Notre Dame Law Review

Volume 62 | Issue 4 Article 8

1-1-1987

Physical Presence Basis of Personal Jurisdiction Ten Years After Shaffer v. Heitner: A Rule in Search of a Rationale

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The Physical Presence Basis of Personal Jurisdiction Ten Years After *Shaffer v. Heitner*: A Rule in Search of a Rationale

A court must have personal jurisdiction over a party before it may render a binding judgment against him. Modern courts may exercise jurisdiction over an individual in various ways. The oldest, and one of the most controversial, is personally serving the defendant with process while present in the state. This basis is known as the transient presence or physical presence rule. The rule was given constitutional dimensions in the celebrated case of *Pennoyer v. Neff*.[1]

In recent years, commentators have criticized *Pennoyer* as outmoded and obsolete. It is widely thought that the Supreme Court's decision ten years ago in *Shaffer v. Heitner*[2] eliminated the transient presence rule.[3] Courts may have replaced its theoretical basis, but the rule that it came to stand for has survived. While commentators periodically read the rule's obituary, the reality is that the reports of *Pennoyer*'s death, to paraphrase Mark Twain, have been greatly exaggerated.[4]

This note examines the physical presence basis of personal jurisdiction as applied to individuals. Part I traces the development of the rule up to the Supreme Court's decision in *Shaffer*. Part II analyzes *Shaffer* and subsequent Supreme Court cases discussing personal jurisdiction. Part III examines the post-*Shaffer* cases in the lower courts involving the physical presence rule. Part IV asserts that transient presence remains a part of American jurisprudence, but with a somewhat confused theoretical basis, and suggests a theoretical framework for analyzing claims of jurisdiction based on in-state service of process.

I. The Historical Basis for Transient Jurisdiction

"The foundation of jurisdiction is physical power."[5] With that statement Justice Holmes summed up the traditional rationale for personal jurisdiction. The power of a state to exercise in personam jurisdiction over an individual correlates directly to its ability to exercise physical power over that person.[6] Historically, the way that physical power mani-

1 95 U.S. 714 (1877). *See infra* notes 16-26 and accompanying text.

2 433 U.S. 186 (1977). *See infra* notes 71-88 and accompanying text.

3 *See, e.g.*, Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977); Karst, *The Supreme Court 1976 Term*, 91 HARV. L. REV. 1 (1977); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978). Other commentators, concerned that only a broad reading of *Shaffer* would mandate the end of transient jurisdiction, were slightly more cautious in their appraisal of the case's impact. *See* Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); Fyr, Shaffer v. Heitner: *The Supreme Court's Latest Words on State Court Jurisdiction*, 26 EMORY L. J. 739 (1977).

4 Twain, Cable from London to the Associated Press (June 2, 1897).

5 McDonald v. Mabee, 243 U.S. 90, 91 (1915).

6 The common law principle was that a state court had the power to issue a valid judgment in the absence of a traditional basis for jurisdiction if that state's legislature decided to permit it. That

fested itself in jurisdiction was personal service of process. When a person was served with process inside the territorial limits of a state, jurisdiction was complete.

A. *Early Development of the Rule*

Early American decisions viewed jurisdiction over a transient defendant as a given. The Supreme Judicial Court of Massachusettes in *Barrell v. Benjamin*[7] upheld jurisdiction in a case between two Connecticut citizens where the defendant was served with a writ of arrest[8] while in Boston about to embark for his home in Connecticut. The defendant did not even temporarily reside in Massachusetts. The court stated that no basis existed for distinguishing between resident and nonresident defendants.[9] A more important question for the *Barrell* court was whether a nonresident plaintiff could sue a transient defendant. The court found that since a Massachusetts citizen could routinely sue anyone who came into the state, the Constitution required states to extend the same rights and privileges to all United States' citizens.[10]

The few reported decisions from the nineteenth century indicate that the doctrine of obtaining personal jurisdiction over transient defendants based on in-state service of process[11] was settled law.[12] The decisions were apparently based on the concept of power, where a state has authority over anyone found within it. As a sovereign, the authority of a state could not be questioned.

