CRIMINAL JURISDICTION OVER FOREIGN CORPORATIONS: THE APPLICATION OF A MINIMUM CONTACTS THEORY

The jurisdictional requirement of "presence" for corporations in civil cases has undergone significant development. However, the requirement in criminal cases has remained unchanged for many years despite the increasing size, number, and influence of corporations. Criminal prosecutions of corporations can only become more important in the future, and recent cases indicate problems presented by modern application of traditional legal concepts. This Comment looks at the unique aspects of the privilege of presence in criminal trials and the underlying considerations in applying this privilege to corporations. The Comment concludes that the civil "minimum contacts" standard is both desirable and workable for corporations in criminal trials.

INTRODUCTION

The number and size of corporations has recently grown to a staggering level so that virtually all economic and most social and political activity is greatly influenced by corporate behavior.[1] Moreover, this impact has coincided with an increase in interstate and multinational operations by corporations.[2] At the same time there has been a dramatic rise in the incidence of corporate crime.[3]

1. *See The Role of Giant Corporations in the American and World Economies: Part 2, Corporate Secrecy: Overviews: Hearings Before the Subcomm. on Monopoly of the Select Comm. on Small Business*, 92d Cong., 1st Sess. 11 (1971).

2. *Id. See also* R. BARNET & R. MULLER, GLOBAL REACH 254-61 (1974).

3. The U.S. Chamber of Commerce estimates that even the short term direct cost of white collar crime is at least $40 billion annually. SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 8, 9 (Comm. Print 1978). In the industries regulated by the Food and Drug Administration alone, recent data indicate that "over-prescription" promoted by the drug companies leads to 60,000 to 140,000 deaths each year. R. NADER, M. GREEN, & J. SELIGMAN, TAMING THE GIANT CORPORATION 25-26 (1976). The few available statistics for prosecutions under the securities laws demonstrate a similar trend. In 1972 the SEC referred 38 cases to the Justice Department for criminal prosecution; by 1976, the number had risen to 114.

In recent years the use of criminal prosecutions as a method to control the corporate crime problem has attracted increased attention.[4] However, the success of criminal sanctions in actually reducing the incidence of corporate crime has been elusive.[5] This failure is due in part to a lack of appropriate penalties,[6] but corporations also pose special problems in the general application of criminal law and procedure.[7]

To prosecute a corporation that is engaged in interstate business operations, a state must first establish personal jurisdiction[8] over the corporation.[9] A determination of personal jurisdiction over a corporate entity requires consideration of factors unique to the corporate character.[10] A corporation, unlike a natural person, is an artificial creation of the law[11] and cannot be arrested or subjected to extradition.[12] In a criminal prosecution, a corporate entity can be brought before the court only by summons.[13]

In the early case of *Pennoyer v. Neff*,[14] the United States

---

SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 24 (Comm. Print 1978).

4. The ratio of civil to criminal antitrust actions brought by the federal government has changed from 133:29 during 1968-1970 to 115:89 during 1974-1976. M. GOTTFREDSON, M. HINDELANG, & N. PARISI, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 61 (1978); *see* Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 70 (1978); Comment, *Increasing Community Control Over Corporate Crime: A Problem in the Law of Sanctions*, 71 YALE L.J. 280 (1961).

5. For example, according to *Business Week* magazine, the FDA's increased efforts to notify heads of companies of alleged criminal violations have succeeded in "raising the consciousness" of some corporate executives. BUS. WEEK, May 10, 1976, at 111. However, studies indicate that white collar offenses usually draw more lenient judicial treatment. SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 49, 50 (Comm. Print 1978).

6. For example, the effect of a $437,500 fine levied on General Electric for its part in an electrical equipment price-fixing conspiracy was roughly equivalent to a three-dollar parking fine for a person with a $15,000-per-year income. M. GREEN, THE CLOSED ENTERPRISE SYSTEM 170 (1971).

7. The inability of courts to imprison a corporation and the questionable effect of a criminal stigma often lead to the prosecution of the individuals within the corporation. When a corporation is prosecuted, the artificial character of the corporation renders uncertain the constitutional protections that might be raised, such as double jeopardy, right to trial by jury, the privilege against self-incrimination, and the restraints on search and seizure. *See* 92 HARV. L. REV. 1227, 1230 (1979).

8. For the purposes of this article, the term "personal jurisdiction" will be used to refer to criminal jurisdiction, and the term "in personam jurisdiction" will be used to refer to civil jurisdiction.

9. *See* text accompanying notes 29-31 *infra*.

10. *See* text accompanying notes 123-60 *infra*.

11. *See* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *455-56.

12. State v. Luv Pharmacy, Inc., 118 N.H. 398, 404, 388 A.2d 190, 194 (1978); People v. Consolidated Edison Co., 42 Misc. 2d 422, 423-24, 248 N.Y.S.2d 267, 268 (1964).

13. People v. Consolidated Edison Co., 42 Misc. 2d 422, 248 N.Y.S.2d 267 (1964).

14. 95 U.S. 714 (1877).

