpose of the prospective component would simply bring express acknowledgment to what is obvious but unacknowledged in the Court's minimum contacts cases: Utility has come to play an increasingly prominent role in minimum contacts analysis. It also allows us to confront openly the challenge of integrating utility with the purposes that the Court has openly acknowledged: protecting the individual and preserving federalism.

III. MENTAL STATE

In this part, I examine the Supreme Court's use of the defendant's mental state as a retrospective criterion for assessing the defendant's "jurisdictional desert." Following *Hanson's* unexplained injection of mental state into the minimum contacts formula,⁷⁶ later cases such as *World-Wide Volkswagen* and *Burger King* make it an analytical focal point. In their imprecision in handling the issue of mental state and the resulting confusion, these cases replicate judicial treatment of mens rea, the "requisite but elusive" mental element in criminal law.⁷⁷ Comparing criminal law's treatment of mens rea with minimum contacts' treatment of mental state helps to expose some sources of the latter's confusion and to reveal some potential remedies.

A. Criminal Law's Treatment of Mens Rea

A persistent problem in the legal treatment of mental state has been a failure to distinguish clearly between different mental states such as purpose, negligence, and recklessness. For example, "intent" commonly means the subjective mental state of having something as one's conscious object. It is synonymous with "purpose."⁷⁸ But in criminal law, judges have often made intent into a term of art, expanding its technical legal meaning

75. See, e.g., Brian Barry, *Justice and Fairness*, in *PHILOSOPHY OF LAW* 333 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980).

76. See *supra* text accompanying notes 24-25.

77. In *Morissette v. United States*, 342 U.S. 246, 252 (1952), for example, Justice Jackson commented on "the variety, disparity and confusion of [judicial] definitions of the requisite but elusive mental element" in criminal law. Similarly, the Model Penal Code's drafters spoke of "the obscurity with which the culpability requirement is often treated." MODEL PENAL CODE § 2.02 commentary at 230 (1985).

78. THE AMERICAN HERITAGE DICTIONARY, *supra* note 11, at 592 (defining "intent" as "[t]hat which is intended; purpose" and "intend" as "[t]o have in mind some purpose or design").

beyond its common meaning to include mental states other than purpose, such as negligence and recklessness.⁷⁹ In doing so, they have blurred distinctions with moral and practical significance for grading and punishment.

Intent in the common meaning is subjective and associated with a high level of culpability. Intentional homicide, for example, typically is classified as murder, one of the most serious of criminal offenses in terms of punishment and stigma.⁸⁰ Negligence conveys the inadvertent taking of a foreseeable risk,⁸¹ is typically characterized as an objective mental state, and is generally viewed as a far less culpable mental state than intent. Negligent homicide, for example, receives a much lighter sanction than murder.⁸² Recklessness is a mixed subjective/objective mental state in which an actor actually foresees a risk and nonetheless acts.⁸³ It falls

79. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.5(e), at 223 (2d ed. 1986). The authors write:

[T]he phrase "criminal intent" is sometimes used to refer to criminal negligence or recklessness. Similarly, the notion of 'constructive intent' has been used by some courts; it is first asserted that intent is required for all crimes, and then it is added that such intent may be inferred from recklessness or negligence. It would make for clearer analysis if courts would merely acknowledge that for some crimes intent is not needed and that recklessness or negligence will suffice.

Id. (footnote omitted); see also ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 832-33 (3d ed. 1982). Perkins and Boyce write:

The phrase 'criminal intent' is one that has been bandied about with various meanings not carefully distinguished. . . . Often it is used to include criminal negligence as well as an actual intent to do the harmful deed, although at other times such negligence is referred to as a substitute, so to speak, for criminal intent in connection with certain offenses.

Id. at 835.

At least two cases exemplify the phenomenon of courts' including recklessness or negligence within the legal meaning of intent. See *Woodward v. State*, 144 So. 895, 896 (Miss. 1932) ("Intent is a necessary element of assault and battery . . . [that] may be committed with a motor vehicle by striking a person, or a vehicle in which he is riding, either intentionally or by driving so negligently as to constitute a reckless disregard of human life and safety."); *Pool v. State*, 13 S.E. 556, 557 (Ga. 1891) ("The law infers guilty intention from reckless conduct; and where the recklessness is of such character as to justify this inference, it is the same as if the defendant had deliberately intended the act committed.").

80. See, e.g., 18 PA. CONS. STAT. ANN. § 2502(a) (West 1983) (stating that murder is punishable by death or life imprisonment).

81. See, e.g., MODEL PENAL CODE § 2.02(2)(d).

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id.

82. See, e.g., MODEL PENAL CODE § 210.4(1). Negligent homicide is a third degree felony. See *id.* § 210.4(2). A third degree felony is punishable with a sentence of one to five years. See *id.* § 6.06(3).

83. See, e.g., MODEL PENAL CODE § 2.02(2)(c).

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element

between negligence and intent in culpability. Recklessness normally qualifies one for manslaughter, which falls between murder and negligent homicide in the hierarchy of criminal homicide.⁸⁴ Neither negligence nor recklessness shares the purposive quality of intent. The use by judges of the word "intent" to encompass three such distinct mental states,⁸⁵ two of which differ significantly from the meaning of intent in common use, has been a perennial source of semantic and conceptual confusion in criminal law.

Director of Public Prosecutions v. Smith,⁸⁶ an English homicide case, provides a classic example of conflating negligence and intent and demonstrates the parallels between judicial fumbling with mental state in criminal law and in minimum contacts doctrine. Charged with killing a police officer, the defendant in *Smith* lacked purpose to kill the officer but was nonetheless prosecuted for murder under a theory that intent to inflict grievous bodily harm qualified the defendant for murder.⁸⁷ As the drafters of the Model Penal Code noted in criticizing the case, *Smith* "effectively equated" such intent "with what the defendant *as a reasonable man must be taken to have contemplated*, thus erecting an objective rather than a subjective inquiry to determine what the defendant 'intended.'" ⁸⁸ In short, *Smith* treats negligence regarding grievous bodily harm as synonymous with intent to inflict grievous bodily harm and in doing so creates a crime of negligent murder.

