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Exorbitant Jurisdiction

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EXORBITANT JURISDICTION

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Exorbitant territorial jurisdiction in civil cases comprises those classes of jurisdiction, although exercised validly under a country's rules, that nonetheless are unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute. The United States, France, and most of the rest of the world exercise a good deal of exorbitant jurisdiction so defined. In the United States, an emphasis on power derived from territoriality has led to jurisdictional restraint in some respects, but has also allowed general jurisdiction based solely on transient physical presence, the attachment of property, or extensive business activities unrelated to the cause of action. In contrast, the civil law's emphasis on fairness has kept France from developing these exorbitant bases of jurisdiction, but has failed to restrain it from asserting general jurisdiction based solely on the plaintiff's nationality. A number of other countries have added some wrinkles to their own brands of exorbitant jurisdiction. We conclude (1) that although the extent, details, and phrasing of the world's exorbitant bases of jurisdiction differ among nations, there appears to be a common core in the nations' urge to disregard defendants' interests in order to give their own people a way to sue at home, if the home country will be able to enforce the resulting judgment locally, and (2) that even though exorbitant jurisdiction is thus understandable, the ultimate goal should remain its elimination by international agreement.

I. INTRODUCTION

In the U.S. headquarters of a large international corporation, a famous comparative law professor, retained as a consultant, has just explained Europe's exorbitant bases of jurisdiction to a shocked group of U.S. lawyers. Among other things, the professor has explained that French courts are willing to assert jurisdiction over defendants with no connection whatsoever to France as long as the plaintiff is French. The corporation's general counsel, confident just moments earlier that his company was safe from suit in a country with which it had few contacts, is the first to react:

> "The bases of jurisdiction which you just outlined for us strike me as being not only improper and exorbitant, but as totally uncivilized."
> "Just as uncivilized," replies the professor, "is our assertion that a contactless forum can obtain personal jurisdiction over a transiently 'present' defendant on the sole ground that he was ambushed by a seedy-looking process server." [1]

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1. RUDOLF B. SCHLESINGER, COMPARATIVE LAW 292-93 (3d ed. 1970). This fictional dialogue has introduced generations of U.S. law students to comparative law. For comprehensibility out of context, we

This dialogue is a good starting point for our discussion of exorbitant jurisdiction—specifically, exorbitant territorial jurisdiction in civil cases—because it so perfectly encapsulates the subject. Many countries allow their courts to assert jurisdiction over defendants in circumstances that outsiders find shockingly uncivilized.[2] Yet, these outsiders tend to overlook their own countries' excesses. As the dialogue's focus suggests, this dynamic may be particularly acute when it comes to the United States and France, where the common law and civilian legal traditions have produced jurisdictional rules that can sometimes appear very different from one another.

To bridge the gulf, it is necessary to examine the world's exorbitant bases of jurisdiction more closely, to understand the contexts in which they arose, and to appraise them not just by their formal expression, but also by their actual implementation, effectiveness, and practical consequences.[3] In this article, we focus on the United States and France, but our aim is to suggest that the world's different bases of exorbitant jurisdiction are, in essence, not as different as they appear.

To begin with, one must understand what it means for jurisdiction to be exorbitant. The concept of exorbitant jurisdiction is fundamental to private international law, affecting, as it does, the question of whether a court's judgment will receive recognition outside the rendering country.[4] The concept, however, remains ill-defined.

While F.A. Mann would tie the definition to the basic sources of international law, "special regard being had to the practice of States and the general principles of law recognised by civilized nations,"[5] his approach seems to be more an aspiration than a reflection of current reality.[6] One can glean definitions from certain treaties[7]—the most important of which is the Brussels Convention and its succeeding E.U. Regulation[8]—but these treaties are limited in application. Given current practice outside the obligations imposed by these treaties, and to some extent practice that

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have modified the dialogue slightly from the original. The dialogue first appeared in the casebook's second edition in 1959, but the particular exchange paraphrased above did not appear until 1970. In the current edition, RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, COMPARATIVE LAW (6th ed. 1998), the casebook's authors have transformed this exchange to focus more on the effect of the Brussels Convention on U.S. parties sued in France.

2. *See generally* Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321 (Kurt H. Nadelmann et al. eds., 1961), *reprinted in* KURT H. NADELMANN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 222 (1972); L.I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706 (1968).

3. *See* Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Closing Remarks*, 75 TUL. L. REV. 1235, 1237 (2001) (discussing the challenges of comparative law generally).

4. Some would actually define exorbitant jurisdiction according to whether a particular judgment receives recognition by foreign courts. *E.g.*, De Winter, *supra* note 2, at 712. In other words, if a judgment gets recognized abroad, it must have been rendered on a nonexorbitant basis of jurisdiction.

5. F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 47 (1964), *reprinted in* F.A. MANN, STUDIES IN INTERNATIONAL LAW 1, 37 (1973), *updated in* F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 1 (1990).

6. *See* De Winter, *supra* note 2, at 712.

7. *See* Joseph Halpern, *"Exorbitant Jurisdiction" and the Brussels Convention: Toward a Theory of Restraint*, 9 YALE J. WORLD PUB. ORD. 369 (1983) (deriving a definition from the Brussels Convention); *see also* Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967).

8. *See infra* text accompanying notes 81-89.

results from these obligations,[9] it is hard to make a case for the definition of exorbitant jurisdiction using international law.

Instead, exorbitant jurisdiction is best understood less as an existing rule than as a normative statement about the appropriate scope of international jurisdiction. To be "exorbitant" is to exceed ordinary or proper bounds, to be immoderate, perhaps even offensive—literally to have departed from one's track.[10] Identifying a particular basis for jurisdiction as exorbitant is, thus, to condemn it as inappropriate from an international standpoint.

Accordingly, we might define exorbitant jurisdiction as jurisdiction exercised validly under a country's rules that nevertheless appears unreasonable because of the grounds necessarily used to justify jurisdiction.[11] But we can probably go farther than this subjective test and identify an objective standard on which accusations of exorbitance tend to rely. That standard seems to focus on whether a class of jurisdiction, as opposed to a single assertion of jurisdiction, is unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute.[12] And it is certainly by this standard that the world judges certain jurisdictional rules of both the United States and France to be exorbitant.

With this definition in mind, we turn to examining the world's exorbitant bases of jurisdiction. Part II of this article summarizes the law of the United States, where an emphasis on power deriving from territoriality has led to jurisdictional restraint in some respects, but has nonetheless allowed general jurisdiction based solely on

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9. Outside of treaty obligations, many countries continue to assert bases of jurisdiction that others find exorbitant. The recognition and enforcement treaties themselves add to the variation in national practice in some respects, even while decreasing it in others. For instance, English courts have long held French nationality-based jurisdiction to be exorbitant, *see* Schibsby v. Westenholz, (1870) 6 L.R.Q.B. 155, 163 (Eng.), but under the Brussels Regulation they are now obligated to enforce French judgments based on such jurisdiction, as long as the defendant is not a treaty country's domiciliary. *See infra* Part III.A.2.c.

10. *See* CHAMBERS DICTIONARY OF ETYMOLOGY (Robert K. Barnhart ed., 1988); OXFORD ENGLISH DICTIONARY (2d ed. 1991); United States v. Oglesby Grocery Co., 264 F. 691, 695 (N.D. Ga. 1920), *rev'd on other grounds*, 255 U.S. 108 (1921).

11. This is a slight modification of the definition offered by Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 59 (1993) ("jurisdiction validly exercised under the jurisdictional rules of a state that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction"). We have removed her reference to "non-nationals" in recognition of the fact that a state's nationals are sometimes among the most vocal critics of the state's jurisdictional rules. We have changed "grounds used to justify jurisdiction" to "grounds necessarily used to justify jurisdiction" based on our view that an assertion of jurisdiction is exorbitant only when it rests solely on an exorbitant basis, not merely when an exorbitant basis happens to have been invoked to justify it.

12. *See* Halpern, *supra* note 7, at 379. Catherine Kessedjian, Hague Conference on Private Int'l Law, June 1997, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Prelim. Doc. No. 7, ¶ 138 (Apr. 1997), *available at* http://www.hcch.net/upload/wop/jdgm_pd7.pdf, suggested the following definition:

> [J]urisdiction is exorbitant when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the two parties to the dispute.

Id.

transient physical presence, the attachment of property, or extensive business activities unrelated to the cause of action. Part III contrasts the civil law's emphasis on fairness, which has kept France from developing these exorbitant bases of jurisdiction, but has failed to restrain it from asserting general jurisdiction based solely on the plaintiff's nationality. Part IV looks briefly at exorbitant jurisdiction in a number of other countries for the purpose of further comparison. We conclude that although the extent, details, and phrasing of the world's exorbitant bases of jurisdiction differ among nations, there appears to be a common core: nations are inclined to disregard defendants' interests in order to give their own people a way to sue at home when the forum country will be able to enforce the resulting judgment locally. To understand this common core, however, is also to appreciate exorbitant jurisdiction's pervasive dangers and hence the need for its ultimate elimination.

II. THE UNITED STATES

The basic U.S. law on the subject of territorial authority to adjudicate is, in a nutshell, this: the forum acquires adjudicatory authority in civil cases through *power* over the target of the action (be it a person or a thing), unless litigating the action there is *unreasonable* (that is, fundamentally unfair)—although the sovereign can naturally choose *self-restraint* (exercising less than its full adjudicatory authority).[13]

Within this general formulation have developed certain categories and bases of jurisdiction that much of the world views as exorbitant. As suggested in the above-quoted dialogue, courts in the United States shock the world by asserting jurisdiction over a defendant based merely on the defendant's transient physical presence. Also shocking is the U.S. version of attachment jurisdiction, as well as its doing-business jurisdiction.[14]

A. Transient Jurisdiction

The ancient basis of presence gives the state power to adjudicate any personal claim if the defendant is served with process within the state's territorial limits. Thus, even momentary presence of the defendant creates power to adjudicate a claim totally unrelated to that presence.[15] So imagine that *D*, a Minnesotan driving to Maine for a vacation, stops at a gas station in Vermont and, while waiting in line there, assaults *P*, who is a businessman from Ohio. *P* sues *D* in an Ohio state court, managing to serve *D* with process when *D* stops for the night in Ohio on a later trip to New York. In these circumstances, such "transient jurisdiction," or "tag jurisdiction," is constitu-

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13. *See generally* KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE § 4.2 (2005).

14. *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 111-15 (1999).

15. *See* Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 270-71 (5th Cir. 1985) (holding that a Florida corporation had achieved effective in-state, in-hand service of process on a German attending a convention in New Orleans; jurisdiction was upheld in this Louisiana action on a contract between them for delivery of German goods to Florida); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (holding that service on defendant flying over state was valid); Darrah v. Watson, 36 Iowa 116 (1873) (holding that court acquired personal jurisdiction over nonresident defendant who was in state only a few hours but was personally served).

tional. *Burnham v. Superior Court*[16] seemed to suggest that transient jurisdiction, merely because of its historical pedigree, satisfies any reasonableness test. However, transient jurisdiction probably is constitutional only where its application is not so outlandish as to be unreasonable in the particular circumstances.[17]

Despite former attempts to fictitiously apply the "presence" concept to corporations, the view today is that this basis meaningfully refers only to jurisdiction over individuals because only individuals can be physically present. Service on a corporate employee present in the state, however, does not establish personal jurisdiction over the corporation.[18]

Even for individuals, the presence basis for personal jurisdiction is not an inevitable one. Formerly the most important basis of U.S. jurisdiction, it is today far from essential. Indeed, transient jurisdiction is used by U.S. courts only when all appropriate bases of jurisdiction are unavailing. It is occasionally used to sue foreigners in the United States, even though the resulting judgment would be unlikely to receive recognition or enforcement abroad.[19] Transient jurisdiction as a basis of general jurisdiction has long been the recipient of criticism from academics and foreigners alike.[20] Given transient jurisdiction's overall lack of utility and dubious propriety, the United States should accept its prohibition as the price for a general jurisdiction-and-judgments treaty, and it appears willing to do so.[21]

B. Attachment Jurisdiction

Attachment jurisdiction is used in cases where the plaintiff has a personal claim against the defendant and seeks to satisfy the claim by attaching unrelated property of the defendant—or by garnishing an unrelated obligation owed the defendant by a third party—without obtaining personal jurisdiction over the defendant.[22] For example, the

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16. 495 U.S. 604 (1990) (upholding jurisdiction of the California state court in a suit seeking divorce and money). After a New Jersey couple separated by agreement and the wife and their two children moved to California, the wife served process on the husband while he briefly visited California on business and to see his children. *Id.* at 607-08.