Supreme Court held that the constitutional requirements of due process restricted a state court's exercise of judicial power to cases in which the defendant was served with a summons while present in the state.[15] The application of the *Pennoyer* standard to foreign corporations[16] necessitated development of the fictional concept of "corporate presence."[17] A state court could serve a foreign corporation with a summons only when indicia of corporate activity justified a determination that the corporation was sufficiently "present" within the state.[18]

In *International Shoe Co. v. Washington*,[19] the Supreme Court abandoned the "presence" standard for civil in personam jurisdiction and set forth the current "minimum contacts" standard.[20] The Court recognized that the terms "present" and "presence" in civil cases were used merely to symbolize the activities of the corporation's agents within a state.[21] The Supreme Court has not yet decided the question of whether "minimum contacts" should be applied as the constitutional standard of personal jurisdiction for corporations in a criminal proceeding.[22]

Two recent cases, *Commonwealth v. Beneficial Finance Co.*[23] and *State v. Luv Pharmacy, Inc.*,[24] are illustrative of state courts addressing the problem of jurisdiction over foreign corporations in criminal prosecutions. In the *Luv* case the court applied the "presence" standard, and in *Beneficial* the court ignored the juris-

15. *Id.* Justice Field's solution in the *Pennoyer* decision displays the influence of the writings of Joseph Story. *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834); Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 589 (1979).

16. For purposes of this article, a "foreign" corporation is a corporation foreign to a particular state, which may or may not be incorporated in another jurisdiction within the United States. This is distinguished from "alien" corporations, which are incorporated in a country other than the United States. For a discussion of jurisdictional problems relating to alien corporations, see Comment, *Obtaining Jurisdiction Over Alien Corporations—A Survey of U.S. Practice*, 9 VAND. J. TRANSNAT'L L. 345 (1976).

17. The problem arose where a corporation was incorporated in another jurisdiction, but was engaged in business activities within the forum state. Thus, by definition the question applied only to foreign corporations because a corporation incorporated within the forum state is a domestic corporation and "present" therein.

18. *See* text accompanying notes 47-48 *infra*.

19. 326 U.S. 310 (1945).

20. *Id.* at 316.

21. *Id.*

22. State v. Luv Pharmacy, Inc., 118 N.H. 398, 403, 388 A.2d 190, 193-94 (1978).

23. 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 914 (1972).

24. 118 N.H. 398, 388 A.2d 190 (1978).

dictional question by rephrasing the issue in terms of corporate accountability for the actions of an agent.[25]

This Comment examines the significance of the privilege of "presence" for a corporation in a criminal proceeding and concludes that the minimum contacts test is a legitimate and desirable standard for criminal jurisdiction over corporations.

The adoption of a minimum contacts standard in criminal cases for corporations would serve three ends. First, the standard would provide uniform criteria for assumption and exercise of jurisdiction among the states.[26] Second, it would eliminate the obsolete and unworkable notion of "corporate presence."[27] Finally, the adoption of a minimum contacts standard would allow states to deal more adequately with the problem of interstate criminal activity by corporations.[28]

BACKGROUND

There are two parts to the question of whether a foreign corporation is subject to the personal jurisdiction of a state court in a criminal proceeding. The first is whether, as a matter of state law, the state has provided the appropriate statutory mechanism or procedure for bringing the corporation into its courts.[29] The second part, to which this Comment is addressed, is whether the assumption of jurisdiction violates any constitutional rights or privileges of the corporate defendant.

In a criminal case personal jurisdiction is ordinarily acquired by obtaining the defendant's physical presence before the court either forcibly by means of an arrest or voluntarily by appearance upon service of a criminal summons.[30] When the defendant is found outside the territory of the prosecuting state, he can be arrested by another authority and surrendered to the state through the process of extradition.[31]

At common law the concept of "presence" in personal jurisdiction required that a natural person be present when arraigned, when a plea was made to the charge, and at every stage of the trial.[32] In the early case of *Hopt v. Utah*,[33] the Supreme Court

25. Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 914 (1972).

26. *See* text accompanying notes 70-72 *infra*.

27. *See* text accompanying notes 163-65 *infra*.

28. *See* text accompanying notes 163-66 *infra*.

29. For illustrative state statutes see ALA. CODE § 7-1 (1977); CAL. PENAL CODE § 1427 (West Supp. 1977); N.H. REV. STAT. ANN. § 11 (1978).

30. People v. Consolidated Edison Co., 42 Misc. 2d 422, 248 N.Y.S.2d 267 (1964).

31. U.S. CONST. art. 4, § 2; UNIFORM CRIMINAL EXTRADITION ACT.

32. *See* text accompanying notes 94-101 *infra*.

33. 110 U.S. 574 (1884).

held that the "right to presence," based on the historical disapproval of trials in absentia, was constitutionally secured by the due process clause.[34] In contrast, a party to a civil action has no comparable right of physical presence before the court, and a judgment in his absence can be entered by default.[35]

The notion of "presence" in civil cases developed from early common law rules concerning territorial restrictions on causes of action.[36] Originally in English practice all actions were tried in the county where the operative facts underlying the litigation had occurred.[37] With the growth of commerce and travel, the transitory cause of action was developed, so that an obligation owed to a plaintiff was found to "cling" to the defendant and could be sued upon wherever the defendant could be found.[38] This "presence-oriented" jurisdiction was constitutionalized by the Supreme Court in *Pennoyer v. Neff*.[39] The Court held that service of summons upon nonresidents of a state would be ineffectual unless made upon their persons while within the state's territory.[40] The effect of the *Pennoyer* holding was that state courts could exercise in personam jurisdiction only over defendants who were physically present within the state.[41]

Because a corporation is an artificial creation that can act only through agents, the presence requirement made it necessary for courts to resort to several variations of a legal fiction to determine whether a corporation was "present" for service of summons.[42]

34. *Id.* at 579.