B. Purpose and Foreseeability in Minimum Contacts Analysis

In minimum contacts cases such as *World-Wide Volkswagen* and *Burger King*, the Supreme Court treats the word "purposeful" with precisely the same imprecision *Smith* displays regarding intent.⁸⁹ One would think that *Hanson's* purposeful availment requirement would require actual, subjective purpose. But as *Smith* did with intent, *World-Wide Volkswagen* and *Burger King* define purpose as an objective mental state of foreseeability similar to negligence.

exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id.

84. See, e.g., *id.* § 210.3(1)(a). Manslaughter is a second degree felony. See *id.* § 210.3(2). A second degree felony is punishable with a sentence from one to ten years. See *id.* § 6.06(2).

85. See cases cited *supra* note 79.

86. 1961 App. Cas. 290 (appeal taken from Eng.).

87. See *id.* at 299, 333-34.

88. MODEL PENAL CODE § 2.02 commentary at 234 (1985).

89. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-76 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-98 (1980).

Burger King, for example, describes the critical mental state as one of purpose.⁹⁰ But two sentences after stating that “the constitutional touchstone remains whether the defendant *purposefully* established ‘minimum contacts’ in the forum State,”⁹¹ the Court states that what is “critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that [the defendant] *should reasonably anticipate* being haled into court” in the forum.⁹² Just as *Smith* did with intent in the context of murder, the Supreme Court here effectively equates the subjective mental state of purpose with what a defendant should reasonably anticipate, establishing an objective standard closely akin to negligence as the meaning of purpose. Immediately after this passage, the Court returns to discussing purposeful availment, using words such as “deliberately”⁹³ that are consistent with purpose but inconsistent with the objective mental state of what the defendant should reasonably anticipate. Other passages in the same case describe the required mental state as one of “expectation,”⁹⁴ a state of awareness more consistent with recklessness or knowledge than either purpose or what the defendant should anticipate. These passages from *Burger King* suggest a “triple contradiction” about whether the critical mental state in minimum contacts is one of purpose, awareness, or inadvertence.⁹⁵

This comparable clumsiness in the handling of mental state in criminal law and minimum contacts is not surprising. Given that the Justices of the Supreme Court, like other judges, historically have tended to bungle mental state in criminal law,⁹⁶ a similar lack of dexterity in the context of jurisdiction seems entirely consistent. What is disappointing, though, is the

90. See, e.g., *Burger King*, 471 U.S. at 473-74 (“[A] forum legitimately may exercise personal jurisdiction over a nonresident who ‘*purposefully* directs’ his activities toward forum residents. . . . [W]here individuals ‘*purposefully* derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other states for consequences that arise proximately from such activities” (emphasis added) (citation omitted)).

91. *Id.* at 474 (emphasis added).

92. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (emphasis added).

93. *Id.* at 475.

94. *Id.* at 473 (“[T]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers.” (emphasis added)).

95. Jerome Hall criticized the phrase “wilful, wanton negligence” used by courts to describe criminal mens rea as suggesting “a triple contradiction.” Negligence implies inadvertence, wilful implies intent, and wanton implies recklessness. For an explication of Hall’s argument, see MODEL PENAL CODE § 2.02 commentary at 242 (1985):

As Jerome Hall has put it, the judicial “opinions run in terms of ‘wanton and wilful negligence,’ ‘gross negligence,’ and more illuminating yet, ‘that degree of negligence that is more than the negligence required to impose tort liability.’ The apex of this infelicity is ‘wilful, wanton negligence,’ which suggests a triple contradiction—‘negligence’ implying inadvertence; ‘wilful,’ intention; and ‘wanton’ recklessness.”

96. See generally Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (describing the Supreme Court’s “inadequate performance” in dealing with mens rea, “an increasingly important area of its adjudication”).

timing of the confusion found in cases such as *Burger King* and *World-Wide Volkswagen*. By the 1980s, when these opinions were written, many states had adopted the Model Penal Code's precise and simplified treatment of mental state, resulting in clearer, more consistent judicial treatment of criminal mens rea issues in state courts.⁹⁷ Unfortunately, the Supreme Court's handling of mental state in its minimum contacts cases shows no similar signs of improvement.

C. *Framing the Issue of Mental State*

In addition to its failure to distinguish clearly among different mental states, the relational nature of mental states gives rise to a second problem in the Court's minimum contacts cases. Clearly, one may simultaneously have different mental states regarding different things, such as purpose regarding the act of driving a car but ignorance or negligence regarding the fact that the car contains marijuana.⁹⁸ Clarity and consistency in framing the issue of mental state allows us to analyze an individual's mental state with precision.

The minimum contacts cases are wildly inconsistent in their framing of the mental state question. The phrase "purposeful availment" indicates that the critical mental state pertains to availment, but the Court never defines availment. In the passage from *Burger King* quoted above in which the Court gives purpose an objective meaning, the Court says that the defendant's mental state about "being haled into court" in the forum is critical.⁹⁹ Other passages suggest that the critical mental state pertains to the defendant's own conduct,¹⁰⁰ the purchase of a product by forum consumers,¹⁰¹ and the benefits received from the forum.¹⁰²

This chaotic treatment of mental state exacerbates the test's uncertainty and unpredictability. In particular, the lack of consistency about the critical mental state makes the test highly manipulable. The Court can determine that the defendant does or does not have the required mental state by selectively choosing the focal point for the mental state analysis. That

97. See Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575 (1988) ("[T]he Code has promoted clearer, more objective thinking about mental elements of offenses.").

98. See, e.g., *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (involving a defendant who admitted to driving his car purposefully across the Mexico-U.S. border but claimed he did not know that the car contained drugs).

99. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

100. See *id.* at 475-76.

101. See *id.* at 473.

102. See *id.* at 473-74.

choice of focal point currently remains unexamined in the Court's cases and therefore unconstrained by any articulated principles.