The early cases frequently cited Justice Story's Commentaries on the Conflict of Laws, the earliest major work on the subject. Justice Story not

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judgment was binding in that state's courts. Such a judgment, however, was only necessarily binding in the state that issued it. Other states are not bound to enforce the judgment unless the state court that issued it exercised jurisdiction using one of the traditional bases, such as physical presence. A sister state is not bound to give full faith and credit to a judgment issued without personal jurisdiction as it was traditionally recognized. A state court judgment issued without personal jurisdiction, which a party subsequently sought to enforce in a sister state, was a "futile attempt to extend the authority and control of a state beyond its own territory." Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917). With the adoption of the fourteenth amendment to the United States Constitution, the exercise of jurisdiction without basis became a violation of due process and void even in the state that issued it. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 43 (1934).

7 15 Mass. 354 (1819).

8 Early English practice required the sheriff to bring the defendant physically before the court under a writ of arrest and hold him there until he posted a bond sufficient to cover the civil claim against him. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 626 (5th ed. 1942). Early American decisions supported this concept. A later Massachusetts court recognized that service by summons was equally as effective as service by writ of arrest. Peabody v. Hamilton, 106 Mass. 217, 222 (1870).

9 15 Mass. at 357.

10 *Id.* U.S. CONST. art. IV, § 2, cl. 1. *See also* Roberts v. Knights, 89 Mass. (7 Allen) 449, 451 (1863) (decision based in part on a 1650 statute authorizing jurisdiction over transient defendants).

11 Many cases involve actions to enforce a judgment granted in another state where the action in the first forum state was based solely on in-state service. The willingness of other states to enforce judgments based on transitory presence allowed a plaintiff to sue in any forum in which he could personally serve the defendant, regardless of the inconvenience to the defendant who may have had no contacts whatsoever with the state. The successful plaintiff could then enforce the judgment by bringing a second action in whatever state he could find the defendant's property. *See, e.g.*, Darrah v. Watson, 36 Iowa 116 (1872).

12 The language of Badger v. Towle, 48 Maine 20, 21 (1860), is typical: "This court has jurisdiction in personal actions between parties not resident in the state, if the defendant is found and duly summoned when temporarily within the state." *See also* Lovejoy v. Albee, 33 Maine 414 (1851); Nelson v. Omaley, 6 Maine 218 (1829).

only provides as black letter law that a state has full in personam jurisdiction over everyone present within its territory, but also states the rationale in terms of sovereignty.[13] In this view, the state possesses absolute authority to adjudicate the claims and rights of those within its boundaries and no power to reach outside its territorial limits to bind persons.[14] Each state's power is a function of its sovereignty where each person owes at least temporary allegiance to the sovereign of the territory he is in.[15] Since a sovereign has full authority over its subjects or citizens, the sovereign state has full in personam jurisdiction to adjudicate the rights and liabilities of those present within its borders.

B. *The Rule Becomes Entrenched*

The year 1877 brought the landmark decision in the area, the still famous case of *Pennoyer v. Neff*.[16] This case gave constitutional weight to the rule of physical presence which became both necessary and sufficient to confer full in personam jurisdiction to the courts of a state.[17] In *Pennoyer*, Mitchell, an Oregon citizen, sued Neff, a California citizen, in an Oregon court to recover unpaid legal fees. Neff was not served with process in Oregon.[18] Service was made, pursuant to Oregon statute, by publication. Neff did not appear at the trial and Mitchell obtained a default judgment. At a court ordered sale to satisfy the judgment, property of Neff was sold to Pennoyer.[19]

Neff argued that the sale to Pennoyer was invalid because the Oregon court did not have personal jurisdiction to render a valid judgment over him in the first action.[20] The Supreme Court, with Justice Field writing the majority opinion, agreed with Neff and upheld invalidation of the sale.[21] The Court rested its decision squarely on grounds of state sovereignty. Justice Field described a system of state court jurisdiction that followed from two well-established principles of public law.[22] The twin principles were that each state possessed exclusive jurisdiction over all persons within its territory and no direct authority over persons outside its territory.[23] Justice Field noted that states are independent except where restrained by the Constitution.[24] Among a state's powers is the authority to bind anyone found and served while within the state.[25]

13 J. STORY, COMMENTARIES ON THE CONFLICT BETWEEN FOREIGN AND DOMESTIC LAWS 905-11 (4th ed. 1852).

14 *See Darrah*, 36 Iowa at 120; Putnam v. Dike, 79 Mass. (13 Gray) 535, 536 (1859).