35. *See* Bass v. Hoagland, 172 F.2d 205 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949).

36. F. JAMES, CIVIL PROCEDURE 615-16 (1965).

37. This restriction was premised on the fact that juries were drawn from the vicinity and were expected to render their verdicts upon personal knowledge of the facts in issue. *See generally* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 332 (7th ed. rev. 1956).

38. Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1030 (1774). In this opinion, Lord Mansfield still expressed some reservations about whether an action arising outside of England between nonsubjects who were now coincidentally within the realm was maintainable in England. *Id.*

39. 95 U.S. 714 (1878).

40. *Id.* at 722.

41. The Court in *Pennoyer* states "[t]hat no state can exercise direct jurisdiction and authority over persons or property without its territory." *Id.*

42. The Supreme Court at first held that a corporation, unless authorized by its charter, could not be subject to in personam jurisdiction outside of its state of incorporation. Bank of Augusta v. Earl, 38 U.S. (13 Pet.) 519 (1839). Obviously, this quickly became unworkable and the concept of "consent jurisdiction" arose.

The standard of presence for corporations was the subject of prolific controversy in civil cases.[43]

The issue of corporate "presence" in criminal personal jurisdiction was before the Supreme Court in 1914 with *International Harvester Co. v. Kentucky*.[44] *International Harvester* involved a criminal proceeding against the International Harvester Company for an alleged violation of Kentucky's antitrust laws. International Harvester sought to quash the service of summons on the ground that the company was not "doing business" within the state.[45]

The Supreme Court held that before a corporation can be responsible under the process of a state court, it must appear that the corporation was carrying on business within the state at the time of the attempted service.[46] Factors such as solicitation of orders, a single transaction, or the casual presence of agents within the state might not in themselves manifest "corporate presence."[47] However, taken together so that it was apparent that the corporation was involved in a "continuous course of business" these indications would be sufficient.[48]

The *International Harvester* decision was consistent with the civil jurisdiction standard of that time.[49] The Court did not address the question of whether the criminal nature of the proceeding would require any special consideration.[50] Whether *International Harvester* is valid law today is doubtful in light of the decision in *International Shoe Co. v. Washington*.[51]

The issue of the standard for personal jurisdiction over corporations in criminal cases was recently before the Supreme Court of Massachusetts in *Commonwealth v. Beneficial Finance Co.*[52] *Beneficial* involved the prosecution of various small loan companies and individuals on charges of bribery and conspiracy. Three of

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856). Adopting a term also used by Judge Cardozo in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917), Justice Brandeis characterized the standard in terms of fictional corporate presence. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).

43. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

44. 234 U.S. 579 (1914).

45. Prior to the indictment, International Harvester had been transacting business in Kentucky. In fact, the company had designated Louisville, Kentucky, as its principal place of business. However, before the service of summons, International Harvester had withdrawn its offices from the state. *Id.* at 585.

46. *Id.* at 589.

47. *Id.* at 585.

48. *Id.*

49. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).

50. International Harvester Co. v. Kentucky, 234 U.S. at 582.

51. 326 U.S. 310 (1945).

52. 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 914 (1972).

the four corporate defendants raised the argument that they, the parent companies, were not doing sufficient business in the state to enable a Massachusetts court to exercise personal jurisdiction over them. On appeal the court disposed of the jurisdictional issue, holding that it essentially involved the question of whether to charge the foreign corporations with the acts of their agents and the sufficiency of the evidence.[53]

Recently, in *State v. Luv Pharmacy, Inc.*,[54] the Supreme Court of New Hampshire directly addressed the question of whether a minimum contacts standard should be applied in a criminal case.[55] In *Luv* three corporations had been indicted for the sale of obscene material. Penthouse International, Ltd. (Penthouse), a defendant, challenged the court's jurisdiction after being served outside the state with a copy of the indictment and a notice to appear.[56] After an evidentiary hearing, the trial court denied Penthouse's motion for dismissal.[57]

In considering the application of the minimum contacts standard, the court in *Luv* noted that the standard represents a constitutional limitation on the in personam jurisdiction of state courts in civil cases. If minimum contacts was applied as the standard for personal jurisdiction in the present criminal case and Penthouse was found to lack minimal contacts in New Hampshire, then the prosecution must be dismissed.[58]

The court rejected the application of the minimum contacts analysis and affirmed the trial court's finding of jurisdiction over Penthouse.[59] First, the court reasoned that it is doubtful whether the standard could be applied in the criminal context: "Application of this standard to natural persons charged with criminal offenses might mean that a criminal judgment could be rendered against a natural person even if he were absent from the jurisdiction. Such a result might render nugatory . . . our extradition

53. *Id.* at 227, 275 N.E.2d at 57.
54. 118 N.H. 398, 388 A.2d 190 (1978).
55. *Id.* at 403-04. 388 A.2d at 193.
56. *Id.*
57. *Id.*
58. Penthouse claimed that it lacked "affiliating circumstances" with the state, without which a court could not enter a judgment imposing obligations on persons. State v. Luv Pharmacy, Inc., 118 N.H. 398, 403, 388 A.2d 190, 193 (1978). *See* Hanson v. Denckla, 357 U.S. 235 (1958).
59. State v. Luv Pharmacy, Inc., 118 N.H. 398, 403-05, 388 A.2d 190, 194 (1978).

