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JURISDICTION—LIBEL—First Amendment's Role in Determining Place of Trial in Libel Actions

State and federal courts have often displayed a reluctance to entertain libel suits against newspapers when jurisdiction over the defendant is based solely upon the distribution of a small number of newspapers within the forum state.¹ Undoubtedly, one of the reasons for this hesitation is the mischief that can be worked by a simultaneous, literal application of the rules of libel and the rules of jurisdiction. A common view of libel places the tort at the point of "publication," that is, at the point of communication to third parties.² Moreover, most states have now enacted statutes which provide that the commission of a single tort within the state is sufficient to justify the exercise of jurisdiction by the state over the tortfeasor.³ When

1. *E.g.*, *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964); *Walker v. Field Enterprises*, 332 F.2d 632 (10th Cir. 1964); *Perna v. Dell Publishing Co.*, 240 F. Supp. 268 (D. Mass. 1964); *Breckenridge v. Time, Inc.*, 253 Miss. 835, 179 S.2d 781 (1965). On the other hand, there are cases in which jurisdiction was exercised despite the defendant's protests that circulation of his publication within the forum state was too small. *E.g.*, *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966) ("wide circulation"—no figures); *Orioni v. Bulletin Co.*, 258 F. Supp. 359 (D.D.C. 1966).

2. This rule originated in *Duke v. Harmer*, 117 Eng. Rep. 75 (Q.B. 1849), found in *RESTATEMENT OF THE LAW OF CONFLICTS OF LAWS* § 377, n.5, at §57 (1934).

3. *E.g.*, *ILL. REV. STAT.* ch. 110, § 17 (1965); see *Elkhart Eng'r Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965).

the two rules are combined, they interact to make the publisher who mails a single copy of his newspaper into a state the potential defendant of a libel suit in that state, regardless of the distance between the forum and the publisher's business and editorial offices or his place of publishing.⁴

The seeming unfairness of basing jurisdiction solely on such ordinarily inconsequential acts as mailing a newspaper into another state has troubled some courts.⁵ Traditionally, the validity of such a jurisdictional basis would be judged against the fourteenth amendment standard of "fair play."⁶ In several recent cases, however, courts have brought to bear constitutional standards of free speech as well as of fairness in dealing with the problem of jurisdiction over the out-of-state defendant in a libel action. The Court of Appeals for the Fifth Circuit, in deciding *New York Times Co. v. Connor*, ruled that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."⁷ Shortly after this pronouncement the Court of Appeals for the Second Circuit, in *New York Post v. Buckley*,⁸ rejected the *Connor* position and proposed instead that first amendment considerations be handled through the doctrine of forum non conveniens. In a third case, *Curtis Publishing Co. v. Golino*,⁹ the Fifth Circuit, which had decided *Connor*, declared that jurisdiction might be acquired more easily where the defendant is a national magazine rather than a newspaper.¹⁰ This Note attempts an analysis of the rules formulated in these cases and the criticism and commentary, both judicial and academic, which have been directed at them.

I. THE CASES

Connor involved a newspaper article on racial tensions in Birmingham, Alabama, which criticized the plaintiff as well as the general community. Jurisdiction was based upon the publication of the alleged libel within the state: approximately 395 copies of the *New York Times* were mailed daily (2,455 on the weekend) into Alabama at that time. The rule formulated by the *Connor* court, requiring

4. *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966), is illustrative of the problem involved although in this instance the court found that it was without jurisdiction.

5. *E.g.*, *Buckley v. New York Times Co.*, 338 F.2d 470, 475 (5th Cir. 1964) ("Such is not enough to make it reasonable and just . . . for the State of Louisiana to enforce against them the obligations arising out of such activities").

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

7. 365 F.2d 567, 572 (5th Cir. 1964).

8. 373 F.2d 175 (2d Cir. 1967).

9. 383 F.2d 586 (5th Cir. 1967).