Consider a hypothetical case in which the defendant purposefully manufactures a product in her home state. Assume it is not her objective to sell her product in the forum, nor is she aware that such sales are practically certain to occur. In other words, she lacks either purpose or knowledge regarding purchase of her product by forum consumers. Assume also that she should be aware of a substantial likelihood of such purchases in the forum. In such a case, her mental state regarding the sale of her product in the forum is roughly equivalent to what the Model Penal Code calls negligence. Assume also that purpose is the required mental state for minimum contacts analysis. Does the defendant in this hypothetical have purpose? The Court can control the answer to this question by how it frames its analysis of mental state. If it chooses to make the defendant's conduct the focal point of the mental state analysis, then she has purpose. If it chooses to make the purchase of her product by forum consumers the focal point, she lacks purpose.

D. Possible Remedies

How might the Court improve its treatment of mental state? As pointed out above, the Court currently mentions a wide range of mental states in its minimum contacts cases. If it continues to employ an assortment of mental states, the Court must distinguish more clearly among them and be more consistent in its framing of the issue of mental state. In short, the Court needs to do to its treatment of mental state what the Model Penal Code did to the treatment of mens rea in criminal law. Use of an assortment of mental states could complement the proportionality requirement I suggest in Part IV. As in criminal law, the defendant's level of desert regarding the imposition of jurisdictional burdens would increase or decrease in proportion to the level of his mental state.

Another way to clarify the Court's treatment of mental state would be to simplify it by abandoning inquiry into the defendant's subjective mental state in favor of a purely objective standard focusing on the degree of foreseeability. This second alternative strikes me as the more sensible path for reform for several reasons. The consequences of an imposition of jurisdiction are so much less drastic in severity and stigma than imposition of a criminal sanction that our intuitive sense of justice does not demand as searching an inquiry into subjective mental state as that found in many criminal cases. Making the test purely objective simplifies it and avoids the epistemological and practical proof objections raised by subjective

standards.¹⁰³ In the context of summary judgment, for example, the Court has recognized that objective mental states are more amenable than subjective mental states to pretrial resolution by a judge operating without a jury.¹⁰⁴ And despite the rhetorical emphasis on purpose in the Court's "purposeful availment" inquiries, its tendency has been to translate purpose into an objective standard.¹⁰⁵ An objective test based on foreseeability could be integrated into a proportionality requirement by correlating the level of burden to the degree of foreseeability.

IV. PROPORTIONALITY

If the expanding list of factors described in Part I above provides the criteria for the minimum contacts test, how does the Court assess the sufficiency of the facts in a particular case in meeting these criteria? In the language of *International Shoe*, how does the Court "mark the boundary line" between what justifies a state's assertion of jurisdiction over a defendant under the minimum contacts factors and what does not?¹⁰⁶ In this part, I suggest that the Court answer this question by using a proportionality requirement similar to one found in criminal law. In short, the strength of the justification for imposing jurisdiction should be proportional to the degree of burden that jurisdiction actually imposes on the defendant.

A. Fairness, Justice, and Reasonableness

Although the Court has at times been expansive¹⁰⁷ and at other times restrictive¹⁰⁸ in marking this boundary line, it has regularly invoked three reference points. In *International Shoe*, the Court said that requiring the

103. See, e.g., Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISC. L.J. 41, 63-88 (1993) (discussing the difficulties of assessing the mental state of others).

104. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1981) ("There are special costs to 'subjective' inquiries Reliance on the objective reasonableness of an official's conduct . . . should . . . permit the resolution of many insubstantial claims on summary judgment.").

105. See *supra* text accompanying notes 89-95.

106. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

107. Cf. FRIEDENTHAL ET AL., *supra* note 4, § 3.11, at 127 ("The application of the minimum contacts, fair play and substantial justice standard allowed for considerable expansion of state jurisdictional power. A good example of the broad reach of the courts' power under the standard is *McGee v. International Life Insurance Company*."); MARCUS ET AL., *supra* note 10, at 695 ("In terms of general attitude toward the extent of jurisdiction, *McGee* represented the apogee of liberality by the Supreme Court.").

108. See, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958); see also FRIEDENTHAL ET AL., *supra* note 4, § 3.11, at 127 ("If the *McGee* case suggested a newly unlimited jurisdictional reach for state courts, the Supreme Court was quick [in *Hanson*] to remind them that the territorial limits of Pennoyer still were relevant.").

defendant to defend must not offend “‘traditional notions of fair play and substantial justice’”¹⁰⁹ and must be “‘reasonable.’”¹¹⁰ These three reference points—fairness, justice, and reasonableness—recur throughout the Supreme Court’s minimum contacts cases after *International Shoe*.

Unfortunately, the abstract nature of standards such as fairness, justice, and reasonableness gives their meanings a confusing plasticity. Fairness, for example, is often used to refer to quite different, often contradictory notions. Some view fairness as concerned primarily with process. For example, a “fair” trial is one conducted according to prescribed rules.¹¹¹ Others see fairness as concerned primarily with result. In this sense, a “fair” trial is one with an accurate factual outcome.¹¹² For some, justice requires uniformity. Captured in the precept “treat like cases alike,”¹¹³ this view of justice measures treatment of an individual by reference to the treatment of others. A competing view of justice is that it requires individualization. Often expressed in the phrase “just deserts,” it measures “just” treatment of an individual by reference to individual moral desert rather than by reference to the treatment of others.¹¹⁴ And what is reasonable may vary dramatically depending on the perspective and criteria used in assessing reasonableness. In the context of self-defense, for example, reasonableness may vary according to the gender of the defendant.¹¹⁵ In the context of assessing a reasonable attorney’s fee, what is reasonable may depend on whether the criterion is the amount of work invested or the value of the work to the client.¹¹⁶

In its minimum contacts cases, the Court has exploited rather than remedied the inherent vagueness of the terms fairness, justice, and reasonableness. It has never given them specific content, often using them

109. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

110. *Id.* at 317.

111. *See, e.g.,* *McGregor v. Clawson*, 506 S.W.2d 922, 929 (Tex. Civ. App. 1974) (“When we speak of the term ‘fair trial,’ to be accurate we should mean a trial conducted within the framework of procedural and substantive rules prescribed by law . . .”).

