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Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction

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LOCKE AS THE KEY: A UNIFYING AND COHERENT THEORY OF *IN* *PERSONAM* JURISDICTION

*Richard B. Cappalli**

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PREFATORY NOTE

This essay is written for professionals and students who have a working knowledge of the Supreme Court cases concerning personal jurisdiction. In order to achieve an uninterrupted flow of my analysis, I have, by and large, avoided technical citation and recitation of case facts. This essay, which offers major reconceptualizations, concentrates exclusively on the chief precedents and does not frequently cite secondary literature.¹ During my 25 years as a civil procedure professor, I have read the bulk of the International Shoe² articles and many personal jurisdiction opinions of the lower federal bench. To the best of my knowledge little of that vast corpus of thinking is relevant to my central concepts and, thus, would not add value to this essay.

I. INTRODUCTION

[C]oherent, stable—and *morally supportable*—government is possible only on the basis of consent, and . . . the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account.³

1. I have consulted the following articles in preparing this essay. Robert H. Abrams and Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 [hereinafter Brilmayer, *How Contacts Count*]; Geoffrey C. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory — A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689 (1991); Linda A. Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569 (1991); David A. Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction Over the Person*, 59 TEMP. L.Q. 47 (1986); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597 (1991); Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659 (1991) [hereinafter Twitchell, *Levels of Harm*]; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) [hereinafter Twitchell, *Myth*]; Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) [hereinafter *Developments*].

2. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (landmark decision establishing present minimum contacts analysis of personal jurisdiction).

3. Alexander M. Bickel, *The Least Dangerous Branch* 20 (2d ed., Yale Univ. Press 1986).

This article concerns a handful of Supreme Court cases which have tantalized the legal profession for decades, the personal jurisdiction cases.⁴ Hardly a term goes by without another case being swept into the vortex of this doctrinal "black hole."⁵ With each new effort to clarify the doctrine more mass is added to the imploding nucleus: more "tests", more sub-doctrines, more words to puzzle over.⁶

Several Justices have attempted to clarify this murky doctrine.⁷

4. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

5. See cases cited *supra* note 4. No pejorative has been spared by the academics in describing the *International Shoe* doctrine. For a recent sprinkling, see Silberman, *supra* note 1, at 572 n.17 ("uncertainty and confusion"); Stein, *supra* note 1, at 598 ("totally incoherent"); Twitchell, *Levels of Harm*, *supra* note 1, at 666 ("jurisdictional stew"); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991) ("chaos").

6. Particularly frightening to me are subtleties such as Professor Twitchell's "conditional general jurisdiction" found in lower federal court opinions. See Twitchell, *Myth*, *supra* note 1, at 611-12 (criticizing the courts' application of general and specific jurisdiction).

7. Justice Marshall was the chief writer when the Court returned to the doctrine in the 70's. See *Kulko*, 436 U.S. at 84 (holding that it would be unreasonable to subject one to personal jurisdiction in California based solely on acquiescence in child's desire to live with her mother in California); *Shaffer*, 433 U.S. at 186 (upholding the minimum contacts principles of *International Shoe*). The baton then passed to Justice White. See *Insurance Corp. of Ireland*, 456 U.S. at 694 (holding that courts may impose a finding of personal jurisdiction where a defendant fails to comply with discovery orders in a proceeding to determine whether the forum has jurisdiction); *World-Wide Volkswagen Corp.*, 444 U.S. at 286 (holding that defendant's lack of minimum contacts in Oklahoma renders personal jurisdiction there unjust regardless of the foreseeability that the product would find its way into Oklahoma). Next Justice Rehnquist took charge. See *Phillips Petroleum*, 472 U.S. at 797 (holding that Kansas must have significant contact or aggregation of contacts to the asserted claims of each class member to ensure that jurisdiction is not arbitrary or unfair); *Calder*, 465 U.S. at 783 (permitting jurisdiction over defendants in California based on the effects of their conduct which was calculated to cause injury to a California

The academics have written reams.⁸ Yet, almost a half-century after *International Shoe*, the personal jurisdiction doctrine continues to be incomprehensible.

In this essay I employ time-honored common law techniques to attempt a synthesis of the Supreme Court personal jurisdiction cases. I first inquire into the heart of the cases, their *ratio decidendi*. At the core of these cases, I find the political philosophy of one of democracy's great theoreticians, John Locke.⁹ In particular, these cases contain the Lockean concept of a compact between the government and the governed whereby the power of the former is invested by concession of the latter.¹⁰ The defendant in a lawsuit is the "governed" while the court is the "governor".

resident); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (permitting jurisdiction over defendant to answer for contents of national publication wherever a substantial number of copies are regularly sold and distributed). By far, the most words have spilled from the pen of Justice Brennan. See *Burnham*, 495 U.S. at 628-40 (Brennan, J., concurring) (arguing that exercise of personal jurisdiction over a transient defendant based on his voluntary presence in the forum complies with due process requirements); *Asahi*, 480 U.S. at 116-21 (Brennan, J., concurring in part) (arguing that although the defendant purposefully availed itself of state benefits, fairness and justice prevent the exercise of personal jurisdiction due to the severe burden on the defendant and the forum state's lack of interest in the dispute); *Burger King*, 471 U.S. at 463-87 (holding that a forum may assert jurisdiction over a nonresident defendant where the defendant purposefully directs actions towards the forum and causes injury and where principles of fairness and justice are not otherwise offended); *Helicopteros*, 466 U.S. at 419-28 (Brennan, J., dissenting) (arguing that it is fair and reasonable to subject a defendant to suit in a forum with which it has significant contacts directly related to the underlying cause of action); *Keeton*, 465 U.S. at 482 (Brennan, J., concurring) (asserting that the contacts between *Hustler* and New Hampshire are sufficiently important and sufficiently related to the underlying cause of action to satisfy the requirements of due process); *World-Wide Volkswagen Corp.*, 444 U.S. at 299-313 (Brennan, J., dissenting) (arguing that Oklahoma's interest in the case and the absence of inconvenience to the defendant mean that personal jurisdiction does not offend the principles of due process); *Kulko*, 436 U.S. at 101-02 (Brennan, J., dissenting) (arguing that *Kulko*'s contacts with California as a parent of children domiciled in the state were sufficient to require him to conduct his defense in California without violating the principles of due process); *Shaffer*, 433 U.S. at 219-28 (Brennan, J., concurring in part and dissenting in part) (arguing that the defendants voluntarily initiated a fiduciary relationship with a Delaware corporation and should be subject to personal jurisdiction in a suit pertaining to that fiduciary relationship).

8. See, e.g., sources cited *supra* note 1.

9. The monumental impact of John Locke on the formation of American government has been concisely described by Professor Gardner. See James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192-213 (1990). The premise derived from Locke's writings is that "the legitimacy of the United States government — that is, its rule by right rather than by force — rests on the consent of the governed." *Id.* at 192.

10. See generally JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* (Prometheus 1986) (1690) [hereinafter LOCKE].

Thus, in theory, the power exercised by a court over a party flows from the consent of the party itself. This consent could at times be actual, but more frequently is implied through benefits obtained or risks created by the party while inside the political forum in which the court sits.

Locke asserts that individuals surrender their natural autonomy to governments in order to obtain the liberties found in an ordered society, thus avoiding the hazards present in a natural state.¹¹ This leads me to a critical understanding — that a reciprocity binds court and party. The party has garnered the benefits offered by the government in which the court sits. These benefits include the laws, the administrative framework and their restraining effects. In return, the party concedes to that government a quantum of power to govern his conduct, a power which he himself holds in a natural autonomous state.

I find this reciprocity to be the “fair play” which *International Shoe* demands of courts in their dealings with defendants.¹² As this essay unfolds, we will discover how Lockean concepts restore simplicity and elegance to the doctrine of personal jurisdiction. We learn, for example, why “arising out of,” or “specific” jurisdiction is always fair play and why its antinome, “unrelated,” or “general” jurisdiction, is ordinarily unfair. We further gain the important insight that the benefits reaped by the defendant within the forum’s territory must be balanced against the reciprocal duties imposed by the court. These duties consist of various orders and judgments which might be issued by the court in the course of litigation. These orders and judgments must be justified by an assessment of “contacts.” From this insight, I naturally accept the idea of “divisible jurisdiction,” meaning that the power of the tribunal is not unitary but varies depending upon the quantum of the defendant’s forum contacts. Under divisible jurisdiction, the sufficiency of these contacts is measured against the weightiness of specific orders issued in specific cases.

While this article adds some new dimensions like “divisible jurisdiction,” the application of Locke’s reciprocity principle works powerfully to simplify *in personam* doctrine. The analysis within teaches how the courts have ample power over the bulk of defen-

11. *Id.* at 54.

12. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“maintenance of [a] suit [must] not offend ‘traditional notions of fair play and substantial justice’”) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

dants who appear before them. The few hard cases involve asserted court powers which can be labelled "extraordinary" in light of a case's particular circumstances. Here, Lockean reciprocity offers a simple analytical framework which strips the *in personam* doctrine clean of its verbal encrustations and enables fairness to be ascertained accurately and efficiently.

I do not undertake any challenge to the social validity of the Court's premises. This essay merely clarifies the existing *in personam* doctrine. I, like many colleagues, have dark moments in which I yearn for the rough but swift justice of the *Pennoyer*¹³ rules. Such a fundamental challenge, however, will have to await another day.

II. THE DEFECTS OF *INTERNATIONAL SHOE*

The Supreme Court's struggles to articulate a coherent, workable doctrine of personal jurisdiction stem principally from the initial inadequate craftsmanship in *International Shoe*.¹⁴ In this section I shall examine the flaws in Justice Stone's majority opinion. The analysis will show the deficiencies in the Court's execution of the philosophic shift from a territorial basis for the personal jurisdiction doctrine to one of individual liberty.

The primary error was, of course, the emptiness of the famous language "certain minimum contacts" so that the assertion of state court power is "fair play and substantial justice."¹⁵ I call it "language" because it is too vacuous to be considered "doctrine" or "norm" or even "general norm." Justice Stone did not provide a qualitative adjective synonymous with "minimum." He made no general proposition that fairness requires just a little contact between the defendant and the forum state.¹⁶ Rather, the opinion

13. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (stating that, except when limited by the Constitution, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory").

14. *International Shoe*, 326 U.S. at 310 (holding that a person may be subject to *in personam* jurisdiction if he has certain minimum contacts within the forum such that the suit does not offend traditional notions of fair play and substantial justice).

15. *Id.* at 316.

16. Thus, the idea that surfaces in Justice Brennan's opinions — that the plaintiff need only demonstrate some minimal affiliation between the defendant and the forum in order to trigger a free-wheeling reasonableness analysis — is one that has no backers, no grounding in precedent, and no rationale. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1984) (asserting that considerations such as burden on defendant, interest of forum state, and plaintiff's need for relief may establish jurisdiction despite a lack of minimum contacts); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300

means that the contacts must be sufficient in order for jurisdiction to be fair.¹⁷ Consequently, he unwittingly confused generations of civil procedure students.

We can also quickly dismiss any idea that the phrases "fair play" and "substantial justice" have different meanings. Nothing in *International Shoe* or its progeny offers any ground for distinguishing "fair" and "just." They seem to be two identical empty vessels waiting for contents.

That the Chief Justice had not himself worked out a fairness theory is evident from the critical passage in which he summarizes and characterizes the "contacts" between International Shoe Company and the State of Washington and adjudicates under "these standards."¹⁸ After describing the company's business in Washington as "neither irregular nor casual," as "systematic and continuous," as "a large volume of interstate business," as receiving "benefits and protections" of the state's legal order, and as causing "the obligation which is here sued upon," the Justice leaves us adrift by proclaiming "[i]t is evident" that contacts are "sufficient" for fair play.¹⁹ How the conclusion is "evident" is a mystery. How much regularity is enough? What about small but recurrent contact? How many shoes become a "large" volume? What kind and amount of benefit and protection is enough? Is the "arising from" factor an invariable fairness trump? Did we need every adjective in the passage to find fairness? If just some, which?

Our case law system sometimes permits judges to be inarticulate about their rationales. No matter how obscure a court's reasoning, we can match present facts with the facts found in precedents and eventually develop inclusionary and exclusionary tests. But Justice Stone even strips us of the method of analogy. We are instructed that because the fairness equation is not "mechanical or quantitative,"²⁰ we should not look at what contacts we have in the case before us and evaluate whether they are a little more or a little less than what we find in the precedents. Yet, Justice Stone, if we are to be fact sensitive and discriminating, against what do

(1980) (Brennan, J., dissenting) (arguing that the amount of contacts needed to support jurisdiction diminish when other considerations such as interests of forum state and the burden on defendant help establish that jurisdiction is fair and reasonable).

17. See *International Shoe*, 326 U.S. at 318 (sufficiency of contact determined by its nature and quality).

18. *Id.* at 320.

19. See *id.*

20. *Id.* at 319.

we evaluate facts?²¹

In sum, contacts sufficient to do substantial justice is no workable formula. We do not even see the "test" at work in *International Shoe* because the conclusion was "evident" to the Chief Justice. Perhaps the key is found in what Chief Justice Stone called "standards."²² These are matters which we should include in the fairness "formula," though their position and ranking in such is unclear. Almost immediately after the "minimum contacts" passage, Justice Stone begins to mention these standards in disorderly fashion.²³ I will paraphrase them (minus their antonyms) in the order in which they appear:

1. the context of interstate federalism ("our federal system of government");
2. the inconveniences of a trial away from home;
3. continuous and systematic activities;
4. forum state activities which give rise to plaintiff's claim;
5. the nature, quality and circumstances of contacts;
6. the fair and orderly administration of the laws; and,
7. obtaining forum state benefits and protection.²⁴

If fairness were defined, we might understand the relevance of these matters, their inter-relationships, and their relative strengths. As presented in *International Shoe*, however, they are mere verbiage to describe contacts, not guideposts to determine fairness.

Without a connecting concept, an intermediary thought, the relationship between defendants' contacts with the state and fairness is unknown and unknowable. Contacts are physical events, merely describable as such, and carry no internal morality. Only if we measure these physical events against some moral standard can we begin to draw conclusions about justice and fairness. If the contact is, for example, my punching you in the nose, we cannot test for "rightness" or "justice" without the aid of legal or moral principles, such as "unconsented battery is unlawful" or "proportionate retaliation is morally acceptable."

21. Justice Brennan speaks of a "weighing of the facts." See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 419 (1984) (Brennan, J., dissenting). However, there is no structured analysis behind the phrase.

22. *International Shoe*, 326 U.S. at 320.

23. See *id.* at 317-19.

24. *Id.*

Yet we search in vain in *International Shoe* for a clear, discriminate statement of the needed moral imperative. We shall eventually ferret it out of the opinion's inventory of relevant factors. But neither in its critical "certain minimum contacts" passage, nor in its due process foundation, nor elsewhere does Chief Justice Stone's opinion identify the missing link.

III. THE LOCKEAN COMPACT

The missing fairness link is John Locke's theory of a political compact by which people surrender their state-of-nature powers of punishment and retaliation to a government which, in return, promises them the greater freedoms possible in an ordered society. Locke wrote of those entering a community, thereby explicitly surrendering their natural autonomy and consenting to governance by the political power of that group.²⁵ Thus, the foundation of fairness seems to be consent.