10. The *Connor* and *Golino* opinions were both written by Judge Thornberry. The other two members of the court were not the same on these two occasions.

a "greater showing of contact," was designed to protect publishers with minimal circulation in a state from the disproportionate risks of bias-inflated jury verdicts.¹¹ The court felt that such protection was necessary not so much for the publisher's sake as for the preservation of vital interests of the people of the state, since the publisher would be likely to cease distribution of his publication in any state "where the size of circulation does not balance the danger of this liability."¹²

Buckley involved neither small circulation nor inflammatory racial issues. Mail circulation of the *New York Post* in Connecticut, where suit was brought, was placed at an average of 1,707 copies daily. The precise number of copies "tucked each day under the arms of commuters" was unknown, but the court indicated its belief that the number was quite substantial.¹³ The distances between the defendant and the forum were also very different in *Connor* and *Buckley*: in the former the *New York Times* was summoned from New York to Alabama; in the latter the *New York Post* was summoned from New York to Fairfield County, Connecticut, only forty miles from New York City.¹⁴ The *Buckley* court considered the *Connor* precedent and rejected it, both in application to the facts of the *Buckley* case and in principle. In place of the *Connor* rule a modified doctrine was suggested: "the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature"¹⁵ Even as modified, however, the doctrine was of no avail to the *New York Post*. Lack of substantial inconvenience and of regional or racial prejudice ruled out any application of the doctrine of *forum non conveniens*.

The *Golino* case involved a magazine rather than a newspaper. The article containing the alleged libel discussed organized crime. Circulation of the defendant's publication, the *Saturday Evening Post*, consisted of 5,000 to 6,000 newsstand sales and 54,000 to 55,000 subscription copies each week. Judge Thornberry, author of both the *Golino* and *Connor* decisions, distinguished *Connor* on the basis of circulation and the nature of the publication. With respect to the latter the court said:

The existence of a newspaper, no matter how popular, depends primarily upon circulation in the vicinity of its publication. Circulation in other areas may well be welcomed, but it is not critical to

11. 365 F.2d at 572.

12. *Id.* For a recent discussion of the general problems of long-arm jurisdiction over out-of-state publishers, see Note, *Can the "Long-Arm" Reach Out-of-State Publishers?*, 43 NOTRE DAME LAW. 83 (1967).

13. 373 F.2d at 184.

14. Suit was brought in the state court, but the case was removed to the federal court.

15. 373 F.2d at 183-84.

the newspaper's continued existence. . . . Such is not the case with a publisher of a national magazine. The primary function of such a business is to sell as many magazines as possible in every state of the union, and to that end the corporation actively directs its business.¹⁶

II. CRITICISMS OF CONNOR

The *Buckley* court was not the only source of criticism of *Connor*. Law review commentary has been almost uniformly unfavorable to the incorporation of first amendment principles in questions of jurisdiction.¹⁷ Four main arguments have been advanced: (1) permitting first amendment policy to affect rules of jurisdiction is a misapplication of the concept of due process; (2) special protection for out-of-state publishers is unfair to defamed plaintiffs; (3) special protection for out-of-state publishers is unnecessary; and (4) even if special protection is necessary, it is supplied adequately by the rule of *New York Times v. Sullivan*.¹⁸

A. *The First Amendment, Rules of Jurisdiction, and Due Process*

The *Buckley* court expressed its belief that while publishers should be accorded various protections by procedural rules,

such considerations go not to "jurisdiction" over the defendant . . . but to the consistency with the First Amendment's objectives in a certain case. The basis for dismissal [of the libel suit], in other words, would not be the minimum contacts requirement of the Fourteenth Amendment due process clause as such. . . . [T]he office served by the Fourteenth Amendment would be simply the making of the First applicable to the states. . . . Putting the matter in a slightly different way, the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters.¹⁹

Buckley thus acknowledged that the first amendment is effective against the states by virtue of the fourteenth amendment,²⁰ and that

16. 383 F.2d at 590

17. Comment, *Constitutional Limitations to Long-Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967); Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967); Note, *Exercise of Jurisdiction Over a Newspaper Vacated on the Basis of the Fifth Amendment*, 35 FORDHAM L. REV. 726 (1967); Comment, *Due Process and First Amendment Considerations in Libel Cases*, 52 IOWA L. REV. 1034 (1967); Recent Case, *Foreign Publishing Corporation Subject to Suit in Connecticut for Libel; in Personam Jurisdiction Over News Media Held Governed by First Amendment Considerations of Parties' and Public's Interests and Not by That Amendment's Application to "Minimum Contacts" Requirement of Due Process Clause*, 4 SAN DIEGO L. REV. 347 (1967); Recent Case, *First Amendment Requires a Greater Showing of Contact in a Libel Action To Satisfy Due Process Than Is Necessary in other Types of Actions*, 20 VAND. L. REV. 921 (1967).

18. 376 U.S. 254 (1964).

19. 373 F.2d at 183.

20. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

thus applied the first amendment has a proper role in determining the place of trial. Only the characterization of this role as "jurisdictional" is rejected. In other words, the first amendment does not prevent the *existence* of jurisdiction in a given state, but it may prevent the *exercise* of that jurisdiction. Such a metaphysical distinction has the advantage of preserving the exclusive status of "fairness" as the standard for jurisdiction, but it poses a difficult question: what exactly is "jurisdiction" that cannot be constitutionally exercised?

If the result reached in the *Connor* case is a desirable one, it would seem more candid to accept the theory behind it as an exception to the strict test of "fairness" which is generally applied than to force the theory into a less innovative guise.

B. *Fairness to the Plaintiff*

The *Connor* rule has been assailed as being unfair to the libel plaintiff in at least two ways. First, it is said, *Connor* denies the libel plaintiff his traditional right to have his injury measured by a jury familiar with the standards of the community in which the loss was suffered (usually, of course, the plaintiff's domicile if it was one of the places of publication).²¹ This "right," however, is far from traditional. Before 1961 Alabama had no long-arm statute whereby its courts might have asserted jurisdiction over the *New York Times*.²² Indeed, before 1955 no state had a statute that would have permitted jurisdiction on the basis of newspapers mailed into a state.²³ But apart from the recent origins of any broad right to a trial before jurors from the plaintiff's community, there are other reasons to doubt the wisdom of allowing local evaluation of the plaintiff's injuries. While a local jury may be in the best position to gauge such imponderable injuries as the plaintiff's loss of standing in the community, the same jury is most likely to fall prey to local prejudices. The \$500,000 verdicts awarded in *Walker v. Savell*²⁴ and *New York Times v. Sullivan*,²⁵ verdicts which survived all the way to the Supreme Court, should serve as warnings that local understanding is sometimes inseparable from local prejudice.

21. Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342, 363 (1967).

22. ALA. CODE tit. 7, § 199(1) (1960). This statute was interpreted *not* to permit jurisdiction over the *New York Times* in *New York Times Co. v. Connor*, 291 F.2d 492 (5th Cir. 1961), but the decision in *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 S.2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1964), specifically disapproved the federal court's ruling. On a second appeal, *Connor v. New York Times Co.*, 310 F.2d 133 (5th Cir. 1962), the earlier order of the federal court was vacated and the case was remanded for trial. The case under discussion in this Note is the appeal taken from that trial.

23. The first of the general long-arm statutes was that of Illinois. Civil Practice Act, art. III, § 6, [1955] Ill. Laws 69th Gen. Assembly 2245-46.

24. 393 S.W.2d 671 (Tex. Civ. App. 1965).

25. 273 Ala. 656, 144 S.2d 25 (1962).

The second way in which the *Connor* rule has been said to be unfair to the libel plaintiff is its effect of forcing him to assume the expenses and inconveniences of litigation far from home.²⁶ This argument must be considered, however, in various settings. Clearly, the well-to-do plaintiff with a meritorious claim should not be seriously discouraged by the costs of litigating in the defendant's forum. The unfairness that he experiences is no greater than the unfairness that the defendant would suffer from litigation in an inconvenient forum. The well-to-do plaintiff with a worthless or marginal claim, on the other hand, will be discouraged because his expected recovery will not justify the expenses of a distant trial. Such a result, however, cannot be called *unfair*. Worthless or marginal claims should not be encouraged at the expense of the free circulation of opinion and information. The more difficult case is that of the impecunious plaintiff with a meritorious, but modest claim. He indeed may be treated unfairly by a rule which makes an otherwise worthwhile claim impractical to pursue. There is some comfort in the fact that such plaintiffs are less likely to be in the news, and hence less likely to be libeled in the national press. But when such plaintiffs appear, courts faced with the *Connor* precedent will have to make the hard choice between creating an exception to the rule²⁷ and having uniformity with an occasional unfair result.²⁸

Moreover, strong policy reasons seem to outweigh many questions of unfairness, as *New York Times v. Sullivan* demonstrates. There the Supreme Court decided that the first amendment dictated a complete denial of remedy to the public official who cannot prove malice in a libel action.²⁹ Thus the *Connor* rule, the general effect of which

