NO END IN SIGHT? NAVIGATING THE "VAST TERRAIN" OF PERSONAL JURISDICTION IN SOCIAL MEDIA CASES AFTER *FORD*

Gregory C. Cook & Andrew Ross D'Entremont

NO END IN SIGHT? NAVIGATING THE "VAST TERRAIN" OF PERSONAL JURISDICTION IN SOCIAL MEDIA CASES AFTER *FORD*

Gregory C. Cook and Andrew Ross D'Entremont***

INTRODUCTION

When the internet began emerging, courts recognized the importance of exerting personal jurisdiction over defendants who allegedly committed wrongful acts over the internet.[1] But the courts have struggled to articulate specific standards for "internet" cases. Today, the waters have grown even murkier in social media cases when "sharing," "liking," "tweeting," and "friending" in one forum can affect another forum. The Supreme Court has even acknowledged that technological changes have increased the need for jurisdiction.[2] Although the field has seen an increase in scholarship on personal jurisdiction in the internet age, there are fewer scholarly contributions in the realm of social media—and none after the important decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[3] This Article seeks to fill that void by examining personal jurisdiction in the social media context.

Part I begins with a discussion on social media. Social media must be differentiated from the internet generally. In dealing with ordinary internet claims, courts have evaluated personal jurisdiction based on the amount of

* Greg Cook received his J.D., *magna cum laude*, from Harvard Law School, where he was the Executive Editor of the *Harvard Journal of Law and Public Policy*. He is the chair of the Financial Services Litigation Group at Balch & Bingham LLP, where he has practiced since 1991. He serves on the Alabama Supreme Court Standing Committee on the Rules of Civil Procedure and recently authored the new Fifth Edition of the *Alabama Rules of Civil Procedure Annotated,* published by Thomson Reuters. He is presently a candidate for the Alabama Supreme Court.

** Andrew Ross D'Entremont is a third-year law and MBA student at the University of Notre Dame, where he is the 2021–2022 Peter A.R. Lardy Fellow. He graduated Phi Beta Kappa from the University of Alabama with a B.A. and M.A. in political science and an M.S. in marketing. Following graduation, he will clerk for Chief Judge Thomas Schroeder of the Middle District of North Carolina and Judge Cory T. Wilson of the Fifth Circuit Court of Appeals.

1. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp 1119, 1124 (W.D. Pa. 1997) (citation omitted) ("Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. Different results should not be reached simply because business is conducted over the Internet."). The *Zippo* court also cites other cases from the earlier days of Internet usage and personal jurisdiction. *E.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

2. Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."). But see Walden v. Fiore, 571 U.S. 277, 290 n.9 (2014), in which the Court declined to answer questions of personal jurisdiction concerning "virtual contacts." *See also* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1167 n.217 (2015).

3. 141 S. Ct. 1017 (2021); *see, e.g.*, Trammell & Bambauer, *supra* note 2.

activity or targeting from the website towards the consumer, often applying the *Zippo* test. Much of the *Zippo* test concerns commercial activities like selling products over a website. The *Zippo* test seems to take for granted that commercial activities and activity on the internet are highly correlated. Social media, however, is unique because it can be interactive without having a commercial purpose, i.e., tweeting defamatory comments to thousands of followers. Understanding the difference between the internet generally and social media specifically is therefore important when discussing personal jurisdiction standards.

Part II then discusses an overview of the Court's jurisprudence on personal jurisdiction cases. It is clear that the Supreme Court's analysis of personal jurisdiction has evolved over time, and Part II outlines that evolution to help understand where the Court stands today. Part II reviews the importance of the *Zippo* test in internet-related cases and how the *Zippo* test has become widely accepted by the circuit courts. Importantly, though the Court has declined to offer more guidance in internet-related personal jurisdiction cases, social media offers even more nuanced issues for courts to address. Finally, the Court's recent decision in *Ford* is introduced to help frame the Article's remaining Parts on the latest personal jurisdiction trends.[4]

Part III then outlines four "categories" of social media cases. While some commentators and some courts have attempted to assign an overarching or field theory of personal jurisdiction, due process depends upon the context and facts. Whether exercise of personal jurisdiction is appropriate may vary depending upon the particular claim being brought, the particular technology at issue, the volume of transactions, and (among other things) the reasonableness of the parties' expectations. Thus, the central thesis of this Article is that it is impossible to discover a field theory (at least at the present time) for personal jurisdiction in social media cases except at the highest level of abstraction.

Perhaps over time, as the courts see more cases, more specific guidelines can be identified, at least within each category. Courts will also almost certainly articulate additional categories. Of course, it would have been very difficult to have imagined the current technology (or culture) related to social media—even when the original *Zippo* ruling was announced. Therefore, how far and how soon such guidelines can develop will depend in part upon how much technology changes over time. Part III will attempt to draw comparisons in personal jurisdictional analyses between "tangible" and "intangible" social media cases. The four categories analyzed in this Part are (1) Presence, (2) Intentional Torts, (3) Commerce, and (4) Other (for instance, unintentional torts or statutory claims). Throughout many of these scenarios, the *Zippo* test

4. *Ford Motor Co.*, 141 S. Ct. 1017.

and the Court's latest ruling in *Ford* are used as helpful backdrops.[5] Instead of fully accepting the various *Zippo* sliding scales in the social media context, examples of more "tangible" personal jurisdiction cases are linked to the "intangible" to discuss other ways to view these cases.

Part IV of the Article then discusses the views of other scholars on personal jurisdiction in social media cases.

The Conclusion offers a discussion on how practitioners can better differentiate and prepare for social media personal jurisdiction cases and a discussion of what general observations can be made from the current state and direction of the law. It also offers helpful questions for practitioners to ponder when reviewing whether personal jurisdiction is applicable in the social media context.

As Professor Adam Steinman has observed, personal jurisdiction is the ultimate "access to justice" issue, and, from a public policy perspective, the courts should attempt to provide a practical forum to resolve real disputes between real parties.[6] This struggle is even harder in the social media space because the parties are more often noncommercial in nature, are sometimes geographically far removed, and are sometimes without any relationship outside of the social media space. From a practitioner's perspective, the present lack of clear guidance on personal jurisdiction in the social media space creates risk. Put simply, for the practitioner, the issue of personal jurisdiction cannot be overemphasized. The failure of a court to gain personal jurisdiction can be fatal, and judgments against defendants over whom a court did not have proper jurisdiction can be attacked on appeal, in a separate action, or even when collection activities occur many years later. Thus, a judgment entered by a court without personal jurisdiction may be later declared void.[7] This Article's final Part offers questions and guidelines to help practitioners grapple with these very real risks.

I. SOCIAL MEDIA

"Social media" has many definitions. For one, "[s]ocial media are Internet-based platforms that allow users to create profiles for sharing user-generated or curated digital content . . . within a networked community of users who can respond to the content."[8] Tufts University writes that "[s]ocial media refers to the means of interactions among people in which they create, share, and/or

5. *See Zippo*, 952 F. Supp. 1119.

6. Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1417–18 (2018).

7. Even if personal jurisdiction were lacking, a court could find that a defendant waived the argument—another risk that practitioners for both plaintiffs and defendants should carefully consider. FED. R. CIV. P. 12(h)(1).

8. KELLI S. BURNS, SOCIAL MEDIA: A REFERENCE HANDBOOK 6 (2017).

exchange information and ideas in virtual communities and networks.'"[9] For purposes of this Article, social media is a subsection of the internet that allows users to interact with one another in some form of a community.

Social media must be distinguished from the broader internet. Although courts have reviewed cases involving personal jurisdiction and the internet, few have needed to grapple with social media in particular, which is the focus of this Article.[10] This need is driven by the differences between the internet broadly and social media specifically. Social media tends to be far more interactive between users than many internet websites.[11] Individuals are far more likely to be the parties speaking on social media as opposed to on the traditional internet. Social media is often very personal rather than commercial. Social media can also have an immense, and very fast, effect on people and forums, while also having the added discomfort of being very invasive. These differences are important and should drive a fulsome analysis of personal jurisdiction.

Social media is also likely to be more widely used each day relative to the average website. For example, as of October 2021, several social media platforms saw over two billion monthly users.[12] Facebook led the way with nearly 2.8 billion monthly users, followed by YouTube at just under 2.3 billion monthly users.[13] In total monthly visits, only Google has more monthly visits than YouTube and Facebook, and Google has social media features within its website.[14] Also, the various social media platforms serve different purposes. New social media applications arise frequently, and it is clear that social media (and the innovation in this space) is not going away. For instance, TikTok now allows users to share short video clips, while WhatsApp is an internet messaging platform.[15] It is also fair to say that there is a trend (at least for now) towards the splintering of social media into distinct communities; for instance, Snapchat allows users to drastically limit who can see postings, how long they can see postings, and what groupings of people can participate in the conversations.[16]

---

9. *Social Media Overview*, TUFTS UNIV., https://communications.tufts.edu/marketing-and-branding/social-media-overview/ (last visited Aug. 29, 2021).

10. *See, e.g.*, *Zippo*, 952 F. Supp. 1119; Maritz, Inc. v. Cybergold, Inc., 947 F. Supp 1328 (E.D. Mo. 1996); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

11. The *Zippo* court, and often its progeny, uses the "passive" versus "interactive" language. See BURNS, *supra* note 8, at 35–39, in which the author details various ways that modern social media platforms are interactive. For instance, Google launched "Hangouts" to allow groups of people to video chat, Instagram allows users to place hashtags in their captions for ease in locating similar brands and events, and Facebook Live allows users to live broadcast video and interact with those watching the stream. *Id.*

12. *Most Popular Social Networks Worldwide as of October 2021, Ranked by Number of Active Users*, STATISTA, (Oct. 2021), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/.

13. *Id.*

14. *Id.*

15. *See* TIKTOK, https://www.tiktok.com/; WHATSAPP, https://www.whatsapp.com/.

16. *See* Christine Elgersma, *Everything You Need to Know About Snapchat*, SCIENCE X (June 18, 2018), https://phys.org/news/2018-06-snapchat.html.

One can see the interactivity on social media as a major differentiating factor from the internet generally.[17] As will be discussed, this interactivity is an important aspect when evaluating whether a defendant can be subject to personal jurisdiction. Because social media is inherently more interactive, particularly between individuals, than the internet, the analysis may be different for courts. Likewise, as noted below, social media disputes may involve more person-to-person disputes as opposed to commercial disputes, making the analysis more difficult.

II. BRIEF HISTORY OF PERSONAL JURISDICTION

The Supreme Court has a somewhat muddy journey through personal jurisdiction. At base, the Court in personal jurisdiction cases must decide whether a particular defendant has acted in a way that submits herself to a forum's authority. In an easy case, persons may explicitly consent to a forum's authority.[18] Personal jurisdiction cases, however, are rarely this simple. This next Part provides a brief overview of the Court's personal jurisdiction cases. Then, this Part discusses the *Zippo* test and the Court's latest personal jurisdiction decision in *Ford*. To understand the difficulty, if not impossibility, in pinpointing a field theory of personal jurisdiction for social media, tracing the Court's ever-moving discussions on personal jurisdiction is important.

A. Personal Jurisdiction Overview

As Professor Richard Freer writes, "Personal jurisdiction is a gateway to the judicial system."[19] Indeed, "[a]s a general rule, neither statute nor judicial decree may bind strangers to the State."[20] Dating back to 1878 in one of its first personal jurisdiction cases, *Pennoyer v. Neff*, the Court has attempted to annunciate coherent standards for exerting personal jurisdiction. Notwithstanding the Court's best attempts, standards for personal jurisdiction seem a moving target. In the early days of personal jurisdiction understanding, as held in *Pennoyer*, state courts possessed personal jurisdiction over a party domiciled in another state only if that party was served with process while

17. The overlap between social media platforms may also play an important role. For example, a user can post on Instagram and Facebook simultaneously through Instagram. *Crossposting from Instagram to Facebook*, META, https://www.facebook.com/formedia/tools/crossposting-from-instagram-to-facebook (last visited Jan. 15, 2021). Instagram allows TikToks to be shared. George D. Harrison, *How to Post a TikTok Video on Instagram?*, IZOOD (Jan. 27, 2021), https://izood.net/blog/how-to-post-a-tiktok-video-on-instagram/.

18. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)).

19. Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. EN BANC 99, 99 (2019).

20. *Nicastro*, 564 U.S. at 880.

physically present within the state.[21] As the economy expanded, and especially with the growth of corporations, consent (sometimes granted as a part of corporate registration to do business) became another basis for jurisdiction.[22] The Court based *Pennoyer*'s holding on "notions of sovereignty—a state had to respect the rights of its sister states as co-equal sovereigns in a federal system."[23] Over time, the Court shifted its approach to personal jurisdiction from one of presence to one based upon due process (that is, "fairness").[24] For instance, in *International Shoe Co. v. Washington*, the Court stated that a forum state could exert personal jurisdiction over a nonresident defendant if the defendant had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[25] Notably, though, Justice Gorsuch's 2021 concurrence in *Ford* appeared to question the continued viability of the *International Shoe* test and may have even suggested considering a return to a personal jurisdiction test (at least for corporations) based upon a "corporate defendant's presence or consent."[26]

The Court has continued to try to clarify its personal jurisdiction jurisprudence. In *International Shoe*, the Court implied that personal jurisdiction could be split into two dichotomies: general and specific jurisdiction.[27] In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Court reaffirmed the implied dichotomy by noting that scholars had begun parsing two types of personal jurisdiction: "general" and "specific."[28]

---

21. Pennoyer v. Neff, 95 U.S. 714, 727 (1878). In fact, some courts seem to still have physical presence as an overarching background standard. *See* Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (finding personal jurisdiction because defendant was served during an airplane flight in Arkansas airspace).

22. *E.g.*, Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95–96 (1917).

23. Alexandra W. Albright, *Personal Jurisdiction*, 30 APP. ADVOC. 9, 11 (2017).

24. *See* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 517–18 (1923); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

25. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Of course, the *International Shoe* test defines the outer limit of personal jurisdiction rather than the requirement. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980). Thus, assuming a state has enacted a long-arm statute that extends to the limits of personal jurisdiction, then *International Shoe* applies. *Id.* at 294. It is still conceivable that some states use long-arm statutes that do not fully extend to due process, and therefore the personal jurisdiction analysis of the court in that state is confined to such statutory limits.

26. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J., concurring).

27. *Id.* at 1032.

> Since *International Shoe Co. v. Washington*, this Court's cases have sought to divide the world of personal jurisdiction in two. A tribunal with "general jurisdiction" may entertain any claim against the defendant. But to trigger this power, a court usually must ensure the defendant is "at home" in the forum State. Meanwhile, "specific jurisdiction" affords a narrower authority. It applies only when the defendant "purposefully avails" itself of the opportunity to do business in the forum State and the suit "arise[s] out of or relate[s] to" the defendant's contacts with the forum State.

Id. (citations omitted).

28. 466 U.S. 408, 414 nn.8–9 (1984). "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' . . . ." *Id.* at n.8. "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be

In exercising general jurisdiction, "the court may entertain *any* claim filed against the defendant. The jurisdictional inquiry is 'dispute-blind' and focuses on all of the defendant's activities in the forum, which the Court has said must be 'continuous and systematic' and 'substantial.'"[29] For individuals, general jurisdiction is applicable in forums in which the defendant is considered "at-home" or a resident.[30] In the context of corporations, the Court has stated that general jurisdiction will exist over a corporation only where it is "essentially at home."[31] Recently, the Court has made clear that in most circumstances, to be "essentially at home" in a forum and thus subject to general jurisdiction, a corporation must either (1) be incorporated in the state or (2) have its principal place of business within the state.[32] "'[O]nly a limited set of affiliations with a forum will render a defendant amenable to' general jurisdiction in [a] State."[33]

Even if a defendant is not subject to general jurisdiction, courts may still exert personal jurisdiction in certain circumstances through specific jurisdiction. In assessing specific jurisdiction, courts look at the relationship between the nonresident defendant, the forum, and the litigation.[34] First, courts determine whether the nonresident defendant has "minimum contacts" with the forum, but "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."[35] Instead, the dispute must relate to the defendant's alleged contacts with the forum for specific jurisdiction to exist.[36]

---

exercising 'general jurisdiction' over the defendant." *Id.* at n.9. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–44 (1966); Calder v. Jones, 465 U.S. 783, 786 (1984); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011); Albright, *supra* note 23, at 11.

29. Albright, *supra* note 23, at 12 (citing *Helicopteros*, 466 U.S. at 416). "In *Helico[pteros]*, the Supreme Court took the first step toward resolving [the] inconsistent applications of general and specific jurisdiction analyses by restoring the original dispute-blind focus of general jurisdiction." *Id.* at 12 n.18 (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 612 (1988)).

30. *Goodyear*, 564 U.S. at 924.

31. *Id.* at 919; *see* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1552 (2017).

32. The Court leaves open the possibility that in "exceptional case[s]" general jurisdiction may be found beyond these forums. *Daimler*, 571 U.S. at 139 n.19 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). In *Perkins*, World War II required a company to relocate temporarily from the Philippines to Ohio. *Perkins*, 342 U.S. at 447–48.

33. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1780 (2017) (quoting *Daimler*, 571 U.S. at 760).

34. The Court in *Bristol-Myers* wrote, "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Id.* at 1781. Importantly, the Court reaffirmed that "[w]hen there is no such connection [between the forum and the underlying controversy], specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.*; *see also* 62B AM. JUR. 2D *Process* § 162 (2022) (citing Walden v. Fiore, 571 U.S. 277 (2014)).

35. *Walden*, 571 U.S. at 286.

36. *Bristol-Myers*, 137 S. Ct. at 1780; 62B AM. JUR. 2D, *supra* note 34 (citing Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208 (4th Cir. 2002)).

Second, courts must determine whether exerting personal jurisdiction would comport with "fair play and substantial justice."[37]

At least in commercial cases, due process requires that the defendant commit "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State."[38] Often, courts use a helpful nomenclature and ask whether defendants have "purposeful[ly] avail[ed]" themselves of the forum.[39] In order to have purposefully availed itself of the forum, the defendant needed to act in a way that "'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum."[40]

In considering whether a defendant has purposefully availed itself of a forum, it can sometimes be helpful to split the question into two parts: purposeful availment and purposeful direction.[41] The "purposeful availment" concept is typically used in contract cases to decide whether a defendant has "'availed' [it]self of the privilege of conducting activities in the forum."[42] In contrast, courts may look for "purposeful direction" in tort cases to determine whether the defendant has directed activities toward the forum.[43] Again, though they may not be explicit personal jurisdiction doctrine, these concepts help to frame questions for effectively analyzing personal jurisdiction questions.

B. Personal Jurisdiction on the Internet: Zippo *to* Ford

The Supreme Court has yet to make a clear, precedential determination in the internet realm.[44] Instead, the lower courts have had to fill the void. Arguably the most prominent personal jurisdiction analysis concerning internet cases is the *Zippo* test.[45]

The *Zippo* test utilizes a sliding scale approach to analyze whether a defendant's activities through a website subject the defendant to personal

---

37. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J., concurring) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In asserting "fair play and substantial justice," the Court has offered five factors for courts to use:

> (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies."

Albright, *supra* note 23, at 12–13 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980))).

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

39. *Ford Motor Co.*, 141 S. Ct. at 1024 (citing *Burger King Corp.*, 471 U.S. at 475).

40. *Id.* at 1025 (citing *Walden*, 571 U.S. at 285).

41. Perry v. Brown, No. CV 18-9543, 2019 WL 1452911, at *6 (C.D. Cal. Mar. 13, 2019).

42. *Id.* (quoting Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006)).

43. *Id.* (citing Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1069 (9th Cir. 2017)).

44. *See Ford Motor Co.*, 141 S. Ct. at 1028 n.4 (citing *Walden*, 571 U.S. at 290 n.9) ("And we do not here consider internet transactions, which may raise doctrinal questions of their own.").

45. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

jurisdiction within a territory.[46] More specifically, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website."[47] As is the case with other personal jurisdiction inquiries, the *Zippo* test focuses on the objective activities of the defendant rather than the subjective intent.[48] Several circuits have adopted, or at least accepted, the use of the *Zippo* test.[49]

The test attempts to place internet cases along a spectrum. The *Zippo* court wrote, "At one end of the spectrum are situations where a defendant clearly does business over the internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper."[50] Contrast these situations to ones that the *Zippo* court deemed were "passive" instances: "At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site . . . is not grounds for the exercise [of] personal jurisdiction."[51]

Between these two ends exists the middle ground through which the *Zippo* test requires looking at a "sliding scale" approach to jurisdiction. In cases that occupy this middle ground, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[52] At base, *Zippo* and its progeny attempt to balance whether a defendant should be subject to personal jurisdiction based on internet contacts. Although *Zippo* uses helpful nomenclature for determining whether personal jurisdiction is proper, "traditional statutory and constitutional principles remain the touchstone of the inquiry."[53]

Of note, according to Heather Retchless, some jurisdictions argue that *Zippo*, while it offers helpful guidance for commercial transactions, "offers little to supplement the traditional framework for considering questions of personal jurisdiction [in noncommercial situations]."[54] She continues that "[a] split exists among the circuits as to whether minimum contacts [via the internet] are

46. *Id.* at 1124.

47. Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999) (quoting *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

48. *Zippo Mfg. Co.*, 952 F. Supp. at 1127; *see* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

49. *See, e.g.*, Fidrych v. Marriott Int'l, Inc., 952 F.3d 124, 141 (4th Cir. 2020) (citation omitted) ("In *ALS Scan*, . . . we adopted the approach set out in *Zippo* . . . ."); GreatFence.com, Inc. v. Bailey, 726 F. App'x 260, 260–61 (5th Cir. 2018) (citing *Mink*, 190 F.3d at 335).

50. *Zippo Mfg Co.*, 952 F. Supp. at 1124.

51. *Id.*

52. *Id.* (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).

53. Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007).

54. Heather N. Retchless, Comment, Tamburo v. Dworkin*: Extending* Calder v. Jones *to Establish Personal Jurisdiction in a World of Internet Contacts*, 35 AM. J. TRIAL ADVOC. 411, 421 (2011) (quoting Oasis Corp. v. Judd, 132 F. Supp. 2d 612, 622 n.9 (S.D. Ohio 2001)).

analyzed according to the *Zippo* sliding scale test, the *Calder* effects test, or by a totality-of-the-circumstances test."[55]

In the absence of a Supreme Court case involving internet contacts, lower courts must do their best to glean guidance from the Court's analysis of more tangible cases.

C. Does Ford *Change the Analysis?*

In March 2021, the Supreme Court issued a new personal jurisdiction ruling in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[56] The Court held that Ford Motor Company was subject to personal jurisdiction in Montana through specific jurisdiction. In sum, "the connection between the plaintiffs' claims and Ford's activities in those States . . . [wa]s close enough to support specific jurisdiction."[57]

In *Ford*, a Montana state court held that it could exert jurisdiction over Ford Motor Company (Ford) in a products liability suit.[58] The plaintiff sued Ford in Montana, where the accident occurred and in which the plaintiff resided.[59] Despite Ford's "substantial business in the State," including "advertising, selling, and servicing the model of vehicle the suit claim[ed wa]s defective," Ford contended that exercise of personal jurisdiction was improper.[60] Namely, Ford argued that minimum contacts were missing because the particular car involved in the crash was neither sold in Montana nor designed or manufactured in Montana and that only its conduct *in the forum* can give rise to a plaintiff's claims.[61]

The Court flatly rejected Ford's argument, stating, "When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."[62] The Court accepted Ford's concession of purposeful availment of the Montana market through (among other things) Ford's advertisements in Montana and Ford's ownership of over thirty dealerships.[63]

---

55. *Id.* (citing Yasmin R. Tavakoli & David R. Yohannan, *Personal Jurisdiction in Cyberspace: Where Does It Begin, and Where Does It End?*, 23 INTELL. PROP. & TECH. L.J. 3, 3 (2011)).