statute. It might also raise serious constitutional questions."[60] The concern expressed by the court rests on the traditional rules in criminal cases against trials in absentia.[61] These rules have recognized that the failure to insure the presence of the accused at his trial may substantially impair his rights.[62]

Second, the court stated that Penthouse was sufficiently "present" in New Hampshire to be subject to prosecution, based upon testimony in the record that "Penthouse does more than publish the magazine in question."[63] Penthouse was involved in distribution of the allegedly obscene materials but was insulated from "contact" with New Hampshire by acting through independent contractors.[64] The court relied on the holdings of civil cases that have liberalized the due process criteria for jurisdiction by eliminating the distinction between independent contractors and agents.[65] If such a distinction were maintained, a corporation could, by using a proper degree of care and "independent contractors" to carry out its business functions, eliminate nearly all physical contacts with all but one state.[66]

Finally, the court in *Luv* noted that the alleged commission of acts by Penthouse represented a compelling "circumstance of affiliation" with New Hampshire.[67] It is interesting that the court's language is similar to that used by the Supreme Court in *Hanson v. Denckla*,[68] a civil case addressing a minimum contacts issue. Although the *Luv* court rejected the minimum contacts analysis, the language implies that if the standard had been used, the court still would have found Penthouse subject to New Hampshire jurisdiction. Apparently, the underlying reason for the court's decision involved an apprehension of the problem a minimum contacts standard might pose for natural persons.[69] However the court seems to suggest that a minimum contacts analysis is otherwise appropriate and desirable for corporations.

The *International Harvester*, *Luv*, and *Beneficial* cases indicate three possible approaches to the standard for criminal jurisdiction over corporations. *International Harvester* suggests a set of

60. *Id.*
61. *See* text accompanying notes 93-117 *infra*.
62. Hopt v. Utah, 110 U.S. 574 (1884). In recent cases the rule has become increasingly less favorable for the defendant. *See* Taylor v. United States, 414 U.S. 17 (1973).
63. State v. Luv Pharmacy, Inc., 118 N.H. 398, 404-09, 388 A.2d 190, 194-97 (1978).
64. *Id.*
65. Mulhern v. Holland America Cruises, 393 F. Supp. 1298, 1302 (D.N.H. 1975); *see* Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).
66. Curtis Publishing Co. v. Golino, 383 F.2d 586, 591 (5th Cir. 1967).
67. State v. Luv Pharmacy, Inc., 118 N.H. 398, 405, 388 A.2d 190, 195 (1978).
68. 357 U.S. 235 (1958).
69. *See* text accompanying note 60 *supra*.

defined indicia that would allow the exercise of jurisdiction when a corporation is found to be "doing business" within a state.[70] The *Beneficial* case ignores the issue of a jurisdictional standard entirely by rephrasing the problem in terms of legal accountability.[71] The *Luv* case suggests the application of the more modern "circumstances of affiliation" standard that makes exercise of jurisdiction reasonable, but retains the "presence" term to avoid the problem of applying minimum contacts to natural persons.[72]

The important question to be decided is whether a corporate defendant has additional rights in a criminal case that might preclude adoption of the minimum contacts standard.[73] If the jurisdictional rights of corporations are similar or the same in both criminal and civil cases, then the minimum contacts standard should be applied.

MINIMUM CONTACTS

Since *Pennoyer v. Neff*,[74] the Supreme Court has held that the due process clause places some limit on the jurisdictional power of state courts over persons outside of their territory.[75] The question in *Pennoyer* involved the degree of affiliation that a nonresident must have with a state before the courts of that state could exercise in personam jurisdiction over him by service of summons.[76] In applying the *Pennoyer* standard of presence, courts resorted to factual items such as local offices, employees, telephone book listings, bank accounts, or other operations to justify the conclusion that a foreign corporation was present in the state.[77]

In civil cases in a continuing process of evolution, the Supreme Court accepted and then abandoned "presence," "doing business," and "consent" as the constitutional standard of in personam jurisdiction,[78] although the standard was usually

70. International Harvester Co. v. Kentucky, 234 U.S. 579, 585-89 (1914).
71. Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 227, 275 N.E.2d 33, 56-57 (1971), *cert. denied*, 407 U.S. 914 (1972).
72. State v. Luv Pharmacy, Inc., 118 N.H. 398, 404-05, 388 A.2d 190, 194 (1978).
73. *See* text accompanying notes 93-117 *infra*.
74. 95 U.S. 714 (1877).
75. *Id.* at 724.
76. *Id.*
77. St. Clair v. Cox, 106 U.S. 350 (1882); *see* cases cited note 42 *supra*.
78. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). *See also* cases cited note 42 *supra*.

characterized in terms of "presence."[79] The Court in *International Shoe Co. v. Washington*[80] held that due process requires only that a foreign corporation have certain minimum contacts with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[81]

The creation of the minimum contacts standard involved a recognition of the fictional character of a corporation.[82] Unlike a natural person, a corporation's "presence" within a state can be manifested only by activities carried on in its behalf by those who are authorized to act for it.[83]

Several subsequent Supreme Court decisions have elaborated upon the *International Shoe* standard.[84] The broad jurisdictional authority conferred upon the states seemed to lead to the demise of all restrictions when the Court decided *McGee v. International Life Insurance Co.*[85] In *McGee* jurisdiction was premised upon a single transaction conducted by mail; the defendant corporation had no other connections with the forum state.[86]