112. *See, e.g.,* *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (“In giving meaning to [the right to counsel], we must take its purpose—to ensure a fair trial—as the guide. . . . This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” (emphasis added)); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 86 (1988) (“[T]he Court has expressed a reductionist notion of what a ‘fair trial’ means, defining it merely as a trial designed to produce a reliable outcome.” (emphasis added)).

113. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961).

114. *See, e.g.,* Kent Greenawalt, *Punishment*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE*, *supra* note 36, at 1338.

115. *See, e.g.,* *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (requiring a self-defense jury instruction to be tailored to the defendant’s gender).

116. *Compare* *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir. 1979) (approving a \$1,000,000 attorney fee based largely on value of services to client rather than hours worked by attorney), *with* *Bushman v. State Bar*, 522 P.2d 312 (Cal. 1974) (finding a \$2800 fee unreasonable based on hours worked rather than value to client).

interchangeably and inconsistently. *International Shoe*, for example, indicates that the standards of "fair play and substantial justice" are ex post standards, used to measure whether the defendant's past "contacts" make it fair and just to assert jurisdiction.¹¹⁷ But *World-Wide Volkswagen* treats "fair play and substantial justice" as ex ante standards, used to assess the prospective factors after minimum contacts have been established under the retrospective factors.¹¹⁸ In *Asahi*, the Court referred to its assessment of the prospective factors as bearing on "the determination of the reasonableness of the exercise of jurisdiction,"¹¹⁹ the same inquiry that *World-Wide Volkswagen* refers to as the "fair play and substantial justice inquiry."¹²⁰

In short, it is not clear which conceptions of fairness, justice, and reasonableness govern the minimum contacts test. Conflicting and poorly articulated views of fairness, justice, and reasonableness appear to compete for expression in the Court's minimum contacts cases.

B. Proportionality as a Means for Marking the Boundary

As the preceding discussion demonstrates, a central, elusive question in minimum contacts doctrine is how to determine the sufficiency of a defendant's contacts. What quantity or quality of contacts justifies a state's asserting jurisdiction over a nonresident? The Court has often stated that its method for drawing the "boundary line" between insufficient and sufficient contacts is not "simply mechanical or quantitative"¹²¹ and has referred to fairness, justice, and reasonableness in measuring sufficiency.¹²² Otherwise, the Court has provided little guidance on this question. I suggest that the Court explicitly recognize a principle of proportionality as the primary criterion for determining the sufficiency of a defendant's contacts.

To understand and apply the proportionality requirement discussed in this section, it is necessary to focus precisely on just what it is that requires justification in minimum contacts analysis. Should the concern be with justifying the entire burden defending the suit places on a defendant? Or is the proper focus any *marginal* increase in burden that would result if the

117. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

118. See FRIEDENTHAL ET AL., *supra* note 4, § 3.10, at 122 n.9 ("The Supreme Court in [*World-Wide Volkswagen*] explicitly adopted the two-pronged approach, characterizing the minimum contacts inquiry as a threshold question. *Only when minimum contacts are found to exist among the parties and the forum do fair play and substantial justice become relevant considerations.*" (emphasis added)).

119. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

120. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (citations omitted).

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

122. See *supra* Section IV.A.

defendant defended the suit in the forum chosen by the plaintiff rather than at home?

Justice Brennan implicitly adopted the latter focus on the marginal increase in burden in his dissent in *World-Wide Volkswagen*, finding the burden in that case slight because if the suit went forward in the forum “the defendant would bear almost no burden or expense beyond what he would face if the suit were in his home State.”¹²³ Since a state clearly can assert jurisdiction over its own citizens, the defendant’s home state could impose on her the burden of defending at home, regardless of magnitude, without a constitutionally valid complaint from the defendant. Such a burden is simply a result of the plaintiff’s choice to sue the defendant. In most cases, this burden inevitably will be borne by the defendant either at home or elsewhere.

By contrast, any marginal increase in the burden of defending the suit due to the defendant’s having to defend in a foreign forum results from the plaintiff’s choice of forum rather than from her choice to sue. Since the plaintiff’s choice of forum, rather than her choice to sue, is the primary concern of minimum contacts inquiry, the only burden that should count for minimum contacts purposes is the marginal increase attributable to that decision. Expenses for travel and local counsel and the application of less favorable and more costly procedural, evidentiary, or substantive rules are examples of things that might produce a marginal increase in the burden of defending.

This marginal difference in burden will vary from case to case and is capable of ranging from nonexistent to severe. At the *de minimis* end of the burden spectrum, imagine a case in which the parties, citizens of different but adjoining states, live in cities in their respective states that are geographically quite close, such as Philadelphia, Pennsylvania and Camden, New Jersey, or Kansas City, Kansas and Kansas City, Missouri. Assume that the relevant substantive, procedural, and evidentiary rules that would be applied in both the forum and the home state are the same and that, because of the geographical proximity, the lawyer who would represent the defendant if sued in her home state can represent her in the forum state in this particular lawsuit at the same cost as in her home state. In such a case, the forum’s assertion of jurisdiction may impose no marginal increase in burden on the defendant. Litigating in the out-of-state forum in such a case may in fact be less burdensome than if the defendant were sued in a distant part of her home state.¹²⁴ In short, the forum’s

123. *World-Wide Volkswagen*, 444 U.S. at 304 (Brennan, J., dissenting).

124. *See id.* at 301 n.1 (Brennan, J., dissenting) (“In fact, a courtroom just across the state line from a defendant may often be far more convenient for the defendant than a courtroom in a distant corner of his own State.”).

assertion of jurisdiction would result in no marginal increase in the cost to the defendant of defending the case.

At the severe end of the burden spectrum, by contrast, consider a hypothetical case in which the forum state and the defendant's home state or country are far from one another, such as California and Japan, or Louisiana and Maine. Assume too that the forum would apply substantive, procedural, and evidentiary rules much less favorable and more costly to the defendant than those that would apply in her home state. Because of distance and the differences in applicable laws, the defendant needs to hire local counsel in addition to her regular home state lawyer. In short, litigating the case in such a forum would result in a significant marginal increase in the burden of defending the suit compared to defending at home. One could easily imagine other scenarios in which the magnitude of the burden falls somewhere between these two extremes.