56. 141 S. Ct. 1017 (2021).

57. *Id.* at 1032.

58. *Id.* at 1022. The Montana case was consolidated with a similar case from Minnesota. *See* Ford Motor Co. v. Bandemer, 140 S. Ct. 2665, 2665 (2020).

59. *Ford Motor Co.*, 141 S. Ct. at 1022.

60. *Id.*

61. *Id.* at 1026 (citing Brief for Petitioner at 13, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368, 19-369)).

62. *Id.* at 1022.

63. *Id.* at 1028. Ford "purposefully availed" itself of the forum through its various connections and sales. Ford also arguably "purposefully directed" activities at the forum. *Ford Motor Co.* is a reminder that the personal jurisdiction inquiry lacks hard-line rules. See discussion *supra* notes 38–43 and accompanying text.

As to the minimum contacts argument, the Court held that specific jurisdiction requires the suit to either (1) arise out of or (2) *relate to* the defendant's contacts with the forum.[64] The suit may not have directly arisen from Ford's contacts with the forum, but the suit was sufficiently *related to* those contacts to exercise personal jurisdiction. In creating this distinction, the Court made clear that specific jurisdiction does not always require proof of causation between the contact and the lawsuit.[65] Indeed, the Court was so explicit in its formulation of deciphering between claims that "arise out of" and those that "relate to" contacts with the forum that Justice Alito filed a concurrence counseling against making the two provisions *independent* bases for specific jurisdiction.[66]

Importantly, the Court discusses at least a hypothetical involving the internet (first raised in oral argument)—in a debate between the majority and Justice Gorsuch. The majority discusses in a footnote whether a "retired guy in a small town" who "carves decoys" and sells the decoys on the internet can be sued in any State if some harm arises from the decoys.[67] The majority declines to answer whether the decoy seller would be subject to personal jurisdiction, stating that the Ford case and the decoy case are dissimilar.[68]

Justice Gorsuch, in a concurrence, argues that the majority's test is too vague. According to Justice Gorsuch, the majority found the "continuous" contacts with Montana sufficient to establish an "affiliation" with those States and thus subjected Ford to personal jurisdiction.[69] Gorsuch also noted, though, that the majority seemed to find that the decoy seller's contacts "may be too 'isolated' and 'sporadic' to entitle an injured buyer to sue in his home State."[70] According to Justice Gorsuch, "For between the poles of 'continuous' and 'isolated' contacts lie a virtually infinite number of 'affiliations' waiting to be explored."[71] "And when it comes to that *vast terrain*, the majority supplies no

64. *Id.* at 1024 (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).

65. *Id.* at 1025 (citing Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1781 (2017) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))).

66. *Id.* at 1033 (Alito, J., concurring) ("My only quibble is with the new gloss that the Court puts on our case law. Several of our opinions have said that a plaintiff's claims 'must arise out of or relate to the defendant's contacts' with the forum. The Court parses this phrase 'as though we were dealing with language of a statute,' and because this phrase is cast in the disjunctive, the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not 'arise out of' (i.e., are not caused by) the defendant's contacts but nevertheless sufficiently 'relate to' those contacts in some undefined way. This innovation is unnecessary and, in my view, unwise." (citations omitted)).

67. *Id.* at 1028 n.4 (majority opinion).

68. *Id.* ("The differences between that case and the ones before us virtually list themselves. (Just consider all our descriptions of Ford's activities outside its home bases). So we agree with the plaintiffs' counsel that resolving these cases does not also resolve the hypothetical.").

69. *Id.* at 1035 (Gorsuch, J., concurring).

70. *Id.*

71. *Id.*

meaningful guidance about what kind or how much of an 'affiliation' will suffice."[72]

At least for cases involving social media (and the internet in general), perhaps both the majority and Justice Gorsuch are correct. Perhaps the majority is correct that the *Ford* case is easy because of the large number of contacts between Ford and the forum, and perhaps Justice Gorsuch is correct that the abstract test articulated by the majority leaves much to be decided in the future (especially for internet cases).

This is not the first time the Court has seemingly created "poles" between which courts must analyze personal jurisdiction, leading the lower courts to develop more fulsome law.[73] For instance, in *McGee v. International Life Insurance Co.*, the Court found that California could exert personal jurisdiction over a Texas insurance company because the "suit was based on a contract which had substantial connection with [California]."[74] The Court began with a brief review of its own personal jurisdiction jurisprudence and concluded, "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[75] The Court then proceeded to find that the contacts in this case, notwithstanding the lack of presence in the forum by the defendant, sufficed for jurisdiction.[76] These contacts with the forum included the insurance company having mailed the insured a reinsurance certificate to the insured's home in California, the insured's sending of premiums from California to the insurance company's office in Texas, and the insured being a resident of California.[77]

Contrast *McGee* with *Hanson v. Denckla* (decided only one year later), in which the Court held that a Florida court did *not* have jurisdiction over a nonresident defendant trust corporation.[78] The trust company, a Delaware corporation, neither had an office in Florida nor transacted business in the state.[79] Further, the company never administered trust assets in Florida or solicited business in Florida.[80] The main argument for personal jurisdiction, then, centered on the settlor and the majority of the beneficiaries being

72. *Id.* (emphasis added).

73. There is a litany of cases that could show the "vast terrain" of possibilities for analyzing personal jurisdiction *before* the Court's decision in *Ford*. *E.g.*, Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017); Walden v. Fiore, 571 U.S. 277 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984).

74. 355 U.S. 220, 223 (1957).

75. *Id.* at 222.

76. *Id.* at 224.

77. *Id.* at 223.

78. 357 U.S. 236, 251 (1958).

79. *Id.*

80. *Id.* at 247.

domiciled in Florida.[81] The Court held that these contacts were not sufficient enough to exert personal jurisdiction.[82] In short, the defendant had not sufficiently directed its conduct—related to this dispute—towards the forum state.[83]

Perhaps the best lesson to take from these two poles (both of which were commercial cases) is the amount of express aiming into the forum state required by the defendant.

The real question after the *Ford* decision is whether the Court intended to create another "vast terrain" or merely deal with a case where Ford clearly did aim efforts into the state of Montana. If "related to" means something more than aiming, the Court's majority in *Ford* may expand, whether intentionally or unintentionally, the reach of personal jurisdiction in the internet context. Even though the Court hinted in dicta that it was not entering the realm of internet contacts, the Court's discussion bifurcating the independent bases for personal jurisdiction may very well perplex courts (especially in the social media context). The next Section highlights these concerns, while also tying the Court's tangible examples of harm to intangible examples occurring over social media.

III. TYING SOCIAL MEDIA TO THE TANGIBLE

This next Section attempts to categorize social media cases into four categories to make the due process analysis clearer. When confronted with new technology, the best approach to understanding the results can be to find the best analogy in the tangible world. These categories attempt to tie social media cases to their best tangible analogs. The categories are helpful paradigms when trying to evaluate whether a court may exert jurisdiction because of a defendant's actions on social media.

This Article identifies four categories: Presence, Intentional Torts, Commerce, and Other. In no sense are these categories bright lines; instead, they are merely paradigms to begin the personal jurisdiction analysis. Nor do we identify express standards for the cases within particular categories; however, we do believe that the analysis for each category would emphasize different questions. This next Section also analyzes possible repercussions from the Court's latest decision in *Ford* and juxtaposes the *Ford* analysis with the *Zippo* test within these four categories.

81. *Id.* at 254.

82. *Id.*

83. *Id.* at 251–54.

A. "Presence" in the Forum

Imagine a case where Georgia resident, *D*, posts a defamatory comment about another Georgia resident, *P*, on social media.[84] *D* posted the comment while sitting in her home in Georgia, and *P* read the comment while sitting at her office in Georgia. *P* becomes incredulous and files suit against *D* in Georgia state court. This is certainly a case in which the Georgia courts possess general jurisdiction over *D* because *D* is a resident of Georgia.

Although this is an easy case, it is important to start here as a base for building future analogies. Rather than posting a defamatory comment, imagine that *D*, again a resident of Georgia, purposefully tripped *P* while walking down the sidewalk, trespassed on her property, or committed some other tort all within Georgia. In this tangible case, *D* is present in the forum, is a resident of the forum, and courts possess general jurisdiction over *D*. Why should it not be so simple because the tort occurred over the internet?[85]

Looking at presence through the eyes of *Zippo* is not necessary, for if a defendant is present in the forum, specific jurisdiction is likely not an issue. Instead, general jurisdiction is likely the grounds on which a court would exert personal jurisdiction in this case.[86] Further, from the Court's dicta in *Ford*, there is no need for a discussion of whether the plaintiff's claims either arise from *or* relate to the defendant's contacts with the forum because this is a general jurisdiction case.

Nonetheless, it is helpful to start with this concept of presence for two reasons. First, some litigation involving social media will fall into this "presence" category. Not every case will need an extensive personal jurisdiction analysis. Second, this provides an excellent example of the need to analogize tangible cases with intangible social media cases. Depending upon the facts, it may be odd to allow jurisdiction in cases in which the defendant is *present* in the forum but allow the defendant to dodge jurisdiction in other states because of a shield of Facebook, Twitter, or Instagram.

---

84. For ease, "*D*" stands for defendant and "*P*" stands for plaintiff.

85. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Recall that the *Zippo* court made a similar inquiry and stated, "Different results should not be reached simply because business is conducted over the Internet." *Id.*

86. There remains a mostly theoretical debate about whether personal jurisdiction exists whenever a defendant is physically served in a forum state. For instance, one federal court found personal jurisdiction when a defendant was served on an airplane over the airspace of a state. *See* Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

B. Intentional Torts

1. Calder *and* Walden

The logical starting point for an analysis of personal jurisdiction for social media posts and intentional torts is the famous Supreme Court case *Calder v. Jones*.[87] In *Calder*, the California plaintiff filed a libel suit against Florida defendants (writers) in California court.[88] The writers worked for the *National Enquirer*, which had a total circulation of over five million weekly newspapers.[89] Six hundred thousand of those weekly newspapers were sold in California.[90] In holding that the California court could exert personal jurisdiction over the writers, the Supreme Court found that the writers' story concerned "California activities of a California resident" and "impugned the professionalism of an entertainer whose television career was centered in California."[91] Further, the story "was drawn from California sources," and "the brunt of the harm, in terms both of [plaintiff's] emotional distress and the injury to her professional reputation, was suffered in California."[92] The Court noted that the writers resided in Florida, conducted research for the article in Florida, and physically traveled to California, albeit sparingly.[93] Famously, though, Justice Rehnquist opined that "California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California."[94] From this case was born the "*Calder* effects" test.

One can imagine, then, that in the social media context, the "effects" of a post may transcend boundaries so that courts may properly exert personal jurisdiction over defendants. Take the facts of *Calder* but instead of the *National Enquirer*, imagine that the writers made a Facebook post. Replace subscribers of the magazine with followers of a Facebook page. Would courts have enough to exercise personal jurisdiction on the same facts?

The Court clarified, or rather updated, its *Calder* holding in *Walden v. Fiore*.[95] In *Walden*, a Drug Enforcement Administration (DEA) agent from Georgia confiscated cash from professional gamblers after they returned from a trip to Puerto Rico.[96] The agent had used a drug-sniffing dog to perform a sniff test

87. 465 U.S. 783 (1984).
88. *Id.*
89. *Id.* at 785.
90. *Id.*
91. *Id.* at 788–89.
92. *Id.*
93. *Id.* at 785–86.
94. *Id.* at 789.
95. 571 U.S. 277 (2014).
96. *Id.* at 280.

on the cash.[97] The agent and the DEA refused to return the cash for an extended period of time.[98] As part of the investigation process, the agent later signed an affidavit for the United States Attorney's Office, in which the officer allegedly omitted exculpatory information concerning the money.[99] This affidavit prolonged the return of the cash to the plaintiffs.[100] The plaintiffs filed suit in Nevada.[101]

After a brief overview of the Court's personal jurisdiction jurisprudence, Justice Thomas arrived at *Calder*. He wrote that the "crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[102] Remember, in *Calder*, the writers relied on California sources, wrote an article concerning activities in California, and caused reputational harm in California. In *Walden*, unlike *Calder*, the "effects" did not harm the forum (Nevada) but only a resident of the forum. In sum, *Walden* stands for the principle that courts will emphasize whether conduct directed at the forum is connected to the forum in more ways than just affecting the plaintiff.[103] Notably, the *Walden* court specifically refused to set standards for (or worry about) personal jurisdiction "via the Internet or other electronic means."[104]

With the benefit of the nonvirtual cases in *Calder* and *Walden*, how would a court decide a personal jurisdiction motion for a Facebook user who posted content like that in *Calder*? In favor of jurisdiction is that the effects would still be felt in California, the defendants targeted California in some way by contacting sources there, and the plaintiff suffered reputational harm in California. So, what is the twist?