One year later in *Hanson v. Denckla*,[87] the Court again indicated that the extent of state court jurisdiction was not without limitation.[88] In *Hanson* the Court held that the Florida courts could not exercise in personam jurisdiction over nonresident trustees who had no office and transacted no business there, although the trust beneficiaries were domiciled in Florida.[89] The Court distinguished the facts from those in *McGee* by noting that the cause of action did not arise out of an act done or a transaction consummated in the forum state.[90]

The substance of the minimum contacts standard requires that a court find the corporation has sufficient affiliation with the forum state before in personam jurisdiction can be acquired by service of summons or other reasonable notice.[91] The courts in

79. Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264 (1917).
80. 326 U.S. 310 (1945).
81. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
82. *Id.*
83. *Id.*
84. Recently the Supreme Court extended the *International Shoe* "reasonableness" standard to in rem jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977). *Shaffer's* implication for in personam jurisdiction is primarily that the presence of property alone is not sufficient to be the basis of state court jurisdiction. *Id.* at 208-09, 212.
85. 355 U.S. 220 (1957).
86. *Id.* at 221.
87. 357 U.S. 235 (1958).
88. *Id.* at 251.
89. *Id.*
90. *Id.*
91. Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235

civil cases no longer look to manifestations of "presence" in making this determination, but examine the corporation's relationships with the state that make the exercise of jurisdiction reasonable.[92]

AN ARGUMENT FOR THE APPLICATION OF MINIMUM CONTACTS

The decision whether a minimum contacts standard should be applied to corporations in a criminal case involves three crucial issues:[93] first, whether a foreign corporation has jurisdictional rights or privileges in a criminal proceeding,[94] other than those found in a civil proceeding; second whether a standard for corporations different from that for natural persons is justifiable; third, whether the minimum contacts standard is workable in criminal jurisprudence.

Trials in Absentia

The minimum contacts standard was drafted in response to a continual struggle by the courts to adapt the *Pennoyer* concept of "presence" to the metaphysical character of corporations during a period when interstate activity by corporations was increasing significantly.[95] In contrast, the historical privilege of presence at criminal trials developed from a disapproval of trials in absentia.[96] The presence of the defendant at his own trial has long been an important part of the Anglo-Saxon criminal justice system.[97] Originally, the defendant's presence was functionally necessary because trial procedures involved such early practices as trial by water or fire ordeal.[98] When these procedures were eliminated, the rationale focused on the defendant's presence as essential for

(1958); *see* Comment, *Minimum Contacts Analysis of In Personam Jurisdiction Over Individuals Based on Presence*, 33 ARK. L. REV. 159 (1979).

92. *See* authorities cited note 91 *supra.*

93. *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

94. *Id.*

95. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

96. *See* Cohen, *Trial In Absentia Re-Examined*, 40 TENN. L. REV. 155 (1973) *See also* Drope v. Missouri, 420 U.S. 162 (1975).

97. *See* Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18 (1916), where the history of presence at a criminal trial is discussed more fully.

98. For ordeal by fire, the accused was innocent if he was not burned. For ordeal by water, he was innocent if he was not burned by boiling water or if he floated without swimming when thrown into a pond. *See generally* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *336-42.

the legitimacy of the proceedings.[99] In addition, because most offenses at that time were sanctioned by capital punishment, a trial and verdict in the defendant's absence would have been pointless.[100]

A number of early Supreme Court cases considered the constitutional bases of the privilege of presence. In 1884, the presence of the accused was characterized as a constitutionally secured "right" in *Hopt v. Utah*.[101] The *Hopt* holding was reaffirmed in *Lewis v. United States*,[102] in which the Supreme Court stated that it was not within the power of the accused to waive personal presence at a felony trial.[103] However, in 1912 in *Diaz v. United States*,[104] the Court modified its position and limited the broad holding of *Lewis* to cases where the defendant was in custody or where he was charged with a capital offense.[105] The power of the accused to waive his privilege of presence, here authorized by statute, was acknowledged by the Court.[106]

A number of later cases allowed the waiver of presence during certain portions of the trial, such as during rendition of the verdict or while the jury viewed the scene of the crime.[107] Recently, in *Illinois v. Allen*,[108] the Supreme Court reviewed the guidelines for trial of a disruptive defendant[109] and held that the removal of a defendant from the courtroom was reasonable in such a circumstance.[110]

The privilege of presence has been characterized as stemming from the sixth amendment confrontation clause.[111] The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[112] However, the intended purpose of this

99. This analysis was proposed by Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18 (1916).

100. *See* Shetsky v. Utecht, 228 Minn. 44, 36 N.W.2d 126 (1949).

101. 110 U.S. 574, 579 (1884).

102. 146 U.S. 370 (1892).

103. *Id.* at 372. In *Lewis*, however, the Court relied on "the dictates of humanity" and "[a] leading principle that pervades the entire law of criminal procedure." *Id.*

104. 223 U.S. 442 (1912).

105. *Id.* at 455.

106. *Id.*

107. Valdez v. United States, 244 U.S. 432 (1917); Frank v. Mangum, 237 U.S. 309 (1915).

108. 397 U.S. 337 (1970).

109. The Court noted three possible solutions: (1) bind and gag the defendant, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promised to conduct himself properly. The Court acknowledged that each alternative had its shortcomings. *Id.* at 344-46.

110. *Id.* at 347.