In some cases, consent may be actual; Locke believed this to be the case in primitive communities.²⁶ In a large, complex, modern society, however, consent is constructive. We do not ask whether a community member considered such matters, nor whether he can extricate himself from surrounding political controls. Instead, we attribute consent to people because of their affiliating activities. In the following passage Locke describes this as "tacit consent":

The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds — *i.e.*, how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of land to him and his heirs forever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and, in effect, it reaches as

25. See LOCKE, *supra* note 10, at 55.

26. See *id.* at 57 (discussing the civilizations of Rome, Venice, and Peru).

far as the very being of any one within the territories of that government.²⁷

"Tacit" or "constructive" consent is a metaphor, or perhaps a misdescription with a laudable purpose; that of permitting legal norms to expand within the comforting categories of known, accepted law. Fairness is no longer based upon individual will, but upon a different fairness criterion, perhaps that of political expediency. Fairness now depends on an exchange whereby the government takes the natural liberty of persons and gives them an ordered society in return. Here, choice is irrelevant; what counts is the fairness of the bargain. For the sake of the larger good we cannot allow islands of autonomy in the midst of our organized polity. The hermit in the cave, despite his protests, is still subject to the community's will.

We start with a very capitalistic concept at work in a marketplace economy. It is fair for a state's governmental organs to exercise power over an individual because he has profited from that state's ordered liberty. If that individual has had no contacts, ties or relations with that group of people and its government, then he should not be called upon to perform any political duty, such as appearing in court.

The idea of reciprocity between the defendant and the state in judging the fairness of power assertions by courts has been hinted at in *in personam* cases in the past. Though this was not the central focus of *Pennoyer*,²⁸ in its dicta the Court acknowledged that defendants could consent to a court's power.²⁹ Such consent introduces a quite different relationship, that between defendant and state. If the Court's concern focused exclusively on umpiring power disputes between states, consent would have to come, not from the defendant but from the non-forum states, and an individual could not be permitted to waive the objections of these states. Thus, while muted and confined, the Lockean idea of an agreement between a person and a polity stretched back into the last century's jurisdictional theorizing. Over the years, the law would slowly shift

27. *Id.* at 67. In her excellent challenge to consent as a basis for personal jurisdiction as opposed to territorial sovereignty, Professor Brilmayer focuses exclusively on actual consent and does not consider this aspect of Locke's political "bargain." See Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989) [hereinafter Brilmayer, *Consent*].

28. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

29. *Id.* at 735-36.

from an interstate federalism doctrinal base to a liberty base. *International Shoe* merely culminated this shift.

Indeed, before *International Shoe* the reciprocity-as-fairness idea had already surfaced several times in the Court's *in personam* cases.³⁰ Recall *Hess v. Pawloski*,³¹ in which Hess's entering Massachusetts (where he allegedly drove his car into Pawloski) made him subject to that state's judicial power. The Court believed it fair for Hess to "answer for his conduct in the State,"³² especially because his conduct had given rise to the grievance. While the Court's opinion is couched in terms of "implied consent," such language of human will disguises the government's need to regulate dangerous conduct within its boundaries. *Hess* also suggests that in-state conduct may be alternatively or simultaneously risk-creating and benefit-reaping.

Though reciprocity-as-fairness had to be teased out of *Hess*, in *Milliken v. Meyer*³³ it is explicitly the *ratio decidendi* for subjecting an absent domiciliary to process in his hometown courts. Justice Douglas' brief opinion intoned:

"Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidents of state citizenship The responsibilities of that citizenship arise out of the relationship to the state which domicile creates.³⁴

Given this natural bridge to a "contacts" theory of jurisdictional due process, *International Shoe*'s step forward was not as large as many might imagine. In fact, just before his pro-jurisdiction conclusion Justice Stone stated:

But to the extent that a corporation exercises the privilege

30. For early examples, see *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 107 (1898) (criticizing the "manifest injustice" for a company to be "exempt from the burdens" while "allowed the benefits" of the forum state); *St. Clair v. Cox*, 106 U.S. 350, 355 (1882) (acknowledging that where a corporation is protected by a state's laws, it is "only right" to require the corporation to respond in the state's courts); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407-08 (1855) (holding that a company selling insurance within a state "for [its] benefit and profit" is "under obligation to attend").

31. 274 U.S. 352 (1927) (upholding a statute declaring that non-resident motorists consent to service of process on the state registrar in cases arising from their use of state highways).

32. *Id.* at 356.

33. 311 U.S. 457 (1940).

34. *Id.* at 463-64 (citing *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932) and *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937)).

of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as these obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.³⁵

This is pure Locke. Unfortunately though, Justice Stone added reciprocity as merely one of the factors to be considered rather than emphasizing it as the central concept. This deemphasizing of the fair play rationale allowed the doctrine to mutate into its current, incoherent form.³⁶

35. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

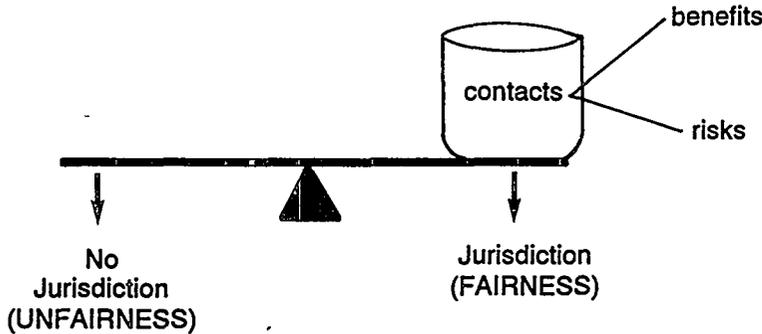
36. To this point I have stated nothing very novel. If the reciprocity philosophy had not clearly emerged at the time of *International Shoe*, it was surely the critical concern in *Hanson v. Denckla*, 357 U.S. 235 (1958). In that case there were cogent practical reasons to vest Florida with adjudicatory authority. Most of the parties were Floridians, all of whom had an unchallengeable interest in single-piece adjudication. Yet the common sense of the situation was insufficient to overcome the idea of reciprocity as fairness. The record revealed no contacts between Florida and an indispensable party, the Delaware trustee. *Id.* at 251. The trustee had not benefited from Florida's sun, sand, or society. Consequently, the predicate for jurisdiction was missing: "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state" *Id.* at 253. In Lockean terms the trustee had not surrendered its pure autonomy, at least not to Florida. LOCKE, *supra* note 10, at 14.

IV. THE PRIMARY FAIRNESS BALANCE: BENEFITS AND RISKS VERSUS POWER

A. The "Benefits and Risks" Side of the Balance

The first piece of the formula is easy to place. Graphics can help us conceive the right-side weight of the primary balance.

Figure 1



The "contacts" weight represents, of course, the affiliations between the defendant and the forum state. Such affiliations are appraised in two ways. First, the appraisal considers advantages the defendant has achieved in the forum state: money earned, pleasures taken, contracts concluded, products sold, suits prosecuted, and so forth. The productive use by the defendant of the forum state's ordered society produces an equitable reciprocity, here meaning the exercise of forum power against the defendant in forms like taxation, jury duty, or amenability to suit. This, then, is what I mean by the "benefits" portion of the "contacts" weight.

The other portion is "risks." This is an appraisal of the defendant's forum contact in terms of its actual or potential harmful effects within the forum, probably the most important *International Shoe* factor. The doctrine under study is relevant to cases in which the defendant is sued because of some alleged transgression he committed, harming the plaintiff (think of Hess driving recklessly into Pawloski).³⁷ Other pernicious consequences of the defendant's acts include the violation of the forum's laws, a "pub-

37. *Hess v. Pawloski*, 274 U.S. 352, 353 (1927).

lic wrong" which is of legitimate concern to the forum's inhabitants. Hess's reckless driving infringed the right of the people of Massachusetts to lawful behavior within state boundaries³⁸ — the public duty aspect of unlawful conduct represented by symbols like speeding tickets. Thus, even if the illegal act within a forum caused no individual harm there, but only outside forum boundaries, it is still of *Shoe* relevancy because of the affront to the "ordered society" where it was perpetrated.

The "contacts" weight pushes toward a finding of "jurisdiction" because this is what justifies the state's demands of the defendant. The greater the defendant's forum affiliations, the greater the justification for a forum to haul him into its courts.

The *International Shoe* adjectives come to life when understood in the Lockean sense of a person reaping benefits from an ordered society or wreaking havoc therein.³⁹ "Continuous" and "systematic" point in the direction of significant benefits and risks; "casual," "single" or "isolated" in the opposite direction. We now know why the precise form of affiliation is important — "nature and quality" in *International Shoe* terms. Some contacts reap large benefits. Filing a multi-million dollar lawsuit in a state's trial court is one example, executing an important contract in a state is another. Other contacts within a forum endanger its inhabitants. For example, a large risk would flow from entering a state in a high-speed car chase. In sum, looking through the Lockean prism, we assess the extent to which the defendant has used or abused the "ordered society," that is, the network of laws and institutions created and maintained by the state's inhabitants.⁴⁰

An additional consideration is whether it is relevant that benefits or risks are often potential instead of actual. Our natural tendency is to value birds in the hand more than those in the bush. It would be sensible to emphasize recorded facts which quantify and demonstrate the defendant's actual benefits derived from his sojourn in the forum state, and comparably for destructions as opposed to mere risks. But here we need not be precise. The fairness formula is not mathematical but philosophical.

38. *Id.* at 356.

39. LOCKE, *supra* note 10, at 95 (state has power, derived from consent of the governed, to "make laws, and annex such penalties to them as may tend to the preservation of the whole").

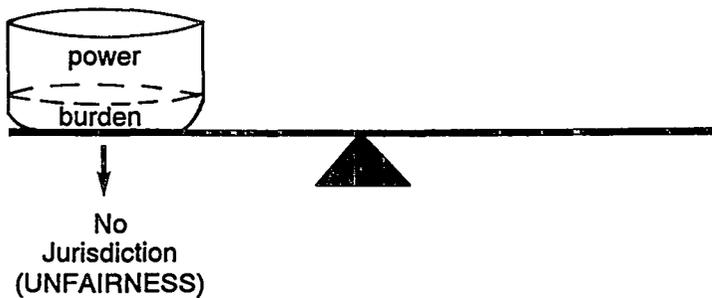
40. *Id.* at 67 (arguing that consent to governance exists where the governed enjoys "any part of the dominions of any government," including possession of land, lodging or free travel upon highways).

One point, however, does merit emphasis. The benefits we receive from the laws and institutions of an ordered society are real even though inchoate. The shadow of law and courts looms large and restrains those who might otherwise act against the social order. Law works best when obeyed and worst when broken. Consequently, those multiple, incipient benefits we reap from the polity where we exist do count and often count mightily when our presence is lengthy and active.

B. The "Power" Side of the Balance

On the "no jurisdiction" side of the primary balance I place a "power" weight which represents the reciprocal social duty of the affiliated party.

Figure 2



By "power" I mean the full demand made upon the defendant by the forum court. Such demand equals the sum total of the judgments and orders issued or issuable against the defendant by such court. In the weight pictured above, the word "burden" below the dotted line represents the onus of coming to court in response to a court subpoena or other process. This is typically a small part of the power exercised by a court against a defendant. I give it special attention only because it plays an important role in the Court's personal jurisdiction jurisprudence.

Power pushes toward a finding of no jurisdiction because a state's claims against a person need justification, which is the "contact" just discussed, and the greater those claims the greater must be the basis.

The idea of measuring forum contacts against a court's full set of demands upon the defendant departs significantly from traditional *Shoe* doctrine. The Court has regularly conceived of the defendant's reciprocal burden only as that of a foreign defense. This was one of several *International Shoe* relevancies: an "estimate of the inconveniences" which the defendant would suffer from a trial away from its "home" or "principal place of business."⁴¹ In later cases, which attempted to vest the *in personam* doctrine with theoretical coherence and structure, the contacts analysis was seen as "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum."⁴² Taking the Court literally, we would place on the left side of our fairness scale a single weight representing the quantum of litigation unfairness caused by having to travel away from "home."

Under Locke's concept of reciprocity we cannot stop where the Court has. The Lockean approach would ask about the totality of reciprocal duties expected of the "citizen" by his "fellow citizens."⁴³ In the state of nature *X* and *Y* may punish each other based upon their respective assessment of the other's violations of the natural order.⁴⁴ But in ordered liberty, *X* and *Y* turn over to the State those assessments and constructively agree to be bound by its dictates. The Lockean reciprocity, thus, includes acceptance of the punishments and sanctions meted out by the State against *X* or *Y*.

In terms of jurisdictional due process, I am led to the conclusion that we must assess the full quantum of power being asserted by a state court against a defendant. Forcing a defendant to respond to a summons in order to avoid a default judgment is but a small, introductory piece of that power. During the course of a civil litigation, several papers will issue under the court's seal and command the defendant to do this or that. Moreover, the "power" of the court's litigation rules controls the defendant's litigation conduct. The final paper, the court's judgment, embodies the ultimate power of taking the defendant's property or controlling his

41. See *International Shoe*, 326 U.S. at 317 (citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

42. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("travail of defending in a distant forum"); *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978) ("burden and inconvenience" of California defense).

43. See LOCKE, *supra* note 10, at 11.

44. *Id.* (suggesting that men have a right to retaliate to preserve the natural order).

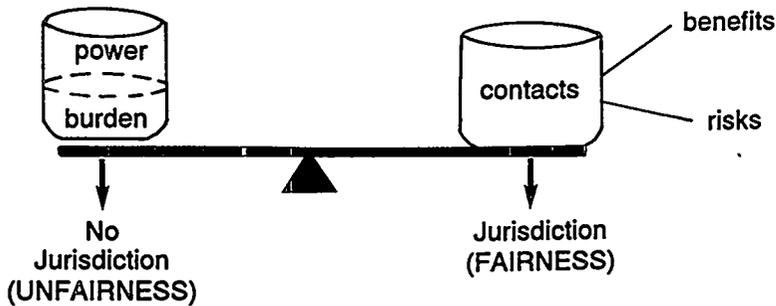
behavior under threat of contempt.

How can we assess the weight of a court's power? The answer is that here, as with many preliminary jurisdictional questions, we make the best possible assessment based on available information. To determine the potential judgments assertable against the defendant, we look to the "relief sought" clause in the plaintiff's complaint. If a plaintiff is opaque in his request for relief, then a motion for a more definite statement would be in order.⁴⁵

C. Balancing the Weights to Determine Jurisdiction

Figure Three combines the two elements of the primary balance and pictorially represents our first line of thought in a *Shoe* controversy.

Figure 3



The contacts push towards jurisdiction; the exercise of power, needing justification, pushes towards "no jurisdiction." Hopefully the reader will forgive me for using the infelicitous balancing metaphor. "Balancing" is misleading because a balance between the two weights would lead to irresolution. Imbalance leads to a decision because the scale in Figure Three must tip in order to resolve the jurisdictional inquiry. For the sake of simplicity and elegance, I refrain, nonetheless, from calling it an "imbalance test."

This "power versus contacts" idea immediately shines a beacon into some of personal jurisdiction's dark corners. We now understand why the *Shaffer* court could confidently say that there would

45. See FED. R. CIV. P. 12(e).

be no unfairness in a plaintiff's execution of a judgment against a defendant's dispersed property.⁴⁶ The executing court should not do a full contacts probe because that body is exercising such limited power against the judgment debtor. That court is not assessing liability and measuring compensation but merely making property available to satisfy the liquidated claim. Instead the assessing and measuring is done by a judgment-issuing court with "full" *in personam* power.