Both desert and utility are matters of degree as well. A defendant that routinely sells a large volume of its product in the forum has a higher level of desert regarding the burden of responding to a lawsuit in the forum than one that occasionally sells a product there, and the occasional seller has a higher level of desert than a defendant that sold a product in the forum on a single occasion. Similarly, a defendant who acts with purpose regarding the forum has a higher level of desert than one who lacks such purpose and acts with a mental state akin to recklessness or negligence. And the utility of the forum's assertion of jurisdiction also can vary across a wide spectrum. In the most extreme cases, falling at either end of the utility spectrum, all of the minimum contacts prospective factors could weigh in favor of or against the utility of the forum's exercise of jurisdiction. In more typical cases, some utility factors could weigh in favor of and some against the utility of the forum's exercise of jurisdiction, with net utility falling somewhere in the middle of the spectrum.

In sum, burden, desert, and utility are continuous, not dichotomous. Unlike death, they exist in degrees that may vary greatly. The Court's current theoretical approach tends to be dichotomous: You simply have minimum contacts or you do not. Like a two-position on-off switch used to control the volume on a radio, such an approach is inappropriate for notions such as burden, desert, and utility in particular or for due process analysis generally.¹²⁵ By explicitly using a proportionality requirement, the Court would acknowledge and directly address the variable nature of each of these critical elements in minimum contacts analysis.

In addition to acknowledging the continuous nature of these key ingredients, the Court should also establish some correspondence among

125. Cf. Redish, *supra* note 5, at 1138 ("[A] due process decision is generally a matter of degree.").

them—that is, the Court should require proportionality between the degree of burden imposed in a particular case and the degree of desert and utility present in the same case. Such a requirement would help answer the elusive sufficiency question in minimum contacts by providing an explicit criterion where one currently does not exist. A defendant's minimum contacts would be sufficient if the degree of desert and utility revealed by the minimum contacts factors were roughly proportional to the degree of burden imposed.

Concern with proportionality permeates many different areas of law, especially criminal law. One finds it in the constitutional requirement of proportional punishment derived from the Eighth Amendment's prohibition of cruel and unusual punishments.¹²⁶ One also finds it in criminal statutes. The basic architecture of the law of homicide, for example, reveals a spectrum of offenses ranging from negligent homicide to murder, the severity of which varies in direct proportion to the mens rea of the defendant.¹²⁷

Proportionality in the context of minimum contacts jurisdiction has strong intuitive moral appeal, which may explain why individual Justices have at times expressed concern for proportionality in the context of minimum contacts. In his dissent in *Hanson*, Justice Black refers to a “disproportionate burden on a nonresident defendant” as offensive to *International Shoe's* “traditional notions of fair play and substantial justice” standard.¹²⁸ But he never states the standard by which such disproportionality might be measured. And Justice Brennan, dissenting in *World-Wide Volkswagen*, states that “[b]ecause lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts.”¹²⁹ With this statement, Justice Brennan acknowledges the continuous nature of both burden and justification and suggests a correlation between them.

In more recent cases, the Court has used a two-tiered scheme to measure the sufficiency of a defendant's contacts, reflecting a crude sort of

126. See *Solem v. Helm*, 463 U.S. 277, 284 (1983) (stating that the Eighth Amendment's “final clause prohibits . . . sentences that are disproportionate to the crime committed”).

127. See, e.g., MODEL PENAL CODE § 210 (1980) (dividing homicide into murder, manslaughter, and negligent homicide based primarily on the defendant's culpability).

128. *Hanson v. Denckla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting) (emphasis added). The sentence from which the language in the text is taken reads as follows:

It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as “traditional notions of fair play and substantial justice.”

Id. at 258-59 (Black, J., dissenting) (citation omitted).

129. *World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting).

proportionality.¹³⁰ With a lesser level of contacts, jurisdiction can be exercised over the defendant for a case related to the contacts, called specific jurisdiction. With a higher level of contacts, jurisdiction can be asserted for cases unrelated to the contacts, called general jurisdiction.¹³¹ In short, the greater burden of responding to both related and unrelated cases is justified by a higher level of contacts; the lesser burden of responding only to related cases is justified by a lower level of contacts.

But the concern with proportionality one may find latent in such passages remains in the shadows. And the specific-general jurisdiction scheme simply replaces the two-position approach with three positions. It still falls short of responding to the many variations one may encounter in the degrees of burden, desert, and utility implicated in minimum contacts cases.

V. A MIXED THEORY

A. *One Step or Two?*

The Supreme Court has been erratic on the basic architecture of the minimum contacts test. Early cases such as *International Shoe* and *McGee* used a "very loose, unstructured approach,"¹³² sometimes called a "unified approach,"¹³³ which does not treat retrospective and prospective factors separately. Starting in 1980, *World-Wide Volkswagen* and some later cases such as *Burger King* and *Asahi* adopted a "two step"¹³⁴ or "two-pronged"¹³⁵ approach, dividing retrospective and prospective factors into distinct analytical components. Other cases after *World-Wide Volkswagen*, such as *Calder* and *Keeton*, returned to the original unstructured approach of *International Shoe* and *McGee*. As with the addition of factors, the cases that adopt the two-step approach neither acknowledge nor attempt to justify alteration of the test.¹³⁶ Consequently, there is now doubt about the structure of the minimum contacts test. More specifically, there is doubt about whether the minimum contacts test has just one "loose" step mixing

130. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984).

131. The specific and general jurisdiction classification scheme was originally suggested in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-63 (1966).

132. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 290 (1994).

133. See, e.g., FRIEDENTHAL ET AL., *supra* note 4, § 3.10 at 122 n.9.

134. TEPLY & WHITTEN, *supra* note 132, at 290-91.

135. FRIEDENTHAL ET AL., *supra* note 4, § 3.10 at 122 n.9.

136. See *id.* ("Many later decisions appear to sever the standard into a two-pronged test. These decisions neither explicitly admit that the test has been altered nor attempt to base the bifurcation upon the text of *International Shoe* itself.").

retrospective and prospective factors or two steps treating retrospective and prospective factors separately.