111. Illinois v. Allen, 397 U.S. 337 (1970).

112. U.S. CONST. amend. VI.

clause is not entirely clear.[113] What is apparent is that in the past ninety years the Supreme Court has significantly changed its position on the privilege of presence.[114]

Recently, in *Taylor v. United States*,[115] a defendant voluntarily absented himself after the trial had begun in his presence. The Supreme Court rejected an argument that the right to confrontation requires an express warning to a defendant that he has a "right to presence" and that the trial will continue in his absence.[116] The Court clearly indicated that no warning was required and that the defendant voluntarily waived any privilege of presence by absenting himself.[117]

It is evident that the confrontation clause requires that a defendant be permitted to attend his own trial,[118] but as long as presence is possible, the Constitution leaves the states relatively free to fashion their own rules of waiver.[119] At the outset, it is questionable whether a corporation has any right to presence at a criminal trial if an appearance is waived. Whether mere notice of the proceedings by service of summons and a voluntary failure to appear would be a sufficient waiver of the corporation's privilege is a question yet to be answered.

The Corporation: A Separate Standard

In felony prosecutions, the Supreme Court cases have attached some importance to the initial presence of the defendant at the proceeding, although waiver of continued presence or of presence at a specific portion of the trial has clearly been allowed.[120] Part of the remaining uncertainty arises from the fact that there are two components to the privilege of presence in a criminal trial. The first is the applicable provisions of the code of criminal proce-

113. Justice Harlan, concurring in California v. Green, 399 U.S. 149, 174 (1970), states: "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope. . . ."

114. The privilege was occasionally termed a right, but the recent holdings have used the term "privilege" or indicated that the "right" can be waived.

115. 414 U.S. 17 (1973).

116. *Id.* at 19-20. This argument had been upheld in United States v. McPherson, 421 F.2d 1127 (D.C. Cir. 1969), but the Supreme Court, citing *Diaz*, rejected the holding.

117. Taylor v. United States, 414 U.S. 17, 20 (1973).

118. Even this privilege is subject to limitation if the defendant insists upon acting in a disorderly manner. Illinois v. Allen, 397 U.S. 337 (1970).

119. *See* text accompanying notes 120-22 *infra*.

120. Taylor v. United States, 414 U.S. 17 (1973).

dure.[121] The second is the constitutional privilege. The *Taylor* case involved the Federal Rules of Criminal Procedure, which provide for waiver of continued presence by a defendant "initially present."[122] Whether the rendering of a criminal judgment against a natural person absent from the jurisdiction would be constitutionally permissible is still an open question.

The application of the privilege of presence to corporations requires both a due process and an equal protection evaluation. For purposes of due process, the question is whether a criminal judgment rendered against a corporation not "present" within a state or rendered in the corporation's absence upon failure to appear would be fair and reasonable.[123] An equal protection argument is available to a corporation where a state by statute requires a natural person's presence at criminal proceedings but arbitrarily allows judgment to be pronounced against a corporation for failure to appear.[124] With either a due process or an equal protection claim, the issue is whether the Constitution requires that corporations be afforded the same right or privilege of presence as natural persons.

The application of other constitutional rights and privileges to corporations suggests that a separate standard of jurisdiction may be reasonable and justifiable. The fourth amendment prohibition against unreasonable searches and seizures was early held to apply to corporations as well as to individuals,[125] but the degree of protection for corporations was minimal compared to that received by individuals.[126] This standard of "lower reasonableness" originally put corporations in a less favorable constitutional position, although the significance of this difference diminished as the fourth amendment shield over business documents of individuals eroded.[127] This dual fourth amendment standard does indicate that the status of a corporation, as an invention of the state, may affect a corporation's constitutional rights or privileges.

Another area in which a dual standard has been developed is in the application of the fifth amendment provision for the privilege

121. In the *Taylor* case, the Court's discussion was largely directed to this first component, which raises the question of whether the holding may have reached only the statutory issue.

122. FED. R. CRIM. P. 43.

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

124. This possibility is illustrated in People v. Consolidated Edison Co., 42 Misc. 2d 422, 248 N.Y.S.2d 267 (1964), where the court held that service of a criminal summons confers personal jurisdiction over a corporate defendant, even though it would not confer personal jurisdiction over a natural person.

125. Hale v. Henkel, 201 U.S. 43 (1906).

126. *Id.* at 76.

127. Warden v. Hayden, 387 U.S. 294 (1967).

against self-incrimination in criminal cases.[128] The Supreme Court has consistently held that this privilege does not extend to "artificial persons" such as corporations and collective entities.[129] In early cases the Court analyzed the fifth amendment protection of corporate documents by asking whether the "person" asserting the privilege was entitled to do so, not whether the documents themselves were privileged.[130] In *Hale v. Henkel*,[131] the Court based its decision on the rule that a person cannot invoke the privilege on behalf of another, in this case an agent on behalf of a corporation.[132]

In *United States v. White*,[133] the Supreme Court advanced a new theory for denying corporations any privilege against self-incrimination.[134] The Court, holding that a labor union could not assert the fifth amendment privilege, based its decision on the nature of the union as an "artificial entity."[135] The Court indicated that the holding would apply to corporations as well.[136] The fifth amendment protection was designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. Thus the privilege of self-incrimination is a purely personal one; it cannot be utilized by or on behalf of a corporation.[137]

The fifth amendment analysis developed by the Supreme Court in the *White* case is persuasive authority for a separate standard for the corporate privilege of presence. Historically, the privilege

128. U.S. CONST. amend. V.
129. Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944).
130. Hale v. Henkel, 201 U.S. 43 (1906).
131. *Id.*
132. *Id.* at 69-70.
133. 322 U.S. 694 (1944).
134. *Id.* at 698-701.
135. *Id.*
136. *Id.*
137. The Court stated:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . . Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.