This concept also clarifies the inchoate equity in an "arising from" case such as *McGee*.⁴⁷ Why was it fair to subject a defendant like International Life Insurance Company to California court power when there was no proof of contacts beyond the single incident in litigation? The answer is provided by the "power versus contacts" reciprocity. It was fair to hold the defendant chargeable and responsible for the effects of its singular entry. Such holding to account occurs not merely in forcing the defendant to come to California but, more importantly, in vesting California's courts with the power to enter a compensatory judgment in favor of the plaintiff, Lulu McGee. Assuming the plaintiff makes no unusual demands in his petition, the reciprocity is perfect. A state court always has enough power to clean up the ill effects of defendant's entry, however brief, into that state. This translates into an automatic enhancement of the "contacts" weight whenever a causal connection exists between defendant's conduct in the forum state and the claim *sub judice*.⁴⁸

As another example, the decision in *Insurance Corporation of Ireland*⁴⁹ is incomprehensible when measured against the Court's doctrinal formulations. Despite Justice White's unconvincing statement to the contrary,⁵⁰ one easily sees paradox in the entry of

46. See *Shaffer v. Heitner*, 433 U.S. 186, 210-11 n.36 (1977).

47. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (holding that respondent's contract was not unconstitutionally impaired even though the California statute did not become effective until after respondent had assumed the obligation). Professor Twitchell suggests the phrase "dispute-specific" to describe cases in which the relationship between the dispute and the forum is relevant to the jurisdictional question. See Twitchell, *Myth*, *supra* note 1, at 613. Professor Brilmayer focuses on a "related" contact, meaning that one of the events relevant to the substantive issues being litigated took place in the forum. See Brilmayer, *How Contacts Count*, *supra* note 1, at 87-88.

48. For more discussion of these "arising out of" situations see *infra* text accompanying notes 98-106.

49. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (holding a no-contact defendant subject to personal jurisdiction because he defied a district court's discovery orders).

50. *Id.* at 706 ("By submitting to the jurisdiction of the court for the limited purpose

any order by a state court against a defendant who has no forum contacts. After all, the Court has held time and again, no contacts, no power.⁵¹

Rather than soft shoeing around that barrier like Justice White, let us look at the problem through the Lockean reciprocity prism.⁵² On the left side of the balance we have a mild request made even milder by the trial court's power under the rules of procedure to alleviate burdensome discovery requests: "Please answer some questions about your business in Pennsylvania. If it's financially onerous, we'll entertain a Rule 26(c) protective order."⁵³ Note how small the "power" weight is. For fairness, we need only a slight "contacts" weight. Normally, the plaintiff can find enough "contact" to vest the court with discovery power without the court's assistance. By making some simple inquiries, the plaintiff could have easily obtained dozens of sources to ascertain an international re-insurer's dealings in Pennsylvania.⁵⁴ Such inquiries would even produce the positive effect of reducing jurisdictionally frivolous suits against non-residents when the plaintiff has no reason to suspect defendant has any forum state contacts.⁵⁵ Alternatively, *Ireland* can be analyzed by appraising the company's motion to dismiss as seeking a benefit from the court, namely a

of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction."

51. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (reaffirming the reasoning of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *Rush v. Savchuk*, 444 U.S. 320, 332-33 (1980) ("no contacts with the forum"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("total absence of . . . affiliating circumstances"); *Kulko v. Superior Court*, 436 U.S. 84, 96 (1978) ("did not purposefully derive benefit"); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("[a]ppellants have . . . had nothing to do with the state of Delaware"); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (defendant invokes the protections of forum state when he purposefully avails himself of the privilege of conducting activities there); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

52. *See LOCKE, supra* note 10, at 8-14 (discussing the reciprocity of power and jurisdiction).

53. *Compagnie des Bauxites de Guinee v. Insurance Co. of North America*, 651 F.2d 877, 882 (3d Cir. 1981), *aff'd sub. nom. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

54. *See id.* at 881 (plaintiff's affidavit contained a list of contacts relating to the re-insurer's dealings in Pennsylvania).

55. To ask the plaintiff to make some pre-discovery inquiries about the defendant's forum affiliations is no more and perhaps less burdensome than the "reasonable inquiry" into the merits to avoid Rule 11 sanctions. *See, e.g., Business Guides, Inc. v. Chromatic Communications Enters.*, 111 S. Ct. 922 (1991) (holding that Rule 11 imposes an objective standard of reasonable inquiry).

decision clarifying that the company need not fear that body's judgments. The company could have stayed away but only at the risk of losing its defense on the merits should it be defeated on the jurisdictional question in a later proceeding elsewhere to enforce the default judgment.⁵⁶ That benefit, though small, justifies the court's power to make mildly burdensome discovery requests of the insurance company.

I suggest that beneath the *Ireland* case was the unexpressed feeling that the defendant, a player in international insurance markets,⁵⁷ likely had enough Pennsylvania affiliations to satisfy *Shoe* and that its evasions and protests were legal machinations. I doubt that the Court would use the jurisdiction-as-penalty rationale against its hypothetical distant soft drink vendor selling a Coke to an interstate traveller.⁵⁸

The "no contacts, no power" axiom also cornered the Court in *Phillips Petroleum Co. v. Shutts*,⁵⁹ which resulted in a disappointing jurisdictional decision. The decision was not, however, disappointing in terms of the court's conclusion. It made good sense to vest state courts with nationwide class action jurisdiction in small claim cases, particularly in light of *Eisen's*⁶⁰ and *Zahn's*⁶¹ closing of federal courthouse doors. Otherwise, these \$100 claims would be forfeited for lack of a cost-efficient forum.

However, the method used by the Court to reach its conclusion was inadequate. The Court's answer to determine how a Kansas judgment could affect these "no contact" nonresidents was a series of inartful dodges. On the "effects" side of the balance, the Court essentially said to class members, "Don't come to defend your property. It's only \$100 and the court and class representative will protect you."⁶² The burden-of-a-foreign-defense factor was fi-

56. See *York v. Texas*, 137 U.S. 15, 21 (1890) (upholding the constitutionality of forbidding defendant to challenge service validity without surrendering to jurisdiction of the court).

57. *Insurance Corp. of Ireland*, 456 U.S. at 696 (describing defendant's business dealings).

58. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1979).

59. 472 U.S. 797 (1985).

60. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (dismissing a federal court class action where petitioner refused to bear the prohibitively high cost of sending individual notice to all the members of his class).

61. See *Zahn v. International Paper Co.*, 414 U.S. 291 (1974) (dismissing a federal court class action where the unnamed plaintiffs could not show damages in the jurisdictional amount).

62. *Phillips Petroleum*, 472 U.S. at 809.

nessed by stripping the class members of a defense! The weirdness of this rationale is accentuated by juxtaposing it with the Court's unequivocal right-to-a-hearing doctrine which offers the same \$100 full procedural protection.⁶³ The same due process clause exalts the "property" in one doctrinal branch (procedural due process) and mocks it in another (jurisdictional due process).

Phillips Petroleum also resorts to fictitious reasoning, a judicial technique which is generally unwise and particularly offensive in the personal jurisdiction field given *Shoe's* and *Shaffer's* and *Rush's* condemnation of the practice.⁶⁴ The Court presumes that each of those 28,000 royalty owners who did not return their "opt out" forms consented to Kansas jurisdiction.⁶⁵ Contrary to reality,⁶⁶ each class member is presumed to have received, read, understood and consciously reacted to the court's notice. In this guise, the turn-of-the-century fiction of "implied consent" returns.⁶⁷

My idea of a "power versus contacts" reciprocity offers a more rational road to an otherwise wise result. On the left side of the balance, the "power" weight is minimal. Class members are asked to surrender to Kansas courts a power to deprive each of \$100.⁶⁸ a small rendering. On the "contacts" side we have each class member's affiliation with a nationwide company entering into hundreds of similar contracts touching many or all states. By choosing to do business with an interstate dealer, one locks into a nationwide approach to resolving common disputes against the company. This is essentially a mirror image of the *Burger King*⁶⁹ approach

63. See, e.g., *Sniadach v. Family Finance*, 395 U.S. 337 (1969) (garnishment of wages without notice and prior hearing violates due process); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (right to a hearing when welfare payments are discontinued). Cf. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("small" enough stake for standing).

64. See *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (fictitious corporate consent); *Shaffer v. Heitner*, 433 U.S. 186, 205-07 (1977) (fictional treatment of suit as against property and not property owners); *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) (double fiction of situs of debt and corporate presence).

65. *Phillips Petroleum*, 472 U.S. at 820.

66. People are likely to ignore or misunderstand class action notices. See Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321 (1973) (arguing a typical citizen does not notice or understand court process).

67. See *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (implied consent to service on registrar of motor vehicles).

68. See *Phillips Petroleum*, 472 U.S. at 809.

69. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (defendant "established . . . a relationship with Burger King's Miami headquarters").

where the defendant "enters" the forum state legalistically, that is, by means of legal ties to another who is located there. Since companies like Phillips Petroleum are subject to the jurisdiction of the courts of almost all states,⁷⁰ its lessees "contract into" the scenario of nationwide class actions. The affiliation of these customers with Kansas is by virtue of their contracting partner's presence in all states. While the "contact" weight was small because the affiliation was both minimal and indirect, the "power" weight was even smaller because *Phillips Petroleum* was a *small claim* class action. Hence, using this Lockean analysis, jurisdiction is fair.

V FINE TUNING THE BALANCE

A. First Level Analysis: Sizing the Weights

If the *in personam* defense is a Fourteenth Amendment liberty interest, as has been declared by the Court,⁷¹ then the Lockean reciprocity analysis, which balances power versus contacts to determine fairness, must be the primary consideration. Only in close cases should other factors, unrelated to Locke's contractual concept, affect the liberty interest. In other words, if the primary function of the doctrine of personal jurisdiction is to evaluate the fairness of a forum in terms of defendant's forum affiliations, matters unrelated to that measure could operate only in cases of doubt about the primary balance.⁷²

In this first section I shall discuss the "size" of the weights in order to evaluate the primary balance. In developing the Lockean theory and testing it with my students, I have used the simple expedient of differently sized "power" and "contact" weights.⁷³

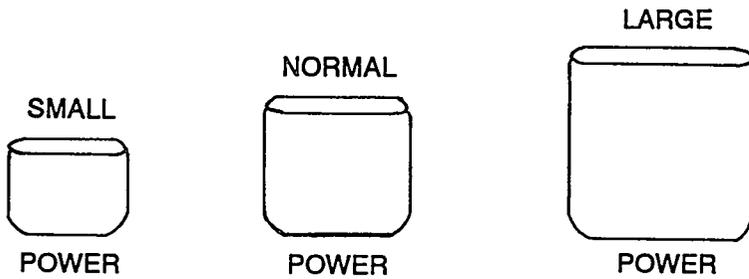
70. See *Phillips Petroleum*, 472 U.S. 797.

71. E.g., *Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest.").

72. This will displease those who care to emphasize other social needs and values. Yet I am not restructuring the *Shoe* doctrine in this essay, but only rendering comprehensible the Court's current calculus.

73. In this part I am trying to avoid the balancer's trap of "some undisclosed scale of social value" and to ground my weights in "history, tradition and current [societal interests]." See T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 YALE L.J. 943, 986, 962-63 (1987).

Figure 4



An example of a “small power” weight would be the Court’s “do not take the children” restraining order issued against Dr. Kulko.⁷⁴ At the other extreme, both the award of custody and the imposition of considerable annual support payments in *Kulko*⁷⁵ would qualify as “large power” weights. The former involves significant family emotional concerns, while the latter is a constant sizeable economic obligation backed by contempt sanctions. Between these two extremes are the normal petitions, the unexceptional cases which cluster about the median.

In making the “power” evaluation, our universe is the infinity of American court orders, and we are judging how onerous such orders would be perceived by a normal litigant. In Lockean terms, being subject to court orders is the contribution expected of a citizen by his state. In the gray areas we will certainly debate what size weights are appropriate, but that does not make the process invalid, just subjective.⁷⁶

I have no qualms about upsizing or downsizing the power weight to account for the burden of a foreign defense. Forcing a person to litigate in a distant place is part of the “demand” placed on a subject by the community’s court and therefore makes up part

74. *Kulko v. Superior Court*, 436 U.S. 84, 88 n.2 (1978). The restraining order at issue appeared only to be temporary in nature; if it were *permanent*, it would amount to a form of custody and arguably would be a “large power” exercise.

75. *Id.* at 88.

76. Curiously, however, my students and I can normally agree on how onerous a given order may be.

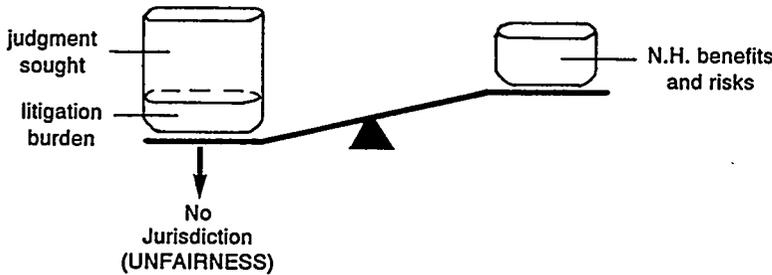
of the "power" weight.⁷⁷ In cases where a small claim is filed in

77. As previously stated, the Supreme Court has frequently insisted that contacts are to be measured against the "burden of a foreign defense." See sources cited *supra* notes 41-42 and accompanying text. However, one case, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), also considers the total damages sought as "certainly relevant to the jurisdictional inquiry." *Id.* at 775. Keeton was seeking to have the New Hampshire courts collect her libel damages in all states. The Court admitted that:

the contacts between respondent and New Hampshire must be such that it is "fair" to compel respondent to defend a multi-state lawsuit in New Hampshire seeking nationwide damages for all copies of the five issues [of Hustler] in question, even though a small portion of the copies were distributed in New Hampshire. *Id.*

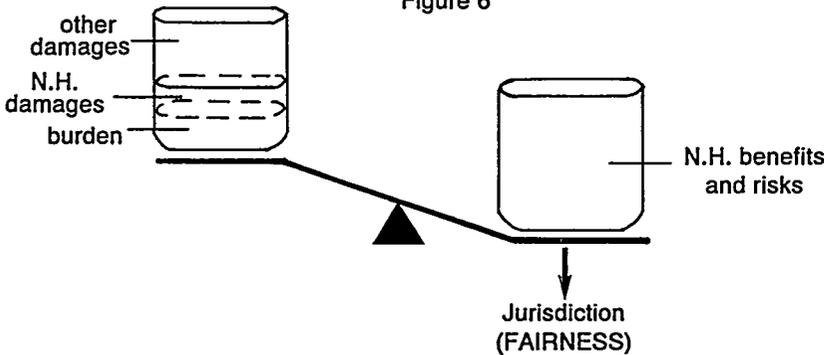
Under our Lockean concept, the balance might appear thus:

Figure 5



I would have to ascertain other additional powerful considerations, unrelated to the contacts-power reciprocity, to "load up" the balance's right side. The *Keeton* court may have found these in the need for an interstate collection system. See *id.* at 777 ("New Hampshire also has a substantial interest in cooperating with other States"). But a more likely explanation is that the Court reached its result by using loaded rhetoric to exaggerate Hustler's contacts with New Hampshire. *Id.* at 781, 774 ("continuously and deliberately exploited"; "regular monthly sales of thousands of magazines"). Transposing the Court's evaluations to my primary balance, the Court's "picture" may have been:

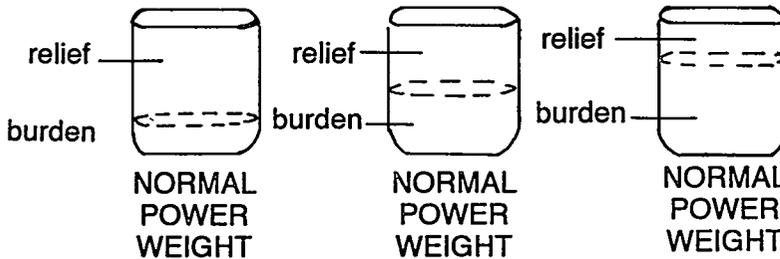
Figure 6



I conclude that while describing the "power" factor in my terms, the *Keeton* court attributed little importance to it. Consequently, at bottom the Lockean reciprocity is not to be found there.

a distant, inconvenient court, such burden may be the principal part of the "demand." Consequently, we might have options such as the following:

Figure 7



The "contacts" analysis poses a more complex sizing problem. What is the relevant universe for a comparative assessment of contacts? The reciprocity concept appears most frequently in cases of non-residents challenging the power of a state court, and the Court often describes *Shoe* as the doctrine for determining jurisdiction over such defendants.⁷⁸ This tempts me to assess relative degrees of non-resident contacts. Yet the jurisdictional liberty interest is held by all parties subject to state court power: residents and non-residents, citizens and foreigners,⁷⁹ plaintiffs and defendants.