17. *See* Sarieddine v. Moussa, 820 S.W.2d 837, 840 (Tex. App. 1991).

18. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194-95 (1915).

19. *See* DAVID EPSTEIN, JEFFREY L. SNYDER & CHARLES S. BALDWIN, IV, INTERNATIONAL LITIGATION § 6.04[3] (3d ed. 2002); LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION § 1-6, at 50-52 (1996).

20. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 121-23 (3d ed. 1996); MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 78 (1995) (explaining that most Western European countries do not utilize transient jurisdiction); Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 13-14, 18 (1998); Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 599-601; Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 613-16 (1991); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1296-97 (1998) (explaining that transient jurisdiction conflicts with international standards).

21. *See* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 189-90 (1998) [hereinafter Weintraub I]; Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269, 1278-79 (1998).

22. *But cf.* Rush v. Savchuk, 444 U.S. 320, 326 n.10 (1980) (recognizing that some states limit some kinds of attachment jurisdiction to resident plaintiffs).

plaintiff might seek attachment jurisdiction in a New York state court for a tort claim arising from an auto accident elsewhere by garnishing the defendant's New York property.

To satisfy the power test, this kind of quasi in rem jurisdiction normally must be exercised where the thing is. Unreasonableness will then be the key test. But here the unreasonableness test is particularly difficult to satisfy today because attachment jurisdiction is no longer really necessary and can be quite unfair.

Historically, attachment jurisdiction was quite useful. If the plaintiff had any claim against the defendant but failed to acquire personal jurisdiction, the plaintiff could proceed against any of the defendant's property within the state, such as a bank account. The defendant usually defaulted, and the resulting judgment allowed the plaintiff to apply the property to satisfy the claim. If successful, the plaintiff would apply the bank account to awarded court costs and then to satisfaction of the claim itself. Anything extra would go back to the defendant. However, on such attachment jurisdiction, the plaintiff's recovery was limited to the bank account.[23] The defendant was not liable for any deficiency. The plaintiff could later sue for any unsatisfied portion of the claim, either in personam or again by attachment against other property belonging to the defendant.

Also, attachment jurisdiction was formerly quite appropriate. Consider its local origin. In the infant American colonies, a tremendous trade deficit with the mother country led to a severe shortage of cash. This in turn induced a risky reliance on credit and gave rise, in part, to the Depression of 1640. Bad economic times and lessened social cohesiveness encouraged debtors to abscond or at least to evade payment. The inadequacy of the colony's rudimentary personal jurisdiction to fulfill the politically powerful local and English creditors' consequent collection needs motivated the legislative and judicial development of attachment jurisdiction around 1650. Henceforth, the creditor could attach any local property of the missing debtor, and then satisfy any resulting judgment out of that property.[24]

Three hundred and fifty years later, attachment jurisdiction is still with us. In the course of history, it facilitated the industrialization of America and often worked justice. But today the needs that generated it are much less intense, because personal jurisdiction has greatly expanded. Nevertheless, the courts must continue to divert resources to determine the doctrinal implications and complications of attachment jurisdiction and to control the abuses that this ancient form of jurisdiction would otherwise allow.

For example, in *Harris v. Balk*,[25] the Supreme Court held that the plaintiff could invoke this kind of jurisdiction by garnishing a debt owing from a third person to the defendant, in order to pursue the plaintiff's unrelated claim against the out-of-state defendant. The debt was the res, and the forum state deemed the debt present within the state because the third person was temporarily present in that state. However, in

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23. *See* CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001) (bank account contained one nickel).

24. *See* GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 215-20 (1960); Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1150-62.

25. 198 U.S. 215 (1905).

Shaffer v. Heitner,[26] the Court overturned *Harris* by making clear that nonpersonal jurisdiction must pass the reasonableness test. It is not reasonable for a court to entertain a totally unrelated claim, based merely on the presence of some bit of the defendant's property, even if the defendant's liability were limited to the value of that property. Something more—an adequate relation of the forum, the parties, and the litigation—has to exist before a court will, in its subjective opinion, deem an adjudication to be fundamentally fair.

The result of *Shaffer* is that attachment jurisdiction is now available only[27] in the rather special situations described by the following four hypotheticals:

> (1) Ohio plaintiff sues by attaching Iowa defendant's land in New York in order to *secure* a judgment being sought by plaintiff in California for personal injuries stemming from a traffic accident with defendant in California. Attachment jurisdiction in New York is constitutional.[28]
>
> (2) Ohio plaintiff sues by attaching Iowa defendant's land in New York in order to *enforce* a judgment already rendered for plaintiff in California for personal injuries stemming from a traffic accident with defendant in California. Attachment jurisdiction in New York is constitutional.[29]
>
> (3) Ohio plaintiff sues by attaching Iowa defendant's land in New York in order to *recover* for his personal injuries stemming from a traffic accident with defendant in New York. Attachment jurisdiction in New York is constitutional. If a state *could constitutionally exercise personal jurisdiction*, it may choose to allow a plaintiff instead to cast the suit in the form of attachment jurisdiction,[30] although arguably the Constitution prohibits actual seizure solely for this unnecessary formalism.[31]
>
> (4) Ohio plaintiff sues by attaching French defendant's land in New York in order to *recover* for his personal injuries stemming from a traffic accident with defendant in Japan. Attachment jurisdiction in New York is thought to be constitutional, assuming personal jurisdiction is not available in any other American forum.[32] This is an example of so-called jurisdiction by necessity, in which the *unavailability of an alternative American forum* arguably allows jurisdiction to squeak by the unreasonableness test. Other factors could help to rebut unreasonableness, such as

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26. 433 U.S. 186 (1977).

27. *But see* Rhoades v. Wright, 622 P.2d 343, 345-48 (Utah 1980) (broadly allowing such jurisdiction whenever based on attachment of real estate).

28. *See* Shaffer v. Heitner, 433 U.S. at 210; *see also* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1048-49 (N.D. Cal. 1977). In particular, New York might require legislative authorization of any form of jurisdiction, and its legislature has not in fact authorized this sort of anticipatory attachment. *See* DAVID D. SIEGEL, NEW YORK PRACTICE § 104 (4th ed. 2005).

29. *See* Shaffer v. Heitner, 433 U.S. at 210 n.36; *see also* Biel v. Boehm, 406 N.Y.S.2d 231 (Sup. Ct. 1978).

30. *See* Shaffer v. Heitner, 433 U.S. at 208 & n.29; *see also* LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 35 (1996).

31. *See* Richard W. Bourne, *The Demise of Foreign Attachment*, 21 CREIGHTON L. REV. 141, 185-95 (1987) (invoking the Privileges and Immunities Clause of the Constitution).

32. *See* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (a post-*Shaffer* federal case, allowing New York plaintiffs to obtain attachment jurisdiction in a New York state court for a tort claim arising from a plane crash in Turkey, simply by garnishing a New York bank account belonging to the defendant Turkish Airlines); *cf.* Shaffer v. Heitner, 433 U.S. at 211 n.37 (leaving the constitutional question open).

the neediness of the plaintiff or some link between the cause of action and the attached property. Power is no problem, because the property is present in New York.

Only jurisdiction in the fourth situation, which remains constitutionally shaky, might constitute exorbitant jurisdiction. It receives regular criticism, although it actually sees little use.[33] The United States should be, and seemed to be in the course of recent negotiations at The Hague, willing to surrender that use in exchange for a general jurisdiction-and-judgments treaty.[34]

C. Doing-Business Jurisdiction

The vibrant basis of personal jurisdiction gives the state power over an individual or corporation that has committed certain state-directed acts, but the power extends only to personal claims arising out of those acts.[35]

As the level of the defendant's state-directed activity increases, however, the state's constitutional power extends to claims less related in nature and time to that activity. Both the level of activity and the degree of unrelatedness are continua. If state-directed activities are considerable, the activities will bestow power, even though the activities might be considered partial, parallel, or incidental to the activities that the claim actually "arose from," as long as those state-directed activities sufficiently "relate to" the claim. Indeed, if a defendant's business activities in the forum state when served with process are extensively continuous and systematic—which is phrased as "doing business" rather than merely "transacting business"—the defendant becomes subject to jurisdiction even on claims wholly unrelated to the in-state activities. Thus, *Perkins v. Benguet Consolidated Mining Co.*[36] held that the defendant's activities were so extensive in the forum state as to support jurisdiction in an action unrelated to those activities. In this way, the development of jurisdiction based on state-directed acts has brought into the open the absence of any clear distinction between specific and general jurisdiction—they just comprise the rules for the two ends of the unrelatedness continuum.[37]

In any event, truly general jurisdiction based on doing business, which is peculiar to the United States,[38] entails terrible problems of line-drawing and does not conform

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33. *See* Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1095-96, 1100 (1990).

34. *See generally* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló III & Kevin M. Clermont eds., 2002).

35. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317-19 (1945).

36. 342 U.S. 437 (1952) (upholding jurisdiction in an Ohio state court suit against a Philippine corporation, which was performing all of its management activities in Ohio while mining was suspended by the effects of war in the Philippines, on a basically unrelated claim); *cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (finding no general jurisdiction of Texas over a foreign corporation, but not reaching the difficult issue of more specific jurisdiction).

37. *Compare* Russo v. Sea World of Fla., Inc., 709 F. Supp. 39, 44 (D.R.I. 1989) (applying due process test and holding that slip-and-fall claims did not "arise out of or relate" to Florida theme park's sale of ticket to plaintiff in Rhode Island and that its other Rhode Island sales activity did not create general jurisdiction), *and* Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997) (similar), *with* Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 716 (1st Cir. 1996) (reading due process's requirement of relating to in-state transaction of business more loosely).

38. *See* REIMANN, *supra* note 20, at 77, 82-83.

to the usual rationale of general jurisdiction.[39] This basis of general jurisdiction arose to provide appropriate jurisdiction when specific jurisdiction was not yet fully available. Because doing-business jurisdiction requires the defendant to be so active in the forum as to seem a native,[40] it is seldom available under its own terms.[41] Today, courts resort to it, albeit usually improperly, only when all appropriate bases of personal jurisdiction fail to reach the defendant.[42]

Yet, elimination of this doing-business basis is controversial. For reasons difficult to accept, some objective persons in the United States retain allegiance to it.[43] Given the shortcomings of doing-business jurisdiction, however, a general jurisdiction-and-judgments treaty should abolish this basis of general jurisdiction. Of course, the more common activity-based jurisdiction that falls more solidly within specific jurisdiction should survive.

III. FRANCE

Undeniably, France too has sometimes succumbed to parochial impulses in jurisdictional matters. Its courts have read the Civil Code's Article 14 as authorizing territorial jurisdiction over virtually any action brought by a *plaintiff* of French nationality (while reading Article 15 to make excessive any foreign nation's exercise of jurisdiction over an unwilling French *defendant*).[44] Thus, a French person can sue at home on any cause of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests. The forum-shopping potential of this jurisdiction based on the plaintiff's nationality is evident, whether or not that potential is realized in actual practice.

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39. *See* BORN, *supra* note 20, at 103-16.

40. *See* Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 811 (2004).

41. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418 (1984) (holding that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions"). *Compare* Nichols v. G.D. Searle & Co., 991 F.2d 1195 (4th Cir. 1993) (insufficient activity in Maryland to create general jurisdiction over IUD manufacturer), *with* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 576 (2d Cir. 1996) (general jurisdiction over building materials manufacturer was unreasonable "in the absence of any cognizable interest on the part of the plaintiff or the State of Vermont in adjudicating these claims in Vermont").

42. *E.g.*, Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967); Bryant v. Finnish Nat'l Airline, 208 N.E.2d 439 (N.Y. 1965) (maintaining a small New York office for paperwork and a small New York bank account creates general jurisdiction in New York); *see* Weintraub I, *supra* note 21, at 188 (explaining that elimination of doing-business jurisdiction "will block suit in only a few cases in which the United States has a legitimate interest in providing a forum").

43. *See* ALI, Report 2000: INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT 14-15 (2000) (describing this dispute as a possible "deal-breaker"). *But cf.* Linda J. Silberman, *Can the Hague Judgments Project Be Saved?: A Perspective from the United States*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS, *supra* note 34, at 159, 175-79 (suggesting a compromise); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 214 (ultimately willing to give up this basis against foreign defendants).

44. *See* CODE CIVIL [C. CIV.] arts. 14-15. We have adapted our analysis of French jurisdiction from Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction, Viewed from the United States*, *in* DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473 (2005).