26. Comment, *supra* note 21, at 362.

27. More lenient treatment for the impecunious plaintiff need not be deemed an "exception" to the rule if it is recalled that the *Connor* rule was presented as a "balancing" test. The *Connor* court merely required a *greater* showing of contact in cases involving freedom of the press; it did not establish first amendment considerations as the only relevant determinants of jurisdiction. Thus it might be argued that the economic position of the impecunious plaintiff is simply another factor to be considered. The opinion in Fourth N.W. Nat'l Bank v. Hilson Indus., Inc., 264 Minn. 110, 114-16, 117 N.W.2d 732, 734-36 (1961), appears to have had this principle in mind in distinguishing between individual and corporate defendants. The economic means of the parties also seems to underlie the "multistate activity" approach to the jurisdictional decision suggested by von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167-73 (1966). The cost of including the economic means factor, however, is the further complication introduced into pretrial procedure. See notes 40-42 *infra* and accompanying text.

28. Discussion of the fine points of fairness tends to obscure a fact apparently ignored by some of the *Connor* critics, *viz.*, present jurisdictional law is not concerned with a fine balance of fairness. For example, one finds little discussion of mere inconvenience to the *defendant* who must defend himself far from home or chief place of business. For him the jurisdictional question is not whether suit in the plaintiff's forum is merely unfair, but whether it is "so unfair to the defendant as to amount to a denial of due process." Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 557 (1963).

29. 376 U.S. at 283 (1964).

is merely to increase the plaintiff's burden in pursuing his remedy, is far more fair than the remedy-denying rule that the *Sullivan* decision found to be required by the first amendment.

C. *The Need for Special Protection for Publishers in Interstate Defamation Cases*

In the *Buckley* opinion, Judge Friendly observed:

Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones . . . [T]hey must pay the freight; and injured persons should not be relegated to forums so distant as to make collection of their claims difficult or impossible unless strong policy considerations demand.³⁰

Thus the profit motive of the publishing business is made to appear a reason for avoiding special jurisdictional rules for publishers. Yet it is precisely this profit motive that gave rise to the *Connor* rule. Any profits derived from a state with which the publisher has only minimum contacts may be outweighed by the extra costs of litigating in that state or by excessive verdicts handed down by biased juries in that state.³¹ A publisher faced with increased litigational costs,³² or with the possibility that some excessive verdicts will survive appeal,³³ must make a rational economic response. As the *Connor* court put it: "In the face of this very real risk, could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of his liability?"³⁴

True, the publisher contemplating termination of distribution in high-risk states has an alternative. Rather than abandon whatever income he may derive from these states, he may find it more attractive to exclude, or at least modify, potentially libelous articles. While libel laws are designed in part to deter the publication of true libels, such deterrence should not be geared to the standards of the most sensitive plaintiff or the most inflammable jury. Yet the added cost

30. 373 F.2d at 182.

31. See text accompanying notes 24 & 25 *supra*.

32. Increased litigation costs may not be a substantial threat to the publisher already defending a \$500,000 law suit, but they will always assure the merely vexatious libel plaintiff that he can harass the large out-of-state newspaper for the small cost of filing within his own state. Under the *Connor* rule the defendant will still have to bear the costs involved with raising the *Connor* defense itself, but he will be able to avoid the otherwise inevitable costs of importing witnesses from his place of publication in order to settle, for example, the factual question of malicious intent raised by *New York Times Co. v. Sullivan*.

33. If a jury is instructed properly as to the rule in *New York Times v. Sullivan* concerning actual malice, prejudice can still influence it to make a finding of malice. When the evidence is sufficient to support (but not compel) a finding of malice, the judge and courts of appeal will not be able to discover the true basis for the jury's decision merely by inspecting the evidence.

34. 365 F.2d at 572.

of defending even a worthless libel claim in a foreign forum may have the *in terrorem* effect of causing the publisher to avoid controversial or highly sensitive articles.³⁵ In such a situation, the impact on free speech is direct. Furthermore, the publisher's entire readership is affected, not merely the handful that would be affected by the termination of subscriptions in high-risk states.