Remember that in *Calder* the Court noted that there were over six hundred thousand weekly subscribers to the Enquirer.[105] In finding jurisdiction proper,

---

97. *Id.*

98. *Id.* at 280–81.

99. *Id.*

100. *Id.*

101. *Id.* at 279.

102. *Id.* at 287.

103. Another distinguishing point noted in *Walden* is that *Calder* involved the tort of defamation, which actually occurred in the state of California. *See id.* at 287–88. The *Walden* court expressly rejected the argument that mere forum-resident injury is, by itself, enough for jurisdiction:

> *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.

Id. at 290.

104. *Id.* at 290 n.9. Recently, in a case regarding Facebook, the Alabama Supreme Court appeared to admonish a party for arguing *Calder* but failing to cite *Walden*, noting that *Walden* "expressly rejected the notion that specific jurisdiction may be exercised based on the foreseeability of harm suffered in the forum state." Facebook, Inc. v. K.G.S., 294 So. 3d 122, 140 (Ala. 2019).

105. Calder v. Jones, 465 U.S. 783, 785 (1984).

the Court wrote, "[The writers] knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation."[106] In contrast, viewers on Facebook could see the posting for free rather than having to subscribe to a weekly publication to the Enquirer. Further, unlike in a weekly subscription in which the Enquirer needed to actively distribute the paper, it is the Facebook member that can choose to view the posting at his or her leisure. Moreover, the size of the audience on Facebook (as well as the identity of the audience) can be much smaller than a newspaper (at least a newspaper in the past). Further, the audience size can vary wildly from what might have been reasonably expected by the person making the post. In fact, the identity of the audience (both the location of the audience as well as the connection between the audience and the plaintiff or defendant) might make a difference.

Consider this Facebook hypothetical through the *Zippo* test. This case is unlike one in which "the defendant enters into contracts with residents of a foreign jurisdiction."[107] Thus, asserting personal jurisdiction is far from a foregone conclusion. In fact, one may argue that this is closer to the passive end of the spectrum in which "a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions."[108] What makes this case more difficult is that the writers actively solicited information from California and the reputational harm was felt in California. As discussed above, though, can a court determine that defendants purposefully availed themselves of California because they knew there were Facebook followers in California who would see the post? These complications highlight *Zippo*'s "middle ground," and bolster this Article's thesis that a field theory of personal jurisdiction in social media cases is untenable.[109] Perhaps this analysis explains why the *Zippo* test will have limited utility in social media cases (at least noncommercial cases).[110]

To further explore the "middle ground," imagine a few more obstacles thrown into the jurisdictional analysis. Imagine that instead of the defendant merely posting on its Facebook page, it purchases Facebook's targeted advertisement process to target the California market.[111] This likely militates towards directing activities to California more so than posting on a page to which people in California may subscribe. The facts, however, can be changed

106. *Id.* at 789–90.

107. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

108. *Id.*

109. *See id.* ("The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.").

110. *See* Ellen Smith Yost, Comment, *Tweet, Post, Share . . . Get Haled into Court?* Calder *Minimum Contacts Analysis in Social Media Defamation Cases*, 73 SMU L. REV. 693, 701 (2020) ("*Calder*—and not *Zippo*—is the relevant framework in social media defamation cases where the user is not the website owner.").

111. *See Ad Targeting*, FACEBOOK, https://www.facebook.com/business/ads/ad-targeting (last visited Jan. 18, 2022) ("Advertise in the cities, communities and countries where you want to do business.").

again. Imagine a scenario in which the defendant pays for advertisement in every single state or merely pays for a particular demographic, and Facebook selects the geographic audience. Does this constitute targeting specifically to California if Facebook drives the targeting?

This targeting of the jurisdiction was key in a recent Sixth Circuit opinion in which the court held that Kentucky federal courts did not have personal jurisdiction over two nonresidents. In *Blessing v. Chandrasekhar*, a group of high school students, who were residents of Kentucky, filed suit against two defendants who were residents of other states.[112] The defendants tweeted several defamatory statements about the students after media outlets accused the students of harassing members of a Native American tribe at a Washington, D.C. rally.[113] Some of the tweets called for "re-education" of the students and for others to "shame" the students.[114]

The district court dismissed the case for lack of personal jurisdiction, and the Sixth Circuit affirmed.[115] The appeals court found that the tweets "'did not create sufficient contacts' with Kentucky 'simply because' the plaintiffs have Kentucky connections."[116] The court highlighted that the defendants did not (1) have any preexisting relationship with the students, (2) take affirmative steps to direct communications to the students or others in Kentucky, nor (3) availed themselves of the laws of Kentucky.[117] The Court found persuasive that the defendants' messages did not target Kentucky specifically, but instead targeted the defendants' followers generally.[118] Rather than contacting individuals in Kentucky or specifically mandating individuals in Kentucky to harass the students, the defendants' comments "targeted" a broader scope of individuals not necessarily related to the forum.[119]

The Sixth Circuit noted that its sister circuits have likewise focused upon the targeting of the forum, citing cases from the Fourth and Fifth Circuits. In *Young v. New Haven Advocate*, the Fourth Circuit did not subject Connecticut

112. 988 F.3d 889, 892–93 (6th Cir. 2021).

113. *Id.*

114. *Id.*

115. The Sixth Circuit affirmed the dismissal for two reasons: (1) that the conduct of the defendants did not fit within Kentucky's long-arm statute and (2) the exercise of personal jurisdiction would violate due process. *Id.* at 907. The discussion here will focus on due process, but both prongs are important.

116. *Id.* at 906 (quoting Walden v. Fiore, 571 U.S. 277, 289 (2014)).

117. *Id.*

118. *Id.* at 905–06. The *Blessing* court cited Sixth Circuit precedent in *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 679 (6th Cir. 2005), in which the Sixth Circuit

> declined to subject the defendant to jurisdiction in Ohio because "while the 'content' of the [allegedly defamatory] publication was about an Ohio resident, it did not concern that resident's Ohio activities" and "nothing on the website specifically target[ed] or [wa]s even directed at Ohio readers, as opposed to the residents of other states."

Blessing, 988 F.3d at 905.

119. *Id.* at 906.

newspapers to personal jurisdiction in a defamation suit.[120] The Fourth Circuit held that the newspapers did not target Virginia and therefore did not have sufficient contacts with Virginia.[121] Similarly, the Fifth Circuit did not extend personal jurisdiction against defendants when social media posts about airplane bombings appeared directed at the "entire world" rather than "specifically at Texas."[122]

The Sixth Circuit in *Blessing* continued by distinguishing its facts from *Calder*. The opinion quoted that jurisdiction was proper in *Calder* because "California [wa]s the focal point both of the story and of the harm suffered."[123] Rather than Kentucky serving as the focal point of the tweets, Washington, D.C., and the events that took place in the nation's capital served as the focal point, according to the court.[124] Further, "[t]he plaintiffs' alleged harm—being identified and 'shamed' as the students present at the Lincoln Memorial—'is not the sort of effect that is tethered to [Kentucky] in any meaningful way.'"[125] The *Blessing* court likened the facts to *Walden* in writing that "the [students] were allegedly injured in Kentucky 'not because anything independently occurred there, but because [Kentucky] is where [the students] chose to be.'"[126] Of course, the defendants in *Blessing* probably cared a great deal about the effects in Kentucky and very little about what people in Washington felt about them. The defendants likely knew that their tweet would have a great impact in Kentucky—both on the plaintiffs and on the people in Kentucky who read the tweet.[127]

Notably, *Blessing* is consistent with the conclusion of some other lower courts that the *Walden* language requires targeting of the forum rather than mere awareness of damage in the forum.[128] Thus, those courts appear to require more

120. 315 F.3d 256, 264 (4th Cir. 2002).

121. *Id.* at 258–59.

122. Revell v. Lidov, 317 F.3d 467, 475 (5th Cir. 2002).

123. *Blessing*, 988 F.3d at 904 (quoting Calder v. Jones, 465 U.S. 783, 789 (1984)).

124. *Id.* at 906–07.

125. *Id.* at 906 (quoting Walden v. Fiore, 571 U.S. 277, 290 (2014)).

126. *Id.* at 906–07 (quoting *Walden*, 571 U.S. at 290).

127. Another court reaching a similar result to *Blessing*, discussed further below, is *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122 (Ala. 2019). Like *Blessing*, the *K.G.S.* Court found no jurisdiction for social media posts. *Id.* at 147. In that action, it was undisputed that all of the impact was in Alabama (the allegedly improper posts and photos concerned an adoption of a child in Alabama by a mother who lived in Alabama, and the child lived in Alabama). *Id.* at 136. The difference in the cases, however, is that *Blessing* was an action against the person making the "post," whereas the *K.G.S.* decision concerned personal jurisdiction against the social media company itself (for the most part, the "posters" had waived their personal jurisdiction defense). *Id.* at 130–31, 142. The court may have implied that it is easier to argue that the person making the post is targeting something (at least the plaintiff), while the social media company is passive as to the particular post. *See id.* However, the Alabama Supreme Court also expressly recognized that the relevant targeting is the targeting of the forum rather than the individual plaintiff. *Id.*

128. *See* Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002) ("The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers."); *see also* Medinah Mining, Inc. v. Amunategui, 237 F. Supp. 2d 1132, 1138 (D. Nev. 2002) ("[We hold] that a showing that residents of a forum had access to a website is insufficient to prove that defamatory statements were aimed

than the posting of harmful content that might be anticipated to cause harm to the plaintiff in a particular forum. Instead, these courts require that the "defendant expressly aim or specifically direct his or her intentional conduct at the forum, rather than at a plaintiff who lives there."[129]

Another example of a result similar to *Blessing* is *Edwards v. Schwartz*, which involved negative social media posts regarding a Virginia Tech professor and his involvement in the Flint, Michigan water crisis.[130] The professor brought suit in Virginia against Michigan defendants.[131] The court noted that it must analyze personal jurisdiction as to each claim and that personal jurisdiction over one claim would not create jurisdiction over another.[132] Ultimately the court found no jurisdiction based upon social media posts, writing: "*Calder*, however, does not vest jurisdiction in a state merely because it serves as the locus of the plaintiff's injury."[133] The "proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[134]

Notably, the court did find personal jurisdiction over a separate defamation claim based upon a letter sent to Virginia Tech administrators.[135] Oddly, the court did not consider this a "plus" factor when analyzing possible personal jurisdiction over the social media claims but instead analyzed it independently. In passing, the court also noted that if the social media posts had included additional Virginia-connected content (such as "tags"), jurisdiction might have been proper:

There is no factual matter in *Edwards*'s pleadings suggesting that the authors of these communications took affirmative steps to direct these communications into Virginia or had any intent to target or focus on Virginia readers or otherwise avail themselves of the benefits and protections of the laws of

---

at the forum."); Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790, 796 (W.D. Tenn. 2000) (holding that statements on Internet were not expressly aimed at plaintiff's forum because "the alleged defamatory comments had nothing to do with plaintiff's state of residence"); Novak v. Benn, 896 So. 2d 513, 520–21 (Ala. Civ. App. 2004) (finding that posting statements on Internet forum did not constitute express aiming to Alabama and that personal jurisdiction over nonresident defendant was not proper); Dailey v. Popma, 662 S.E.2d 12, 19 (N.C. Ct. App. 2008) (requiring showing of intent to target content on Internet bulletin board to audience in forum state to support jurisdiction). Likewise, according to *Walden*, courts should look to the defendant's "own contacts" with the forum, not to the defendant's "knowledge" of a plaintiff's "connections" to a forum. *Walden*, 571 U.S. at 289.