In addition to this ambiguity about whether the test has one step or two, the cases that use the two-step approach give mixed signals as to how the two components interact. *World-Wide Volkswagen* treats the retrospective component as a necessary condition, fulfillment of which is assessed independent of any inquiry into the prospective component.¹³⁷ *Asahi* treats the prospective component the same way—as a necessary condition the sufficiency of which is assessed independently of the retrospective component.¹³⁸ *Burger King*, though, suggests the two components are interdependent, stating at one point that prospective factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing” of the retrospective factors.¹³⁹ In the next sentence, *Burger King* indicates that if under the retrospective component the defendant has purposefully directed his activities at forum residents, then the burden shifts to the defendant to make a compelling showing against jurisdiction under the prospective component.¹⁴⁰ Thus, adoption of the two-step approach gives rise to other ambiguities.

B. *Integrating Desert and Utility*

An important issue raised by the desert/utility framework discussed in Section I is how to integrate desert and utility, with their distinct perspectives and criteria, into a single minimum contacts test. The retrospective justice and prospective utility paradigms can work in harmony. A lengthy prison term for a highly culpable and dangerous defendant, for example, may be both deserved by the defendant and useful to society in preventing future crime through deterrence and incapacitation. Imposing damage liability on a negligent tortfeasor can both serve retrospective corrective justice by compensating a victim for past damages and simultaneously be socially useful in deterring other potential tortfeasors. Similarly, a state's imposition of jurisdiction on a foreign corporation may be done retrospectively just because the corporation deserves it, having purposefully marketed and sold a large quantity of its

137. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (“Because we find that petitioners have no ‘contacts, ties, or relations’ with the State of Oklahoma, the judgment of the Supreme Court of Oklahoma [upholding jurisdiction] is [r]everse[d].” (emphasis omitted) (citation omitted)).

138. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (“Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.”).

139. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

140. See *id.*

products in the forum. Such an imposition of jurisdiction may be socially useful if the state is an efficient location in which to conduct the litigation.

But as their viewpoints and criteria suggest, there is also significant potential for tension between the retrospective justice and prospective utility paradigms. Punishing an innocent person who appears guilty to the public could be useful in deterring future offenders but would offend retributive justice.¹⁴¹ Rehabilitating or deterring chronic shoplifters might require lengthy incarceration out of proportion to the culpability of shoplifting.¹⁴² Vicarious liability in tort may be socially useful in terms of deterrence¹⁴³ but contrary to retrospective justice, since it imposes the burdens of liability without proof of past culpability.¹⁴⁴ A forum state to which a divorced, custodial parent and her children have moved and in which they have resided for years may, from society's perspective, be a useful place to litigate a child support matter brought by the custodial parent. But imposition by the forum of jurisdiction on the noncustodial parent may be retrospectively unjust if undeserved by the defendant.¹⁴⁵ As these cases suggest, the purposes associated with the minimum contacts test may pull in opposite directions. Concern with individual justice, for example, would not dictate efficiency as a factor; neither utility nor federalism would be concerned with the defendant's past mental state. In part, it is the divergent nature of these purposes and their respective focal points that lends current doctrine an internally inconsistent, contradictory quality.

One of the advantages of articulating desert and utility as the focal points of the minimum contacts test is that it forces us to confront this tension. Paul Robinson has written about the need for developing mixed theories in criminal law to deal with just such tensions. The retrospective and prospective purposes of the criminal law—just punishment, deterrence,

141. See, e.g., MOORE, *supra* note 41, at 238-42 (discussing the notion of "scapegoating" from both utilitarian and desert perspectives).

142. Cf. Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1173 (1974) (arguing that punishment in excess of desert is equivalent to punishing the innocent, even if it serves other purposes); Andrew von Hirsch & Lisa Maher, *Should Penal Rehabilitationism Be Revived?*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 25, 27-28 (discussing the tension between rehabilitationism and desert).

143. See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996).

144. Similarly, strict liability may also be socially useful but contrary to retrospective justice. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 534 (5th ed. 1984):

"Strict liability," . . . as that term is commonly used by modern courts, means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of duty to exercise reasonable care, i.e., actionable negligence. This is often referred to as liability without fault.

Id.

145. See *Kulko v. Superior Court*, 436 U.S. 84, 100-01 (1978).

incapacitation, and rehabilitation—frequently conflict because, Robinson writes, “each purpose requires consideration of different criteria.”¹⁴⁶ When such conflicts occur,

[u]ltimately a choice must be made to follow one purpose at the expense of another. Yet, when faced with conflicting purposes, judges, legislators, and sentencing-guideline drafters have no principle to guide that decision. In the absence of a guiding principle, the choices made are at best inconsistent. . . . At worst, the absence of a guiding principle fosters arbitrariness or prejudice.¹⁴⁷

The same can be said about the conflicts between desert and utility in minimum contacts cases. The minimum contacts doctrine fails even to acknowledge—much less provide guidance in resolving—such conflicts. The result, as Robinson suggests, is the sort of inconsistency and arbitrariness that has plagued the Supreme Court’s minimum contacts cases for over five decades.

How should we deal with this tension? In the theoretical debate over the underlying purposes of tort law, advocates of prospective utility or retrospective justice have tended to disparage or ignore the opposing viewpoint.¹⁴⁸ Similarly, in the minimum contacts debate, some scholars have argued that the Court should adopt either an exclusively prospective or exclusively retrospective viewpoint.¹⁴⁹ Another way to handle the tension between social utility and individual justice can be found in the work of scholars in criminal law¹⁵⁰ and more recently in tort law¹⁵¹ who advance mixed theories that express concern for both prospective utility and retrospective justice. Given the Court’s tendency to use both retrospective and prospective components in its minimum contacts doctrine, such mixed theories may provide useful models for accommodating the tension between these two components. Explicitly adopting such a theory would also help clarify the ambiguity about the test’s current architecture.

146. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 19-20 (1987).

147. *Id.* at 20.

148. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1806 (1997) (describing “the extent to which each school commonly downplays or disparages the other”).

149. See, e.g., Redish, *supra* note 5, at 1137-42; Stravitz, *supra* note 5, at 811-12.

150. Criminal scholars who have written on mixed theories of criminal law include H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-13 (1968); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 179-209 (1982); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 6-19 (1993); Greenawalt, *supra* note 114, at 1342-43; and Robinson, *supra* note 146.

151. See, e.g., Schwartz, *supra* note 148 (attempting to develop a mixed theory of tort law).

C. *Justifying With Utility, Limiting With Desert*

What form should a mixed theory of minimum contacts take? In my view, the form of mixed theory that seems most promising is modeled on a form of mixed theory, popular among criminal law theorists, that uses utility as a justifying principle¹⁵² and desert as a limiting principle.¹⁵³ As described by Michael Moore, this form of mixed theory

asserts that we do not punish people *because* they deserve it. Desert enters in, this theory further asserts, only as a limit on punishment: We punish offenders *because* some net social gain is achieved, such as the prevention of crime, but *only if* such offenders deserve it. It is, in other words, the achieving of a net social gain that justifies punishment, whereas the desert of offenders serves as a limiting condition on punishment but as no part of its justification.¹⁵⁴

A minimum contacts mixed theory based on this model would have multiple steps, each explicitly tied to an underlying purpose of the minimum contacts test. There would be either two or three steps, depending on whether the Court ultimately retains or jettisons federalism as one of the test's purposes.¹⁵⁵

If federalism is retained as a purpose of the test, the Court would require as a first step that the prospective utility calculation regarding the forum's assertion of jurisdiction be broad enough to include and give appropriate weight to factors other than the interests of the forum and its citizens (such as efficiency from an interstate perspective). In other words, in pursuing its utility inquiry, the Court would require the forum to include and give adequate weight to the various prospective factors that call on the forum to look beyond its own parochial interests. This step would give expression to the purpose of federalism.

As a second step, the Court would determine whether the forum's exercise of jurisdiction would produce adequate utility. While the forum need not be the optimal place for resolving the case from a utilitarian perspective, the Court could nonetheless require either (1) some net gain in utility compared with possible alternative fora; or (2) sufficient proportionality between the net utility resulting from the forum's exercise of jurisdiction and the degree of marginal burden imposed on the defendant.

152. See, e.g., Robinson, *supra* note 146, at 29-31 (discussing determining and limiting principles in mixed theories of criminal law).

153. See, e.g., RICHARD J. BONNIE ET AL., CRIMINAL LAW 10-11 (1997) (discussing retribution as a limiting principle in criminal law).

154. MOORE, *supra* note 41, at 237 (footnote omitted).

155. See *supra* Section II.B.

This step would give expression to the purpose of advancing prospective utility.

As a third step, the Court would express the purpose of protecting the individual defendant by drawing on the notion of desert. It would require the Court to reject an imposition of jurisdiction, regardless of its utility, if such an imposition would be grossly disproportionate to the defendant's desert as determined by the test's retrospective factors.

In summary, the Court would ask and answer the following questions:

1. Is the utility inquiry sufficiently broad to satisfy federalism?
2. Is the forum's exercise of jurisdiction sufficiently useful?
3. Is the forum's exercise of jurisdiction grossly unjust to the individual defendant from a desert perspective?

This form of mixed theory has several things to recommend it. It gives explicit expression to each of the purposes identified in Part II. It can easily be modified if, as suggested in *Burger King*, the Court ultimately decides to reject federalism as an animating purpose by deleting step one and turning the test into two steps.¹⁵⁶ Also, it is consistent with the historical trend in the Court's minimum contacts cases from *International Shoe* to *Asahi* toward giving weight to both desert and utility and with the recent prominence of utility, which was expressed with particular emphasis in *Asahi*.

Recognizing utility as the primary determining principle and desert as a limiting principle in minimum contacts doctrine is consistent with the Supreme Court's larger due process jurisprudence outside the context of minimum contacts. Laurence Tribe describes the Supreme Court's due process jurisprudence as reflecting two "alternative conceptions of the primary purpose of procedural due process," which he labels "intrinsic" and "instrumental."¹⁵⁷ These "competing visions"¹⁵⁸ are analogous in broad philosophical perspective to the competing retrospective justice and prospective utility paradigms in minimum contacts analysis. The intrinsic conception grounds due process rights in the dignity of the person seeking the due process right.¹⁵⁹ This intrinsic conception of due process could be restated as expressing the view that individuals deserve due process rights on grounds of personal dignity. What Tribe terms the instrumental conception, by contrast, "views the requirements of due process as

156. See *Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985).

157. TRIBE, *supra* note 8, § 10-7, at 666.

158. *Id.*

159. See *id.* ("One approach begins with the proposition that there is intrinsic value in the due process right to be heard, since it grants to the individuals or groups against whom government decisions operate the chance to participate in the process by which those decisions are made, an opportunity that expresses their dignity as persons.").

constitutionally identified and valued less for their intrinsic character than for their *anticipated consequences* as a means for assuring that the *society's* agreed-upon rules . . . are in fact accurately and consistently followed.”¹⁶⁰ Again, this instrumental conception could be restated as one valuing due process rights for the prospective utility of accurately enforcing legal rules.

The instrumental view clearly has dominated the Supreme Court's due process jurisprudence, with the intrinsic view receiving occasional acknowledgment.¹⁶¹ Making the instrumental conception of utility in minimum contacts a justifying principle and the intrinsic conception of desert a secondary limiting principle is therefore consistent with the Supreme Court's general preference for instrumental over intrinsic approaches to due process.