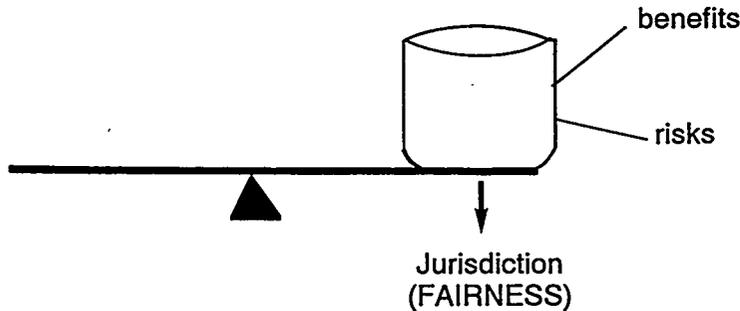
Furthermore, reciprocity-as-fairness is a neutral principle ready to test *any* "subject's" claim of unmerited assertions of community power. Just because we are unaccustomed to *Shoe* challenges when the defendant is a permanent resident and domiciliary of the forum state does not mean that the formula is not implicitly at work. We therefore conclude that the relevant universe is that of all defendants and not some subset thereof. We can again use the sizings "small," "normal" and "large", measured by benefits reaped and risks created, with flexibility to assess an "extraordinary" situation with extremely sized weights.

78. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (power to render a valid personal judgment against "a nonresident defendant"); *Kulko*, 436 U.S. at 91 ("judgments affecting rights or interests of nonresidents").

79. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (Japanese corporation was sued in a California state court).

The quantitatively normal case is that of the resident-domiciliary or the domestic corporation (or qualified foreign corporation) sued in its "home" state. The constant "presence" or "activity," respectively, of this type of defendant indicates a sizable quantity of benefits gained and risks caused. A large contacts weight, then, is appropriate.

Figure 8



In sizing this weight, we cannot help but have the left-sided "power" weight in mind. As in any other legal "calculation" we can cheat to attain pre-determined results. For example, we know that state courts do and must enter a wide range of remedial orders against their resident individuals and businesses. Because the range of permissible left-side "power" is determined by our assessment of the weight of right side "contacts," and vice-versa, wherever we start we are conscious of the "other side."

This potential "loading" of the weights does not trouble me. The honest evaluator has a reasonably objective reference for basing his evaluation: on one side, comparing the relief sought with "normal" scenarios, and on the other, judging this defendant's forum-state contacts against the universe of defendant contacts. Both assessments can be made independently of each other.

Also hard to imagine is how or why a person inclined to cheat would pre-ordain a result. What *in personam* formula would be at the back of the "cheater's" mind? Some different *Shoe* analysis? If so, the decisionmaker is not abusing the reciprocity-as-fairness concept; he is simply not using it. Any predisposition or prejudgment by a user of the reciprocity formula is merely a subconscious run-through of the balance, capable of being perfected or perhaps

supplanted by more mature consideration.

The simplicity and elegance of the power-versus-contacts reciprocity makes planning feasible for cases in which the contacts are in the making and liabilities only potential. The Court has often spoken of defendants being able to "reasonably foresee" a particular *Shoe* result, or having had "fair notice" of such result, or having engaged in "purposive" acts.⁸⁰ These pronouncements mean that the defendant could have predicted (and avoided) the forum's power assertion, which is ludicrous in light of the Court's shapeless doctrine. When the courts themselves are splitting constantly and widely in these cases, the defendants in them could never confidently predict a result. In comparison, the straightforward "power versus contacts" reciprocity does enable some real corporate planning to occur. A foreign company like Asahi can assess its commerce with United States customers and calculate with some assurance the jurisdictional effects of raising or lowering its stream of commerce.⁸¹ Similarly, a single automobile dealer could be advised of its jurisdictional exposure should it wish to develop an interstate clientele.

Yet if several wild cards were inserted in the deck, each capable of producing a sudden reversal of fortune, then predictability and planning would be impossible. The "other factors" inventoried in *World-Wide Volkswagen*,⁸² such as the interests of the forum state and the plaintiff's need for a forum,⁸³ could "trump" the basic fairness calculation and lead to unexpected results.

80. *E.g.*, *Republic of Argentina v. Weltover*, 112 S. Ct. 2160, 2169 (1992) (discussing question of whether foreign state "purposefully availed" itself of a United States forum); *Asahi*, 480 U.S. at 109 (determining that Asahi had not "purposefully availed" itself of privileges to conduct business in forum state); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 484 (1985) (discussion of foreseeability and that the contract provision constituted "fair notice" of possibility of personal jurisdiction); *Keeton*, 465 U.S. at 774 (distribution of several thousand magazines within forum state amounted to "purposefully directed" conduct which satisfied requirements of due process); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (shareholders do not "purposefully avail" themselves of forum state by owning stock in corporation chartered there; nor by owning such stock would they have "reason to expect" that the state would have jurisdiction over them); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (introduction of "purposeful availment" as test for minimum contacts).

81. The degree of confusion surrounding current "minimum contacts" doctrine was based on Asahi's quite believable claim that, although a significant number of its valve assemblies made their way to California, the company never contemplated the possibility of being subject to suit there. *See Asahi*, 480 U.S. at 107.

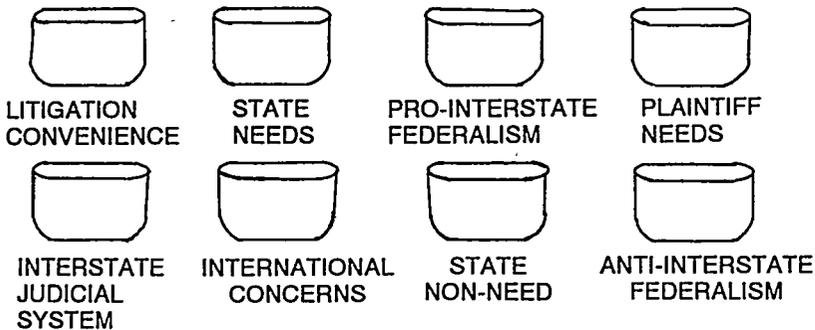
82. *World-Wide Volkswagen*, 444 U.S. at 286.

83. *Id.* at 292.

B. Second Level Analysis: Other Unrelated Factors

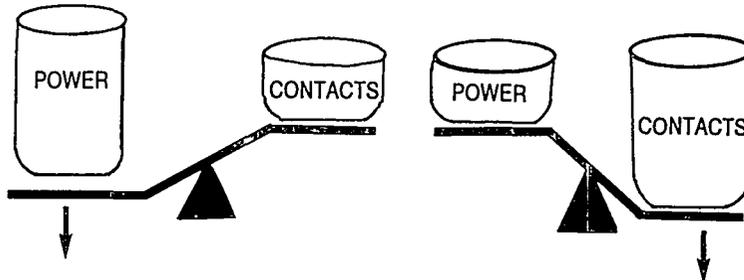
An understanding of the application of Lockean theory to personal jurisdiction takes us smoothly to a sensible handling of “jokers.” They can only enter cases in which the initial power versus contacts balance is close. Because this reciprocity is the measure of fairness, unrelated matters such as state and interstate needs must stay backstage. That is, they are usable only when the basic balance is in doubt. If liberty is the core interest, we can only consider other unrelated interests (the “other factors”) when such will not distort the liberty balance. In this I may differ from readers who wish these other interests to exercise greater control over defendant’s liberty, or who see in the cases a more complex interweaving of relevant *Shoe* factors. From my reading of the cases, I am led to consider, and pictorially represent these factors as much smaller weights.

Figure 9



In general, a primary imbalance between power and contacts cannot be “righted” using these secondary weights. Such a conclusion is mandatory once we accept the predominance of the liberty interest. Thus, the secondary weights must stay out of play when either of the following is the initial balance:

Figure 10



If the "other factors" weigh in the same direction as the primary imbalance, a court will want to "cement" the decision by discussing these other factors.⁸⁴ The danger of such makeweight argumentation is that it falsely implies that had these factors pointed in the other direction, they could have tipped the balance the other way. Because of this danger, courts should avoid such pedantry.⁸⁵

Conversely, the cases "in balance" must call upon these other considerations for their resolution. The reader must recall that in cases of equipoise the opposing factors balance out, leaving the court in complete doubt about how to decide the matter.⁸⁶ The court must turn to these other considerations to break the impasse, including the occasional use of a "tipping" weight cast against the plaintiff when all considerations have washed out.⁸⁷ Such might be the following.

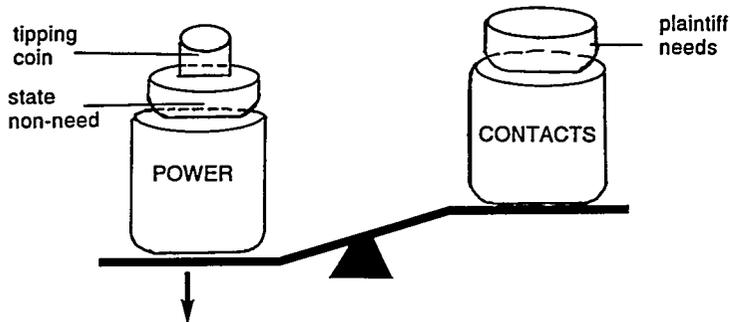
84. See, e.g., *Asahi*, 480 U.S. at 113-16 (deciding whether or not to assert jurisdiction because of other factors such as the burden on the defendant, interests of the forum state, the plaintiff's interest in obtaining relief, or the interstate judicial system's interest).

85. See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2222 n.* (1992) (Stevens, J., concurring) ("An easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case.").

86. See *supra* text accompanying note 46.

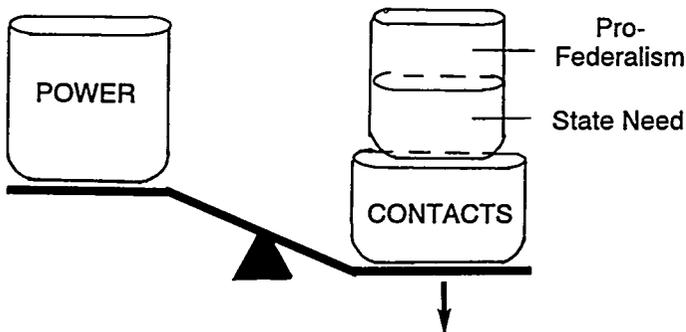
87. Here I merely follow traditional learning that the plaintiff, in seeking to assert court power, must demonstrate his entitlement thereto. E.g., *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (stating that plaintiff bears the burden of establishing that the court has jurisdiction).

Figure 11



The hard cases would be when there is neither equipoise nor a large imbalance: a “normal” weight on one side and a “large” or “small” one on the other. Could the other factors tip the scale back against the liberty interest?

Figure 12

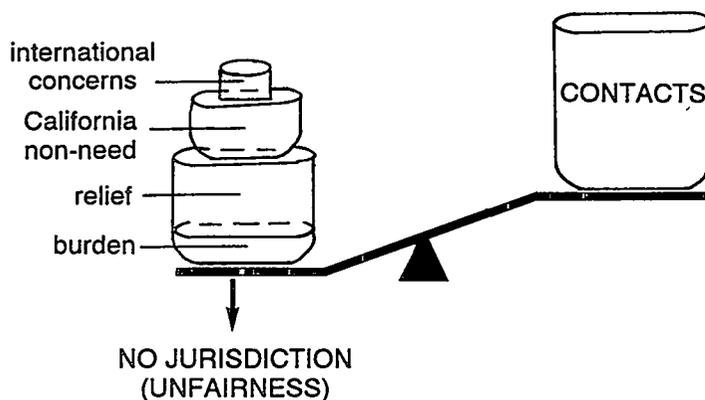


Unfortunately, I cannot answer this question because I do not know just how secondary these “other factors” are. Predictability and judicial efficiency (including reducing the number and size of *Shoe* opinions) would be served by a narrow use of these other matters, calling upon them only when the power-contacts weights are in equipoise. The neatness of that solution, however, would naturally disserve these other interests. How much of *Pennoyer’s* interstate federalism interest (territoriality) remains is an open question. The amount of concern for the plaintiff’s jurisdictional needs, if any, is

an unexplored matter. How much weight to give a state's disinterest in a particular litigation or vice-versa is unclear.

Part of the problem is that the Court's opinions have rarely played these factors against each other; rather, the typical Court opinion, like *Burger King*, has involved serial incantations of the "tests" and poorly explained conclusions based upon them.⁸⁸ For now, I will assume that the Court's continued use of these "other factors" means they do have more than marginal significance. For example, even if Asahi's California sales were direct and significant, a healthy percentage of its total international sales, the "other factors" might still tip the scale against Chen Shin in the indemnity third-party suit, as appears in Figure Thirteen.

Figure 13



VI. A LOOK AT THE SUBDOCTRINES

A. Foreseeability

The Court is so open to criticism on the foreseeability topic that I hesitate to cover it. Yet I do so for the sake of a generation of confused students. The Court opinions have often couched fairness in terms of the defendant's state of mind: whether it "purposefully" entered the forum state,⁸⁹ or whether it could have "reasonably anticipated" a pro-jurisdiction *Shoe* result.⁹⁰

88. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-78 (1985) (analysis included numerous string quotations from precedents).

89. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (noting that an essential element to asserting personal jurisdiction is that the defendant purposefully availed himself of the forum state's privileges).

90. See, e.g., *Burger King*, 471 U.S. at 474 (discussing whether the defendant would

In evaluating this language against the Lockean citizen-state bargain,⁹¹ we immediately draw some apparent conclusions. One is that the citizen's state of mind is irrelevant because Locke's philosophical-political construct does not depend upon any party's specific intent or understanding of the consequences which flow from the specific act giving rise to the cause of action.⁹² There must be only some conscious "affiliating" act of the citizen, some act of joinder with the community.⁹³ This theory of consent⁹⁴ is the very predicate for a Lockean surrender of autonomy by the individual.⁹⁵

This is consistent with the Court's insistence that there be some purposeful act of the defendant directed toward the forum state.⁹⁶ Yet, any resulting "bargain" between a defendant and forum state identified by a court is purely conceptual, "fairness" being not a product of a defendant's affirmative, volitional choice but instead an intellectual construct superimposed by the court upon actual relationships. Regardless of an individual's conception of the jurisdictional consequences of his actions, a court analyzes

"reasonably anticipate being haled into court" (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("no reason to expect" state would have jurisdiction).

91. In creating or joining a society, man relinquishes part of his natural liberty for the good, prosperity, and safety of the society. LOCKE, *supra* note 10 at 71. In return, society agrees to safeguard each individual's property and to resolve disputes fairly, limiting its power to the public good of the community. *Id.* at 75.

92. For instance, when by inheritance or purchase, an individual takes possession of real property, Locke *assumes* that it is taken on condition that the individual submit to the governed under whose jurisdiction the property is. *Id.* at 68.

93. However, this affiliating act need not take the form of an explicit expression. According to Locke,

every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment . . . whether this his possession be of land to him and his heirs forever, or a lodging only for a week.

Id. at 67.

94. Because men are "by nature all free, equal and independent," an individual could not be subjected to the political power of any governmental authority unless that individual had voluntarily joined together with other men, uniting into a community. *Id.* at 54.

95. As part of the original compact, this consensual surrender of autonomy obligates each individual member of that society to submit to the determination of the majority and to be "concluded" by it. *Id.* at 55.