The total effect of a publisher's cutting off distribution in a given state or modifying what he would otherwise have printed is by nature incapable of precise measurement or evaluation. The faith which the *Connor* court placed in the importance of the press, however, is in accord with general legal principles,³⁶ and in particular with the Supreme Court's emphasis on the importance of widespread public debate in cases like *New York Times v. Sullivan*.³⁷

D. *The Sufficiency of the Sullivan Rule*

The doctrine of *New York Times v. Sullivan*, requiring a public official to demonstrate actual malice before recovering in an action for libel, has been advanced as a protection for the press sufficient to accomplish the goals of the *Connor* court.³⁸ While the beneficial effects of *Sullivan* cannot be doubted, it has not solved all the related problems in need of solution. For example, *Sullivan* places no limit on the *size* of the verdict in a defamation case. By removing the trial from a place of likely prejudice, *Connor* (and *Buckley* as well) makes an excessive verdict improbable. Moreover, *Sullivan* is concerned with the status of the plaintiff, not the possibly inflammatory nature

35. Certain publications, especially those whose reputation is built on complete coverage of the news, may not be easy prey to the temptation to avoid the risk of controversy. Not all publications, however, have such a powerful incentive or the economic means to resist such temptation.

36. At common law a defamation would not be enjoined unless incident to another tort. See W. PROSSER, *TORTS* 755 (1964). This was true even though the plaintiff might thereby be denied any hope of complete relief. (Injunctions are granted, in general, only when legal relief is inadequate. Thus, in the situation which would have called for an injunction because legal relief is inadequate, under the special defamation rule injunctive relief is denied.)

37. 376 U.S. at 269-83 (1964). See also *NAACP v. Button*, 371 U.S. 415 (1963); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (statutes which permit injunctions against defamatory publications are unconstitutional).

38. Comment, *supra* note 21, at 358-59. It could be argued, of course, that any suit against an out-of-state publisher is capable of having a "chilling effect" on freedom of the press, but few cases are as amenable as libel cases to a direct appeal to regional prejudice. Cf. *Curtis Publishing Co. v. Butts*, 351 F.2d 701, 730-31 (1965) (dissenting opinion), *aff'd* 388 U.S. 130 (1967), quoting some remarks made by the plaintiff's lawyer to the jury:

I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here [Georgia], and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

of the alleged libel. Thus, if a newspaper feature should negligently include the name of a relatively unknown person, not a public official, in its account of a racial disturbance, and if the account should cast this person in an unfavorable light, the possibility of jury prejudice against the newspaper in a subsequent libel case would be just as strong as in the *Sullivan* case, but the *Sullivan* principle would not apply because the plaintiff was not a public official.

Finally, the *Sullivan* rule does not protect the out-of-state publisher from the costs of defending himself against frequent worthless or marginal claims. The *Connor* case itself was one in which the plaintiff's evidence was ultimately deemed insufficient,³⁹ but only after three appearances in the federal district court and three in the court of appeals. Had the *Connor* rule been available from the first, these costs might have been avoided.

There will, of course, be some preliminary inconvenience in deciding the jurisdictional issues. This problem may be minimized, however, by the deterrent effect that the *Connor* rule should have on a plaintiff who contemplates bringing suit in the wrong forum. Moreover, an effort can be made to simplify the procedure for resolving the question of jurisdiction. Unless there is a genuine dispute as to jurisdictional facts, affidavits should be sufficient to settle the question.⁴⁰ If there is such a genuine dispute, the use of a preliminary hearing, hopefully neither long nor complicated, should ordinarily suffice to answer jurisdictional questions before a trial on the merits becomes necessary.⁴¹ Even if a trial appears to be the only means adequately to resolve jurisdictional questions, a separate trial for those questions should be considered.⁴²

III. THE FUTURE OF THE CONNOR RULE

Both the Second and the Fifth Circuits have recognized the role of the first amendment in determining the place of trial for a libel suit between plaintiffs and defendant-publishers from different states. *Connor* cast the issue in terms of jurisdiction, *Buckley* in terms of forum non conveniens. The *Buckley* court believed its approach to have the following advantage:

[It] has the merit of focusing attention on the facts allegedly creating hardship in each case without mandating a uniform rule that would

39. 365 F.2d at 573-77.

40. This approach was taken in *Unicon Management Corp. v. Koppers Co.*, 38 F.R.D. 474 (S.D.N.Y. 1965), where the sole jurisdictional question was also the central issue to be litigated: whether or not defendant had committed a tort within the state.

41. *Id.* (suggesting the possibility of a pretrial hearing should the affidavit approach fail); *United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D.N.Y. 1964).