French Article 14 jurisdiction distinguishes itself from the United States' exorbitant bases by overtly emphasizing the Frenchness of the plaintiff. The French are not alone in basing their brand of exorbitant jurisdiction on the plaintiff's nationality. Jurisdiction in the style of Article 14 emigrated with French law to a number of other countries, such as Belgium, Gabon, Greece, Haiti, Luxembourg, the Netherlands, Romania, and Senegal.[45] However, the Belgians abandoned this

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45. On Belgium's nineteenth-century adoption of this style of jurisdiction, see Nadelmann, *supra* note 2, at 323.

On Gabon, see Law of July 29, 1972, art. 27, *reprinted in relevant part in* 2 GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE) § 8.02, at 3 n.1 (1990).

On Greece, see ALBERT A. EHRENZWEIG, CHARALAMBOS FRAGISTAS & ATHANASSIOS YIANNOPOULOS, AMERICAN-GREEK PRIVATE INTERNATIONAL LAW 29 (1957); Pelayia Yessiou-Faltsi, *Jurisdiction and Enforcement*, *in* DOING BUSINESS IN GREECE § 24.1, at 1 (Eugene T. Rossides et al. eds., 1996) (explaining that their Code of Civil Procedure of 1834 arts. 27 & 28 based jurisdiction on the plaintiff's nationality); Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 538-39 (1994).

On Haiti, see Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 173 (1975); F.A. Mann, *supra* note 5, at 39; Nadelmann, *supra* note 2, at 324 & n.4 (citing their Civil Code art. 16).

On Luxembourg, see C. CIV. art. 14, which is identical to its French counterpart, aside from inserting references to Luxembourg in place of those to France.

On the Netherlands, see R.D. KOLLEWIJN, AMERICAN-DUTCH PRIVATE INTERNATIONAL LAW 30-31 (2d ed. 1961); RENÉ VAN ROOIJ & MAURICE V. POLAK, PRIVATE INTERNATIONAL LAW IN THE NETHERLANDS 53 (1987) (noting that their Code of Civil Procedure art. 127 formerly based jurisdiction on the plaintiff's nationality); Pearce, *supra*, at 539.

On Romania, see C. CIV. art. 13 (1864), *available at* http://diasan.vsat.ro/pls/legis/legis_pck.frame; MICHEL B. BOÉRESCO, ÉTUDE SUR LA CONDITION DES ÉTRANGERS D'APRÈS LA LÉGISLATION ROUMAINE RAPPROCHÉE DE LA LÉGISLATION FRANÇAISE 326-29 (Paris, V. Giard & E. Brière 1899); Chr. J. Suliotis, *De la condition des étrangers en Roumanie*, 14 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 559, 565 (1887) (indicating that this provision of the Romanian Civil Code was interpreted expansively by the Romanian courts, much as the French Article 14 has been interpreted expansively by the French courts); *see also* Renee Sanilevici, *The Romanian Civil Code and Its Fate Under the Communist Regime*, *in* EUROPEAN LEGAL TRADITIONS AND ISRAEL 355, 357 (Alfredo Mordechai Rabello ed., 1994) (noting that the Romanian Civil Code of 1864 was modeled closely on the French Civil Code).

On Senegal, see 2 DELAUME, *supra*, § 8.02, at 3 n.1.

On Quebec, according to Akehurst, *supra*, at 173, the Canadian Province of Quebec also bases jurisdiction on the plaintiff's nationality. However, this appears to be incorrect, both today and at the time Akehurst was writing. Akehurst supports his assertion by citing JEAN-GABRIEL CASTEL, CONFLICT OF LAWS 951, 953 (2d ed. 1968). That source simply reproduces the text of Quebec's Civil Code of 1866 art. 27, which read: "Aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them in foreign countries." While this provision seemed to show the influence of France's Article 14, it nonetheless lacked any explicit reference to the plaintiff's nationality. More importantly, it was read not to confer jurisdiction, but merely to make clear that the fact of the defendant's being an alien did not oust jurisdiction. *See* JEAN-GABRIEL CASTEL, PRIVATE INTERNATIONAL LAW 240-41 (1960). Thus, courts had to rely on one of the jurisdictional bases provided in the Code of Civil Procedure, *see id.* at 240 & n.35, and these bases did not include a plaintiff's nationality rule, *see* C. CIV. arts. 68-75 (2003); CODE OF CIVIL PROCEDURE ANNOTATED arts. 94-104 (Philippe Ferland ed., Wilson & Lafleur 1964); CODE OF CIVIL PROCEDURE OF LOWER CANADA arts. 34-42 (Ottawa, Malcolm Cameron 1867); QUEBEC CIVIL LAW 701-04 (John E.C. Brierley & Roderick A. Macdonald eds., 1993). Moreover, while the text of art. 27 had remained essentially unchanged since it was first proposed by the drafters of the Civil Code of 1866, *see* CIVIL CODE 1866-1980: AN HISTORICAL AND CRITICAL EDITION 23 (Paul-A. Crépeau & John E.C. Brierley eds., 1981); *Second Report of the Commissioners Appointed to Codify the Laws of Lower Canada*

approach in 1876,[46] the Romanians appear to have abandoned it in 1924,[47] the Greeks[48] and the Dutch[49] abandoned it in the 1940s, and the Senegalese limited its use in 1972.[50] These countries' specific reasons for surrendering nationality-based jurisdiction were diverse. But generally surrender came when internal and external criticism and pressure, combined with a desire to do the just thing, began to outweigh the benefits derived from doing the exorbitant thing. The first set of factors have tended to increase with passing time, but some of the bigger countries have shown a persistent ability to resist those factors, perhaps because these countries derived more benefits from their exorbitances.

The hold-out countries prompt the need not only for academic criticism but also for international retaliation or, better, international agreement.[51] Retaliations attempt to increase the costs of exercising exorbitant jurisdiction, while treaties would try to achieve the benefits of exorbitance through alternate means. That is, a treaty would provide the nation's deserving plaintiffs a reasonable forum, even if not always a home forum, and would ensure them easy enforcement of any resulting judgment.

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in Civil Matters, *in* CIVIL CODE OF LOWER CANADA 139, 151, 253 (Quebec, George E. Desbarats 1865), it was entirely removed from the Civil Code during the revisions of the 1990s, *see* HENRI KÉLADA, CODE CIVIL DU QUÉBEC (2003).

46. Although the Belgians did not formally abrogate their statutory provision until 1949, they ceased applying it in 1876, except as a retaliatory measure. *See* Nadelmann, *supra* note 2, at 323; *see also infra* note 154 and accompanying text.

47. *See* C. CIV. (indicating that art. 13 was abrogated by legislation on Feb. 24, 1924), *available at* http://www.corpvs.org/ (last visited April 18, 2006). In contrast, much of the rest of Romania's Civil Code of 1864 appears to have remained intact to this day. *See* Flavius A. Baias, *Romanian Civil and Commercial Law*, *in* LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 211, 213 n.3, 231 (Stanislaw Frankowski & Paul B. Stephan III eds., 1995) (indicating that the only change to the Civil Code of 1864 was made in "the part dealing with persons and family"); Samuel L. Bufford, *Romanian Bankruptcy Law: A Central European Example*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 251, 251-52 (1997); Sanilevici, *supra* note 45, at 358-59. *But see* John W. Van Doren, *Romania: Ripe for Privatization and Democracy? Legal Education as a Microcosm*, 18 HOUS. J. INT'L L. 113, 139 (1995) (citing H.B. JACOBINI, ROMANIAN PUBLIC LAW 7 (1987), for the proposition that the Romanian "codes of today are radically changed from those inherited from the nineteenth century").

48. The Greeks abandoned such jurisdiction legislatively, by repealing their statutory provision in 1946. *See* EHRENZWEIG ET AL., *supra* note 45, at 30 (identifying the legislation that effected this repeal as the Introductory Law to the Civil Code of 1940); Yessiou-Faltsi, *supra* note 45, at 1 (stating that the Introductory Law to the Civil Code entered into force on Feb. 23, 1946); Pearce, *supra* note 45, at 538-39. *See also* Athanassios N. Yiannopoulos, *Historical Development*, *in* INTRODUCTION TO GREEK LAW 1, 10 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., 2d rev. ed. 1993) (explaining that Civil Code of 1940 did not enter into force until 1946 because of the Axis invasion).

49. The Dutch abandoned such jurisdiction through a court decision in 1940, which effectively removed plaintiff's nationality as a basis for jurisdiction. *See* 2 DELAUME, *supra* note 45, § 8.06, at 15; KOLLEWIJN, *supra* note 45, at 30-31; J.P. Verheul, *Private International Law*, *in* INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 263, 280 n.88 (D.C. Fokkema et al. eds., 1978). The Dutch finally repealed their statutory provision in 1992. *See* Th.M. de Boer & R. Kotting, *Private International Law*, *in* INTRODUCTION TO DUTCH LAW 265, 270 n.21 (J.M.J. Chorus et al. eds., 3d rev. ed. 1999). The Dutch had shifted to jurisdiction based on plaintiff's domicile. *See infra* note 148 and accompanying text.

50. The Senegalese have abandoned such jurisdiction in cases where "the judgment must necessarily be enforced abroad." Law No. 72-61 of June 12, 1972, *reprinted in* 2 DELAUME, *supra* note 45, § 8.02, at 3 n.1. Compare our discussion *infra* Part III.B.1, however, where it becomes apparent that such a limitation may not represent much of a change from the way the jurisdictional basis applies in practice.

51. *See infra* text accompanying note 154; *see also* De Winter, *supra* note 2, at 720.

At any rate, France remains the most significant country to continue to exert jurisdiction based on the plaintiff's nationality, and so it is the French who bear the brunt of this rule's criticism. Accordingly, U.S. commentators love to use Article 14 as an example of exorbitant jurisdiction, one that illustrates how the law of the international jungle puts U.S. litigants at a disadvantage and creates a need for a jurisdiction-and-judgments treaty.[52] A hypothetical serves to demonstrate the illustrative power of Article 14:

> Assume that Emily Sherwin, a New York law professor with property in London, had a car collision in Ithaca, New York, with Xavier Blanc-Jouvan, a law professor visiting from France. Imagine that Professor Blanc-Jouvan sues Professor Sherwin in Paris. This jurisdiction is okay under the French Civil Code's Article 14, being personal jurisdiction based on the plaintiff's French nationality. Moreover, a judgment for Blanc-Jouvan will be entitled under the Brussels Regulation to recognition and enforcement against Sherwin's property in England.
>
> Now assume conversely that the collision was in Paris. Imagine that Sherwin sues Blanc-Jouvan in New York. This jurisdiction is impermissible under U.S. law. If a default judgment were rendered, neither France nor England (nor any U.S. court) would enforce it, because the lack of personal jurisdiction made the judgment invalid. Even a litigated judgment would enjoy far less than automatic recognition and enforcement abroad.

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52. *See, e.g.*, KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 13-14 (1999); Beverly May Carl, *The Common Market Judgments Convention—Its Threat and Challenge to Americans*, 8 INT'L LAW. 446, 447-51 (1974); Kevin M. Clermont, *An Introduction to the Hague Convention, in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS, *supra* note 34, at 3, 4-5; Clermont, *supra* note 14, at 91-94; Nadelmann, *supra* note 2, at 321-28, 330-35 (calling it the "notorious" Article 14); Russell, *supra* note 11, at 59-60; Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1239-40 (1998).

Unsurprisingly, U.S. commentators have not been the only ones to attack Article 14 jurisdiction. For an early German criticism, see L. BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL 510 n.12 (G.R. Gillespie trans., Boston, Soule & Bugbee 1883) (calling Article 14 jurisdiction "an invasion of the principles of international law . . . drawn [partly] . . . from the natural desire to protect the interests of [one's] own subjects, which is here carried too far"). For a more recent Dutch criticism, see De Winter, *supra* note 2, at 706-07, 717 (calling Article 14 jurisdiction the "most disreputable" of the world's "chauvinistic" jurisdictional provisions).

Indeed, the French themselves have often criticized Article 14 jurisdiction. *See, e.g.*, BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 316-17 (3d ed. 2000) (criticizing, while noting that the problem is not terribly serious). French scholars have questioned Article 14 almost from its inception, including in France's first treatise on private international law. *See* FOELIX, TRAITÉ DU DROIT INTERNATIONAL PRIVÉ 213-14 (Paris, Joubert 1843) (arguing that Article 14 is an extraordinary measure). Later, Jean-Paulin Niboyet was a major critic during the early twentieth century, *see* J.-P. NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ 888-89 (2d ed. 1928) (arguing that Article 14 was bad enough as written, but even worse in the broad way it was construed). Although he changed his views during the chaos of the 1930s and 1940s, see Nadelmann, *supra* note 2, at 322. Georges Droz is representative of modern France's moderate critics: the limited cure he proposes is to switch to domicile in order to eliminate the nationalist tone of Article 14 or to restrict the remedy to situations where property is in France (and maybe to limit the relief to that property). *See* Georges A.L. Droz, *Réflexions pour une réforme des articles 14 et 15 du Code civil français*, 64 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 16-18 (1975).