Id. at 698.

of presence evolved from the functional requirement of trial procedures for having a physical body before the court.[138] Later rationales suggested by the purpose of the confrontation clause focus on the defendant's role in his own trial. The physical presence of the defendant legitimizes the fairness of the proceedings because he can observe improper conduct by the judge and jury.[139] He is able to calm certain defense witnesses[140] and render assistance to his attorney by correcting errors of fact or law.[141] When required, the defendant can supersede his attorney and question witnesses himself.[142] If the defendant is a corporation, these underlying rationales for the privilege of presence would not be applicable as a corporation is necessarily represented by agents.

It can be argued that the interests secured by the privilege of presence attach to the corporation's directors or officers. This argument was raised in connection with the fifth amendment protection, but was rejected by the Court.[143] The directors or officers are wholly able to exercise their individual privilege of presence by taking part in the proceedings. The corporation itself as an artificial entity cannot physically act to protect its interests.[144]

The Corporation: The Public Interest

In addition to the inapplicability of the rationale for the privilege of presence to corporations, a separate standard for corporations would serve an important public interest. Because a corporation is an artificial entity, it apparently cannot be arrested or extradited.[145] It may be possible to arrest or extradite corporate officers or directors to effectively compel an appearance by the corporation, but this is a coercive measure and may not be practical in all situations. The only means of legally securing the appearance of a corporation in a criminal proceeding is through service of summons.[146] Thus the corporation, because of its fictional character, has more discretion as to whether it will appear in a proceeding than does a natural person who can be ar-

138. *See* text accompanying note 98 *supra*.
139. Miles v. State, 222 Ind. 312, 314-15, 53 N.E.2d 779, 780-81 (1944).
140. Brown v. State, 372 P.2d 785, 789 (Alaska 1962).
141. Ashley v. Pescor, 147 F.2d 318, 319 (8th Cir. 1945).
142. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).
143. Dreier v. United States, 221 U.S. 394 (1911); Wilson v. United States, 221 U.S. 361 (1911).
144. *See* authorities cited note 143 *supra*.
145. State v. Luv Pharmacy, Inc., 118 N.H. 398, 404, 388 A.2d 190, 194 (1978); People v. Consolidated Edison Co., 42 Misc. 2d 422, 423-24, 248 N.Y.S.2d 267, 268 (1964).
146. People v. Consolidated Edison Co., 42 Misc. 2d 422, 423-24, 248 N.Y.S.2d 267, 268 (1964).

rested. The unavailability of arrest or extradition should not be allowed to provide potential immunity from prosecution. A corporation should be held to a separate jurisdictional standard so that the public policy favoring prosecution of criminal offenders can be enforced.

The application of the constitutional and statutory extradition provisions to corporations requires an additional consideration. It can be argued that, because the Constitution provides a mechanism for securing the physical presence of a criminal defendant who is outside the state's territory,[147] the use of summons by a court to compel an appearance by a foreign corporation is unconstitutional unless the corporation is "present" within the state. But this argument assumes the rendition clause is protective of individual rights. On the contrary, the provision for extradition was developed and historically interpreted as a legal and moral duty of states to deliver fugitives.[148]

Most states have now supplemented the constitutional provision for extradition with the Uniform Criminal Extradition Act.[149] The Act provides that a person who commits an act intentionally resulting in a crime in a state may be extradited into that state, whether or not that person was present in the state at the time the crime was committed.[150] As with the rendition clause, the basic goal of the Act is not to create new individual rights but to expand criminal jurisdiction.[151] Rights that are afforded a fugitive in the Uniform Criminal Extradition Act involve the application of uniform and fair extradition procedures.[152] Because a foreign corporation cannot be extradited, if it is brought before a court by summons, the corporation should not be allowed to utilize the existence of extradition procedures as a shield to prevent jurisdiction.

147. U.S. CONST. art. 4, § 2, cl. 2.

148. Biddinger v. Commissioner of Police, 245 U.S. 128, 131 (1918); *In re* Strauss, 197 U.S. 324, 326 (1905). It has generally been held that the rendition clause should be liberally construed to effect the return of fugitives. Appleyard v. Massachusetts, 203 U.S. 222 (1907).

149. Hardy v. Betz, 105 N.H. 169, 196, 195 A.2d 582, 586 (1963).

150. UNIFORM CRIMINAL EXTRADITION ACT 6. Even though under the same circumstances extradition would not be allowed under the rendition provision of the Constitution, the state supplementary provision is not unconstitutional. Morgan v. Horrall, 175 F.2d 404, 407 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949).