129. Burdick v. Superior Court, 183 Cal. Rptr. 3d 1, 13 (Ct. App. 2015); *see* FireClean, LLC v. Tuohy, No. 1:16-cv-0294, 2016 WL 3952093, at *7 (E.D. Va. July 21, 2016) ("The mere fact that Tuohy referenced a Virginia company, its product, and its owners without mentioning Virginia does not demonstrate an intent to target Virginia, as even overt references to a [s]tate may be jurisdictionally insufficient if the focus of the article is elsewhere.").

130. 378 F. Supp. 3d 468, 478–79 (W.D. Va. 2019).

131. *Id.* at 486–87.

132. *Id.* at 490–91.

133. *Id.* at 490; *see Walden*, 571 U.S. at 290 ("[M]ere injury to a forum resident is not a sufficient connection to the forum.").

134. *Edwards*, 378 F. Supp. 3d at 490 (quoting *Walden*, 571 U.S. at 278).

135. *Id.* at 495–96.

Virginia. Nor are there any facts indicating that a Virginia resident, or anyone at Virginia Tech, read, "liked," reposted, or was even aware of the communications in question. Indeed, Edwards failed to present any evidence that any Virginia resident, for example, subscribed to, "friended," "retweeted," or "followed" any of the defendants' social media accounts or commented on the posts in question, or that the accounts themselves had a geographic focus. Lastly, there are no facts suggesting that any of the communications were published from Virginia, routed through servers located in Virginia, or were of special interest to Virginia readers.[136]

In short, the *Edwards* court, like so many others, held that due process is heavily fact-based.[137]

There is perhaps another way to harmonize *Calder*, *Blessing*, *Edwards*, and *Walden*. In *Calder*, the *National Enquirer* had a profit motive behind its targeting of the forum. The *National Enquirer* deliberately targeted the forum to advance its own monetary interests. In *Blessing*, *Edwards*, and *Walden*, there was no profit motive by the defendants. To further belabor the point, use the conceptual frameworks mentioned earlier from the Ninth Circuit in *Perry v. Brown*: "purposeful availment" and "purposeful direction." There was no contract or profit motive, so the defendants in *Blessing* were arguably not availing themselves of the laws of the state of Kentucky. For "purposeful direction," the *Blessing* court found the "directing" too attenuated to suffice for specific jurisdiction. Even though *Blessing* and *Calder* both involved "speech," one (*Calder*) had a tangible, monetary benefit while the other (*Blessing*) did not.

What if the facts were changed slightly and the subject of the tweets in *Blessing* were the actions of the plaintiffs in both Kentucky and in Washington (or perhaps, the tweets expressly mention the Kentucky home addresses of the plaintiffs); would the result change? Is the impact any different? Was the intent of the defendant any different? Was the knowledge of the defendant that a large

136. *Id.* at 494.

137. Perhaps one of the earliest cases that could be called a social media case also refused jurisdiction based upon a similar analysis. *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002) involved the now-antiquated form of online communication called a newsgroup. A Minnesotan made a comment challenging the credentials of a fellow user, an Alabama professor, who then sued for defamation in Alabama. *Id.* at 529. On advice of counsel, the Minnesotan did not answer the complaint, which resulted in a $25,000 default judgment. The jurisdictional gamble paid off. *See id.* The Minnesota Supreme Court held that although the comment might have been directed at the Alabamian, it was not "expressly aimed" at Alabama and therefore personal jurisdiction was lacking. *Id.* at 535. Therefore, the judgment could not be enforced in Minnesota. *Id.* at 537. In addition to those cases cited above and in prior notes, other examples of social media defamation decisions refusing jurisdiction include: Janus v. Freeman, 840 F. App'x. 928 (9th Cir. 2020) (holding, in a California defamation case, that jurisdiction was improper when a nonresident defendant's comments on social media did not create meaningful contacts with the forum); FireClean, LLC v. Tuohy, No. 1:16-cv-0294, 2016 WL 3952093, at *7 (E.D. Va. July 21, 2016) ("The mere fact that Tuohy referenced a Virginia company, its product, and its owners without mentioning Virginia does not demonstrate an intent to target Virginia, as even overt references to a [s]tate may be jurisdictionally insufficient if the focus of the article is elsewhere."); Binion v. O'Neal, 95 F. Supp. 3d 1055, 1060 (E.D. Mich. 2015) (holding that posting offensive pictures of the plaintiff on Instagram and Twitter did not constitute the defendant purposefully availing himself of the forum).

effect would result in Kentucky any different? What if the tweets included hashtags related to Kentucky and intended to draw attention to Kentucky and draw the attention of a Kentucky audience?

Although it is possible to change the facts in many ways, perhaps the real difference here is that there was no profit motive in *Blessing* and *Edwards*. The tweet was not a commercial activity. Or is the difference that the maker of the tweet was an individual rather than a business? Of course, the profit motive can have many shades of gray in today's social media world where private persons—influencers or celebrities—maintain larger-than-life social media presences that they monetize in other ways.

Should the result change over time if the public comes to understand the potentially "viral" impact of a social media posting? What if the impact was that the plaintiff committed suicide after the original (false) tweet went "viral" and then horrible harassing social media postings, texts, and calls ensued? Or, what if physical attacks (by others) ensued in the forum because of the details or the tenor of the tweet? All of the above questions highlight some of the tension expressed in Gorsuch's concurrence in *Ford*. With this potential emergence of a vast terrain for exerting personal jurisdiction, lower courts are left without many guideposts at the moment. True, because of the due process aspect of the personal jurisdiction analysis, it would be improper, if not unconstitutional, to place too rigid constructions on personal jurisdictional analysis. However, the consequences of the lack of much guidance could lead to a divide among the circuits and among state courts.

Another important question to ask is what if the tort is not defamation or libel but is instead an intentional business tort? Contrast the Sixth Circuit's decision in *Blessing* with the Ninth Circuit's decision in *Perry*.[138] The district court in *Perry* found that personal jurisdiction over a nonresident defendant was proper in California because the defendant committed an intentional act and knew that the plaintiff lived in California. There, Steve Perry, the plaintiff and lead singer in the band "Journey," filed suit against the nonresident defendant, Brown.[139] Nearly thirty years prior, the two men recorded songs together that were never released to the public.[140] In 2018, Brown began posting promotional

138. *See* Perry v. Brown, 791 F. App'x. 643, 646 (9th Cir. 2019) ("Perry has established the first two prongs of specific jurisdiction. Brown purposefully directed his actions at California by targeting Perry, whom he knew to be a California resident, through the use of Perry's name and likeness in proximity to advertisements of Brown's band and CD."), *aff'g* No. CV 18-9543, 2019 WL 1452911 (C.D. Cal. Mar. 13, 2019). Note, however, that in the Ninth Circuit's opinion, in reviewing the case *de novo*, the panel chose to highlight contracts made between the parties decades prior. *Id.* at 646 ("Brown's actions were based on his claimed right to exploit the 1991 works that he participated in writing and recording with Perry in California, two of which are the subject of a contract executed in California.").

139. *Perry*, 2019 WL 1452911, at *3.

140. *Id.* at *2.

messages on social media suggesting that Brown and Perry played in the same band.[141] Brown, through his girlfriend, also posted videos on Facebook.[142]

The district court first found that Brown committed intentional acts by using Perry's trademark "Steve Perry" on Twitter and Facebook and that the acts "caused harm to [Perry] in California."[143] The court correctly noted that the contacts must focus on a defendant's connection with the forum and not a plaintiff's connection with the forum.[144] Citing Ninth Circuit precedent, the court held that in the trademark context, Perry needed to only show that Brown knew that Perry lived in California.[145] This knowledge constituted "express aiming" at California and aided the court in finding personal jurisdiction proper.[146]

In *Blessing*, it would seem likely the defendants "knew" that the students lived in Kentucky, and in *Perry* the court considered knowledge of the location as an important factor. The difference in outcomes, however, makes this factor seem difficult to use to harmonize the results. These cases, and the differences in their holdings, highlight some of the problems that courts face with social media cases. In sum, the facts and the context matter to due process, and there will be close cases.

2. *What About* Ford*?*

Calder, *Walden*, *Blessing*, *Edwards*, and *Perry* were all decided before *Ford*, so it is worth inquiring as to how *Ford* may change the analysis moving forward. First, however, it is important to understand how the discussion arrived at *Ford*. In a set of three cases, *Goodyear Dunlop*, *Daimler*, and *Bristol-Myers Squibb*, the Court narrowed general jurisdiction.[147] In particular, the Court now requires that for general jurisdiction, defendants *actually* be "at home" in the forum through either residence for individuals or incorporated or principally placed for businesses, rather than merely having "continuous" and "systematic" contacts with the forum.[148] This narrowing of general jurisdiction has put considerable pressure to expand specific jurisdiction.

---

141. *Id.*

142. *Id.* at *3.

143. *Id.* at *6.

144. *Id.* at *6–7 (quoting Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017)).

145. *Id.* at *7. The court also discussed that Brown needed to cause foreseeable harm in California. *Id.* The court found that there was foreseeable harm in California because Perry lived in California. *Id.*

146. *Id.*

147. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017).

148. *E.g.*, *Goodyear*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

Before *Ford*, the phrases "arise out of" and "relate to" could be read similarly as both requiring some form of "but-for" causation.[149] Now, at least in some cases, courts may be confused (as Justice Gorsuch appears to be) regarding the "virtually infinite number of 'affiliations'" represented by the term "relating to."[150] It certainly appears that the Court has expanded specific jurisdiction less than a decade after considerably constricting general jurisdiction.[151] Of course, the *Ford* expansion does not restore the earlier status quo. The requirement that the contacts "relate to" the claim at issue is a more narrow test than the earlier general jurisdiction test that a defendant's activities merely must be "continuous and systematic" and "substantial." Thus, for instance, if a corporate defendant had a significant manufacturing facility for one industry (for instance, boats), general jurisdiction might have previously existed for any claim of any kind; however, under *Ford*, the presence of such a boating facility would not seem to provide "related to" jurisdiction for a claim about a defective car, absent some additional facts.

Such post-*Ford* confusion has now arisen. In *Johnson v. TheHuffingtonPost.com, Inc.*,[152] the Fifth Circuit split 2–1 on the meaning of *Ford*.[153] There, the plaintiff brought a libel suit against a website that publishes online articles and commentary.[154] The majority found no personal jurisdiction and applied a pre-*Ford* Fifth Circuit precedent that had adopted the *Zippo* test.[155] Finding that the website was interactive, the Court then determined that the story did not "target Texas," observing, among other things, that there was no mention of Texas.[156] The Court noted that in *Revell*, even the solicitation of subscriptions in Texas did not satisfy the targeting test because the "libel claim did not arise from it."[157]

149. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring) ("[T]he plaintiff's suit must 'arise out of or relate to' the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries.").

150. *Id.* at 1035.

151. *See id.* at 1034. ("The majority admits that 'arise out of' may connote causation. But, it argues, 'relate to' is an independent clause that does not. Where this leaves us is far from clear.").

152. 21 F.4th 314 (5th Cir. 2021).

153. Thus far, it appears that *TheHuffingtonPost.com* is one of only two Circuit Court opinions, post *Ford*, which have tackled personal jurisdiction in the social media (or near-social media) context. The other decision is *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021). There, a plaintiff sued for a violation of her right of publicity under state law after photographs of her were posted on Facebook, Imgur, and Reddit and used for commercial purposes. *Id.* at 207. Imgur and Reddit contested personal jurisdiction. *Id.* "Imgur is a photo sharing website," and "Reddit is an online forum that allows users to create communities." *Id.* Like *TheHuffingtonPost.com*, the Third Circuit rejected the argument that Imgur and Reddit had purposefully availed themselves of the state market because they "targeted their advertising business to Pennsylvania" and sold online merchandise to Pennsylvanians. *Id.* at 208. The Court explained that none of these contacts "form[] a strong connection to the misappropriation" because the plaintiff did not allege that the merchandise "featured her photo" and the advertising was not used "to sell advertising." *Id.*

154. *TheHuffingtonPost.com*, 21 F.4th at 316.