This hypothetical clearly shows the inequity that can result from exorbitant jurisdiction. In so doing, the hypothetical works to suggest the U.S. motivation for seeking a treaty with the Europeans. In short, U.S. interests are being whipsawed: not only are U.S. citizens still subject, in theory, to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but, in practice, U.S. judgments tend to receive short shrift in European courts. More broadly, Article 14 works nicely to sketch the legal context in which the recent negotiations on a world-wide convention transpired at The Hague.

When invoking this illustration, U.S. commentators typically recognize that French law differs little from what most other nations accomplish through other exorbitant bases of jurisdiction. Moreover, they acknowledge that this illustration is an extreme one, seemingly without much importance in actual practice, because the French do not use or at least do not abuse their nationality-based jurisdiction all that often.[53] Still, as we can personally attest, some French commentators jump to counter-attack any U.S. invocation of the illustration, no matter how qualified the invocation. The issue posed by such unpleasant confrontations is this: Even if Article 14 provides a useful illustration, is that nevertheless an unfair illustration? The answer is equivocal: Yes and no—but mainly no.

On the one hand, a close examination of French nationality-based jurisdiction, with comparison to other countries' practices, will make it look less shocking. Anyone who cites it for shock value is in the wrong.

On the other hand, Article 14 exists and, going well beyond any appropriate jurisdiction for special situations, has real and pernicious effects. Like any exorbitant jurisdiction, then, it merits illustrative use in showing the need for international agreement to eliminate it.

A. Past Use of Article 14 Jurisdiction

1. Background for Jurisdictional Study

As to jurisdiction, the civil law embraced the Roman idea of jurisdictional restraint, which reflected a spirit of fairness.[54] *Actor sequitur forum rei* was a Justinian maxim pronouncing that the plaintiff follows the defendant's forum. Generally, then, the civil law required the plaintiff to go to the forum at the defendant's domicile, and this forum could entertain any cause of action against the defendant regardless of where it arose. Eventually, there was an additional provision for long-arm-like jurisdiction in actions of tort, contract, and property, so that, for instance, a plaintiff could sue for a tort at the place of wrongful conduct. In other words, the civilian tradition somewhat differed, with telling consequences, from the U.S. tradition of tying jurisdiction to the power existing inside the sovereign's territorial boundaries.

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53. *See, e.g.*, Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 115-16 (1998) (observing that anecdotal evidence suggests "European courts rarely render judgments against American citizens or enterprises that have no 'minimum contacts' with the foreign forum"); *infra* note 91. *But see* Russell, *supra* note 11, at 59-60, 78-80.

54. *See* SCHLESINGER ET AL., *supra* note at 379-80, 405, 413-34 (illustrating the difference between civil and common law); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203-12 (1984).

France, of course, is a prototypical civil-law country in most respects,[55] including its civil procedure.[56] Modern French jurisdictional law accepts most of the civil-law ideas for its law applicable outside the coverage of the new European treaties.[57] Domicile is thus the foundation of French jurisdiction. Yet socio-economic-political pressures similar to those prevailing in the United States, as well as the usual procedural policies of accuracy, fairness, and efficiency, have pushed France to reach defendants whose acts have caused harm in France.

In its Article 14, however, France went much further, providing, "[a]n alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen."[58]

At first glance, this statute seems wordy, using two clauses to accomplish what it could have easily accomplished with one. In addition, the statute appears to reach only claims involving contracts between foreigners and French nationals. As it turns out, while the unnecessary wordiness does in fact exist, any limitation to contracts does not prevail.

In order to understand Article 14's convoluted structure, and in order to appreciate its full scope, we must turn to its legislative history, judicial interpretation, and treaty

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55. *See generally* JOHN BELL, FRENCH LEGAL CULTURES (2001); JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW (1998); WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW (1995); CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM (2d ed. 1996); BRICE DICKSON, INTRODUCTION TO FRENCH LAW (1994); CATHERINE ELLIOTT, CAROLE GEIRNAERT & FLORENCE HOUSSAIS, FRENCH LEGAL SYSTEM AND LEGAL LANGUAGE (1998); CATHERINE ELLIOTT & CATHERINE VERNON, FRENCH LEGAL SYSTEM (2000); FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT (1991); ANDREW WEST, YVON DESDEVISES, ALAIN FENET, DOMINIQUE GAURIER & MARIE-CLET HEUSSAFF, THE FRENCH LEGAL SYSTEM (2d ed. 1998); MARTIN WESTON, AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM (1991); Claire M. Germain, *French Law Guide*, http://www.lawschool.cornell.edu/library/encyclopedia/countries/france (last visited Aug. 15, 2005). A good source for actual French law, in French and English, appears at http://www.legifrance.gouv.fr/ (last visited Aug. 15, 2005).

56. *See generally* PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE (1967); Thierry Bernard & Hedwige Vlasto, *France*, *in* 2 TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE (John Fellas ed., 2003); Robert W. Byrd & Christian Bouckaert, *Trial and Court Procedures in France*, *in* TRIAL AND COURT PROCEDURES WORLDWIDE 138 (Charles Platto ed., 1990); Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 247-51 (2002); Christine Lécuyer-Thieffry, *France*, *in* INTERNATIONAL CIVIL PROCEDURES 241 (Christian T. Campbell ed., 1995); Raymond Martin & Jacques Martin, *France*, *in* 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE (Piet Taelman ed., 2002); Renée Y. Nauta & Gerard J. Meijer, *French Civil Procedure*, *in* ACCESS TO CIVIL PROCEDURE ABROAD 131 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., 1996).

57. *See* NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 42-48; JEAN VINCENT & SERGE GUINCHARD, PROCÉDURE CIVILE 327-38, 354-55 (26th ed. 2001); Bernard & Vlasto, *supra* note 56, at FRA-10 to -22; Lécuyer-Thieffry, *supra* note 56, at 244-49 (comparing French rules with Anglo-American principles and explaining French rules of international jurisdiction); Nauta & Meijer, *supra* note 56, at 140, 142. See *infra* Part III.A.2.c for a discussion of the treaties' impact.

58. C. CIV. art. 14. This translation comes from Henry P. deVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 317 & n.45 (1959). The French reads, "*L'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.*"

treatment. This will clarify that Article 14 jurisdiction is largely a court-made edifice built on a drafting error but lately extended by international agreement.

2. *History of the Code Provision*

a. *Napoleon's Contribution*

Article 14 was an innovation of Bonaparte's Civil Code of 1804.[59] The Code attempted to unify the array of ordinances and customs in force in different parts of France, including those relating to international jurisdiction.[60] One basis of jurisdiction that existed in some parts of France at that time was jurisdiction to attach or garnish the assets of foreign debtors and even to secure a judgment against those assets in some cases.[61] The impulse underlying this old basis of so-called *forum arresti* jurisdiction—the desire to let one's own people sue at home when enforcement is possible there—appears to have provided at least part of the inspiration driving Article 14.[62]

The other part of the inspiration behind Article 14 appears to have been the fear that French nationals would be unable to receive fair treatment in foreign courts. This was a time when all of Europe not under French domination was at war with France. Beyond Europe lay barbarism to French eyes. For the French, suing at home before French judges seemed far preferable to seeking justice abroad—indeed, it seemed naturally just.[63]

Interestingly, however, unrestrained pursuit of such broad aims was not evident in the original draft of what ultimately came to be Article 14. The version initially considered by the Conseil d'État read:

> An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; *and if he is found in France,* he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen.[64]

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59. *See generally* JEAN-LOUIS HALPÉRIN, THE CIVIL CODE (David W. Gruning trans., 2000). There has been some debate as to whether French courts could assert jurisdiction based on the plaintiff's nationality prior to the Civil Code. *See* Nadelmann, *supra* note 2, at 323. The currently accepted view is that this jurisdictional basis was not generally available then. *See* HÉLÈNE GAUDEMET-TALLON, RECHERCHES SUR LES ORIGINES DE L'ARTICLE 14 DU CODE CIVIL 43-52 (1964), *reviewed by* Kurt H. Nadelmann, Book Review, 14 AM. J. COMP. L. 348 (1965).

60. *See* GAUDEMET-TALLON, *supra* note 59, at 75-86; Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 762-63 (1969); Charles Sumner Lobingier, *Napoleon and His Code*, 32 HARV. L. REV. 114, 115, 120-21 (1918).

61. *See* Nadelmann, *supra* note 2, at 324-26 (noting that this basis of jurisdiction was available in many French cities, including Paris, as early as 1134, and that in 1580 it appeared in the Custom of Paris arts. 173 & 174).

62. *See* GAUDEMET-TALLON, *supra* note 59, at 69-74.

63. *See id.* at 52-58; Louis Rigaud, *La conception nationaliste de la compétence judiciaire en Droit international privé: sa persistance et ses origines*, 33 REVUE CRITIQUE DE DROIT INTERNATIONAL 605, 606 (1938).

64. *See* 7 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 12 (Otto Zeller 1968) (1827) (emphasis added). The French reads:

> *L'étranger, même non résidant en France, peut être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français;* et s'il est trouvé

In other words, the draft did not provide for jurisdiction based merely on the plaintiff's nationality, but instead contained two different bases of jurisdiction, logically separated into two clauses. The first clause provided for jurisdiction based on the forum-directed act of incurring a contractual obligation *in France*. The second clause provided for what might be viewed as a limited form of jurisdiction based on physical presence: if the defendant is contractually obligated to a French national, then the French courts may base jurisdiction on the defendant's transient presence *in France*.

For unknown reasons, the key phrase in the draft—"and if he is found in France"—did not make it into the final version.[65] While one is left guessing as to how this occurred, the drafting history does, at least, explain Article 14's convoluted structure, which has remained unchanged for two hundred years.

b. The Doctrine's Development

One might be tempted to read the murky Article 14 narrowly. One might, for instance, assume that it should apply only to contract disputes, or that the defendant must have incurred obligations directly to the French plaintiff. This is not so. In a series of cases beginning in 1808,[66] the French courts have interpreted the code provision expansively, such that it now merely requires a person currently holding any right to sue to be a French national at the time of commencing suit.[67] Thus, in our hypothetical above, Professor Blanc-Jouvan could sue Professor Sherwin in France for a tort arising entirely in New York.[68] This would be so even if Blanc-Jouvan were domiciled in New York.[69] Moreover, if Sherwin got into a car accident with anyone who happened to have a French insurer, the French insurer could sue her in France.[70]

> en France, *il peut être traduit devant les tribunaux de France, même pour des obligations contractées par lui en pays étranger envers des Français.*

Id.; *see also* deVries & Lowenfeld, *supra* note 58, at 318 & n.47.

65. *See* 7 FENET, *supra* note 64, at 606, 622; FOELIX, *supra* note 52, at 215 & n.2 (noting that the clause was removed after discussion between the Conseil d'État and the Tribunat); GAUDEMET-TALLON, *supra* note 59, at 75 ("*un inexplicable accident de rédaction*"); deVries & Lowenfeld, *supra* note 58, at 318 & n.47; Nadelmann, *supra* note 2, at 323.

66. Ingelheim v. Fridberg, Cass. req., Sept. 7, 1808, 2 S. Jur. I, 579 (holding that there is no difference between "*cité*," in the first clause of Article 14, and "*traduit*," in its second clause, and that therefore French courts can take jurisdiction over alien defendants regardless of where they have incurred their obligations to French nationals).

67. *See generally* AUDIT, *supra* note 52, at 315-26; 2 DELAUME, *supra* note 45, §§ 8.02-8.05; YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ 491-93 (4th ed. 1993); PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ 198-203 (4th ed. 1991); deVries & Lowenfeld, *supra* note 58, at 318-30.

68. *See* Cie du Brittannia v. Cie du Phénix, Cass. req., Dec. 13, 1842, 43 S. Jur. I, 14 (interpreting Article 14's "*obligations par lui contractées*" to include tort obligations incurred when an English ship collided with a French ship on the high seas).

69. *See* Bertin v. de Bagration, Cass. civ., Jan. 26, 1836, 36 S. Jur. I, 217.

70. *See* Cie La Métropole v. Soc. Muller, Cass. 1e civ., Mar. 21, 1966, D. 1966, 429; *see also* Wieldon v. Hébert, Cass. req., Aug. 18, 1856, 57 S. Jur. I, 586 (Fr.) (allowing suit by the French holder of a negotiable instrument, even though the instrument was originally made out to an alien); Forman & Cie v. Pugh, Cass. civ., Mar. 9, 1863, 63 S. Jur. I, 225 (allowing suit by a French widow for debts owed to her deceased husband, even though the husband had not been a French national, and even though she had not herself been a French national during the marriage). Corporations as well as individuals can invoke Article 14. *See* AUDIT, *supra* note 52, at 319.