151. Morgan v. Horrall, 175 F.2d 404 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949).

152. *Id.*

The doctrine of legal accountability in criminal prosecutions is an additional example of a separate standard for corporations. The question of legal accountability of corporations for criminal offenses was analyzed by the Supreme Court of Massachusetts in *Commonwealth v. Beneficial Finance Co.*[153] The court held that the defendants' relationships as parent companies were sufficient to charge the defendants with the acts of their agents, the subsidiaries and business trusts located within the state.[154]

The defendants argued that no Massachusetts case was dispositive on the issue of whether a corporation may be held accountable for the offenses of an agent involving specific criminal intent. This reasoning is premised on a fundamental principle of criminal jurisprudence—that for serious offenses guilt is personal and not vicarious.[155] The court noted that the theory of vicarious liability may be an inadequate basis for imposing criminal liability on a natural person, although it has generally been applied in favor of corporate criminal accountability.[156] Because a corporation acts only through agents, it can be treated differently from a natural person for purposes of criminal intent.[157] The imposition of corporate criminal liability involves the question of when the acts and intent of a natural person can be treated as the acts and intent of the corporation itself.[158]

The Supreme Court in *New York Central & Hudson River Railroad v. United States*[159] was confronted by the same issue when it upheld the constitutionality of a statute which specifically rendered corporations liable for the acts of their officers, agents, or employees.[160] The Court stated that public policy favored the liability of a corporation that had profited by the transaction of an agent.[161] To grant immunity from punishment would virtually preclude the correction of the abuses sought to be eliminated.[162] This policy objective cited by the Court applies with equal force

153. 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied*, 407 U.S. 914 (1972).
154. *Id.* at 294, 275 N.E.2d at 94.
155. Commonwealth v. Stasiun, 349 Mass. 38, 206 N.E.2d 672, 679 (1965).
156. Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 264-65, 275 N.E.2d 33, 77 (1971), *cert. denied*, 407 U.S. 914 (1972).
157. *See* Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 721-22 (1930).
158. Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 264-65 275 N.E.2d 33, 77 (1971), *cert. denied*, 407 U.S. 914 (1972).
159. 212 U.S. 481 (1909).
160. *Id.* at 496.
161. *Id.* at 493-96.
162. *Id.* at 496. *See generally* Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976); Miller, *Corporate Criminal Liability: A Principle Extended to its Limit*, 38 FED. B.J. 49 (1979).

to the question of corporate criminal jurisdiction. The privilege of presence at a criminal trial should not be utilized to create insulation or immunity for corporations from criminal prosecution.

Minimum Contacts as a Workable Standard

In criminal jurisdiction, the remaining constitutional interest for a corporation is that it be given notice of the proceedings and that the exercise of jurisdiction is reasonable. The application of a minimum contacts standard requires practical evaluation. If states were given unlimited jurisdictional power over corporations, one could argue that there is the risk that states might attempt to regulate criminal conduct that occurs outside of their territorial limits.

The possibility of unreasonable extensions of state regulation is precluded by the limitations of criminal subject matter jurisdiction. Unlike in civil cases, a state court has no extraterritorial jurisdiction in criminal matters because the criminal law of a state has no operation or effect beyond the state's geographic limits.[163] This would prevent attempts to regulate conduct occurring wholly outside of the state. In addition, when the conduct occurs within the state, the restriction on jurisdiction by outside courts indicates the reasonableness of exercise of jurisdiction by the courts of that state.

The adoption of a minimum contacts standard would provide uniform criteria for corporate personal jurisdiction among the states. As illustrated by the *Luv* and *Beneficial* cases, there is uncertainty as to what the present jurisdictional criteria are.[164] The adoption of a minimum contacts standard for criminal jurisdiction would eliminate the obsolete notion of "corporate presence." Although early courts may have reconciled the concept of legal presence with corporate transactions of local character, significant changes in the national economy have rendered the notion unworkable.[165] Technological progress in transportation and communications have led to a fundamental transformation of business activity, so that today many corporate transactions touch two or more states.[166] The Supreme Court in *International*

163. Hardy v. Betz, 105 N.H. 169, 173-75, 195 A.2d 582, 585 (1963).
164. *See* text accompanying notes 70-73 *supra*.
165. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
166. *Id. See also* authorities cited note 1 *supra*.

Shoe recognized that this fictional concept of "corporate presence" was no longer a workable standard.[167] The reasons that led to the demise of the "presence" standard in civil jurisdiction are also applicable to criminal jurisdiction.

Finally, the very involvement of a corporate entity in criminal conduct is problematic when a state attempts to regulate in this area. The artificial and inanimate nature of the corporation renders uncertain the range of constitutional protections that a corporation may invoke when prosecuted.[168] As the reliance of states upon criminal sanctions to deter corporate crime increases, the adoption of a uniform and definite standard for jurisdiction can only serve to make state regulation more effective. The practical employment of the minimum contacts standard in criminal cases would likely involve less controversy and would result in a more equitable result than found in civil cases. In a criminal case, the occurrence of the offense itself could provide the requisite reasonable affiliation with the prosecuting state.

CONCLUSION

Historically, in both civil and criminal courts, jurisdiction was premised upon the notion of presence. The application of the early standard for jurisdiction required development of the legal concept of "corporate presence." In civil cases this symbolic fiction has been abandoned in favor of the minimum contacts standard. Criminal courts, either because of uncertainties about the extent of corporate constitutional privileges or because of the problems that could be involved in the application of the standard to natural persons, have failed to adopt the minimum contacts standard for corporations. The only remaining jurisdictional requirement for corporations in criminal cases is that they be given notice of the proceeding and that the exercise of jurisdiction be reasonable. The adoption of a minimum contacts standard for corporations in criminal cases would provide uniformity among the states, eliminate the need to perpetuate the antedated concept of "corporate presence," and allow criminal courts to more adequately deal with the economic realities of corporate activity in modern society.

DAVID JAMES HOMSEY

167. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
168. *See* 92 HARV. L. REV. 1227 (1979).