96. *See, e.g., Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) (insisting, on due process grounds, that an action of the defendant purposefully directed toward the forum state is necessary for minimum contacts); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (asserting that "fair warning" is satisfied when defendant has purposefully directed his activities toward the forum state).

them retrospectively and then makes a determination as to whether a bargain was, in fact, present which would justify the jurisdiction demanded by the state.

"Foreseeability" is pegged to an individual's ability to understand the consequences of his action, specifically, of his activities within the forum state. Without a clearly defined and articulated jurisdiction doctrine, no individual or entity can possibly foresee such consequences. Because the Supreme Court has offered no such comprehensible doctrine, any discussion in cases of "foreseeability" seems absurd. How could any defendant foresee an extension of jurisdiction when *in personam* case law is like a black hole?

No defendant, however, can shield himself from personal jurisdiction by asserting the incoherence of *Shoe* and its predecessors. Whether the defendant did or should have anticipated the *Shoe* effects the courts later adjudicate is irrelevant. Instead, in keeping with Lockean analysis, as long as the affiliating act is consciously taken, the actor should be held responsible for the legal effects of this affiliating act, even the unpredictable ones. For example, in applying this analysis to *Asahi*, it is irrelevant that *Asahi* "has never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California," as declared by *Asahi's* president.⁹⁷ Instead, the volitional act should serve as the foundation, and not an individual's cognizance of expected consequences.

B. "Arising Out Of"

Forum courts normally, and perhaps invariably, have jurisdiction when the defendant's liability-causing conduct occurs within the territorial boundaries of the government in which the court sits. When a cause of action specifically relates to activities of the defendant directed at the forum, it is accepted that due process does not prevent the forum from exercising jurisdiction. In *International Shoe Co. v. Washington*, the Supreme Court distinguished between causes of action generated by a defendant's conduct in the forum and those claims unrelated to the defendant's forum-directed activities.⁹⁸ As long as the defendant acted within the forum to

97. *Asahi*, 480 U.S. at 107.

98. The Court wrote that a defendant's "single or isolated items of activities in a state . . . are not enough to subject it to suit on causes of action *unconnected* with the activities there." 326 U.S. 310, 317 (1945) (emphasis added). However, in that case, the

cause the controversy, the forum is entitled to exercise jurisdiction based on the state's interest in regulating conduct within its borders.⁹⁹ This theme was honed in the court's most notable "arising out of" case, *McGee v. International Life Insurance Co.*,¹⁰⁰ where the court accepted as jurisdictionally sufficient one single contract that the defendant had with a resident of the forum state.¹⁰¹

Under Locke's theory, this type of consensual connection to a forum state naturally carries with it jurisdictional consequences. The Lockean premise entails a transfer from individual to community of power to create and enforce laws, regardless of whether the individual associates himself with that community temporarily or permanently.¹⁰² Neighbors are mutually constrained because the organs of government have promulgated general norms of permissible conduct and stand ready to enforce them.¹⁰³ Extending these principles, it is precisely the creation and enforcement of community norms which occurs when a court is requested to exercise "jurisdiction" — the power to speak the law.

This "bargain" between an individual and community makes extending jurisdiction in "arising out of" cases fair. In these situations the harmful consequences to plaintiff have directly "arisen out of" actions which defendant voluntarily took in the forum state. Here reciprocity is plain. Just as an individual expects his neighbors to submit to their society's relief institutions, which enforce rules governing all entities interacting with that society, these neighbors can anticipate that the individual too will be required to respond to their society's enforcement agent. Therefore, applying Lockean principles, claims which arise from the defendant's forum contacts should be resolved for the plaintiff at the jurisdiction level because it would be fair for the community to exercise sufficient power to adjudicate the alleged violations of its norms by the defendant. In terms of the balancing analysis, in "arising out of" cases, the contacts weight would be larger than the power weight.

McGee v. International Life Insurance Co. illustrates how extending jurisdiction in "arising out of case" is fair when considered

defendant's activities had given rise to the cause of action and furthermore, the defendant's overall contacts were considered continuous and systematic. *Id.* at 320.

99. *See id.* at 319.

100. 355 U.S. 220 (1957).

101. *McGee*, 355 U.S. at 223.

102. *See* LOCKE, *supra* note 10, at 94-95 (transfer of "political power" from man to governors so that the latter can "make laws and annex . . . penalties").

103. *Id.*

in terms of Lockean reciprocity. The record in that case disclosed no contacts between the defendant, or its predecessor, and the California forum besides the one life insurance policy *sub judice*.¹⁰⁴ A Lockean analysis focuses upon the "entry" of the defendant into California and its reaping of benefits from that state's structure of laws and institutions. California law determined whether a binding "acceptance" of the offer to insure had occurred. The Texas insurance company could have, indisputably, sought a judgment in California against the insured, Lowell Franklin, for arrears in payments, thereby using California law and courts. Indeed, we can presume that Lowell Franklin made timely payment of the premiums because of the pressure of California's legal norms.

The reciprocity in *McGee* is now clear. Because International Life Insurance Company benefited, both potentially and actually, from California law and institutions, it must dutifully respond in kind. Notice how difficult it becomes for the defendant to use a paucity of contacts as a shield against California jurisdiction (*i.e.*, that only a single, small contract is insufficient). The court, in Lulu McGee's suit for the policy proceeds, is only claiming the power to adjudicate and enforce rights under that single, small contract. The perfect reciprocity surges from the perfect coincidence between acts of entry and the boundaries of the lawsuit. We now have put life into Justice Black's barren rationale in *McGee* that the "contract . . . had substantial connection with that state"¹⁰⁵

Is "arising out of" therefore an absolute factor such that jurisdiction always should be established? The question assumes the asserted liability springs directly from the defendant's forum state action and is not merely "related to" such action.¹⁰⁶ Although I would prefer a positive answer for the sake of doctrinal simplicity, I would defer to complexity justified by sound policy.

Let us approach the problem by using an extreme hypothetical — the traditional testing ground of absolute propositions. Imagine a car crossing the corner of State X. The driver, *D*, sees a "State X"

104. See *McGee*, 355 U.S. at 221-22.

105. *Id.* at 223.

106. Justice Brennan pushed, unsuccessfully, for a broader test that looked for forum contacts "related to" the litigation rather than a test that looked to litigation that "arose out of" the forum contacts. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 420 (1984) (Brennan, J., dissenting). For discussion on the relatedness of contacts that, in turn, implicates state sovereignty interests see Brilmayer, *How Contacts Count*, *supra* note 1 (discussing the distinction between "related" and "unrelated" contacts).

sign and cannot assert that he unconsciously entered that jurisdiction. The passage is brief — five minutes — but within that interlude *D* makes fraudulent material misrepresentations to *P*, his passenger. Six months later *P* acts upon the representations to his detriment in distant State *Y* where both parties are domiciliary-residents. *D*, the driver, had no other contacts with State *X*. Can *P* sue *D* there?

The answer is positive, of course, if judged only in terms of my proposition that “arising out of” is justice, but we must account for any contrary pulls. First, State *X*’s interest in the matter is only in the enforcement of its fraud rules. Next, because the harm actually occurred in distant State *Y* where *P* detrimentally relied, *D* is suable in State *Y*. The distance, then, will make the defense burdensome. Yet neither of these two counter-considerations strike me as particularly weighty.

The fact that *D* is suable in State *Y* does not undercut the legitimacy of State *X*’s claim over the episode within its borders; it means merely that *D*, a traveler, has jurisdictionally relevant affiliations with several locales. The fact that State *Y* might use its conflicts rules to reach and apply State *X*’s substantive law is a weak substitute for the surer application by State *X* itself. If the defense must travel it is only because *D* himself traveled. I conclude, therefore, that even in extreme cases, “arising out of” points to fairness and no sound policy indicates otherwise.

C. General Jurisdiction

In the hypothetical used in the previous section, what if another plaintiff, domiciliary-resident of State *Y*, uses the distant courts of State *X* to sue *D* for breach of a contract concluded and broken in State *Y*? The only affiliation of State *X* with the litigation is that one of the parties, *D*, once drove through there for five minutes, allegedly defrauding another in that span of time. Based on that solitary event can a court of State *X* fairly assume jurisdiction over this breach of contract claim?

The Supreme Court would use the sub-doctrines of “specific” and “general” jurisdiction to address the problem.¹⁰⁷ This is an

107. Specific jurisdiction is a doctrine designed to limit a court’s authority to controversies relating to or arising out of a defendant’s contacts with the forum, even if the cause of action is based on a single act of the defendant. In *Helicopteros Nacionales de Colombia v. Hall*, the court recognized the distinction between specific and general jurisdiction. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). General

other dark corner of *Shoe* jurisprudence. Once again we encounter the problem of rudderless guessing about when the contacts will be enough to constitute fairness.

In *Perkins v. Benguet Consolidated Mining Co.*¹⁰⁸ we learn that a foreign corporation can do enough business in a particular locale that it is suable there on unrelated claims.¹⁰⁹ Unfortunately, the Court's analysis in *Perkins* casts no light on fairness. Quoting language from *International Shoe*, the Court tested the defendant's Ohio contacts against two phrases, "sufficiently substantial" and "of such a nature," without bothering to clarify their purpose and meaning.¹¹⁰ Like *Shoe* itself, *Perkins* describes the particular contacts and concludes simply that Ohio would not violate the defendant's due process rights by assuming jurisdiction.¹¹¹

These criticisms are not overstated; the *Perkins* decision offered no guidance for evaluating other types and degrees of contacts. Thirty-two years later, despite a span of continuous "refinements," the Court in *Helicopteros* still failed to clarify the standardless general jurisdiction analysis when it concluded that defendant Helicol's contacts with Texas did not represent the kind of "continuous and systematic general business contacts" that the *Perkins* court identified.¹¹² Without an underlying conceptual philosophy for its reasoning, the Court in *Helicopteros* engaged in a form of contacts analysis that earlier had been belittled by the *Shoe* court as "mechanical" jurisprudence.¹¹³ It merely compared defendant Helicol's Texas contacts with those contacts which the Philippine mining company (the *Perkins* defendant) had with the forum Ohio.¹¹⁴ Why this "lesser" quantum of contacts was not enough

jurisdiction analyzes the amount and kind of contacts that the defendant has with the forum state, and requires that these contacts be "continuous and systematic" in order to justify entertaining claims arising from dealings entirely distinct from those activities within the forum state. See *id.* at 415; see also *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) (considered as the seminal case on general jurisdiction).

108. 342 U.S. 437 (1952).

109. *Perkins*, 342 U.S. at 445-46.

110. See *id.* at 447.

111. See *id.* at 447-48; see *infra* note 114 for a description of these contacts.

112. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984).

113. See *International Shoe*, 326 U.S. 310, 319 (1945) (stating that the criteria used to determine personal jurisdiction should not be mechanically applied).

114. See *Helicopteros*, 466 U.S. at 415-16. The Court in *Perkins* determined that the defendant had actively carried on company business in Ohio by maintaining an office, holding meetings, dispatching correspondence, and distributing payroll checks drawn on local banks. *Perkins*, 342 U.S. at 447-48. Yet in *Helicopteros* the Court found the defendant's contacts to be more isolated even though the company CEO had made a

for general jurisdiction was not articulated with any precision, apart from the unexplained conclusion that "mere purchases, even if occurring at regular intervals, are not enough."¹¹⁵ This mysterious process, which Justice Brennan unhelpfully called a "weighing of facts,"¹¹⁶ merely shifts the dilemma to another context. How much, then, is "enough" when the claim does not arise from the forum contacts?

What is troublesome in these cases is that the forum is exercising a power over the defendant which is truly extraordinary: judging the lawfulness of his activity outside the jurisdiction's boundaries. One naturally expects to have one's conduct judged by the laws and judicial bodies of the territory where one acts. An individual driving or contracting in State *Y* would not expect that the substantive laws or conflict rules of State *X* would apply to him.¹¹⁷

Individuals accustomed to living in civilization understand that different states and countries have different laws. Regardless of their familiarity with the specific foreign laws, transitory individuals also expect that, while physically present in foreign territory, they are obliged to comply with the laws and government there. Even after their departure, these individuals probably realize they will be subject to the corpus of foreign laws respecting consequences of their past conduct within the foreign territory. This natural expectation is not fulfilled when "foreign" judges act and "foreign" laws are applied, meaning officials and rules foreign to the place *where the actual conduct occurred*.

purchasing trip to Texas, Helicol's employees were to be trained in Texas, and Helicol habitually accepted checks drawn on Texas banks. See *Helicopteros*, 466 U.S. at 416 (in addition, emphasizing Helicol's lack of control over the selection of its payors' financial institution).

115. *Id.* at 418.

116. *Id.* at 419 (citing *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (Marshall, J., dissenting) (the "facts of each case must be weighed")); *Kulko*, 436 U.S. at 101-02 (Brennan, J., dissenting).

117. The Supreme Court has weakly controlled a forum's application of its own laws in litigation with multi-state connections. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (holding that the "Full Faith and Credit" clause was not violated when the state applied its own statute of limitation despite having applied the substantive law of another state); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (stating that the Court's role is only to ensure that the Minnesota Supreme Court did not exceed the limits of the Constitution in applying its choice-of-law rules). But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (concluding that the application of the forum state's law exceeded constitutional limits and thus the forum state could not apply its law to out-of-state transactions).

In addition, such "foreign" exercises of power exceed that conceded to the community in the Lockean compact.¹¹⁸ Take for example, one form of general jurisdiction, "home base" jurisdiction (*i.e.*, the defendant's domicile).¹¹⁹ Assume one is now back "at home" where the primary Lockean compact is in force, keeping in mind that as he travels afar he enters into temporary Lockean agreements, philosophically speaking, each time he passes a frontier. Why would one, as a philosophical bargainer, concede to his home base the power to judge his conduct abroad? Concededly, while one is abroad home base jurisdiction continues to protect what he leaves behind, but its ordered liberty does not travel with him. There is no "police escort," so to speak. Having abandoned one's security to others, the home base cannot fairly assume the power to judge that individual's conduct abroad.

As illustrated by the above discussion, the forum state has given you nothing *with respect to the transactions or events underlying the particular litigation* to justify its power exercise. Applying this reasoning to all "general jurisdiction" I conclude that this type of jurisdiction (as opposed to that of "arising out of") is generally unreciprocal and, consequently, generally *unfair*. Indeed, the proponents of "general jurisdiction" often emphasize other factors over fairness to the defendant.¹²⁰ They subtly seem to cast their eyes either upon courts¹²¹ or plaintiffs.¹²²

If the comfort of courts is the goal, we should simply return to the surer *Pennoyer* doctrines. The Supreme Court, itself, however, has explicitly rejected the argument favoring the certainty of *in rem* jurisdiction despite the "uncertainty inherent in the *International Shoe* standard."¹²³ In addition, the premise that general jurisdiction should be allowed for judicial expediency is flawed because

118. "[N]o one can be . . . subjected to the political power of another without his own consent" which is given by agreeing, through a compact, to join a society with other men for their mutual benefit. LOCKE, *supra* note 10, at 54.

119. See generally Twitchell, *Myth, supra* note 1 at 667-70 (advocating limiting general jurisdiction to the defendant's "home base").

120. See, e.g., *id.* at 665-66 (1988) (listing problems which would result from the elimination of general jurisdiction, none of which consider fairness to the defendant).

121. See, e.g., *id.* at 666. (According to Professor Twitchell elimination of general jurisdiction would decrease judicial efficiency.).

122. See, e.g., *id.* at 667 ("The best approach to general jurisdiction is to confine it to its most essential function: providing one forum where a defendant may always be sued.").