42. FED. R. CIV. P. 42(b) provides that: "The court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial . . . of any separate issue or of any number of . . . issues . . ."

apply whether the place to which the newspaper is summoned to defend a libel suit is twenty-five or twenty-five hundred miles from the point of publication, as a jurisdictional due process approach that necessarily focuses at least in part on state boundaries might well do.⁴³

It thus appears that the *Buckley* court did not perceive the essence of the *Connor* rule: the publisher's circulation must "balance the danger of . . . liability," that is, his revenue from circulation within the state must bear some reasonable relation to what he might lose from law suits arising out of that circulation. Such a balancing must necessarily focus attention "on the facts allegedly creating the hardship in each case." The decision of the *Golino* case by the Fifth Circuit should serve to dispel any doubts about the flexibility of the *Connor* rule, for in *Golino* the court found the facts to be such that upholding jurisdiction would "in no way inhibit the zeal with which Curtis distributes its ideas."⁴⁴

Application of the *Connor* principle to the facts in *Buckley* should further illustrate the flexible nature of the jurisdictional approach. The *Buckley* court specifically found no danger of regional prejudice against the defendant, and it further noted that New York City, the headquarters of the defendant, was only forty miles from the place in which suit had originally been brought. Thus, under the balancing test of *Connor*, Connecticut should be permitted to exercise jurisdiction. The exercise of jurisdiction would put the defendant to no serious inconvenience, no danger of prejudice, and no extraordinary expense of litigation, and consequently he would have no incentive to limit either his circulation or his expression.

A hypothetical application of the *Buckley* rule of forum non conveniens to the facts of the *Connor* case is more difficult. Since *Buckley* ruled, on the facts of the case, that the place where suit was brought was the proper place for trial, the rule suggested in *Buckley* is still mere dictum that has not yet been tested in action. One of the difficulties yet to be faced is clarifying the meaning of the "constitutional stature" that *Buckley* would give to its forum non conveniens rule.⁴⁵ It is hoped that "constitutional stature" includes the right to appellate court review of rulings by the trial court on forum non conveniens motions. Ordinarily, denial of a motion of forum non conveniens would not merit such treatment, since the inconvenience that granting the motion is intended to avoid would already have occurred by the time an appeal could be taken.⁴⁶ However, in

43. 373 F.2d at 183.

44. 383 F.2d at 592.

45. See text accompanying note 15 *supra*.

46. See W. BARRON & A. HOLTZOFF, 1 FEDERAL PRACTICE AND PROCEDURE 433-40 (C. Wright ed. 1960). The same reasoning applies to *Davis v. Farmers' Co-Operative Equity Co.*, 262 U.S. 312 (1923), invoked by the *Buckley* court in favor of its forum non con-

the context of an interstate libel case review is meaningful for two reasons: (1) the effects of likely jury prejudice can be cured best by a reversal with a direction to dismiss,⁴⁷ the new trial, if there is one, taking place elsewhere, most likely in the publisher's state;⁴⁸ (2) appellate supervision of the application of the first amendment principles is desirable, since consistency, especially with respect to important constitutional questions, usually depends upon the availability of such supervision. Doctrinal simplicity argues for characterizing the first amendment's role in determining the place of trial as jurisdictional, since questions of jurisdiction need no exceptional treatment to be appealable.

The question of characterization is, of course, of little importance if the essential features are the same. Thus far, the differences between the approaches of the Fifth and Second Circuits lie chiefly in rhetoric; no court has yet demonstrated that one rule must yield results different from those of the other. It is important that courts considering long-arm libel cases in the future not create differences where none yet exist. *Connor* must not be interpreted as an invitation to a numbers game wherein circulation figures are compared with a magical minimum. The forum non conveniens of *Buckley* must be given its "constitutional stature." Above all, superficial differences between the two cases must not be used to undermine the principle on which they agree: the first amendment has a proper role in determining the place of trial in interstate defamation cases.

veniens approach. *Davis* held that a state court could not exercise jurisdiction over an interstate carrier when trial in that state would impose an undue burden upon interstate commerce. McGowan, in *Litigation as a Burden on Interstate Commerce*, 33 ILL. L. REV. 875, 889-90 (1939), made the same point suggested here: that the forum non conveniens approach was unsatisfactory because, under most circumstances, review would not be possible until the harm of the inconvenient litigation was almost complete.

47. See note 33 *supra* concerning the difficulties of judicial control over prejudice. If reversal is not accompanied by dismissal—*i.e.*, if a new trial is allowed in the same location—the effects of prejudice would have no reason to be weaker on the second round.

48. *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966), which held that a state must have not only minimum contacts with a case, but a sufficient interest in the case to sustain constitutional jurisdiction, tends to indicate that in most cases the plaintiff's home state or the defendant's home state will be the only acceptable forums.