155. *Id.* at 317–20 (citing Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002)).

156. *Id.* at 320.

157. *Id.* at 319.

According to the majority, "[m]aking a website that's visible in Texas, of course, does not suffice."[158] Despite the fact that the defendant in *TheHuffingtonPost.com* showed Texas-specific ads to Texas visitors, the majority held that the ads were "unrelated activities."[159] In fact, according to the majority, the ads did not direct visitors to the libelous material but actually drove them away from the website (to the sponsors of the ads).[160] The court wrote, "Grannies with cooking blogs do not, and should not, expect lawsuits from Maui to Maine."[161]

The dissent read *Ford* entirely differently, writing that *Ford* "made clear that the state in which an injury occurred can exercise specific personal jurisdiction over a defendant if the defendant *deliberately engaged in commercial activities in that state*."[162] The majority strongly disagreed, writing that *Ford* "did not say that 'anything goes'" and "a plaintiff must link the defendant's *suit-related* conduct to the forum. Mere market exploitation will not suffice."[163] The majority insisted that "selling merch[andise] and showing ads to every visitor" are unrelated activities from the libel.[164] In contrast, the dissent responded that this case is "[j]ust like Ford" because the Huffington Post "sold its products" in the forum state and the plaintiff "was injured by that product."[165] The dissent believed that the "link" that was relevant was "between the article" and the defendant "circulating articles to Texas."[166]

The *TheHuffingtonPost.com* case is interesting not only for the disagreement between the majority and dissent over what "relate to" means but also because it finds no personal jurisdiction in a clearly commercial case—concerning a significant national website (definitely not a grannie with a cooking blog).[167] *TheHuffingtonPost.com* is not a pure social media case[168] and fits far more comfortably in the *Zippo* analysis. Even with the *Zippo* structure, there is still strong disagreement between the majority and dissent. Perhaps most notable is the lack of evidence in the opinion about the defendant (for instance: how much revenue does the defendant derive from Texas, how many visitors from Texas "click" every day, does the defendant keep records of its Texas visitors, does it sell its visitor list, does it solicit its Texas visitors after they leave the site). There

158. *Id.* at 320.

159. *Id.* at 325.

160. *Id.* at 321–22.

161. *Id.* at 320.

162. *Id.* at 326–27 (Haynes, J., dissenting) (emphasis added).

163. *Id.* at 324 (majority opinion).

164. *Id.* at 325.

165. *Id.* at 331 (Haynes, J., dissenting).

166. *Id.*

167. *See, e.g.*, *HuffPost*, BRITANNICA, https://www.britannica.com/topic/The-Huffington-Post (last visited Mar. 8, 2022).

168. Some might characterize the Huffington Post as something between a traditional website and a social media site. For instance, the *K.G.S.* opinion of the Alabama Supreme Court concerned Facebook posts which, in part, linked to blogs and photos on the Huffington Post. Facebook, Inc. v. K.G.S., 294 So. 3d 122, 127–28 (Ala. 2019).

is also no discussion of any evidence that the defendant attempted to drive Texas visitors to its website through the use of other advertising (for instance, the majority observes the lack of related evidence that the defendant "aimed the alleged libel at Texas through geotargeted ads on Facebook or Google").[169]

In sum, there is not yet a clear consensus test—except at the highest level of abstraction—for personal jurisdiction cases based upon social media, even for intentional torts such as defamation. While the *Ford* decision has made it more likely that personal jurisdiction will be found in a social media case involving an intentional tort, it has also made the analysis less fixed. Thus, *TheHuffingtonPost.com* illustrates that facts will matter a great deal (even though it is not a pure social media case) because the opinion does not include very many facts. However, thus far in defamation cases on social media, notwithstanding *TheHuffingtonPost.com*, it is fair to observe that courts may be scrutinizing the "expressly aiming" test more closely (1) if the case is not commercial and (2) if the defendant is an individual (such as the Grannie and her cooking blog).

C. Commerce

Social media is not just a place for sharing family photos. Social media platforms also offer means by which individuals and businesses can sell their products and services.[170] When, then, can a seller on Facebook be subject to personal jurisdiction for a defective product or some other tort? This presents us with the next category of cases: commerce.

As an initial note, some commerce cases also fit neatly into the intentional tort category. These might include intentional interference with contract or business relations or perhaps some forms of unfair competition or antitrust claims. Other commercial cases in the social media space (for instance, breach of contract, breach of warranty, product defect, etc.) seem a little closer to their tangible analogs than intentional torts and thus easier.[171] In other words, this category requires a background and analogy to previous Supreme Court cases.

---

169. *TheHuffingtonPost.com*, 21 F.4th at 321.

170. *See, e.g.*, *Selling on Marketplace*, FACEBOOK, http://www.facebook.com/marketplace/learn-more/selling/ (last visited Aug. 31, 2021) (offering insight on how to sell products on Facebook Marketplace, including tips and avenues); *see also* Jasmine Enberg, *Why Small Businesses Could Benefit from the Launch of Facebook Shops*, INSIDER INTELLIGENCE (Jan. 12, 2021), https://www.emarketer.com/content/why-small-businesses-could-benefit-launch-of-facebook-shops (noting that nearly 20% of Americans purchased items through Facebook in the previous year).

171. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Another example of a typical breach of contract personal jurisdiction dispute is *Ex parte LED Corps., Inc.*, 303 So. 3d 1160 (Ala. 2020). There, the court found personal jurisdiction over a lighting supplier based in Florida. *See id.* at 1171–72. The court found that specific jurisdiction existed. *Id.* at 1172. The court noted that the contract between the parties was important because it reflects the "future consequences which themselves are the real object" of the transaction. *Id.* at 1168 (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 317 (1943)). Although this was a single sale, it was the supply of substantial goods to an Alabama corporation to be used in a construction project in Alabama. *See id.* at 1170. Further, the defendant sent an employee to Alabama to determine the specifications to be used for a customized package. *Id.* "Physical entry into the forum state by an agent . . . 'is

Even cases in the tangible world appear to have different nuances in their personal jurisdiction tests depending upon their category (or their context). For instance, courts seem to decide breach of contract cases based upon whether (and how much) a defendant purposefully availed themselves of the forum such that they would reasonably anticipate being haled into court there.[172] The case law seems well developed for contract cases.[173] However, the case law is less clear for product defect claims when the court must resort to the "stream of commerce" line of cases. At least at the United States Supreme Court, there continues to be some lack of consensus over the standards to apply.[174] "The stream of commerce . . . refers to the movement of goods from manufacturers through distributors to consumers."[175] If a defendant places goods into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State," then a court may consider this activity as purposeful availment that renders the defendant subject to personal jurisdiction.[176] Because *Ford* (a products liability case) provides a broader interpretation of the initial minimum contacts, courts may not need to resort to the stream of commerce analysis as often.

1. Social Media Context

For social media, the commerce category will also involve factual inquiries, which may make it difficult to find a fixed, simple rule. To understand the problems courts will face, imagine two different scenarios.

a. Scenario A

Scenario A involves an Alabama resident taking pictures of his car and posting the pictures on his private Facebook page. The resident notes that he is selling the vehicle for $1,000 and asks others to send him a private message if they are interested in purchasing the vehicle. The man promises that the car

certainly a relevant contact.'" *Id.* (quoting Walden v. Fiore, 571 U.S. 277, 285 (2014)). This visit was "integral to negotiations." *Id.* There was a clear nexus between the defendant's conduct and the alleged injurious consequences such that it should "have reasonably anticipated being sued in an Alabama court." *Id.*

172. *See* Asad v. Pioneer Balloon, 10 F. App'x 624, 626 (9th Cir. 2001).

173. *E.g.*, *id.*; Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A., 972 F.3d 1101 (9th Cir. 2020); Knox v. MetalForming, Inc., 914 F.3d 685 (1st Cir. 2019); Whaley v. Esebag, 946 F.3d 447 (8th Cir. 2020).

174. *See* Swift & Co. v. United States, 196 U.S. 375, 399–402 (1905); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

175. *Nicastro*, 564 U.S. at 881.

176. *Id.* at 881–82. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)). The plurality decision in *Nicastro* is an example of the confusion in this line of cases. There, the court held that the defendant corporation must purposefully avail itself of each particular jurisdiction to trigger exercise of personal jurisdiction. *Id.* at 886. Justice Kennedy's plurality advanced that it is the "defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *Id.* at 883.

is as "good as new." The resident has had a Facebook for about ten years with about one thousand "friends," although he does not know where all of his Facebook connections now reside.

One of his "friends" is an Arkansas resident and desperately wants a car for his son's sixteenth birthday. The Arkansas resident flies to Alabama to inspect the vehicle. After some discussion, the Arkansas resident buys the vehicle from the Alabama resident and begins to drive back home to Arkansas. Along the way, the car malfunctions in Louisiana. The man later sues in an Arkansas court claiming that the seller's social media post misled and deceived him. He argues that jurisdiction is proper because the social media post reached the plaintiff in Arkansas, so the Alabama resident should be subject to jurisdiction in Arkansas courts. Is the Arkansas resident correct?

Under *Zippo* and its progeny, but before *Ford*, a court likely could not exert personal jurisdiction. As the Court has said on numerous occasions, the contacts with the forum must go beyond just affecting the plaintiff.[177] Here, there exists no evidence that the man targeted Arkansas as a forum. This is likely a case that falls within the "middle ground" in *Zippo* but tilts away from personal jurisdiction. The Alabama resident's posts appear more passive than active, notwithstanding that Facebook has some interactivity to its website.

b. Scenario B

The Alabama resident owns a tool manufacturing company in Alabama. He has a Facebook page on which he sells his tools. He purchases Facebook's targeted advertisement subscription to boost his advertisements in the states of Alabama, Georgia, and Florida.[178] A woman, located in Florida, wants to purchase a new tool set for her husband. One day, while scrolling on her Facebook, she notices the targeted advertisement. She calls, orders a set of tools to be delivered to her door in Florida, and gifts the equipment to her husband. A few weeks later, one of the pieces malfunctions and causes injury to her husband. Can a Florida court properly exercise jurisdiction over the Alabama tool manufacturer?

Under *Zippo*, although this case likely falls within the middle ground, it likely militates towards a more interactive affair. The tool manufacturer has taken a deliberate step to target the Florida forum. Is this interaction enough to be considered "targeting" the forum? Does the result change if there is no injury but merely a malfunction and therefore a contract or warranty claim?

177. *E.g.*, Calder v. Jones, 465 U.S. 783, 788 (1984); Walden v. Fiore, 571 U.S. 277, 279 (2014); and for stream of commerce cases, the Court in a plurality opinion discusses this in *Nicastro*, 564 U.S. at 883.

178. First, one should pause and recognize from the outset that this resident is likely already subject to general jurisdiction in the state of Alabama, as he is a *resident*. This is the importance of drawing analogies from the tangible to the intangible. It would make little sense that a person could be subject to only general jurisdiction in social media cases but never specific jurisdiction, even though exerting specific jurisdiction may be more difficult.

c. Scenario C

Now, what if the claim was based on a defective product, purchased in another state as a result of a social media posting? Imagine that the facts are exactly as in Scenario *B* but that the plaintiff purchased the tools while living in Georgia. But then she moved to Florida, and her husband was injured there. Assuming that the defendant did not otherwise sell, market, or service such tools in Florida, the plaintiff will need to try to satisfy the stream of commerce tests. On the other hand, if (as in *Ford*) the manufacturer also markets, sells, and services tools in Florida as in Georgia, it would appear that specific jurisdiction would be satisfied. Even though the particular sale was not made in Florida, the lawsuit "relates to" the contacts of the defendant with Florida. The fact that the initial sale was through social media does not seem to justify varying the *Ford* analysis. Because of *Ford*, there should be no need to resort to the sometimes murky stream of commerce case law on these facts.