15 J. STORY, *supra* note 13, at 908.

16 95 U.S. 714 (1877).

17 *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 133 (2d ed. 1980).

18 95 U.S. at 716.

19 *Id.* at 719-20.

20 *Id.* at 716.

21 *Id.* at 736.

22 *Id.* at 720.

23 *Id.* at 722. The Court cited Justice Story's treatise, *supra* note 13, as authority for the position.

24 95 U.S. at 722.

25 Justice Field also discussed the fourteenth amendment, even though it did not become effective until after the judgment in the original proceeding by Mitchell against Neff. While the discussion was technically dictum, other courts accepted it as law. The Court stated that the adoption of the fourteenth amendment allowed a person to directly challenge judgments issued without personal jurisdiction in a collateral proceeding. The Court also stated that a judgment issued without per-

The Court found that the Oregon court did not have personal jurisdiction over Neff since he was not personally served while within Oregon.[26]

While the idea that physical presence was necessary for the assertion of jurisdiction quickly vanished,[27] the twin concept of sufficiency of personal service while inside the state persisted. State courts continued to assert jurisdiction based solely on transient presence.[28] The decisions use matter of fact language in discussing the issue and are for the most part conclusory.[29] It is perhaps surprising that citations to *Pennoyer* are conspicuously absent. Most decisions omit *Pennoyer* altogether, and those that include it expressly say that it is supportive, but not controlling.[30] This shows that the physical presence rule of *Pennoyer* merely expressed traditional state law, rather than creating new law.

Despite the general paucity of discussion of principles to justify the physical presence rule in the cases, some state courts discussed the theoretical underpinnings of the state power theory. A Georgia case treated the defendant's mere presence in the state as the functional equivalent of citizenship for jurisdictional purposes.[31] This position finds historical support in Justice Story's treatise. Traditional ideas of sovereignty and power form its basis. The state as sovereign has power to bind all persons within its territory. Persons, by the act of entering the territory, owe temporary allegiance to the local sovereign.[32]

Reed v. Hollister[33] is a variation of this approach, focusing on a person's expectations. The Oregon Supreme Court held that by voluntarily going into the state the defendant submitted to the state's jurisdiction,[34]

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sonal jurisdiction was not only not entitled to full faith and credit in sister states, but was also void in the state that issued it. *Id.* at 732-33.

26 *Id.* at 736.

27 Courts generally accepted three exceptions to the presence requirement applicable between the various states: (1) domicile (A court can exercise jurisdiciton over a person in the state of his domicile, which is normally the place of his home. *See* R. WEINTRAUB, *supra* note 17, at 12-14.); (2) consent (The defendant voluntarily submits to the jurisdiction of the court.); and (3) long-arm jurisdiction (Jurisdiction is based on the defendant performing some act within the state or having some effect within the state.). *See* R. LEFLAR, AMERICAN CONFLICTS LAW §§ 35-42 (3d ed. 1977). *See also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 77 (1934).

28 Lee v. Baird, 139 Ala. 526, 36 So. 720 (1904); Smith v. Gibson, 83 Ala. 284, 3 So. 321 (1888); McDaniel v. Alford, 97 S.E. 673 (Ga. 1918); Reeves v. Southern Ry. Co., 123 Ga. 697, 49 S.E. 674 (1905); Rice v. Brown, 81 Me. 56, 15 A. 334 (1888); Alley v. Caspari, 80 Me. 234, 14 A. 12 (1888); Hieston v. National City Bank of Chicago, 132 Md. 389, 104 A. 281 (1918); Thompson v. Crowell, 148 Mass. 552, 20 N.E. 170 (1889); Johnston v. Trade Ins. Co., 132 Mass. 432 (1882); Williams v. Simon, 128 S.C. 315, 122 S.E. 772 (1924); Ford v. Calhoun, 53 S.C. 106, 30 S.E. 830 (1898); Bowman v. Flint, 37 Tex. Civ. App. 28, 82 S.W. 1049 (1904).

29 *See, e.g., Gibson*, 83 Ala. at 285, 3 So. at 321 where the court stated:

> It is not a debatable question that such actions may be maintained in any jurisdiction in which the defendant may be found, and is legally served with process. However transiently the defendant may have been in the state, the summons having been legally served upon him, the jurisdiction of his person was complete . . . .