Finally, casting desert as a limiting rather than a justifying principle in minimum contacts analysis seems to fit well with the essentially negative way both desert and due process claims are raised in the context of minimum contacts. The classic “just deserts” approach in criminal law views the need for punishment of deserving defendants as the “ethical imperative”¹⁶² that drives criminal law. On this view, all blameworthy defendants should be punished simply because they deserve it, regardless of the prospective utility of punishment.¹⁶³ Casting desert as a similar ethical imperative makes no sense in the minimum contacts context. We feel no moral imperative to subject all nonresidents who satisfy the minimum contacts retrospective factors to jurisdiction by the forum just because they deserve it. We do not demand, for example, subjection to forum jurisdiction for every nonresident who purposefully sells a large volume of products in the forum, as a retributivist would demand punishment for every purposeful killer simply because he deserves it.

Many criminal law theorists, however, accept desert as a limiting principle on the application of consequentialist views of punishment.¹⁶⁴ On this view, criminals should be punished if it is socially useful, but *only if*

160. *Id.* § 10-7, at 666-67 (emphases added).

161. *See id.* § 10-7, at 671.

The Court, while nonetheless pursuing an almost exclusively instrumental vision in its due process jurisprudence, has at times acknowledged, that procedural due process is of intrinsic significance, alluding to considerations weighing in favor of giving an individual procedural protections well beyond those that might be justified solely by the need to make an accurate determination.

Id.; *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 524 (4th ed. 1991) (“The Supreme Court has tended to view its decisions on necessary procedures under the due process clause in an essentially *utilitarian* fashion.” (emphasis added)).

162. BONNIE ET AL., *supra* note 153, at 10.

163. *See* MOORE, *supra* note 41, at 236 (“A retributivist theory is necessarily nonutilitarian in character, for it eschews justifying punishment by its tendency to achieve any form of net social gain. Rather, retributivism asserts that punishment is properly inflicted because, and only because, the person deserves it.”).

164. *See id.*; *see also* PACKER, *supra* note 46, at 67-70.

they deserve punishment and only if the punishment is proportional to their desert. The crime of shoplifting, a relatively minor crime from a desert perspective, might be rampant in a particular jurisdiction. Punishing with severe prison terms both innocent persons strongly suspected of shoplifting and persons actually guilty of shoplifting might send a powerful general deterrent message. But even a jurisdiction that accepted deterrence as the determining principle for punishment would refrain from punishing in this way if it accepted desert as a limiting principle.

Desert as just such a limiting principle makes sense in the minimum contacts context. Civil defendants generally are dragged into court primarily for the utilitarian reason of aiding in the resolution of a lawsuit to enforce the substantive law. But we think it just to ask them to submit to this utilitarian demand *only if* they can be said to deserve that imposition.

Recognizing desert as a limiting principle allows it to act as a shield against society's tendency to use individuals merely as means to collective social goals. This shielding quality fits well with the way due process claims are raised in the minimum contacts context. When a defendant complains in a minimum contacts case about being forced to participate in a forum's litigation process, describing her complaint as a claim *for* due process is a bit awkward. The Supreme Court has stated that "[t]he fundamental requisite of due process of law is the opportunity to be heard."¹⁶⁵ A defendant making a due process claim typically seeks participation in the process for resolving a dispute, most often through a hearing from a government refusing her such participation. In *Fuentes v. Shevin*, for example, Mrs. Fuentes wanted the chance to participate in a hearing about the seizure of her stove and stereo.¹⁶⁶ The elderly patients in *O'Bannon v. Town Court Nursing Center*¹⁶⁷ wanted to participate in a hearing about their nursing home being decertified as eligible to receive Medicare/Medicaid payments. The lawyers in *Leis v. Flynt* wanted to participate in a hearing about their *pro hac vice* admission to Ohio's courts.¹⁶⁸

In a minimum contacts case, by contrast, the defendant is making the reverse of the typical due process claim. Rather than seeking to participate in a state's legal process, she wants to be shielded from coerced participation. This idea of due process as a shield from coerced participation is captured in *Hanson's* language about a due process

165. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). In *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), the Court similarly emphasized that "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard'"

166. 407 U.S. at 71.

167. 447 U.S. 773 (1980).

168. 439 U.S. 438 (1979).

“guarantee of immunity from inconvenient or distant litigation”¹⁶⁹ and *World-Wide Volkswagen*’s description of one of the minimum contacts test’s functions as protecting “the defendant against the burdens of litigating in a distant or inconvenient forum.”¹⁷⁰ It might be more accurate, then, to describe such a defendant’s claim as one for protection *from undue process* rather than a claim for due process. Expressing desert as a limiting principle is consistent with this attitude toward due process as a shield against injustice.

VI. CONCLUSION

On Saturday afternoons, my local public radio station airs a cooking show featuring a game called “Stump the Cook.” A listener calls in with a list of items occupying space in his refrigerator and challenges the show’s host to create something edible and appetizing from the random ingredients. The minimum contacts test poses a similar challenge: How does one take the motley assortment of ingredients strewn throughout the Court’s minimum contacts cases and turn them into a coherent, sensible theory of personal jurisdiction for nonresident defendants?

Discarding what one finds in existing minimum contacts doctrine and starting fresh may be an easier and more promising route to a satisfying theory of personal jurisdiction. As noted earlier, however, the Supreme Court has shown little inclination to discard and a strong inclination to keep, use, and add to the ingredients currently found in minimum contacts analysis. Given that attitude, the central challenge is how to make better use of what is currently there. A mixed theory of personal jurisdiction such as the one advanced in this Essay, blending notions of desert, utility, and proportionality, would do just that. It would make use of all the current minimum contacts factors, allow for new additions to both the desert and utility components, and blend them in a way that is both just and workable.

Such a theory will not cure all the ambiguities found in the minimum contacts doctrine. Desert and proportionality are difficult to assess, and each is subject to measurement by differing and often conflicting standards. Desert, for example, may be gauged by internal fault or resulting harm. Calculations of utility are similarly freighted with weighing and common metric problems. But as with all legal rules, the standard of acceptability for a theory of personal jurisdiction should not be perfection, but whether the theory improves on the current state of doctrine. And, in comparison with

169. *Hanson v. Denckla*, 357 U.S. 235, 250 (1958).

170. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

the current state of the minimum contacts test, a mixed theory such as that suggested in this Essay would represent a significant increase in both coherence and rationality.