If Sherwin were a domiciliary of France or had some other significant link to France, or if Blanc-Jouvan were a member of some disadvantaged group, then France's asserting jurisdiction would not seem so unreasonable, and could even be accomplished using one of France's now multifold bases of international jurisdiction. The real significance of Article 14, then, lies in settings where no such special justification exists. Indeed, the French courts now see Article 14 as applying *only* when no other jurisdictional basis exists.[71]

When interpreting Article 14, the courts often appear to focus their reasoning on legislative intent. The *Cour de cassation* held early on that the legislature clearly intended to undercut the principle of *actor sequitur forum rei* when it adopted the code provision.[72] Subsequent cases involved textual analysis also, with broad readings given to such key phrases as "obligations contracted by him"[73] and "toward Frenchmen."[74] To the extent that the courts have articulated a policy justification for their expansive readings, they appear to have followed some of the same impulses that initially inspired the statute. In an early holding that the French plaintiff need not be domiciled in France, the *Cour de cassation* reasoned that the statute was designed to protect the foreign commerce of French nationals.[75] A leading French treatise today infers that the courts' justification must be that French courts should always be open to French nationals, perhaps because all foreign courts do not offer sufficient guarantees of justice.[76]

This is not to say that Article 14 jurisdiction has no limits, for the courts have carved out some exceptions. It does not apply in real property actions when the immovable property lies abroad[77] or in cases that require foreign official action.[78] More significantly, it does not apply when the French plaintiff has clearly renounced the privilege of invoking it in a particular case, either expressly or impliedly. This renunciation can come in advance by contract, such as by including a forum selection or arbitration clause, or after the fact by an act, such as choosing to sue abroad on the claim.[79] Finally, Article 14 jurisdiction is overridden in some cases by particular treaties, which include not only specialized treaties such as the old Warsaw Convention on air transportation[80] but also the general agreements known as the Brussels Regulation[81] and the Lugano Convention.[82]

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71. *See* AUDIT, *supra* note 52, at 300-01, 317 (citing sources); MAYER, *supra* note 67, at 201; H. Gaudemet-Tallon, *Nationalisme et compétence judiciaire: déclin ou renouveau?*, 1987-1988 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 171, 177 (1989).

72. *See* Ingelheim v. Fridberg, Cass. req., Sept. 7, 1808, 2 S. Jur. I, 579.

73. *See* Cie du Brittannia v. Cie du Phénix, Cass. req., Dec. 13, 1842, 43 S. Jur. I, 14; *see also* Industrie française v. Rydes & Cie, Cass. civ., Aug. 12, 1872, 72 S. Jur. I, 323.

74. *See* Arnold v. Fontaine, Cass. vac., Sept. 25, 1829, 9 S. Jur. I, 373.

75. *See* Bertin v. de Bagration, Cass. civ., Jan. 26, 1836, 36 S. Jur. I, 217.

76. AUDIT, *supra* note 52, at 315 ("*que les nationaux devraient toujours pouvoir demander justice devant les tribunaux français; ou encore que les tribunaux de tous les pays n'offrent pas des garanties suffisantes*").

77. *See id.* at 318 (citing modern sources).

78. *See id.* at 318-19 (citing modern sources).

79. *See id.* at 322-25 (citing modern sources); MAYER, *supra* note 67, at 202-03.

80. *See* HERZOG & WESER, *supra* note 56, at 196 & n.168; GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 293 (1977).

81. Commission Regulation 44/2001, 2001 O.J. (L 12) 1, *as amended* 2002 O.J. (L 225) 1 [hereinafter

c. *The Brussels Regulation's Impact*

The Brussels Regulation, along with the similar Lugano Convention, deserves special attention not only because of its broad substantive application to ordinary kinds of litigation and because of its wide territorial application in Europe,[83] but also because it expands Article 14 jurisdiction while abrogating it within the Brussels and Lugano world.

From the point of view of a U.S. defendant like Professor Sherwin in our hypothetical, the most frightening thing about these two agreements is that they expose her property all over Europe to the risk of seizure if a judgment is entered against her in France. Prior to these agreements, she might not have cared so much about being sued by Professor Blanc-Jouvan in a French court on the basis of Article 14 jurisdiction. Because other countries would have refused to enforce any resulting judgment, she would have risked losing only property in France. If her heavily mortgaged *pied-à-terre* in Paris was falling apart anyway, she might have simply ignored the suit, and spent her summers at the villa in Tuscany or the chalet in the Swiss Alps instead. With the Brussels and Lugano scheme in effect, however, Sherwin had better defend and win in the French court, or else she can kiss both the Tuscan villa and the Swiss chalet goodbye. For while France can no longer use Article 14 jurisdiction against domiciliaries of fellow signatories to the Brussels and Lugano agreements,[84] France can still use it against defendants domiciled elsewhere.[85] And France's fellow signatory countries must give effect to French judgments, even those based on Article 14 jurisdiction if rendered against an outsider.[86]

Another effect of the Brussels Regulation is to extend the remaining privilege of suing in French courts based on Article 14 jurisdiction to all domiciliaries of France, not just French nationals.[87] While jurisdiction based on the plaintiff's domicile, or so-called *forum actoris*, may be somewhat less shocking than the old *for nationaliste français*, it does, of course, broaden the pool of potential plaintiffs that Sherwin needs to watch out for.[88] Indeed, the Article 14 privilege still remains available to French nationals domiciled abroad.[89]

Brussels Regulation]. On the preceding Brussels Convention, see ALAN DASHWOOD, RICHARD HACON & ROBIN WHITE, A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION (1987).

82. The Lugano Convention extended the Brussels Convention scheme to the EFTA countries and today still offers an avenue for other countries to affiliate with the Brussels regime. *See* PETER STONE, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE 4-6, 25-28 (1998).

83. *See* Brussels Regulation, *supra* note 81, ch. I; *infra* text accompanying notes 130-132.

84. *See* Brussels Regulation, *supra* note 81, art. 3.

85. *See id.* art. 4(1).

86. *See id.* ch. III.

87. *See id.* art. 4(2); Droz, *supra* note 52, at 8.

88. On the use of *forum actoris* jurisdiction by other countries, see *infra* text accompanying note 148.

89. *See* Droz, *supra* note 52, at 8.

B. Current Use of Article 14 Jurisdiction

1. Limited Uses

For all of the criticism that Article 14 suffers in academic circles,[90] one could be forgiven for assuming that it is regularly used to bludgeon unsuspecting foreign defendants, and U.S. defendants in particular. In fact, Article 14 appears not to be regularly invoked in practice.[91] That is, while Article 14 makes a French forum generally available to the French, they nonetheless may end up not invoking that forum—for any of a number of reasons.

First, and foremost, French plaintiffs today need not, and indeed cannot, invoke Article 14 when another of France's now multifold bases of international jurisdiction applies.[92] Obviously, then, Article 14 jurisdiction has faded into the background.

Second, even when Article 14 is the French plaintiffs' only hope, a French forum may be unavailable in a particular case. As noted above,[93] French courts have held that the code provision does not apply to actions involving immovable property located outside of France, to claims requiring foreign official action, or to cases controlled by certain treaties. Even if the case does not fall within one of these categories, the French plaintiff may have already renounced jurisdictional privileges, for instance, by contract. Indeed, to the extent that Article 14 poses a risk to foreigners who deal with

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90. *See supra* note 52.

91. Although we lack empirical data with which to support this proposition, we can offer some circumstantial evidence. To begin with, a number of other commentators offer anecdotal evidence that Article 14 jurisdiction is rarely invoked against U.S. defendants. *See* Juenger, *supra* note 53, at 115-16 ("[T]he concededly anecdotal evidence I have been able to collect by reading foreign cases and literature suggests that European courts rarely render judgments against American citizens or enterprises that have no 'minimum contacts' with the foreign forum."); Juenger, *supra* note 54, at 1212 ("[T]here is no indication in reported decisions to suggest that the Brussels Convention's jurisdictional discrimination has posed much of a practical problem."); Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, LAW & CONTEMP. PROBS., Summer 1994, at 289, 303 (indicating that the author had heard of no cases in which a judgment based on exorbitant jurisdiction was enforced against an American defendant's European assets under the Brussels Convention); Weintraub I, *supra* note 21, at 172 ("There is no evidence that [the E.U. countries' exorbitant bases of jurisdiction] are being used against U.S. defendants . . . .").

Furthermore, a search of all U.S. federal and state court decisions reported on Westlaw turned up only six cases that even discuss French Article 14 jurisdiction, and these do so only in passing. *See* Souffront v. Compagnie des Sucreries, 217 U.S. 475, 483 n.1 (1910); Simon v. Philip Morris, Inc., 86 F. Supp. 2d 95, 136 (E.D.N.Y. 2000); Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1226, 1229 (E.D.N.Y. 1990); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 165 n.6 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971); Scott v. Middle E. Airlines Co., 240 F. Supp. 1, 4 n.7 (S.D.N.Y. 1965); Mitchell v. Garrett, 10 Del. (5 Houst.) 34, 44-45 (Del. Super. Ct. 1875). These are the only cases that mention Article 14 jurisdiction, by name or otherwise, among the total of 168 cases retrieved from Westlaw's "ALLCASES" and "ALL CASES-OLD" databases on June 24, 2003, using the following search terms: [(jurisdiction! /s (france french france's) /s defendant /s foreign!) (("art. 14" "article 14") /s (france french france's "code civil" "civil code" "c. civ." "civ. c."))]. None of them involves a dispute over the effects of a French judgment rendered on such basis of jurisdiction. While this is by no means conclusive, one would expect that if U.S. defendants were regularly subjected to Article 14 jurisdiction, there would be at least some published opinions concerning the effects of the resulting judgments in the United States.

92. *See* sources cited *supra* note 71.

93. *See supra* Part III.A.2.b.

French people via contract and who are in a position to bargain over terms, one should expect to see these foreigners insisting that their French associates contractually waive their jurisdictional privileges.[94]

Third, even in the situation where French plaintiffs could obtain a French forum, they may choose to avoid that forum and instead sue in foreign courts for reasons of convenience.[95] The French plaintiff may already reside in the foreign country or, in the case of a corporation, may have a branch office there. Witnesses and evidence may be concentrated in the foreign country. If the dispute is expected to involve foreign law regardless of forum, the plaintiff may want to hire foreign lawyers and may calculate that they will be more effective in their own courts. If there are potential plaintiffs of other nationalities involved, the French plaintiff may want to join with them or share representation and cost, and a foreign court may be the best forum to meet everyone's interests.

Fourth, French plaintiffs may choose to sue in a foreign court because of a perceived legal or other advantage.[96] The French plaintiff may prefer a foreign court's choice-of-law rules, which may point to favorable causes of action and generous remedies. The plaintiff may prefer the foreign court's procedural rules, such as the availability of discovery devices and jury trials. The plaintiff may also prefer the rules and practices of the legal profession in the foreign jurisdiction, and may be especially drawn to contingency fee arrangements and nonreimbursement of fees. Finally, the plaintiff may perceive that the foreign court is favorably biased or prone to give out large damage awards. Many of these considerations are particularly relevant for plaintiffs choosing between a French court and a U.S. court.[97] Indeed, it is often U.S.

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94. Of course, the foreigners must know of the danger. *See* GEORGES R. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW 57 (1953) (warning that Article 14 is "a legal trap into which foreigners, unaware of the existence of the privilege, may fall").

95. *See, e.g.*, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (involving plaintiffs from all over Europe and the United States who may have found the United States to be the most convenient forum in which to join suits); Jackson v. Coggan, 330 F. Supp. 1060 (S.D.N.Y. 1971) (involving a French plaintiff who was living and working in New York and who sued a U.S. defendant in New York over a car accident that had occurred while the two were visiting France); De Sairigne v. Gould, 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949) (involving successful forum non conveniens motion).

96. *See, e.g.*, *In re* Air Crash Off Long Island NY, on July 17, 1996, 65 F. Supp. 2d 207 (S.D.N.Y. 1999) (involving a large number of French plaintiffs suing two U.S. corporations, Boeing and TWA); Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764 (D. Kan. 1981) (involving air crash in France). In *Air Crash Off Long Island*, 65 F. Supp. 2d at 212, the plaintiffs argued that the Warsaw Convention prevented them from suing in France. This appears to have been a weak argument, however, because they offered meager evidence to support it, and because the defendants were doing everything possible to move the lawsuit to France, including consenting to suit there. *See id.* at 210, 212.