30 *Simon*, 128 S.C. 315, 122 S.E. 772; *Calhoun*, 53 S.C. 106, 30 S.E. 830. Only one federal case, Mason v. Connors, 129 F. 831 (D. Vt. 1904), cites *Pennoyer* as controlling authority.

31 "All persons found witin the limits of this state are to be deemed so far citizens thereof as that the right of jurisdiction will attach to such persons." Hines v. Moore, 148 S.E. 162, 164 (Ga. 1929).

32 J. STORY, *supra* note 13, at 908.

33 106 Or. 407, 212 P. 367 (1923). This case involved an action in Oregon state court to enforce a judgment rendered in California. *Id.* at 409, 212 P. at 368. The California court obtained jurisdiction based on the defendant's very temporary presence in the state. *Id.* at 413, 212 P. at 369.

34 *Id.* at 413, 212 P. at 369.

suggesting an expectation justification. By entering a state's territory, a person must reasonably expect he may be brought into court there.[35]

The concept of physical presence as sufficient to grant jurisdiction became fully ingrained into the country's jurisprudence. The First Restatement provided that a state can exercise jurisdiction over anyone voluntarily inside its territory, whether permanently or transiently.[36] Professor Beale, the Reporter for the First Restatement, and perhaps the most influential writer of the first half of this century, fully supported an extreme exercise of transient jurisdiction: "It is immaterial that the person has come into the state for a merely temporary purpose. This is true even though the person is served while in transit through the state."[37]

C. *The Minimum Contacts Test as an Alternative to Physical Presence*

Dissatisfied with the relatively narrow exceptions to the strict *Pennoyer* requirement of physical presence,[38] the Supreme Court in 1945 announced its decision in *International Shoe Co. v. Washington*.[39] The Court shifted away from a mechanical test towards one more in line with current realities. The Court held that due process requires that "in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[40]

The traditional physical presence test of *Pennoyer* survived *International Shoe*. The Court clearly phrased minimum contacts as an alternative to physical presence. The minimum contacts test is an additional jurisdictional means to the physical presence rule, not a replacement.[41] This indicates the depth to which physical presence was ingrained. While announcing a major change in personal jurisdiction, the Court was unwilling to challenge the concept of state power over those physically present within the state.[42]

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35 *Id.* at 414, 212 P. at 369.

36 RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 78 (1934). The Restatement also adds that while common law required personal service of process, modern statutes could permissibly authorize an alternative method of process if they gave reasonable notice to the defendant and the defendant was served while physically present in the state. *Id.* § 78 comment c.

37 J. BEALE, TREATISE ON THE CONFLICT OF LAWS 339-40 (1935).

38 *See supra* note 27.

39 326 U.S. 310 (1945). The state of Washington assessed unemployment compensation taxes on the International Shoe Co., a Delaware corporation with its principal place of business in Missouri. *Id.* at 311-12. It employed 11 to 13 salesmen who resided and worked in Washington. *Id.* at 313. The company refused to pay the tax and the state Tax Commissioner sued in Washington state court. *Id.* at 312. Pursuant to state statute, the Commissioner served the company by serving one of the local sales agents (an act that did not grant jurisdiction under *Pennoyer* since the salesman was not authorized to accept binding service on the company) and by mailing a copy of the process to the company's principal office in Missouri. *Id.* The state trial court and the Supreme Court of Washington upheld jurisdiction. 22 Wash. 2d 146, 154 P.2d 801 (1945). The United States Supreme Court affirmed, holding that the defendant had sufficient minimum contacts to make the assertion of jurisdiction fair. 326 U.S. at 320.