123. *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977) ("the cost of simplifying . . . may be the sacrifice of 'fair play and substantial justice'").

general jurisdiction is not a doctrine which is comfortably applied. How much contact, then, is enough for general jurisdiction? General jurisdiction cases like *Helicopteros* and *Perkins*, even considered together, do not provide a clear answer.

If fairness to plaintiffs lurks behind general jurisdiction, I remind readers that *Shoe* focused on the defendant's liberty, not his adversary's.¹²⁴ Moreover, the plaintiff already has the choice between the place where the defendant's illegal conduct occurred and the place where the damage occurred. The first choice, "arising out of" usually should be fair.¹²⁵ The second choice is fair because defendants are normally accountable for both causes and effects of their actions.¹²⁶ That the plaintiff should be offered yet another forum is not a defensible proposition.

I conclude that "general jurisdiction," meaning a forum foreign to the defendant's conduct, is almost always unfair and thus should rarely — if ever — be asserted. Notice how this conclusion is not only morally and philosophically advantageous, but is also efficient because many general jurisdiction cases can be disposed of easily as unfair. I use the qualifier "almost always," however, because in the wonderful world of *International Shoe* one can never engage in *Pennoyer*-type absolutes.¹²⁷ The following discussion will illustrate how some general jurisdiction cases are fair because there has been "actual" and "valid" consent.

D. Consent and Waiver

1. Actual and Valid Consent Is Always Fair

Given that Lockean fairness is based upon the philosophical bargain, *actual valid* consent to a state's jurisdiction must be

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

125. See *supra* notes 98-106 and accompanying text (discussing how the reciprocal relationship between the defendant and the forum state means invariably that jurisdiction is fair).

126. See, e.g., *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (holding that a manufacturer located in Ohio and incorporated in Pennsylvania can be sued in Illinois for a products liability claim since the plaintiff was injured there).

127. Except for Justice Scalia. See *Burnham v. Superior Court*, 495 U.S. 604 (1990). In *Burnham*, the husband, a resident of New Jersey, contested personal jurisdiction because he had been served with a divorce petition while visiting his children in California. 495 U.S. at 608. Scalia's plurality opinion held that the husband's physical presence alone subjected him to personal jurisdiction. *Id.* at 619. For discussion as to why such "absolutist" jurisdiction using mere domicile or service of process is unfair under Locke, see *infra* notes 139-62 and accompanying text.

deemed just *per se*.¹²⁸ This is because a "deal" has been struck between a party and the state. In other words, a party voluntarily has conceded its power to a state's court in exchange for certain benefits. The consent of the party, then, means the bargain is actual and valid and not just philosophical. Thus, the assertion of these states' jurisdiction over the party will always be fair.

The act of a foreign corporation registering to do business in a particular state is a vivid illustration of such an actual agreement. If the state's law defines the jurisdictional effects of the corporation's registration to do business, then the registration is a formal bargain with the state.¹²⁹ The corporation's attorneys will have judged the costs and benefits, including the jurisdictional implications, of qualifying to do business in that state as compared to other states. Having "signed on" in that state, the corporation has agreed to submit to any lawsuit permitted by that state's law. Moreover, this consent even includes state court jurisdiction over claims totally unrelated to the company's business within the forum.¹³⁰

Sometimes a state's corporation laws merely require the appointment of an agent to receive process without any further explanation of the jurisdictional consequences of such an appointment.¹³¹ Courts of that state may read consent to suit into such statutes.¹³² Once that judicial gloss is incorporated into the statute, it would seem fair, despite being burdensome, to read consent-to-suit into the act of corporate registration.¹³³

128. I use the qualifiers "actual" and "valid" because here, as elsewhere, courts may look beneath the surface of the bargain and invalidate the act of consent for either real or constructive involuntariness.

129. See generally *Developments, supra* note 1, at 920 (discussing the necessity for a corporation to consent expressly in order to be subject to personal jurisdiction as a condition of doing business in a state).

130. Thus, we see how actual consent makes "general" jurisdiction possible. See, e.g., *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) (holding that suit could be brought against the defendant in Missouri on a claim relating to an insurance contract in force in Colorado because the defendant had agreed that, in exchange for being allowed to do business in Missouri, its Missouri Insurance Superintendent would accept service on its behalf).

131. See *infra* text accompanying note 146.

132. See, e.g., *Rykoff-Sexton, Inc. v. American Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991) (construing a corporation's consent to service of process through an agent to mean consent to personal jurisdiction).

133. Arguably, the first corporation to suffer such consequence might have a decent *Chevron Oil* prospectivity claim. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107-08 (1971) (deciding against a retroactive application of a statute of limitations law).

Consent, however, most often appears in private party bargains by means of forum selection clauses.¹³⁴ In such cases the defendant's bargain with the forum is at most indirect because the bargained benefits come from another party through the contract, and not from the forum itself. This is not, however, a hurdle because we can reconceptualize the situation as a waiver of a right. The personal jurisdiction defense is a liberty interest under the Fourteenth Amendment that can be knowingly and voluntarily waived.¹³⁵ When agreeing to a forum selection clause, each signer manifests a willingness to waive certain dispute-related rights, which would otherwise be claimable, in exchange for the benefits of doing business with the other party. Consequently, the fact that the signer has received no correlative benefits from the forum state is irrelevant.

2. Domicile in a State Is Not Always Actual and Valid Consent

A harder consent case is when personal jurisdiction is solely based on domicile.¹³⁶ Arguably, merely establishing domicile is not the same as actually and validly consenting to be subject to a state's jurisdiction. Using domicile alone to establish personal jurisdiction means the jurisdiction will be "general" when the claim did not arise out of any contact with the forum state.¹³⁷ Unlike a corporation registering to do business in a forum state, usually a State X domiciliary knows nothing of state laws concerning court jurisdiction.¹³⁸

E. The "Absolutes": Domicile and Service of Process

Not only has domicile been equated with consent to personal jurisdiction, courts often deem domicile, as well as service of pro-

134. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (upholding a contract's forum selection clause that required suit to be brought in Florida even though the passenger, who had purchased his ticket in Washington, was injured off the coast of Mexico).

135. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982) (noting that personal jurisdiction, unlike subject matter jurisdiction, can be waived).

136. This discussion is not necessarily limited to domicile. Conceivably it might extend to citizenship and residence.

137. See Twitchell, *Myth*, *supra* note 1, at 667 (advocating elimination of all general jurisdiction except that based on the defendant's "home base"). See also *supra* note 119 and accompanying text (discussing why one form of general jurisdiction, "home base" jurisdiction, is unfair).

138. Probably the majority of the tiny subset of state X domiciliaries who are familiar with state jurisdiction laws are civil procedure professors.

cess, sufficient *per se* to invoke personal jurisdiction. Lockean analysis will demonstrate that such an absolutist approach is unfair.

1. Domicile

Because the Lockean reciprocity is at the root of fair play, and because such reciprocity involves an assessment of the defendant's forum state relations in light of the state court's demands upon that person, it would seem imperative that the facts of each particular litigation be individually assessed. Hence, an absolutist approach to domicile would be unfair.

Take for example, *Milliken v. Meyer*,¹³⁹ which held that the defendant's domicile in the forum state was sufficient to establish personal jurisdiction despite the defendant's lack of continuous presence in that state.¹⁴⁰ Justice Douglas created an absolute rule: "One . . . incident of domicile is amenability to suit within the state even during sojourns without the state"¹⁴¹ While this absolutist approach has the advantage of simplicity,¹⁴² this simplicity sacrifices accuracy. This is because domicile is merely a legal construct based upon certain affiliations between defendant and his country or his state; a construct needed for purposes alien to the personal jurisdiction inquiry. One thinks of Justice Frankfurter's critique of transferring into the *Erie* field the "substance versus procedure" distinctions made in other branches of the law.¹⁴³

The advantage of eliminating domicile as a *Shoe* relevancy is that we will not stumble over domicile complexities which serve no *Shoe* function. For example, an individual may permanently leave State X while technically maintaining a domicile there because he has yet to select a domicile elsewhere.¹⁴⁴ His State X contacts fade with each passing day. While he continues to be suable in State X for any lingering effects of his presence there, what justifies State X's continuing power over him for his actions

139. 311 U.S. 457 (1940).

140. *Id.* at 464.

141. *Id.*

142. A few responses to well-chosen questions at the defendant's deposition may be enough to fix a forum domicile irrefutably.

143. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945) (rejecting a "substance versus procedure" distinction as the proper test for determining whether to apply a state statute of limitations to federal law).

144. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15 cmt. b, illus. 2, and cmt. c (1969) (discussing the effects of moving on domicile).

and effects outside State X? Certainly the technicality of a continuing domicile cannot supply the fairness quotient.

Consider less extreme cases in which the defendant acts outside the locus of domicile, returns, and is sued at home on those acts. If the plaintiff cannot prove fairness based on a *Perkins*-type assessment of defendant-domiciliary's unrelated forum contacts, then no reason appears for why domicile should trump such an assessment. Domicile adds nothing to the defendant's act nor does it lessen the power exercised by the forum court. In sum, "domicile" is extraneous to the *Shoe* balance. It is merely a shorthand expression for certain quantum of forum state contact, for certain benefits (e.g., right to vote), and for certain duties (e.g., jury service). Only in the descriptive sense might domicile have any utility in *Shoe* cases.

The above analysis applies equally well to the idea that a corporation is always suable where it has its charter.¹⁴⁵ Modern corporation statutes stay clear of the topic of personal jurisdiction. While they may require the designation of an agent to receive process, such statutes do not purport to judge the jurisdictional effects of such service.¹⁴⁶ As in the case of an individual's domicile, I find no justification in suits against corporations for substituting *per se* personal jurisdictional rules in lieu of a Lockean fairness balance.

2. Service of Process: *Burnham v. Superior Court*¹⁴⁷

The Scalia plurality in *Burnham* sits as the *Pennoyer*-island in a sea of fairness. These Justices would have personal service within the forum's territory always be valid service regardless of the defendant's lack of other contacts with the forum.¹⁴⁸ In essence this means that "benefits reaped and risks sown" is not part of such a jurisdictional formula because the lack of contacts is not part of their jurisdictional formula. Consequently, a Lockean reci-

145. See *Developments, supra* note 1, at 919 ("[T]here was never any dispute that a domestic corporation could be sued on any cause of action.").

146. See, e.g., MODEL BUSINESS CORP. ACT § 5.04 (1991) (addressing service on registered agent of domestic corporation without mentioning jurisdictional effects of service); *id.* § 15.10 (addressing service on registered agent of foreign corporation without mentioning jurisdictional effects of service).

147. 495 U.S. 604 (1990).

148. See *Burnham*, 495 U.S. at 619 (jurisdiction upheld for New Jersey father served while in California with divorce petition stating that "physical presence alone constitutes due process").

procuity is definitely not at work. Rather, an absolutist approach much akin to *Pennoyer's in rem* jurisdiction resurfaces. Service within the territory constitutes a "capturing" of the defendant, and such authoritarianism is constitutionally permitted by all states as to persons and properties within their territorial boundaries. The fundamental fairness required under the Due Process Clause is supplied solely by the historical lineage of the idea.

I disagree with the concept that mere tradition creates *per se* due process fairness, and believe that Scalia's opinion in *Burnham* conflicts with *Shaffer v. Heitner*.¹⁴⁹ Those are polemics, however, that I will entrust to others because they do not involve the Lockean thesis elaborated herein. I will pause to note, however, that Scalia's analysis of the precedents is little more than a first year legal method trick. Justice Scalia rejected everybody's perspective on the *International Shoe* line of cases. Judges, academics, lawyers, and students all thought that the *in personam* doctrine elaborated in those cases controlled all state court exercises of jurisdiction over defendants, not just some subset.¹⁵⁰

For example, in *Perkins v. Benguet Consolidated Mining Co.*,¹⁵¹ although the corporate president was served in the forum, the decision to assert personal jurisdiction was actually decided on a fairness basis.¹⁵² Otherwise, the court's contacts analysis would be irrelevant if in-hand in-forum service, alone, was constitutionally sufficient. Further, I could spin the cases in the other direction by asserting that the question was open in *Burnham* because if the Court had never precisely determined that in-forum service was invalid, neither had it precisely held that it was constitutionally valid. Remember that the infamous attorney Mitchell, the subject of *Pennoyer*, was not served within Oregon,¹⁵³ making the Court's pronouncements on the point technically dicta.¹⁵⁴ In addition, if

149. 433 U.S. 186 (1977) (rejecting *quasi in rem* jurisdiction under *Pennoyer* over out-of-state defendant-directors by sequestering the defendants' stock, and instead holding that the "minimum contacts" test from *International Shoe* must be applied).

150. See *Burnham*, 495 U.S. 604, 632 (1990) (Brennan, J., concurring) (stating that all assertions of state court jurisdiction "must comport with contemporary notions of due process").

151. 342 U.S. 437 (1952).

152. For a discussion of *Perkins* see *supra* notes 108-14 and accompanying text.

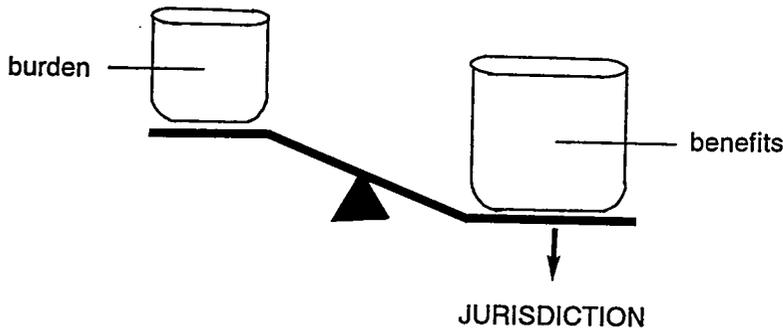
153. *Pennoyer v. Neff*, 95 U.S. 714, 719-20 (1877).

154. See *id.* at 724 (the Court's pronouncements that a non-resident within a state's territory may be subject to *in personam* jurisdiction but a non-resident not within the territory may only be subject to *in rem* jurisdiction were based on dicta).

the question was still open at the time of *Burnham*, was not the *Shoe* line of cases the most relevant corpus of case law?

The Brennan opinion in *Burnham* concerns me more than Scalia's plurality opinion because in applying *Shoe* it demonstrates a weak grasp of the Lockean reciprocity implicated by the case facts. Justice Brennan drastically overemphasizes what *Burnham* reaped in his brief sojourn in California¹⁵⁵ and drastically understates what *Burnham* is suffering at the hands of California courts.¹⁵⁶ Consequently, Brennan's basic balance is:

Figure 14



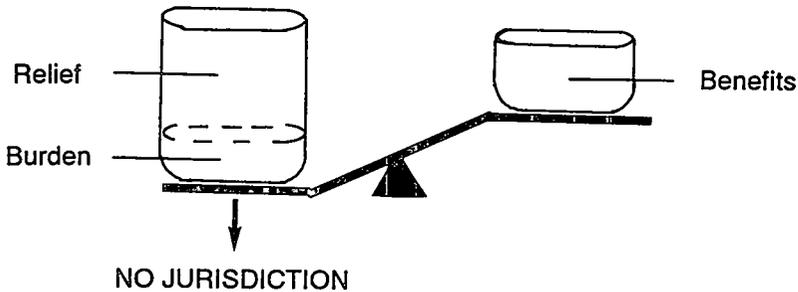
In reality, however, the balance is very different. California will be judging *Burnham's* out-of-state (New Jersey) conduct, possibly using California substantive law in the process, to affect his fundamental interest in his marital status, parental rights, continuing economic obligations, and property holdings. Because the Justices erroneously perceive the balance's power weight as the burden of a foreign defense, they can minimize it, as does Brennan, by talking of "modern" ameliorating improvements in "transportation and communications."¹⁵⁷ A Lockean balance, however, would reverse the result:

155. See *Burnham v. Superior Court*, 495 U.S. 604, 637-38 (stating that the forum state provides "significant benefits" to a transient defendant).