97. Accurate or not, there is clearly a perception that U.S. courts provide a favorable forum for European plaintiffs. One German scholar characterizes U.S. courts as "the plaintiff's heaven." Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 37 (1996). Citing contingency fees and sympathetic juries, Lord Denning writes: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (Eng. C.A. 1982).

defendants who are the ones fighting to get into French courts, and French plaintiffs who are the ones fighting to get into U.S. courts.[98]

Fifth, and significantly, French plaintiffs may determine that while Article 14 ultimately makes a French forum available, any resulting judgment would have limited value because courts outside of France would refuse to enforce it. Leaving aside the Brussels Regulation and Lugano Convention, a judgment rendered solely on the basis of Article 14 jurisdiction will generally not be enforceable outside of France.[99] In fact, courts outside of France are prone to cite this code provision as the paradigmatic example of exorbitant jurisdiction that is unworthy of international recognition.[100] Indeed, it is probably because foreign courts are so hostile to this basis of jurisdiction that one seldom hears parties mention it outside of France. In short, if the French plaintiff wants a judgment that will be enforceable abroad and has no basis of jurisdiction in France other than Article 14, the plaintiff will likely sue directly in the foreign forum in which enforcement is desired.

Consequently, when Article 14 jurisdiction *is* invoked, the case typically involves a status suit such as a matrimonial matter[101] or, more importantly for our purposes, a situation where the defendant has assets in France (or now, under the Brussels Regulation and Lugano Convention, in Europe).[102]

This point about assets not only illustrates the continued link between Article 14 jurisdiction and the *forum arresti* jurisdiction that inspired it, but also goes a long way toward explaining the continued existence of Article 14 jurisdiction.[103] When the French government began a project to reform the Civil Code at the end of the 1940s, the question arose whether to scrap Article 14. The commission in charge of the effort decided against doing so based in part on the assumption that plaintiffs invoke such jurisdiction in practice only when the defendant has property in France.[104] The president of the commission noted that the benefit of Article 14 jurisdiction is that it allows French courts to hear cases in which French interests are involved.[105] He continued:

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98. *See, e.g., In re* Air Crash Off Long Island NY, on July 17, 1996, 65 F. Supp. 2d at 209; Grimandi v. Beech Aircraft Corp., 512 F. Supp. at 777-81; De Sairigne v. Gould, 83 F. Supp. at 271.

99. *See, e.g.*, Schibsby v. Westenholz, (1870) 6 L.R.Q.B. 155, 163 (Eng.) (refusing to enforce a French judgment rendered on the basis of Article 14 jurisdiction).

100. *See, e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 165 n.6 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971).

101. *See* Droz, *supra* note 52, at 5-7 (approving of this use of Article 14); Gaudemet-Tallon, *supra* note 71, at 178-80. This use does not result because the judgments from status suits will necessarily receive greater recognition abroad. Rather, it results because French plaintiffs in such suits often care about the effects only in France. *See* GEORGES R. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW 170 (2d ed. 1961). *But cf.* AUDIT, *supra* note 52, at 317 ("*il reste que l'application de la règle est plus contestable dans les relations de famille entre personnes de nationalité différente*").

102. *See* Nadelmann, *supra* note 2, at 327; *supra* Part III.A.2.c.

103. Of course, other explanations circulate. For example, some believe that the French preserve Article 14 in order to have something to surrender in international negotiations on jurisdiction and judgments. *See* Gaudemet-Tallon, *supra* note 71, at 176 (criticizing this explanation).

104. *See* Nadelmann, *supra* note 2, at 327; Kurt H. Nadelmann & Arthur T. von Mehren, *Some Remarks on the Proposed Codification: The Draft of the Commission for the Reform of the Civil Code*, 1 AM. J. COMP. L. 407, 415 (1952) (translating part of the exchange).

105. *See* Nadelmann & von Mehren, *supra* note 104, at 415.

> It can be taken for granted that the judgment will not be given an exequatur in the foreign country, but the rule is of practical importance when the alien has property in France.
>
> . . . .
>
> The fact that the stranger has property in France justifies, to a certain extent, the taking of jurisdiction by French courts; it makes it possible to avoid the delays and complications involved in getting an exequatur for a foreign judgment. Therefore, a valid reason exists for maintaining the principle.[106]

Viewed in this light, Article 14 jurisdiction is really not that different from what other countries accomplish in other ways.[107] Reconsider the exorbitant jurisdiction of the United States.[108] Transient jurisdiction arose from historical and conceptual roots, and accordingly proved a clumsy means to any chauvinist ends. Because the presence basis for transient jurisdiction proved ineffective in this regard, attachment jurisdiction developed to ensure favored plaintiffs with the ability to sue and enforce locally—in fact, attachment jurisdiction was usually very inclusive with respect to who could invoke it. More recently, as restrictions on quasi in rem jurisdiction have multiplied, doing-business jurisdiction stepped in to fill the perceived need for plaintiffs to sue foreigners locally when assets are present. Here, the doing-business basis is an oversized form of exorbitant jurisdiction in terms of its remedy too, generating as it does a judgment that runs against the person of the defendant. Despite variations, each country's exorbitant jurisdiction at the core exhibits a concern with allowing its own people to sue at home when they can recover at home, which is usually much easier than suing abroad.[109]

For a closer analogy, Article 14 acts as a form of general jurisdiction that is in personam but based in practice on assets in France—a form much like Germany's property-based jurisdiction, which we shall soon discuss.[110] But the French form is explicitly restricted to certain plaintiffs, yet legally enforceable even if the first assets appear in France only after judgment. In sum, Article 14 is basically similar to other countries' exorbitances, except that it is more nationalistic in expressing who can invoke it and that it does not utilize the subterfuge of expressly linking to property in France or to some other defendant contact.

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106. *Id.*

107. *See* LOUSSOUARN & BOUREL, *supra* note 67, at 490-91; Droz, *supra* note 52, at 3-5.

108. *See supra* Part II.

109. In a well-known essay on this subject, Kurt Nadelmann argued that the French rely on Article 14 jurisdiction as a substitute (albeit an imperfect one) for attachment jurisdiction. In other words, because the French have not maintained jurisdictional rules that allow plaintiffs to sue foreign property in France in order to satisfy unrelated obligations, they keep this overly broad basis of jurisdiction that allows the same result in practice. *See* Nadelmann, *supra* note 2, at 324. Our point is slightly different. We suggest that rather than existing specifically to fill in for attachment jurisdiction, Article 14 exists to serve the same underlying desire that attachment jurisdiction and most other exorbitant bases of jurisdiction exist to serve: the desire of courts to let their own people sue at home when they can do so effectively. *See* De Winter, *supra* note 2, at 716-17.

110. *See infra* Part IV.

2. Extensive Effects

So perhaps Article 14 mainly *sounds* bad, just as do U.S. transient and attachment jurisdictional bases. There is, after all, a long tradition of foreigners' overemphasis of "exorbitant" jurisdictional bases. Certainly the French pick on U.S. jurisdictional bases. So U.S. commentators in picking on Article 14 may simply be taking advantage of France's poor phrasing of its brand of exorbitant jurisdiction.

It may be, on the other hand, that Article 14's flaws extend beyond the tone of its phrasing. After all, French plaintiffs do sometimes use it to go after foreigners' assets, and they surely use it for settlement pressure in many more cases.[111] Such *forum arresti* jurisdiction, when invoked or threatened against a defendant having no other contacts with the forum and on a claim wholly unrelated to the assets, is not especially fair—particularly today when, under modern jurisdictional law, it is not especially needed by deserving plaintiffs.[112] Therein lies the reason that the Brussels Regulation outlaws the United Kingdom's version of attachment jurisdiction.[113]

Furthermore, to the extent that Article 14 jurisdiction tries to play the role of *forum arresti* jurisdiction, it clearly is an oversized and clumsy substitute. Although Article 14 jurisdiction may, in practice, be used mostly against defendants with local assets, it is by no means limited to such defendants as a matter of law. And whereas a judgment obtained on the basis of *forum arresti* jurisdiction reaches only the attached or garnished assets, the French judgment purports to bind the defendant personally.

In fact, the mere existence of Article 14 jurisdiction may have stunted France's development of more refined and precise bases of jurisdiction. As during the reform debates at the end of the 1940s, the operation of the code provision may have long given the legislature the sense that there was no need to act. And the courts until recently tended to look to Article 14 jurisdiction before looking at other bases of jurisdiction, thus failing to address the other bases and delineate their scope.[114]

In this respect, the current judicial approach of relying on Article 14 only as a last resort[115] may be an improvement. But from the perspective of a foreign defendant, the current approach may be disadvantageous. Given the choice between a French judgment entered on the basis of Article 14 and a French judgment entered on some other basis of jurisdiction, a foreign defendant should prefer the former, as it renders more promising a collateral attack upon any attempted enforcement outside of Europe. Today, French courts must search out another basis of jurisdiction when possible, but

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111. *See* Nadelmann, *supra* note 2, at 327.

112. *See* Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977) (holding ordinary use of attachment jurisdiction unreasonable as a constitutional matter, but leaving open its use in some cases against foreigners); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 426 (1981).

113. *See* Brussels Regulation, *supra* note 81, annex I. A more subtle criticism of Article 14 is that a French plaintiff who has chosen first to sue abroad may take advantage of the code provision to avoid res judicata when suing anew at home, arguing that the earlier suit was not really voluntary because suing abroad was necessary to chase assets and so did not constitute a waiver. *See* AUDIT, *supra* note 52, at 324-25; Droz, *supra* note 52, at 19-21; *supra* Part III.A.2.b. In addition to being unfair to the defendant, this loophole would seem to burden France's judicial resources wastefully.

114. *See* Nadelmann, *supra* note 2, at 326-27 (making this point with regard to the *saisie foraine* jurisdiction that used to appear in the French Code of Civil Procedure).

115. *See supra* note 71.

in that process they may be marginally more willing to uphold that other basis of jurisdiction because they know that Article 14 exists as a backup. When the plaintiff seeks to enforce the resulting judgment abroad, the foreign court will see a nonexorbitant basis of jurisdiction underlying the judgment, and further may be unwilling to reexamine the factual support for this basis, and so will tend to enforce the judgment. Article 14 jurisdiction may in this way lurk in the background of numerous cases, causing harmful effects that are not readily apparent.

As an illustration of the shadow cast by Article 14 jurisdiction, consider the recent and celebrated litigation in Paris against Yahoo!, the U.S. internet corporation. Two French nonprofit organizations sued Yahoo! for allowing access through its auction site to Nazi-related propaganda and memorabilia, the display for sale of which is illegal in France.[116] The court ordered Yahoo! to block access by French users.[117] Although the physical location of Yahoo!'s conduct was outside France, the court had based jurisdiction on Article 46 of the New Code of Civil Procedure, relying on the fact that Yahoo!'s conduct had caused effects in France.[118] This sparked an uproar in the internet community and a veritable flood of law journal commentary.[119] Among other things, commentators focused on how territorial jurisdiction doctrines should apply to the internet,[120] and some were quick to suggest that there was an insufficient connection between Yahoo! and France to warrant jurisdiction under the effects test of Article 46.[121] While this is a debatable point, what they entirely missed was that even if Article 46 did not apply, the French court could have simply asserted jurisdiction under Article 14 of the Civil Code. The commentary reads as if the advent of the internet, combined with a new reading of Article 46, suddenly allowed French courts to judge a U.S. citizen with whom they had few contacts.[122] As we know, of

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116. *See Assignation* [Summons], Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Apr. 12, 2000 (No. 00/05308), *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-asg.htm#texte.

117. *See Ordonnance* [Order], T.G.I. Paris, May 22, 2000 (No. 00/05308), *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte, *translation available at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm, *confirmed on reconsideration, Ordonnance* T.G.I. Paris, Nov. 20, 2000 (No. 00/05308), *available at* http://www.juriscom.net/txt/jurisfr/cti/ tgiparis20001120.pdf, *translation available at* http://www.cdt.org/speech/international/20001120yahoofrance.pdf. On the unsuccessful, related criminal case, see Scarlet Pruitt, *Yahoo Freed in Nazi Memorabilia Case*, PCWORLD.COM, Feb. 11, 2003, http://www.pcworld.com/news/article/0,aid,109307,00.asp.

118. *See* N.C.P.C. art. 46.

119. For references to much of this commentary and a brief overview of the major issues raised, see Mathias Reimann, *Introduction: The* Yahoo! *Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT'L L. 663, 668 n.21, 665-72 (2003).

120. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Margaret Khayat Bratt & Norbert F. Kugele, *Who's in Charge?*, MICH. B.J., July 2001, at 43; Brendon Fowler, Cara Franklin & Bob Hyde, *Can You Yahoo!? The Internet's Digital Fences*, 2001 DUKE L. & TECH. REV. 12, http://www.law.duke.edu/journals/dltr/articles/2001dltr0012.html; Daniel Arthur Laprès, *Of Yahoos and Dilemmas*, 3 CHI. J. INT'L L. 409 (2002); Caitlin T. Murphy, Note, *International Law and the Internet: An Ill-Suited Match*, 25 HASTINGS INT'L & COMP. L. REV. 405 (2002). *See generally* CLERMONT, *supra* note 52, at 43-47.

121. *See* Fowler et al., *supra* note 120, at ¶¶ 7-9; Laprès, *supra* note 120, at 418, 427; Murphy, *supra* note 120, at 415-16.

122. *See* Fowler et al., *supra* note 120, at ¶¶ 7-9; Laprès, *supra* note 120, at 418, 427; Murphy, *supra* note 120, at 415-16.

course, for two hundred years French courts have been able to judge a U.S. citizen with whom they had no contacts whatsoever.

This point may not have been lost on Yahoo!, which challenged jurisdiction in the French trial court, but then declined to appeal the trial court's adverse decision.[123] While Yahoo! may have declined because it considered the jurisdictional challenge weak under Article 46, it also may have declined because it recognized that Article 14 was lurking in the background, ready to step in the moment Article 46 wavered. While a judgment based on Article 14 would have been easier to collaterally attack in a U.S. court, Yahoo! already had a strong First Amendment argument on which to base such an attack. Instead of sinking its resources into a French appeal, it made limited attempts to comply with the French order and then sought a judgment from a U.S. court declaring that the French order would be unenforceable in the United States.[124]

Concededly, this was a case in which there was an arguable basis of jurisdiction besides Article 14. What would have been the effect of Article 14 if the alternative basis had been weaker? Very likely Yahoo!—as well as Yahoo!'s liability insurer—still would have been in a difficult situation and so would have been inclined to defend in France. There still would have been a risk that the French court would assert the weak alternative basis of jurisdiction, knowing it had Article 14 as a backup, and thus render a judgment that might then be enforced in the United States.

Even if the French court had been asserting only Article 14 jurisdiction, the resulting judgment still could have been harmful. First, while Article 14 does tend to raise a red flag in U.S. courts, it remains possible that a U.S. court would enforce an Article 14 judgment if the facts supported an alternative but unarticulated jurisdictional basis recognized by the United States. In other words, if the U.S. court were to find that jurisdiction over the defendant did not offend due process, then it might enforce the French judgment even though it expressly rested on Article 14.[125] Second, even

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123. *See* Memorandum of Points and Authorities at 8 n.11, Yahoo! Inc. v. La Ligue Contre le Racisme et, l'Antisémitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (indicating that Yahoo! did not appeal the Paris court's final order); Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 169 F. Supp. 2d 1181, 1188 (N.D. Cal. 2001) (noting that Yahoo! withdrew its appeal of the Paris court's initial order, and did not appeal its final order).

124. Yahoo! successfully induced the U.S. court to exercise jurisdiction over the two French defendants. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 145 F. Supp. 2d 1168, 1174, 1176, 1180 (N.D. Cal. 2001) (questionably finding that defendants' California-directed acts constituted minimum contacts and that personal jurisdiction was not unreasonable). Yahoo! then obtained the declaratory judgment at the trial court level. Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (granting Yahoo!'s motion for summary judgment). *See* Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing* Yahoo! v. L.C.R.A.*: Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089 (2004). However, a three-judge panel of the court of appeals reversed for lack of personal jurisdiction. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 379 F.3d 1120 (9th Cir. 2004). *See* Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 36-40 (2004). Now, the court of appeals reversed the district court by cobbling together minorities of judges who felt either that personal jurisdiction was lacking or that the case was not yet ripe. Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, No. 01-17424, 2006 WL 60670 (9th Cir. Jan. 12, 2006).

125. *See* Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1230-31 (E.D.N.Y. 1990); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. c (1987); DELAUME, *supra* note 101, at 170 & n.744; RUDOLF B. SCHLESINGER, COMPARATIVE LAW 803 n.2 (4th ed.

aside from this uncertainty over future U.S. enforcement, any U.S. defendant would want to avoid becoming a judgment debtor entirely. An unpaid judgment adversely affects the defendant's ability to borrow money, damages the defendant's reputation, and hangs over the defendant's head, threatening any property that the defendant later decides to bring into Europe.[126]

Given such a predicament when sued by a French plaintiff, a U.S. defendant with a good jurisdictional argument, even one who has assets only in the United States, may well choose to enter an appearance in France, and then push its insurer to cover the costs of the defense in France, just as Yahoo! did.[127] It may also push its insurer to cover the costs of a declaratory judgment action in the U.S., as Yahoo!, whose insurer refused coverage for this proactive strategy, was doing in court.[128] All of this is expensive, and all of this is therefore likely to affect insurance premiums, settlement rates, and even primary conduct by anyone who fears somehow ending up in a French court.[129] In other words, the shadow cast by Article 14 may be a long one.

C. Future Use of Article 14 Jurisdiction

As the French like to point out, there is greater use of U.S. exorbitant jurisdiction than there is of Article 14 jurisdiction. This is not only because the U.S. bases are easier to invoke but also because more defendants have assets in the United States and more plaintiffs, in numbers and kinds, can invoke it. Nonetheless, France may be ready to close the gap.

Since the Brussels Convention of 1968, an increased variety of plaintiffs can use Article 14 jurisdiction, and, more significantly, there has been an ever-greater extension toward pan-European enforcement.[130] The Convention entered into force in 1973, obligating Belgium, Germany, Italy, Luxembourg, and the Netherlands to enforce French judgments. By the end of the 1980s, it had extended to Denmark, Greece, Ireland, and the United Kingdom. By the end of the 1990s, either the Brussels or Lugano Convention had also obligated Austria, Finland, Iceland, Norway, Poland,

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1980); Peter Hay, *International Versus Interstate Conflicts Law in the United States*, 35 RABELS ZEITSCHRIFT 429, 449-50 & 450 n.101 (1971).

126. *See* Connecticut v. Doehr, 501 U.S. 1, 13 (1991); Rush v. Savchuk, 444 U.S. 320, 331 n.20 (1980); Street v. Honorable Second Court of Appeals, 756 S.W.2d 299, 301 (Tex. 1988); Montfort v. Jeter, 567 S.W.2d 498, 499-500 (Tex. 1978); Hernandez v. Great Am. Ins. Co., 464 S.W.2d 91, 94 (Tex. 1971).

127. *See* Second Amended Complaint for Damages at 4, Yahoo! Inc. v. Gulf Underwriters Ins. Co., No. 02-3066 (N.D. Cal. June 26, 2002).

128. *See id.* at 7; Shannon Lafferty, *Yahoo Sues Its Insurer over Nazi Case Fees*, LAW.COM, May 30, 2002, http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1022788124580&t=LawArticleTech.

129. *See* Droz, *supra* note 52, at 13 ("*Il nous a été confié que dans certains contrats internationaux des hommes d'affaires s'engageaient de manière formelle à ne jamais contracter une assurance auprès d'une compagnie française afin d'éviter le risque d'une subrogation entraînant la compétence du tribunal français.*").

130. *See supra* Part III.A.2.c.

Portugal, Spain, Sweden, and Switzerland to enforce French judgments.[131] With the expansion of the European Union in 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Slovak Republic, and Slovenia joined this list of obligated states.[132]

As mentioned above, Yahoo! has tried to comply with the Paris court's order, even though the U.S. court ruled that it was unenforceable within the United States. Presumably it is worried about protecting its assets in France, including its interests in its subsidiary, Yahoo! France. But it is also presumably worried about protecting its assets in Denmark, Germany, Italy, Norway, Spain, Sweden, and the United Kingdom, all of which are required to enforce French judgments against it.

Another illustration of the effect of the Brussels Regulation and Lugano Convention is a less well-known lawsuit over a museum in Venice. The Solomon R. Guggenheim Foundation is a New York nonprofit corporation that manages its late benefactor's large art collection.[133] Known to New Yorkers by its spiral-shaped museum on Fifth Avenue, the Foundation began aggressively marketing an expanding array of museums around the world in the 1990s.[134] One of these museums was the Peggy Guggenheim Collection in Venice, which Solomon's niece Peggy had given to the Foundation near the end of her life in 1979.[135] Housed in Peggy's palazzo, which was included in the gift, the museum soon underwent some renovations that were not to the liking of three of Peggy's grandchildren.[136]

So the grandchildren sued the Foundation in 1992, arguing that Peggy had given away her collection on the condition that it not be modified and seeking a court order to restore the palazzo to its original condition, as well as compensatory damages reportedly in the dollar range of six-figures.[137] Although they easily could have sued the Foundation in Venice or New York, the grandchildren happened to be domiciled in France, and so they took advantage of the combined power of Article 14 jurisdiction and the Brussels Convention to sue in Paris.[138]

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131. For a convenient table showing the dates on which the Brussels Convention and its progeny entered into force as between each state party, see ADRIAN BRIGGS, CIVIL JURISDICTION AND JUDGMENTS 449-50 (Peter Rees ed., 2d ed. 1997). For a list of the most recent accessions, see *Conventions*, 2005 INT'L LITIG. PROC. 488; *EC Regulations and Decisions*, 2005 INT'L LITIG. PROC. 490.

132. *See* Treaty of Accession to the European Union 2003, Apr. 16, 2003, arts. 2, 20, annex II, *available at* http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm.

133. *See* Guggenheim Museum Website, http://www.guggenheim.org/exhibitions/past_exhibitions/new_guggenheim/index.html (last visited Aug. 1, 2003).

134. *See* Alex Prud'homme, *The CEO of Culture Inc.*, TIME, Jan. 20, 1992, at 36.

135. *See* Thomas M. Messer, *The History of a Courtship*, *in* KAROLE P.B. VAIL, PEGGY GUGGENHEIM: A CELEBRATION 127, 127-51 (1998) (providing a first-hand account of the Foundation's campaign to acquire Peggy's collection).

136. *See* Prud'homme, *supra* note 134, at 37 (quoting one of the grandchildren as complaining that the Foundation had "robbed the museum of all its originality and personality"). The renovations started in 1982, and animosity between the grandchildren and the Foundation appears to go back even earlier. *See* ANTON GILL, ART LOVER: A BIOGRAPHY OF PEGGY GUGGENHEIM 432-33 (2002).

137. *See* Georges R. Delaume, *Introductory Note to France: Court of Cassation Decision in Foundation Solomon R. Guggenheim v. David Helion, Nicholas Helion and Sandro Rumney*, 37 I.L.M. 653, 654 (1998). The reported six-figure number in pounds comes from Georgina Adam, *Art Sales: Charity in Court*, DAILY TELEGRAPH (LONDON), Apr. 25, 1994, at 16.

138. *See* Fond. Solomon R. Guggenheim v. Helion, Cass. 1e civ., July 3, 1996, 124 JOURNAL DU DROIT INTERNATIONAL 1016 (1997), *aff'g* CA Paris, Nov. 17, 1993, 121 JOURNAL DU DROIT INTERNATIONAL 671

The Foundation did not seem to have had any connection to France. It was not incorporated there, and none of its museums were there. Although Peggy Guggenheim had spent time in France,[139] there was no connection between France and the cause of action. The case involved a gift made in Italy and the U.S. defendant's subsequent conduct in Italy. Moreover, part of the relief sought was a court order that would have to be carried out in Italy. In the absence of the Brussels Convention or any similar treaty,[140] the Foundation might have worried less about the suit, because neither Italy nor New York would have been likely to enforce a French judgment rendered in these circumstances. So the Foundation could have ignored the suit and happily gone about its business of creating museums around the world, provided it was willing to avoid bringing assets into France. With the Convention in place, however, the Foundation had to respond. Any French judgment not only could be enforced against its Venice museum, but also could be enforced against its assets elsewhere in Europe. Peggy's discontented grandchildren consequently had no problem dragging the Foundation into an unfamiliar, distant courtroom in a country with which the Foundation had no contacts. This case, then, provides a nice example of the growing power of Article 14.[141]

In order to truly comprehend Article 14's potential, one must also consider the huge quantity of U.S. assets that are exposed to French judgments. Although it is probably impossible to calculate anything close to an accurate total, the following figures help to convey the order of magnitude. In 1999 U.S. investors had almost $600 billion in net financial claims (both equity and debt) on business enterprises located in countries that are obligated to enforce French judgments under the Brussels Regulation or Lugano Convention; by 2001, this amount had increased by 18 percent to surpass $710 billion.[142] Many of these interests are likely exposed to French judgments.