D. Other

There are a group of cases that do not fit neatly into any of the first three categories. The courts will need to carefully examine the facts of these cases to determine personal jurisdiction. Over time, the law should hopefully develop so that some of these repeated fact patterns can become their own categories and develop more specific standards. Examples of these "other" cases would include, among other things, nonintentional torts or certain statutory claims. For instance:

- Invasion of privacy cases arising out of a social media posting (for instance, posting of private, embarrassing pictures). A related claim could be "doxing."[179] This might—or might not—involve intentional tortious activity. If these cases are intentional, perhaps the analysis should be similar to the earlier category.
- Negligence or recklessness claims (for instance, a mistaken but false social media posting, or the negligent supervision or training of an employee who posted a false or tortious social media post). These claims seem more difficult to decide and may be the most fact-bound decisions.

179. For example, there are instances of "doxing" that occur when someone posts a person's identifying information online, particularly in a nefarious way. Michelle Park, *The Doxing Guide: What It Is, Statistics, Legality, and Prevention*, GARBO (Aug. 16, 2021), https://www.garbo.io/blog/doxing. Also, an individual might use a hashtag or "tag" someone that is known to be in a certain forum, which could be considered "targeting."

- Claims by businesses against individuals for malicious posts on social media (for instance, posts about the service or condition of a business—perhaps claiming that insects or criminal activity plague a business). These cases are especially interesting because they concern commerce and can have a real impact on businesses and income, but the alleged wrongdoer may be an individual and may not have any profit motive. Further, it is easy to imagine facts where the individual making the negative post does not envision the possible "viral" impact that could occur to the business.

And this Article has not even attempted to touch on personal jurisdiction over the social media platform itself. For example:

- Claims against Facebook (or any social media platform) that Facebook should have removed certain defamatory or private information from its platform—placed by individuals. These claims are interesting because Facebook is not normally alleged to have acted intentionally wrongfully as to particular individuals in an active way.[180]
- Claims against Facebook by consumers for selling or failing to protect consumer data.[181]
- Claims against Facebook for violating state statutes for collecting biometric information.[182]
- Claims by individuals against Facebook related to a third-party transaction. For instance, someone purchases a Facebook

180. For instance, in *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122 (Ala. 2019), a child's adoptive mother brought an invasion of privacy action against the social media company and certain individuals regarding the contested adoption; the trial court then entered a preliminary injunction. *See id.* at 126–28 (discussing the invasion of privacy action and the trial court's entering of the preliminary injunction). On appeal, the Alabama Supreme Court reversed, holding that the trial court lacked general or specific personal jurisdiction. *Id.* at 147. The claim for specific jurisdiction arose out of Facebook's failure to remove the Facebook page, which was created by a resident of New York state, after it was notified of the allegedly unlawful activity on the page and the harm it was causing. *Id.* at 127–28. The Alabama Supreme Court observed that most courts that have addressed the question have concluded that the general accessibility of Facebook in a forum does not provide sufficient connection to the forum to support the exercise of specific jurisdiction. *Id.* at 136 n.11.

181. *See* Blaine C. Kimrey & Bryan K. Clark, *Facebook Not Subject to Specific Personal Jurisdiction in Illinois*, MEDIA & PRIVACY RISK REPORT, (Jan. 29, 2016) https://www.mediaandprivacyriskreport.com/2016/01/facebook-not-subject-to-specific-personal-jurisdiction-in-illinois/.

182. For instance, in *Salkauskaite v. Sephora USA, Inc.*, No. 18-cv-08507, 2020 WL 2796122 (N.D. Ill. May 30, 2020), the district court held that there were not sufficient contacts between ModiFace Inc. and the forum to subject the company to personal jurisdiction. *See id.* at *5. ModiFace allegedly violated the Biometric Information Privacy Act (BIPA) because of ModiFace's use of technology to collect biometric information at Sephora Stores. *See id.* at *1. The court found persuasive the lack of property, employees, and operations in Illinois from ModiFace and the fact that the information was on the defendant's computers in California, even if collected from users based in Illinois. *See id.* at *4; *see also* Gullen v. Facebook.com, Inc., No. 15 C 7681, 2016 WL 245910, at *3 (N.D. Ill. Jan. 21, 2016).

> advertisement, Facebook targets a consumer, and the consumer uses Facebook to purchase the item.

And, of course, there is the problem of personal jurisdiction for the actions of agents. For instance, when is a corporation subject to personal jurisdiction when its agent or employee posts something allegedly wrongful on social media?[183] There are many other categories of disputes which generate personal jurisdiction battles, but they may not translate as easily to the social media context.[184]

IV. CURRENT SCHOLARSHIP ON JURISDICTION IN THE INTERNET AGE

To reiterate, this Article argues that there does not exist a field theory of personal jurisdiction in the social media context. Instead, personal jurisdiction should be analyzed depending upon the facts and the context, and that context can vary widely in the social media climate. Though there is a dearth of scholarship on the topic, some scholars have begun to wade in.

Professors Trammell and Bambauer outlined two approaches to personal jurisdiction in cases concerning intangible interests: a broad approach and a narrow approach.[185] The broad approach extends *Calder*'s effects test so that a plaintiff "need only prove that she holds a valid intangible interest in the forum."[186] Under such an approach in a social media context, it is likely that jurisdiction would reach most places in which plaintiffs are affected by the harm of defendants. Said otherwise, "[p]ersonal jurisdiction is appropriate based purely on the supposed intangible harm that the plaintiff has experienced in the forum, and whether such harm has occurred is the entire question on the merits."[187] The authors later reject the broad principle for the narrow

183. *See Ex parte* Reindel, 963 So. 2d 614, 617–18 (Ala. 2007); *see also In re* Chinese-Manufactured Drywall Prod. Liab. Litig., 753 F.3d 521, 530–35 (5th Cir. 2014) (discussing whether contacts may be imputed to an agent under Florida law and federal due process); Jet Wine & Spirits, Inc. v. Bacardi & Co. Ltd., 298 F.3d 1, 7–10 (1st Cir. 2002) (examining whether an alcohol distributor's actions may be imputed to a purchaser for the purpose of establishing minimum contacts); Chem Lab Prods., Inc. v. Stepanek, 554 F.2d 371, 372 (9th Cir. 1977) (finding that the president of a company could not be subject to personal jurisdiction in California when he sent a letter from New York to California on behalf of his company).

184. For instance, divorce actions can generate personal jurisdiction disputes. An example is *Nelson v. Nelson*, 891 So. 2d 317 (Ala. Civ. App. 2004). The court observed that "[t]he mere fact that a nonresident defendant once lived in the marital relationship in this state is insufficient to confer in personam jurisdiction . . . ." *Id.* at 322. "It is essential in each case that there be some act by which the nonresident 'purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* (quoting Coleman v. Coleman, 864 So. 2d 371, 374 (Ala. Civ. App. 2003)). Of course, in the right case, social media might provide that additional activity to satisfy this test. Likewise, environmental cases sometimes generate personal jurisdiction disputes. *See Ex parte* Aladdin Mfg. Corp., 305 So. 3d 214 (Ala. 2019).

185. Trammell & Bambauer, *supra* note 2, at 1163.

186. *Id.* at 1163–64.

187. *Id.* at 1164–65.

approach,[188] discussed below, but it is important to consider that some courts already appear to reject the broadest approach. For example, recall that in *Blessing v. Chandrasekhar*, the Sixth Circuit rejected exercising personal jurisdiction over nonresident defendants even though the Kentucky students felt the harm within the state of Kentucky.[189] If the *Blessing* court had exercised personal jurisdiction, this would have comported with the broader approach. Logically extending *Calder* to all cases in which social media posts "affect" the forum or a defendant in the forum may not be enough to guard for due process concerns, depending upon the other facts of the dispute. As the professors note, "the broad approach['s] outcomes are in tension with both personal jurisdiction's rationales and the Constitution."[190] Thus, the authors' rejection of the broad approach seems to comport with at least some judges' views of personal jurisdiction in the area.

Trammell and Bambauer then discuss their narrow approach: "Internet-based contacts should rarely, if ever, suffice for personal jurisdiction."[191] At base, the authors argue for courts to "abandon the fiction that virtual activity is akin to physical contact with one or more states."[192]

This approach, however, also appears untenable. The authors attempt to discount harm done over the internet relative to harm done in person.[193] For example, take the facts of *Blessing*. Although the Sixth Circuit found that the defendants did not target Kentucky, what if, after viewing the tweets, Kentucky residents felt the need to protest outside the students' homes leading to a need for police protection? Imagine if that harm caused mental health concerns for the plaintiff, who then required hospitalization or contemplated self-harm. The point is that although it may be *difficult* to analogize intangible and tangible harms, that difficulty does not enter the due process analysis.

On the other end of the spectrum, one scholar (Allison MacDonald) has argued that "due process should not require that defendants with . . . knowledge [of harm in the forum] show additional intent to target the

188. *Id.* at 1167.

189. 988 F.3d 889, 905–07 (6th Cir. 2021); *see* Trammell & Bambauer, *supra* note 2, at 1165. Trammell and Bambauer also note the economic principles that militate against accepting the broad approach. "This approach raises costs for defendants and decreases them for plaintiffs. It makes jurisdiction less readily predictable for defendants, who face suit in a greater number of fora." *Id.* Although this may be true, this Article confines its analysis to whether exercising personal jurisdiction in an instance would contravene Due Process.

190. Trammell & Bambauer, *supra* note 2, at 1166.

191. *Id.* at 1166–67 n.216 (comparing their approach to that of Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 137–45 (2012) (arguing for an expanded idea of personal jurisdiction that would permit legislators to fine-tune litigation incentives in accordance with the political process)).

192. *Id.* at 1173.

193. *Id.* at 1170 ("Exploding automobiles implicate fire and police departments; faulty cutting machines draw in EMS and hospital personnel. There is no government entity to call for relief from patent infringement or defamation. And, when physical harm has occurred, relevant evidence is likely to be located in the place where the plaintiff experienced that harm.").

forum state."[194] The author argues that the "express aiming requirement . . . should not be necessary for user-generated Internet content because the viewing of posted material in the forum is the direct result of the posting, rather than unilateral activity of the plaintiff."[195] Therefore, "a defendant who posts . . . should reasonably anticipate being called to answer for that content in any forum where it harms the plaintiff."[196] The broad approach advanced by MacDonald likewise seems untenable. Most importantly, it is difficult to harmonize this approach with most of the results or the standards used in cases cited above (for instance, *Blessing*, *Edwards*, or *Walden*).

Ellen Smith Yost conducts a thorough review of social media defamation cases.[197] She identifies various frameworks that may be used for personal jurisdiction analysis, such as the "*Calder* harmful effects framework" and the "market exploitation framework."[198] Yost's "framework[s]" seem similar in concept to the "categories" which we have identified more broadly. She then provides examples of applying the frameworks to social media defamation cases.[199] She asserts that "*Calder*—and not *Zippo*—is the relevant framework in social media defamation cases where the user is not the website owner."[200] We would agree with this conclusion.

Yost then asserts that the lower courts have required three elements for the *Calder* test: "(1) an intentional act, (2) expressly aimed at the forum state, with (3) knowledge of injury or harm to be felt in the forum state,"[201] although some

194. Allison MacDonald, Comment, *Youtubing Down the Stream of Commerce: Eliminating the Express Aiming Requirement for Personal Jurisdiction in User-Generated Internet Content Cases*, 19 ALB. L.J. SCI. & TECH. 519, 544 (2009).

195. *Id.* at 545–46.

196. *Id.* at 544 (footnote omitted); *see id.* at 544 n.145 (citing Telco Commc'ns v. An Apple A Day, 977 F. Supp. 404, 408 (E.D. Va. 1997) (holding that defendants reasonably could have anticipated the possibility of being haled into forum state)).

197. *See generally* Yost, *supra* note 110.

198. *Id.* at 699–700.

199. E.g., "doxing" and "tagging." *Id.* at 696.

200. *Id.* at 701.