156. *Id.* at 638-39 (stating that "the potential burdens on a transient defendant are slight").

157. *Id.* at 638 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957))).

Figure 15



From my perspective, the irony of *Burnham* is that Justice Scalia is the only Justice who demonstrates an understanding of the Lockean reciprocity underlying *International Shoe*, and yet he does so solely to mock and reject it! He characterizes the Brennan analysis as that of an “equitable bargain” in which the defendant traded three days’ worth of California benefits for California decrees disposing of his “worldly goods” and the custody of his children.¹⁵⁸ He then mocks the trade as “unconscionabl[e].”¹⁵⁹ He is exactly correct! The problem is not with the Lockean mode of analysis, which seeks true fairness and, as this essay demonstrates, can obtain it with some assuredness. Rather, Brennan himself did not see the true “bargain” between California and the defendant and, hence, failed to weigh the proper power factors and even cheated on his benefits evaluation to load the scale in favor of jurisdiction.¹⁶⁰

Scalia is right, of course, that *Shoe*’s “fair play” approach breeds uncertainty,¹⁶¹ as does any constitutional formula which weighs competing interests. The natural implication of Scalia’s “subjectiveness” critique,¹⁶² however, is that we should return to

158. *Id.* at 623-24.

159. *Id.* at 623 (“We daresay a contractual exchange swapping those benefits for that power would not survive the ‘unconscionability’ provision of the Uniform Commercial Code.”).

160. Exactly what propelled him towards this preordained result is unclear.

161. See *Burnham*, 495 U.S. at 626.

162. *Id.* at 623 (“[T]he concurrence’s proposed standard [includes] each Justice’s subjective assessment of what is fair and just.”).

the simpler *Pennoyer* era: Was he served within the state? Was the property attached? Where was the marital domicile? Was there consent to jurisdiction? In my darkest moments I appreciate the simplicity of these inquiries and the efficiency of the resolution they would bring to the world of jurisdictional conflicts. Yet, through Lockean reciprocity we can achieve a more fine-tuned justice in the spirit of *International Shoe* while reducing the "arguable" cases to a small number.

VII. DIVISIBLE JURISDICTION

By "divisible" jurisdiction I mean a judicial authority which is not invariable and all-encompassing, but rather a quantum of limited power which shifts depending on the nature and degree of the minimum contacts. This is a natural consequence of reciprocity between a forum court's power and a defendant's forum contacts. In other words, as a subject's contacts increase, the ability of the community to impose rules and issue orders against him should also increase because he, reciprocally, has increasingly benefited. Conversely, in order to exercise any particular measure of authority over that subject, the court must find a sufficient *quantum* of contacts to justify, reciprocally, the surrendered natural autonomy.

The relevant question in a *Shoe* case then becomes: "Jurisdiction to do what?" More fully, "Are there sufficient contacts to justify the particular court action against the defendant that the plaintiff proposes?" One does not sense that the Court interprets the jurisdiction question in this manner. Instead, it appears that once a court determines there is a minimum level of contacts, then any degree or quantum of power to be exerted over the defendant is acceptable, regardless of whether that degree of power outweighs the level of contacts.

Why must a court have all power or no power? What reasoning supports this approach? The Supreme Court offers no explanation because it has never conceptualized *Shoe* as I have. For example, in *Keeton v. Hustler Magazine, Inc.*, the Court did mention the nature of power being asserted in light of the nature of the defendant's conduct in the forum state.¹⁶³ Yet, it did not expressly state that Hustler's contact with New Hampshire had to increase correspondingly in relation to the degree of power exerted in order

163. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984). See also *supra* note 77 (discussing *Keeton* using a Lockean balancing of "contacts" versus "power").

to achieve fairness. This was, in part, an "arising out of" case because Keeton sought damages for injury to her reputation in New Hampshire by the circulation there of libelous magazines.¹⁶⁴ Yet it was also a case in which a state called upon a defendant to respond for the same act and corresponding injury committed outside that state's borders.¹⁶⁵

The Court was right in its assessment that *Hustler's* sales of the offending issues within the forum state provided sufficient contacts to make it fair for New Hampshire to remediate Keeton's New Hampshire-based reputational damages. This exemplifies arising-out-of reciprocity. The question that remains, however, is why these contacts justified New Hampshire's power to collect the extra-territorial damages? It would seem that the benefits derived by *Hustler* in New Hampshire were outweighed substantially by New Hampshire's exercise of this "extra" power.

One might conclude, then, that the *Keeton* Court treated jurisdiction as unitary. Once the Court became convinced that the defendant had "sufficient" contacts with New Hampshire, it granted New Hampshire unquantified jurisdiction.¹⁶⁶ Presumably Keeton could have amended her complaint to seek five billion dollars in punitive damages, or the New Hampshire attorney general could have intervened to seek dissolution of the corporate offender for its indecent conduct.

The Court often does not specify the relief requested by the plaintiff in these *Shoe* cases, thereby supporting my proposition that the Court considers it irrelevant to *in personam* doctrine. Yet, were the Court to understand and accept the significance of a plaintiff's requested relief in terms of the Lockean reciprocity, much existing confusion would be dispelled. In cases of "minor" power exercises, the Court would not feel obligated to exaggerate the significance of extraneous considerations such as the burden on the defendant defending in a distant forum or as in its vacuous

164. *Keeton*, 465 U.S. at 777.

165. In other words, Ms. Keeton was seeking "nationwide damages for all copies of [*Hustler*] even though a small portion of the copies were distributed in New Hampshire." *Id.* at 775.

166. A second possibility is that the Court threw a hefty interstate federalism weight (the "single publication" rule) on the pro-jurisdiction side of the balance. *Id.* at 777-78 (rule promoting a forum for efficiently litigating in a single proceeding all issues and damages claims arising out of a libel). If so, the *Hustler* case teaches that "other factors" can be weighty enough to defeat a defendant's liberty interest in a fair correspondence between benefits and duties.

“foreseeability” or “stream-of-commerce” rationales. In cases of “major” prayers for relief, the Court should have to find real, substantial forum-state benefits to the defendant.

A divorce case illustrates the concept of divisible jurisdiction. In this type of proceeding, a court enters many orders and decrees which vary in their impact upon the defendant. Some such judicial acts, in order of increasing severity include: 1) discovery orders to establish subject matter or *in personam* jurisdiction; 2) discovery orders to locate or evaluate assets; 3) temporary restraining orders; 4) alimony *pendente lite*; 5) child support and alimony; 6) visitation; 7) property division; 8) custody; and 9) divorce. If a defendant’s contacts are heavy enough, the court then has the power to issue a divorce decree,¹⁶⁷ the most “impacting” order. In addition to the divorce decree, fairness permits the court power to enter any of the lesser “impacting” orders. However, if the contact weight is not so heavy, the court is limited to a less onerous decree. Thus, as the contact weight decreases, there will be a corresponding decrease in the severity of the order the court can issue.

Therefore, a divorce case might involve multiple jurisdictional rulings. If jurisdiction is challenged, the court could make an initial determination of whether there are sufficient contacts to merit discovery and temporary orders. After discovery, the court would then determine whether the challenger of jurisdiction had sufficient contacts, on the whole record, to justify the court’s entering support orders against him and determining his access to the children. This methodology of sequential jurisdictional rulings could be applied to other types of cases.

167. *Shoe* buffs will instantly spot the example’s smudge: personal jurisdiction has been based upon plaintiffs’ domicile, illustrating the rare instance when plaintiffs’ contacts reign supreme. See *Williams v. North Carolina*, 317 U.S. 287, 297 (1942) (domicile of plaintiff recognized as essential in order to give the court jurisdiction when the defendant has neither been personally served nor entered an appearance); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71 (1971) (summarizing *Williams v. North Carolina* as accepting the domicile of one spouse alone as adequate jurisdiction to issue a valid divorce decree but inadequate to enter a judgment ordering support or terminating a duty of support owed the spouse by the other). Yet because of the multiplicity of enterable orders, I prefer not to abandon my hypothetical. Perhaps the reader will indulge me by assuming that one spouse has left his or her domicile and is suing in a state with some affiliations with defendant.

VIII. TESTING THE BALANCE

I will now test my analysis by applying it to some recent federal courts of appeals' *Shoe* decisions.¹⁶⁸ Parenthetically, the still enormous volume of personal jurisdiction decisions reported confirms the existence of doctrinal incoherence and the resulting potential for abusive, dilatory lawyer "moves."

A. Case 1¹⁶⁹

The plaintiff, a resident of Michigan, is a truck driver whose hand was crushed when his truck was being loaded at the defendant's lumberyard in Windsor, Ontario (ten miles from the forum court in Detroit). Given the nature of the injury, the plaintiff presumably has requested a sizeable amount of damages. The record on the defendant's motion to dismiss is comprised of conflicting "contacts" claims asserted by the opposing parties. Unlike the other cases analyzed, we cannot in this case make a final resolution simply because of the factual dispute. We can, however, test each side's position on jurisdiction using our Lockean analysis.

1. Plaintiff's Assertions

The defendant Matthews regularly sells lumber in the United States, and often in Michigan. He contracts with Michigan truckers to do hauling, and hired the plaintiff's employer for this particular haul. The plaintiff claims that the defendant maintains an apartment in Oak Park, Michigan (although the extent to which he uses this residence is unclear). Furthermore, both parties concede that the defendant maintains a post office box in Royal Oak, Michigan and runs a telephone listing in the Detroit yellow pages (which the record notes is in the smallest available type). The plaintiff cites these contacts as sufficient to establish jurisdiction over the defendant.

This is a "hard" case when analyzed by Lockean principles. The cause of action arises from acts and subsequent injury that occurred in Canada.¹⁷⁰ Consequently, this case can be character-

168. The response to a WESTLAW inquiry was that these cases are the most recently reported *Shoe* decisions.

169. *Theunissen v. Matthews*, 935 F.2d 1454 (6th Cir. 1991).

170. The fact that the plaintiff brought his injuries back to his Michigan home is irrelevant; the defendant cannot be held accountable for the plaintiff's subsequent peregrinations.

ized as a general jurisdiction one because the defendant's Michigan affiliations are "unrelated" to the cause of action that arose in Canada.

Since this is not an "arising out of case" which is "easy" under a Lockean analysis, the "benefits" of the defendant's contacts with the forum need to be weighed against the "power" that will be exerted on the defendant to determine whether personal jurisdiction here would be fair. The benefits the defendant derives from his dealings with Michigan are significant. The defendant arranges hundreds of lumber deliveries per year, much akin to a Michigan trader. In addition, the heavy loads he dispatches to Michigan are burdensome to the state in that the hauling is somewhat laden with risk. In addition, although the details are sketchy, the defendant's Michigan residence makes the affiliation stronger. All of these affiliations combined create a "large contacts" weight.

Therefore, the power gained by the court through its jurisdiction enables it to enter a large judgment against the defendant. Although the burden of a foreign defense is slight—Canada and Michigan are separated only by a border and the defendant is a Michigan habitué—once the defendant arrives at the courthouse the impact of the court's jurisdiction will be severe. Thus, the state's "power" also is a "large" weight.

Since the contacts and power weights are in equipoise, we must draw upon other, non-Lockean factors. Because of the proximity of Windsor to Detroit, the case involves metropolitan business transactions which flow freely across national boundaries. It is vital that Michigan, at least in some cases, be able to assert jurisdiction over nearby Canadian traders, not only to protect its residents but also to facilitate multi-party litigation. While Detroit judges would be interpreting and applying Canadian law, they are called upon to do so regularly and are likely comfortable with Canada's common law system. Consequently, this should ameliorate the adverse impact on the defendant of having foreigners judging his conduct in Canada. This "state need" propels the fairness balance toward extending jurisdiction which resolves the matter since no other consideration seems particularly compelling.

2. Defendant's Assertions

The picture that emerges from the defendant's affidavits is quite different. He is a Canadian citizen who does not buy or sell lumber but merely runs a trans-shipment yard for Canadian dealers. These dealers make their own deals in the United States and them-

selves hire truckers, including the plaintiff. The defendant maintains no residence in Michigan but once dated a woman who resides in Royal Oak. The only continuing contacts he has with Michigan are the yellow page advertisement in fine print and the post office box which is intended to facilitate his receipt of mail from the United States.

From this perspective the case is an easy one against jurisdiction. The benefits accruing to the defendant by virtue of the mail drop and the telephone listing are miniscule as compared to the plaintiff's major tort claim stemming from Canadian events. Hence, from the defendant's perspective, Lockean analysis reveals that "power" overwhelms "contacts" and jurisdiction should be denied.

B. Case 2¹⁷¹

A partnership owns a building in Minnesota, the roof of which collapsed, killing the plaintiff's husband. She brings a wrongful death action against the several partners, each of which is incorporated, a resident, or domiciled outside of Minnesota. The plaintiff demonstrates no affiliating circumstances except ownership of the building and the fact that one partner, a corporation, has appointed a Minnesota agent to receive service of process.

This seems an easy case for jurisdiction. The partners have "entered" Minnesota by means of their property. Besides having created large risks to Minnesotians, due to the dangerousness of their building, they have profited largely from the network of state and substate laws which makes such ownership feasible. More important, their "entry" has resulted in the death of plaintiff's husband. Logically, then, Minnesota can justifiably claim the judicial power necessary to remediate the harms caused within the state by the partners.¹⁷²

Although the fact that the corporate defendants had appointed an agent to receive service of process would *facilitate* reaching these defendants, that fact alone would ordinarily not be of much jurisdictional significance.¹⁷³ Appointment of such an agent would

171. *Ytuarte v. Gruner & Jahr Printing and Publishing Co.*, 935 F.2d 971 (8th Cir. 1991).

172. However, in this case, the Eighth Circuit found to the contrary without any reasoning. *See id.* at 972-73 (stating that plaintiff's argument for jurisdiction based on ownership of property within the state and production there of goods intended for worldwide distribution "is entirely without merit, and requires no further discussion").

173. The Court, however, actually used this appointment to assert jurisdiction over these partners because, under Minnesota law, such an appointment was considered consent to

assist an assertion that the corporation is transacting business within the state. However, the volume and nature of such business should still have to be ascertained and proved. Of course, if *Burnham*¹⁷⁴ becomes accepted law and is extended to service upon corporate agents, the plaintiff need merely execute service upon the agent.¹⁷⁵

C. Case 3¹⁷⁶

The defendant was hired through brokers to transport the plaintiff's twine from Brazil, where the plaintiff had bought it, to a port in Wisconsin. The defendant is a one-ship company incorporated in Liberia, with a principal place of business in Greece. The ship and thus the plaintiff's twine sank en route to Wisconsin. The defendant had no other affiliation with Wisconsin, where the plaintiff filed suit in federal court, although the defendant had once unloaded a cargo of beans in Duluth, Minnesota.

Under a Lockean approach, this represents the easiest of jurisdiction cases.¹⁷⁷ As the court sardonically commented, "Minnesota is not Wisconsin"¹⁷⁸ and though Duluth is next to Wisconsin, "close counts only in horseshoes."¹⁷⁹ The court found, no contacts, hence, no personal jurisdiction. The decision is consistent with Lockean analysis because the defendant has neither reaped benefits from nor created any risks within Wisconsin.

D. Case 4¹⁸⁰

The defendant, Bunstein, was based in Massachusetts as a vice president of sales for a nationwide brokerage house. One of his clients set up operations in Florida and borrowed heavily from the plaintiff, Sun Bank. An employee of Sun Bank placed two phone

Minnesota jurisdiction "for any cause of action, whether or not arising out of activities with the state." *Id.* at 973. See generally *supra* text accompanying notes 129-33 (discussing when a corporation consents to jurisdiction).

174. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

175. See *supra* notes 147-50, 155-62 and accompanying text (criticizing the *Burnham* Court's extension of jurisdiction solely based upon the valid service of process within the forum).

176. *United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532 (7th Cir. 1991).

177. Appellant-plaintiff's stronger case was that a federal admiralty court could count the shipping company's national contacts as the relevant *Shoe* contacts. *Id.* at 534-35. The complex argument on this point is beyond this article's scope.

178. *Id.* at 533.

179. *Id.* at 534.

180. *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030 (11th Cir. 1991).

calls to the defendant to verify the securities listed in the personal financial statement provided to the bank by the defendant's client. During the phone conversations, the defendant made representations about his client's stock holdings which the trial court found to be fraudulent. Sun Bank sued Bunstein in the Middle District of Florida when the borrower defaulted and the securities proved inadequate to satisfy a judgment.¹⁸¹

Under a Lockean analysis, this is an easy case. Bunstein deliberately deceived the Florida bank, causing damage in that jurisdiction. One may safely assume that Bunstein was aware that Sun Bank was situated in Florida and knew why the bank needed the information about the borrower's assets (meaning that Bunstein's "entry" into the forum state was conscious and voluntary). The falsifications created substantial risks for Sun Bank which asks only to remedy the harm which ensued within Florida court jurisdiction.

This is simple "arising out of reciprocity," no different from any case where a defendant has created risk within the forum state. We need not search for benefits accruing to Bunstein (for example, enhancing his status with his client); risk-creating conduct within a forum state, when it produces actual harm, obligates an actor to respond there for the conduct's consequences.

Conversely, in the actual case, the Eleventh Circuit ruled that Bunstein lacked sufficient minimum contacts with Florida and therefore, the state could not constitutionally exercise personal jurisdiction over him.¹⁸² The court described the contacts as "fortuitous," emphasizing that Bunstein had not placed the phone calls nor sought out Sun Bank's business.¹⁸³ Remarkably, it even concluded that Bunstein could not have foreseen being suable in Florida.¹⁸⁴ This result and reasoning defy common sense. Without question Bunstein could have gauged the effects of his false statements on the bank's lending posture, realizing the possible detrimental consequences for the bank in case of default. The fact that the bank initiated the phone calls does not undercut the magnitude or willingness of Bunstein's actions.

181. *Id.* at 1031-32.

182. *Id.* at 1034-35.

183. *Id.* at 1034.

184. *Id.*

E. Case 5¹⁸⁵

Mr. Overton is a *pro se* plaintiff claiming that a federal officer, Ms. Crepo, illegally and maliciously filed notices of federal tax lien on his property.¹⁸⁶ Because the plaintiff could not connect Crepo with New Mexico (the forum state), the Tenth Circuit summarily affirmed her dismissal from the case for lack of personal jurisdiction.¹⁸⁷ Had Overton had the benefit of legal training, he might have had a fighting chance. Presumably, Crepo is a national or regional officer who had contacts with New Mexico, directly or through her subordinates, by means of communications with a property registry in the forum state. Arguably, the filing of the tax lien could be considered just as much an act of entry as Hess' entering Massachusetts in a car¹⁸⁸ and International Life Insurance Company entering California with an offer to insure Lulu McGee.¹⁸⁹ Crepo derived benefits from New Mexico's property laws and offices, risking substantial harms to property holders in that state, even to the state itself, if her filings proved defective. Under this line of argument, sufficient contacts to the forum could be established, justifying personal jurisdiction.

F. Case 6¹⁹⁰

In this case, the defendant, Netlink, had qualified under the corporation law of Pennsylvania and had done an unspecified amount of business there for three and one-half years,¹⁹¹ after which time it withdrew its Pennsylvania authorization to conduct business.¹⁹² The plaintiff, Bane, a former employee of Netlink, sued for violation of federal age discrimination laws in the Eastern District of Pennsylvania after such withdrawal.¹⁹³

185. *Overton v. United States*, 925 F.2d 1282 (10th Cir. 1991).

186. *Id.* at 1282.

187. *See id.* at 1283 (finding nothing in the record to connect the defendant to New Mexico).

188. *Hess v. Pawloski*, 274 U.S. 352 (1927).

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

190. *Bane v. Netlink*, 925 F.2d 637 (3d Cir. 1991). This case is a fine example of how the *in personam* thicket can cause even the finest of judges to stumble.

191. *Id.* at 639. Pennsylvania law makes a foreign corporation's qualification to do business in the state a consent to "general personal jurisdiction." 42 PA. CONS. STAT. ANN. § 5301(a)(2) (1981 & Supp. 1991).

192. *Id.*

193. *Id.* at 640. Netlink was served by mail in Massachusetts. Telephone Interview with Alan Epstein, Esq., (Jan. 17, 1992).

A Lockean perspective immediately observes that the explicit consent to suit was withdrawn when the defendant left the Commonwealth of Pennsylvania. Therefore, jurisdiction over the corporation in any subsequent suit in that forum would need to be justified by constructive consent, utilizing a balancing fairness analysis. In this particular case, the corporate actions and their effects on the plaintiff occurred outside of Pennsylvania which forced his *in personam* claim into the difficult category of general jurisdiction.¹⁹⁴ If Netlink had reaped large benefits from its connection with the Pennsylvania market, perhaps a case might be made that its Pennsylvania contacts were sufficiently substantial that it should be suable there for its activities elsewhere in the United States.

The Third Circuit does not quantify the level of the defendant's Pennsylvania business activities but proceeds to assert jurisdiction over Netlink there based on an unconventional method of analysis. When the plaintiff's claim arose (his firing in Massachusetts), Netlink's Pennsylvania business certificate was in effect.¹⁹⁵ Because at that time Netlink had invoked the benefits and protections of that state's laws, Netlink was suable there. According to the Third Circuit this "suability" continued until the plaintiff actually sued, despite the fact that the defendant had withdrawn its business certification by then.¹⁹⁶ Doing business is, of course, distinguishable from registering to do business, the latter being a *de jure* affiliation with little *de facto* substance. If Netlink had fired Bane in Pennsylvania, certainly it could be held accountable there for the harmful, lingering effects of its actions in that state. Yet how the act of once registering has the effect of extending jurisdiction over claims arising from Netlink's extra-Pennsylvania activities escapes the imagination.

G. Case 7¹⁹⁷

As in *Keeton*,¹⁹⁸ the libel plaintiff in this case searched for a generous statute of limitations and found one in Florida where he

194. *Bane*, 925 F.2d at 639-40 (only addressing whether there was general jurisdiction and leaving alone the district court's holding that Pennsylvania did not have specific jurisdiction over the defendant).

195. *Id.* at 640.

196. *See id.* at 640-41 (reasoning that the registration statute continued to be in effect so long as the defendant has liability in that state which arose prior to withdrawing).

197. *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990).

198. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). *See supra* notes 77 and 163-66 and accompanying text.

sued entertainer Daryl Hall of the music group "Hall and Oates." While in New York, Hall had made some unkind remarks about Madara, the plaintiff, in a telephone interview with a reporter for *Music Connection*, a California-based magazine.¹⁹⁹ According to the record, some eighteen copies of the offending issue were mailed into Florida.²⁰⁰ In addition, the plaintiff alleged in his brief that additional copies were sold at the newstands.²⁰¹

Although this case borders, jurisdictionally, on the frivolous, it earned seven pages of earnest court of appeals' *Shoe* analysis, including the comment that Hall did not appoint the magazine as his agent to receive service of process.²⁰² Hall's affiliations with Florida were tenuous: some concerts, record sales, and investment in a partnership which invested in a partnership owning property in Florida.²⁰³ None of these contacts related to the alleged tort. The "contacts" weight was, therefore, patently out of balance with the Floridian "power" weight sought to be exercised against the defendant. The court's decision not to assert jurisdiction is consistent then with Lockean analysis.

H. Case 8²⁰⁴

Our next example is a legal malpractice suit brought in the Northern District of Illinois by two Illinois businesses against their Michigan law firms. One defendant had served as general counsel, the other as a securities specialist. Although the Seventh Circuit found that the case qualified for nationwide service under the bankruptcy law,²⁰⁵ "for the sake of thoroughness,"²⁰⁶ the court issued an alternative pro-jurisdiction holding based on minimum contacts analysis.²⁰⁷

This is an easy case argued in a federal appellate court. The defendants, lawyers, had repeatedly entered the forum in order to

199. *Madara*, 916 F.2d at 1513 (quoting Appellant's Record Excerpts and Appendix, A39, A41 (copy of *Music Connection* interview)). Hall had said that the plaintiff was a "small-time" guy who had "screwed" him when they worked together.

200. *Id.* at 1517.

201. *Id.*

202. *See id.* at 1519.

203. *Id.* at 1517.

204. *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233 (7th Cir. 1990), *cert. denied* 111 S. Ct. 968 (1991).

205. *Id.* at 1244.

206. *Id.* at 1245.

207. *See id.* at 1245-49 (determining that the attorneys' alleged conduct giving rise to the malpractice claim was sufficient to subject them to jurisdiction in Illinois).

serve their clients' needs. Their representation included regularly entering into Illinois by mail, phone and personal visits.²⁰⁸ They benefited from the Illinois legal structure which facilitates the practice of law. Simultaneously, they created risks for Illinois residents and businesses if the firms' legal work proved defective. The malpractice claim alleged a failure to warn the plaintiffs against certain unsound business practices in which the plaintiffs were participating, and a failure to disclose conflicts of interests inherent in the defendants' representation. Because both the claims "arose from" acts within the state of Illinois, that state may justifiably claim the power necessary to remediate any harmful consequences of such entry.

I. Case 9²⁰⁹

The penultimate example in our series involves a lawyer welching on his debts to an expert witness he had hired for three cases.²¹⁰ The murkiness of the *Shoe* doctrine enabled the lawyer to perpetrate more injustice by taking the personal jurisdiction question to the Seventh Circuit. This is because a dilatory debtor, especially a lawyer, can fire enough verbal flak from the *Shoe* arsenal to protect himself from paying damages for a frivolous appeal.

The ambiguity inherent in the *Shoe* doctrine veils the fact that when the defendant failed to pay the plaintiff's fees as promised, his breach then "entered" Wisconsin to the detriment of its citizens. This exemplifies *McGee* "arising out of reciprocity" discussed earlier and consequently is a simple case for jurisdiction.²¹¹

208. *Id.* at 1247.

209. *Daniel J. Hartwig Assocs. v. Kanner*, 913 F.2d 1213 (7th Cir. 1990).

210. *Id.* at 1215 (Although the defendant attorney had entered Wisconsin and made three offers to the plaintiff expert witness who accepted them all, he later refused to pay the plaintiff in breach of contract.)

211. Furthermore, the record indicated that the defendant knowingly reached out to a Wisconsin business with which he sustained a continuous, four-year relationship. *Id.* at 1219. Also, the plaintiff's sole locus of business was in Wisconsin and it was there that the defendant first solicited plaintiff's services. *Id.* at 1216. In addition, the plaintiff performed a substantial portion of the contract while physically in Wisconsin, reviewing "voluminous documentation" sent to him by the defendant. *Id.* These affiliating acts of the defendant clearly demonstrate the Lockean reciprocity necessary for a forum state to assert jurisdiction.

J. Case 10²¹²

The last of the series, *Asarco*, like Case 3,²¹³ deals with a ship's cargo lost at sea. This case, however, is somewhat distinguishable by the fact that one defendant, the manager of the ill-fated vessel, had managed twenty vessels entering ports of the forum state, Louisiana, at various times during the preceding five years. In reaching its conclusion that the defendants lacked sufficient minimum contacts to be subject to personal jurisdiction in Louisiana, the Fifth Circuit emphasized the fact that it was the charterers who controlled ports of entry, and not the defendants. This line of reasoning, however, confuses consent with reciprocity. As long as the manager's employees benefited from Louisiana's political order, that it was the choice of others to enter the forum is irrelevant. When there has not been *actual* consent to jurisdiction, Lockean theory turns to a philosophical benefit-burden reciprocity which bases fairness not on an affirmative choice but on the relationship between state and individual.

The defendant manager had contacts with Louisiana consisting of the twenty times it had previously entered the state. The question thus becomes one of evaluating this contact weight against the power sought by Louisiana. Arguably, the ability to assess damages for loss of valuable cargo against a Hong Kong corporation by virtue of laws, federal and state, foreign to that corporation, is an extraordinary exercise of power. In agreement with the conclusion of the Fifth Circuit, the Lockean approach would compel a conclusion that the manager's unrelated prior Louisiana visits were too infrequent and insubstantial to justify such an extraordinary exertion of power.

IX. CONCLUSION

Have I achieved the simplification promised at the outset? I believe so. Assuming that run-of-the-mill powers are asserted, meaning nothing extraordinary in light of the defendant's forum state contacts, the following categories of personal jurisdiction cases now should have a more uniform outcome when tested against Lockean analysis:

212. *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784 (5th Cir. 1990).

213. See *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532 (7th Cir. 1991). See *supra* text accompanying notes 176-79.

1. cases against in-state defendants (including domiciliaries and residents);
2. cases where actual consent is demonstrated;
3. cases where the cause of action is "arising out of" the defendant's contact with the forum state;
4. cases where the defendant has no contact with the forum state.

Undoubtedly, in certain cases there will be some degree of disagreement over the following questions: Where did the claim arise? What was the extent of consent? Was there a nexus between the individual, the action, and the state? No doctrine is free from such "application" tasks. The important contribution of Locke is to provide understanding why these categories are analytically "easy" cases that will produce an arguable contention only occasionally. Understanding and acceptance of the concepts espoused in this essay should aid judges to resolve most *Shoe* motions quickly and smoothly. Judicial acceptance of these concepts will also prevent lawyers from playing jurisdictional games on the basis of the verbal and conceptual ambiguities of *Shoe* and its progeny.

Furthermore, the Lockean analysis advances an ordered, intelligible method for analyzing cases which do not conform to the four categories listed above. These problematic cases are those in which the defendant's out-of-forum activities are the subject of judicial scrutiny or when some extreme measure of forum power is requested. By focusing on the "power versus contacts" reciprocity, a court should be able to reach a fairness judgment more efficiently. Only in a handful of cases will courts justifiably turn to the "other factors" which, unfortunately, have clouded and cluttered *in personam* thinking for decades.

Years ago, Professor Hazard stated that *Pennoyer* had "long since proved inadequate to hold the problem cases in predictable and useful relationship to each other, which is what a conceptual system is for."²¹⁴ While Hazard's important article helped reconcile the branches of *in rem* and *in personam* jurisdiction,²¹⁵ the

214. Hazard, *supra* note 1, at 277-78. Hazard goes on to suggest that *quasi in rem* and *in rem* jurisdiction should be abolished and property merely should become a "transactional event that provides a legitimate basis for plenary jurisdiction pursuant to the minimum-contacts rule." *Id.* at 282.

215. See *Shaffer v. Heitner*, 433 U.S. 186, 199, 205, 210 (1977) (citing Hazard's article).

eminent professor curiously remained satisfied with an arbitrary, structureless theory. "Minimum contacts," in Hazard's mind, called for "arbitrary particularization"²¹⁶ or, a "pointillist process of locating particular cases on one side of the line or the other."²¹⁷

The doctrine of personal jurisdiction, it seems, needs huge blocks of time to reveal its rationality, like a decades-long triple play: from *Pennoyer* to *Shoe* to *Shaffer* to Locke. Perhaps Lockean reciprocity will provide the ordering concept that will substitute rational analysis in lieu of "pointillism", thus ending this wearying jurisdictional game.

216. Hazard, *supra* note 1, at 283 n.149 (arguing that it would be "infinitely preferable to have a sensible general theory with arbitrary categorical subsystems than . . . an unsensible general system with arbitrary categorical subsystems").

217. *Id.* at 274.