(1994) (rejecting jurisdictional defenses).

139. *See generally* GILL, *supra* note 136, at 71-259.

140. *See* SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS 54-66 (2003) (describing predecessor treaties).

141. Another reason for defending in France was reputational, as the Foundation wished to address the merits immediately. Telephone Interview with Judith Cox, former General Counsel, Solomon R. Guggenheim Foundation (Jan. 15, 2004). The Foundation ultimately prevailed in the case, but it incurred significant expenses in doing so. *See* Roger Bevan, *French Court Dismisses Case Against Guggenheim*, ART NEWSPAPER, Jan. 1995, at 3. The extent to which Peggy had actually placed legally enforceable conditions on the gift was not entirely clear, which may be why the plaintiffs' case ultimately fell apart. According to a recent book by the wife of one of the plaintiffs, Peggy had "stipulated that the Peggy Guggenheim Collection should remain intact and complete in the Palazzo Venier dei Leoni, 'without addition or deletion'; that certain works were never to be loaned, and that the rest of the collection could only leave the *palazzo* during the winter." LAURENCE TACOU-RUMNEY, PEGGY GUGGENHEIM: A COLLECTOR'S ALBUM 171 (1996) (footnote omitted). Another author similarly states that Peggy had "deeded the ownership of her . . . collection . . . [with] the provision that . . . [it] must remain intact, 'as is—without additions or deletions,' in her Venetian palazzo." JOHN H. DAVIS, THE GUGGENHEIMS 1848-1988: AN AMERICAN EPIC 389 (1988). According to one author, however, there was an initial agreement that provided that Peggy's collection should remain in Venice, but Peggy subsequently gave her collection to the Foundation with no strings attached. JACQUELINE BOGRAD WELD, PEGGY: THE WAYWARD GUGGENHEIM 421 (1986); *see also* GILL, *supra* note 136, at 433 (discussing the continuing struggle between the grandchildren and the Foundation over the management of Peggy's collection).

142. These figures derive from the data presented in Jeffrey H. Lowe, *U.S. Direct Investment Abroad: Detail for Historical-Cost Position and Related Capital and Income Flows, 2001*, SURV. CURRENT BUS.

Consider also the U.S. tax return data on the 7500 largest foreign corporations in which major U.S. corporations own a controlling share.[143] In 1998 (the latest year for which data were available) at least 307 major U.S. corporations controlled such foreign corporations that were incorporated in countries obligated to enforce French judgments under the Brussels Regulation or Lugano Convention.[144] While each country's rules on grabbing stock to satisfy judgments vary, much of this foreign stock owned by U.S. corporations is likely exposed to French judgments.[145] Even to the extent that the stock itself is not exposed, various transactions between the controlled corporations and their parent corporations should expose significant U.S. assets to French judgments. For example, the controlled corporations, having over $1.7 trillion in assets by the end of 1998, paid more than $53 billion to their U.S. owners that year.[146]

Given this growing pool of assets exposed to French judgments, one may see an increase in the use of Article 14 jurisdiction in the coming years. French plaintiffs' lawyers may soon wake up and start using Article 14 more aggressively, maybe with U.S. lawyers' advice. While Article 14 jurisdiction will continue to lurk in the background of numerous cases, having its main effects by casting a shadow, it may increasingly move into the forefront, applying expressly. Therefore, in evaluating

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(U.S. Dep't of Commerce, Bureau of Economic Analysis), Sept. 2002, at 68, 75 tbl.10.1, 77 tbl.10.3, *available at* http://www.bea.doc.gov/bea/ARTICLES/2002/09September/0902USDIA.pdf. The figures are calculated by adding the "U.S. Direct Investment Position" in the fifteen E.U. countries with that in Norway and Switzerland (the only Lugano Convention member states for which data are listed). "U.S. Direct Investment Position" is defined as the value of U.S. direct investors' equity in, and net outstanding loans to, their foreign affiliates. "U.S. direct investors" are, in turn, defined as U.S. residents who own at least 10 percent of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, with "foreign affiliates" being defined as those business enterprises. *See id.* at 69.

143. *See* JOHN COMISKY, I.R.S., CONTROLLED FOREIGN CORPORATIONS, 1998 (2003), *available at* http://www.irs.gov/pub/irs-soi/98cfcart.pdf. For the purpose of these statistics, a foreign corporation is "controlled" if one U.S. corporation owns "more than 50 percent of its outstanding voting stock, or more than 50 percent of the value of all its outstanding stock (directly, indirectly, or constructively)," for an uninterrupted period of at least 30 days during a given year. *Id.* at 47. "Major U.S. corporations" are defined here as those with total assets of at least $500 million. *See id.*

144. This figure represents only the U.S. corporations that controlled corporations incorporated in certain E.U. countries. *See id.* at 67 tbl.2. The figure ignores controlled corporations incorporated in France and Italy because the IRS statistics lump these two countries with Andorra and San Marino, neither of which are obligated to enforce French judgments under the Brussels Regulation or Lugano Convention. In addition, the figure ignores controlled corporations incorporated in Norway and Switzerland—both of which are obligated to enforce French judgments under the Lugano Convention—because the data do not indicate how many of the U.S. corporations also controlled corporations incorporated in the E.U. countries, and thus whether or not they were already counted in the first figure. *See id.* at 67 tbl.2, 76 n.1. In sum, 307 is really the bare minimum number of U.S. corporations with such assets.

145. On the use of stocks to satisfy judgments in France, see HERZOG & WESER, *supra* note 56, at 577-78. For an example of a German court attaching foreign-owned stock in a German corporation, see Christof von Dryander, *Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure*, 16 INT'L LAW. 671, 682 (1982) (discussing the attachment of the Iranian government's stock in Friedrich Krupp GmbH); Lawrence W. Newman, *A Personal History of Claims Arising out of the Iranian Revolution*, 27 N.Y.U. J. INT'L L. & POL. 631, 637 (1995) (same).

146. These figures are calculated from Comisky, *supra* note 143, at 67 tbl.2, by adding the reported data for all E.U. countries combined with that for Norway and Switzerland, and then subtracting the reported data for France and Italy for the reasons explained *supra* note 144.

Article 14, one should contemplate not only the past and present, but also the possibly more troublesome future.

IV. OTHER COUNTRIES

Of course, the United States and France are not alone in their exorbitant jurisdictions. Indeed, most nations appear to have succumbed to similar parochial impulses. These impulses have been expressed in a variety of ways.[147] But there are only three major forms that merit mention.

First, the Netherlands replaced French nationality-based jurisdiction with jurisdiction based on the plaintiff's domicile.[148] This basis is narrower than Article 14 jurisdiction in that it excludes nationals domiciled abroad, but also broader than Article 14 jurisdiction in that it includes the country's noncitizen domiciliaries. As a result of the Brussels Regulation and Lugano Convention, jurisdiction based on the plaintiff's domicile can be employed in France itself today against a defendant who is not a Brussels/Lugano domiciliary.[149]

Second, the German code and its far-flung offspring take attachment jurisdiction, or *forum arresti*, to the extreme of *forum patrimonii* by authorizing jurisdiction not only over the property that is physically present, as U.S. law does, but over the person of the defendant whose property it is, even if that defendant defaults and lacks any other contacts with the forum country.[150] Germany otherwise follows the usual civil-law approach, which makes no distinction between jurisdiction over things and jurisdiction over persons (but instead gets to similar results through the notion of exclusive jurisdiction for certain kinds of suits that intrinsically involve things). The drafters of Germany's Code of Civil Procedure adopted *forum patrimonii* in Article 23 as a way to allow suits against foreigners; the drafters apparently considered this exorbitant basis of jurisdiction as simpler to apply than other jurisdictional choices contemplated for the same purpose, and justified it as "still less exorbitant than [French] Article 14 jurisdiction."[151]

More precisely, Article 23 authorizes ordinary personal jurisdiction given only the presence in Germany of a tangible or intangible thing belonging to the defendant, thus going considerably further than the U.S. authorization in certain circumstances of

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147. A modern listing of exorbitant jurisdiction types appeared in Article 18 of the draft Hague jurisdiction-and-judgments treaty, which can be found at the Hague Conference on Private International Law's Website, http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf (last visited Sept. 3, 2005). Later the Hague negotiations contracted to a narrow convention treating business-to-business contracts containing choice-of-court agreements that select forums for disputes to the exclusion of other forums, and so the draft dropped Article 18 as unnecessary. For the content of the eventual convention, see http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited Sept. 3, 2005).

148. On the Dutch use of this basis of jurisdiction (which is contained in the Dutch Code of Civil Procedure art. 126(3)), see 2 DELAUME, *supra* note 45, § 8.07, at 16-17; Nadelmann, *supra* note 7, at 999, 1020 n.150; Pearce, *supra* note 45, at 539-40.

149. *See supra* Part III.A.2.c.

150. On the German use of this basis of jurisdiction (which is contained in their Code of Civil Procedure art. 23), see CLERMONT, *supra* note 52, at 14-16; Nadelmann, *supra* note 2, at 328-30; Nadelmann, *supra* note 7, at 999, 1020 n.149.

151. Nadelmann, *supra* note 7, at 1011 (noting that *forum patrimonii* was adopted, following unification, from the Prussian Code, in which it had existed since 1809).

jurisdiction over a thing based upon presence of the thing. Recovery in a German case founded on presence of goods is not limited to the value of the goods, although obviously the plaintiff might have trouble enforcing the judgment outside Germany. Traditionally the cause of action did not have to relate to the thing or even to Germany, but the German Supreme Court has recently invented a vague but significant requirement that the plaintiff be domiciled in Germany or the cause of action be linked to Germany.[152] The forum-shopping potential remains a little frightening, as many enterprises have assets in countries with the German-derived law that yields such judgments or in countries bound by the Brussels Regulation and Lugano Convention to enforce such judgments.

Third, a number of countries assert exorbitant bases of jurisdiction, including jurisdiction based on the plaintiff's nationality or domicile or on the defendant's property, but only over the national of a country that would assert such a basis of jurisdiction over the forum's nationals. These countries' desires are not to exercise exorbitant jurisdiction, but to discourage others from doing so. In other words, these countries employ exorbitant jurisdiction as a retaliatory measure, in what one author has termed "reactive or anticipatory reciprocity."[153] The countries employing such jurisdiction include Belgium, Italy, and Portugal.[154] Retaliation can be effective in inducing a superior treaty-based solution.

V. CONCLUSION

When one compares different countries' approaches to international jurisdiction, it becomes apparent that differences do not predominate.[155] The evolution of jurisdictional rules demonstrates how different legal systems tend toward so-called convergence, given similar influences. Jurisdictional convergence is often seen as limited to the *non*exorbitant bases, however. The exorbitant bases on each side stand out as looking foreign to the outsider. They seem to set countries apart, to reveal fundamental differences.

Closer examination nevertheless suggests that the world's exorbitant bases of jurisdiction may not be so different after all. Even in the doctrinal details of these exorbitant bases, where national peculiarities start to peak, the differences are smaller than they initially appear. French nationality-based jurisdiction (or Dutch domicile-based or German property-based jurisdiction) may not sound much like U.S. transient or attachment or doing-business jurisdiction, but in fact they share a common core: nations incline to disregard defendants' interests in order to give their own people a

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152. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 241, 251-54 (2d ed. 2002).

153. Pearce, *supra* note 45, at 540.

154. *Id.* For the Belgian use of this basis of jurisdiction (which is contained in their Code Judiciaire arts. 636 & 638), see 2 DELAUME, *supra* note 45, § 8.07, at 17; Nadelmann, *supra* note 7, at 999, 1014-16, 1021; Pearce, *supra* note 45, at 540. On the Italian use of this basis (which is contained in their Code of Civil Procedure art. 4(4)), see MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 89 (1965); 2 DELAUME, *supra* note 45, § 8.06, at 16. For the Portuguese use of this basis (which is contained in their Code of Civil Procedure art. 65(1)(c)), see Pearce, *supra* note 45, at 540.

155. *See* Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L. J. 1, 7 (2004).

way to sue at home, if the home country will be able to enforce the resulting judgment locally.

Even if thus understandable, exorbitant jurisdiction is, by definition, not a desideratum. Indeed, to perceive its common core is to appreciate its pervasive dangers. National variations and extensions beyond the core only make it worse. Elimination of exorbitant jurisdiction by international agreement should remain the ultimate goal.

UNILATERAL AND MULTILATERAL PREVENTIVE SELF-DEFENSE

Stéphanie Bellier