201. *See id.* at 705; Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017); Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1152 (9th Cir. 2017); Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998); Miller v. Gizmodo Media Grp., LLC, 383 F. Supp. 3d 1365, 1373 (S.D. Fla. 2019); Bioheart, Inc. v. Peschong, No. 13-60304-CIV, 2013 WL 1729278, at *5 (S.D. Fla. Apr. 22, 2013) (finding defendant who posted allegedly defamatory statements about Bioheart on website message board did not purposefully direct his tortious acts toward Florida because there was "no reason for [defendant] to have thought that Bioheart's investors would be located in Florida, as opposed to any other state"); Vision Media TV Grp., LLC v. Forte, 724 F. Supp. 2d 1260, 1266–67 (S.D. Fla. 2010) (dismissing libel suit for lack of personal jurisdiction where there was no evidence "showing that the website at issue targeted Florida or that Defendants acted to aim their conduct at a Florida audience"); Sovereign Offshore Servs., LLC v. Shames, No. 17-cv-80172, 2017 WL 7798664, at *3 n.4 (S.D. Fla. Aug. 3, 2017) ("Defendant's awareness that consumers across the nation may access his blog posts is not enough to support the exercise of personal jurisdiction." (citation omitted)).

"circuits apply a more flexible approach."[202] And, she identifies different approaches by the Circuits in determining what is necessary to satisfy the "harm" element—with the apparent plurality position being that the brunt of the harm be suffered in the forum.[203]

Most importantly, Yost observes that there are two different approaches to the "expressly aimed" element: (1) the "audience-focused" approach and (2) the "content-focused" test.[204] She then argues that the courts should adopt a "content-based approach" because it is objective, promotes judicial economy, improves outcome consistency, and satisfies due process.[205] According to Yost, the "audience-based test, by contrast, requires more complicated analysis, potentially drawing inferences of subjective intent, and may be impossible to administer when the intended audience is national."[206] Courts should find that a state is the "'focal point' or 'subject' of content when: (1) the text significantly discusses the forum state by name, or (2) the text significantly discusses an industry or community so understood to be centered in the forum state as to signify the forum state itself."[207]

While Yost's scholarship is helpful in clarifying a single category of social media cases (defamation), we disagree with her proposal to adopt a bright-line test that only considers a "content-based approach."[208] First, this does not seem consistent with the decisions noted above, which, while they do examine content, also examine the reasonably intended audience. For instance, the *Young* decision discussed both the audience and the content: the dispositive question, according to the Fourth Circuit, was "whether the newspapers manifested an intent to direct their website content . . . discussing conditions in a Virginia prison . . . to a Virginia audience."[209] Second, creating a fixed test does not seem

202. *See, e.g.*, Yost, *supra* note 110, at 705; Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010); Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002).

203. Per Yost, the Circuits adopting this brunt-of-the-harm approach include the Third, Eighth, Tenth and Eleventh Circuits. *See Old Republic*, 877 F.3d at 907; *IMO Indus.*, 155 F.3d at 265; *Gizmodo*, 383 F. Supp. 3d at 1373. *But see* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, 433 F.3d 1199, 1206–07 (9th Cir. 2006). The Seventh Circuit appears to join the Ninth in not requiring the "brunt" of the harm. *See Tamburo*, 601 F.3d at 703.

204. Yost, *supra* note 110, at 706–07. For "audience-focused" tests, she cites *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004); *Pacheco v. Padjan*, No. CV 16-3625, 2017 WL 3217160, at *5 (E.D. Pa. July 28, 2017); *Bigfoot on the Strip, LLC v. Winchester*, No. 18-3155-CV-S-BP, 2018 WL 3676962, at *3 (W.D. Mo. Aug. 2, 2018); *Cohane v. Nat'l Collegiate Athletic Ass'n*, No. 14-10494-RGS, 2014 WL 1820782, at *3 (D. Mass. May 8, 2014). For "content-focused" tests, she cites *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 426 (5th Cir. 2005).

205. Yost, *supra* note 110, at 710.

206. *Id.* at 711.

207. *Id.* at 710.

208. *Id.* Admittedly, Yost's content test seems consistent with the Fifth Circuit's majority opinion in *TheHuffingtonPost.com*, which focused, among other things, on whether the alleged libelous article mentioned Texas. Whether the Fifth Circuit really adopted (or whether other Circuits will adopt) such a limited definition of "relating to" remains an open question (because, in part, there were few facts in *TheHuffingtonPost.com*).

209. Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002).

consistent with the intent that due process remains flexible and tied to the entirety of the facts. Again, assuming the *Blessing* facts (that is, the subject of the tweets being about actions in Washington, D.C.), but altering the facts to include doxing of the minors, knowledge of their residency in Kentucky, and a suicide occurring in Kentucky, would Yost still argue that there is no express aiming at Kentucky?

In sum, we maintain that, at least at present, there does not exist a field theory of personal jurisdiction in the social media context or even a particular category of social media cases. Further, the Court after *Ford* has only made the personal jurisdiction analysis murkier. Rather than trying to find and assert a field theory as other scholars attempt to do, we believe that it would be better for courts to analogize tangible harms that have more extensive precedent to intangible harms that lack such helpful guidance.

CONCLUSION – PRACTITIONER'S VIEW POINT – FACTS MATTER MOST

The main job of a practitioner is to understand how to win cases rather than determining how the law should develop. This Article thus argues to the practitioner that a field theory of personal jurisdiction in the social media context is presently untenable. As the Court states time and again, personal jurisdiction is not a matter of convenience, though convenience may be a factor, but instead a concern of due process.[210] In the context of personal jurisdiction, the facts reign supreme on whether exercising personal jurisdiction in a case comports with due process. After *Ford*, the conclusion that facts and context matter seems particularly strong, although we are not as pessimistic as Justice Gorsuch that there remain a "virtually infinite number of 'affiliations' waiting to be explored."[211]

So, if there is no field theory, how should practitioners dealing with real-world cases navigate through personal jurisdiction and social media—other than knowing that facts and context matter? In the real world, counsel for both plaintiffs and defendants must consider the actual facts and react quickly at the very beginning of a lawsuit. Failure to do so can mean wasting time and many dollars for a plaintiff—or worse, a void judgment (perhaps with the statute of limitation having passed). Fighting a personal jurisdiction motion does not win the case, and even a win may generate a mandamus petition or an interlocutory appeal (or create an issue for final appeal). Conversely, the defendant risks waiving[212] a case-dispositive defense forever and litigating in a hostile or distant

210. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); Walden v. Fiore, 571 U.S. 277 (2014); Daimler AG v. Bauman, 571 U.S. 117 (2014).

211. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1035 (2021).

212. *See, e.g.*, Facebook, Inc. v. K.G.S., 294 So. 3d 122, 141–42 (Ala. 2019) (affirming a denial of a motion to dismiss that was "amended" to include a personal jurisdiction defense; trial court's order did not

forum. An experienced practitioner for a plaintiff will evaluate these personal jurisdiction issues even before filing. For instance, he or she should begin gathering personal jurisdiction facts before filing and prepare focused proposed discovery to be served at the beginning of the action directed at jurisdiction issues (and, if necessary, filing an immediate motion requesting such discovery). Some practitioners have even filed a "protective" lawsuit in a safe forum for the purpose of preserving the statute of limitations.

In trying to analyze the current state of the law, practitioners must return to the basics of the Court's jurisprudence:

First, at its base, *International Shoe* and its progeny do explain—at a very high level of abstraction—how to begin analyzing social media cases. Courts want to know whether the defendant should have reasonably expected to be haled into court in the forum state over the social media posting. Courts look carefully for "targeting" or "aiming" or "purposeful availment" or "purposeful direction" towards the forum state—not towards the particular plaintiff. This is the overwhelming lesson of the cases described above. To that end, practitioners must evaluate how alleged defendants *specifically* targeted the forum rather than how social media actions may have touched the forum *generally*.

Second, in general, courts seem to approach this test from an objective basis ("reasonably" anticipate being haled into court)—what the defendant has done as opposed to what they subjectively intended to do. Notably, this question has not yet been tested with tough cases (for instance, a case where there is actual proof that the defendant subjectively intended to direct their actions to the forum or evidence that a social media post went "viral" without any actual expectation). Thus, practitioners must step back and review how a third party would view a defendant's actions and whether it is reasonable to assume that the defendant could be haled into court.

Third, commerce appears to matter a good deal to the courts. As exemplified by the *Perry* case, it seems more likely that personal jurisdiction will be found when there is a profit motive; however, this is not certain as demonstrated by cases like *HVLPO2, LLC v. Oxygen Frog, LLC*[213] or *TheHuffingtonPost.com*.

Fourth, courts are looking for plus factors to demonstrate such "aiming"; these plus factors will vary by the particular social media involved but might include, for instance, efforts to increase or limit the audience, hashtags, references to particular content relevant to a forum state, references to addresses, or a physical contact, among others.

---

state whether motion was denied because of personal jurisdiction or because defense was untimely; on appeal defendant did not argue both bases for ruling and therefore the Alabama Supreme Court affirmed this denial).

213. HVLPO2 v. Oxygen Frog, 187 F. Supp. 3d 1097 (D. Neb. 2016) (finding no personal jurisdiction after posts were made on Facebook even though there was a commercial reason for friending and adding potential customers to a Facebook Business Page).

Fifth, the focus of the "harm" (or where the brunt of the harm occurs) appears to have an influence on the courts. This is not enough by itself but appears to have some impact on the view of courts about whether a defendant was truly "aiming" at a particular forum.

Finally, it is probably fair to conclude that courts seem more hesitant to find personal jurisdiction in the social media world as opposed to the real world. Without having done a full empirical study, this conclusion is more of a mere observation; however, the number of cases where the courts are finding no personal jurisdiction seems high, and some do not exactly follow the result that might have been expected in their tangible analog. It is not exactly clear why this is occurring—perhaps because social media is a virtual space rather than a physical space, or perhaps because defendants are often individuals, or perhaps because it is just less obvious that a social media post would subject someone to personal jurisdiction in a distant forum. Whether this observation is correct or whether this trend will continue is difficult to predict. Practitioners, as well as academics, should keep a vigilant watch over trends, particularly in rulings from the Courts of Appeal.

Considering these high-level observations and from a practical perspective, it is possible to develop a list of questions to consider in analyzing personal jurisdiction issues in the social media world:

- Does the complaint allege an intentional tort?
- Does the complaint concern commercial activity? If not, did either the plaintiff or the defendant have a profit motive? If the defendant is not part of a traditional "for-profit" business, is he or she a social media "influencer" who might have a profit motive?
- What were the objective (and subjective) reasonable expectations of the parties about any forum?
    - Did the defendant know that the plaintiff lived in the forum?
    - Did the defendant know that their activity would impact the forum (not just the plaintiff)?
    - Did the defendant intend the audience to include forum residents?
    - How large was the audience?
    - Was the size of the audience expected? For instance, did the post go "viral" in an unexpected way?
    - Was the size of the audience intended?
    - Did the defendant attempt to limit the audience (for instance, using an application such as Snapchat or limiting the posting to a discrete group)?

    - Is there evidence that forum residents read, "liked," reposted, or were even aware of the communications?
    - Is there evidence that forum residents subscribed to content, "friended," "retweeted," or "followed" any of the defendants' social media accounts or commented upon the posts in question?
    - Is there evidence that the defendant's social media account had a geographic focus that included the forum generally?
    - What volume of social media posting occurred?
- Over how long of a period did the social media postings occur?
- How invasive were the social media postings?
- Where did the brunt of the harm occur? Was this reasonably expected? Was it actually expected?
- How large is the harm?
- Does the statement concern activities inside of the forum?
- Is the social media post of special interest to forum readers?
- Did the defendant take any other actions directed towards the forum that relate to the social media statements?
- Are there any facts to indicate that the postings were made from within the forum state? Or, are there any facts to indicate that communications were routed through servers located in the forum (and was this intentional)?

As courts, practitioners, and litigants attempt to navigate the vast terrain of personal jurisdiction cases that exist after *Ford*, the terrain becomes even more difficult when considering social media aspects of cases. Though no field theory of personal jurisdiction is evident now, hopefully practitioners will utilize the above questions and discussion as guides with which to navigate the ever-shifting waters and vast terrain that is personal jurisdiction.