40 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

41 *Id.*

42 It is open to question, however, whether the Court intended with this language to create an exception to the minimum contacts test based on state sovereignty and *Pennoyer*, or instead, whether

This recognition of physical presence as a single factor sufficient to confer jurisdiction is even more striking given the Court's explanation. The Court gave four factors in its minimum contacts analysis: (1) a defendant is subject to jurisdiction in a forum in which he has had continuous and systematic contacts which give rise to the particular litigation involved; (2) the single act or sporadic acts of the defendant are not sufficient to give jurisdiction over acts unrelated to those acts; (3) the continuous acts of the defendant may be so substantial to subject the defendant to jurisdiction on any cause of action; and (4) sporadic acts, or even a single act of the defendant, is sufficient to give jurisdiction for claims arising out of that act or acts if they are of a certain nature or quality.[43] The second factor clearly states that a single act is not sufficient to grant jurisdiction over claims unrelated to that act.[44] Despite this stricture, the Court recognized that presence in the forum was sufficient to grant jurisdiction.[45]

In the late fifties the Supreme Court decided two more important personal jurisdiction cases. *McGee v. International Life Insurance Co.*[46] represents the broadest application of personal jurisdiction given to date by the Supreme Court.[47] The Court upheld a California court's exercise of jurisdiction over a Texas insurance company based on one isolated, although arguably continuing, contact.[48] Importantly, the Court recognized jurisdiction as proper when only one contact existed—the single factor analysis some commentators use to describe exercises of jurisdiction based on a single factor such as in-state service of process.[49] These findings, coupled with the Court's comments on the growing ease of defending lawsuits in foreign states,[50] and that mere inconvenience to the defendant is not sufficient to defeat jurisdiction,[51] point to a broad and

it wanted to indicate that the physical presence of the defendant was itself a sufficient minimum contact.

43 *Id.* at 317-18.

44 The Court stated that it would "lay too great and unreasonable a burden on the corporation to comport with due process." *Id.* at 317. While *International Shoe* spoke in terms of corporations, courts have extended its reasoning to individuals. Moreover, it seems that if it is unfair to require a corporation to defend a suit in a state in which it does at least some business, it is even more unfair to require an individual, with presumably less resources, to defend a suit in a state away from his home on the basis he was fortuitously found and served there.

45 *Id.* at 316.

46 355 U.S. 220 (1957).

47 The defendant was a Texas insurance company that offered to continue a policy issued by Empire Mutual to the plaintiff's decedent, a resident of California. The decedent accepted the offer and mailed premium payments from his home in California to the defendant's offices in Texas. This policy was the only contact defendant had with California. After the death of the decedent, the defendant refused to pay the claim. The beneficiary brought suit in California state court. Defendant was served by registered mail. The California court based its jurisdiction on a state statute that permitted jurisdiction over nonresident insurance companies that held policies with state residents even though a person could not serve the company within the state. The plaintiff obtained a judgment against the insurance company and sought to enforce it in Texas. The Texas courts refused to give the judgment full faith and credit, claiming that the California court lacked personal jurisdiction. *Id.* at 221.

48 *Id.* at 223.

49 *See generally* Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation of the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997 (1978).

50 355 U.S. at 223.

51 *Id.* at 224.

loose application of the minimum contacts analysis of *International Shoe*. *McGee* indicates it is possible that service of process while physically present in the forum may be a single factor sufficient to meet the minimum contacts test, independent of the continuing vitality of the state power concept.[52] *McGee*, citing *Pennoyer*, noted that the due process clause "placed some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries."[53] Thus, the Court recognized both the continued existence of state sovereignty concerns, and by implication, jurisdiction by service of process alone.

The next year, *Hanson v. Denckla*[54] dispelled any ideas that *McGee* signalled a loosening of the jurisdictional restraints the due process clause imposed. The Court stated that the trend away from the rigidity of *Pennoyer* to the minimum contacts analysis of *International Shoe* and *McGee* did not herald the end of restraints on the exercise of state court jurisdiction.[55] While the Court recognized the importance of state sovereignty concerns,[56] it focused on what acts of the defendant are sufficient to meet the minimum contacts test. The Court stressed that the defendant must do something to affiliate himself with the forum. "[I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[57] *McGee* not only restricted the class of defendants that courts could exercise jurisdiction over, it demonstrated the importance of the defendant's purposeful acts. In a case involving the assertion of jurisdiction based solely on in-state service of process, the defendant's voluntary presence in the state could be the single purposeful act required since the person places himself under the protection of that state's laws by entering the state.

Lower courts continued to accept the concept of transient jurisdiction.[58] The Second Restatement recognized that a state has jurisdiction

52 This interpretation is consistent with the approach Justice Stevens took in his concurring opinion in Shaffer v. Heitner, 433 U.S. 186 (1977). *See infra* notes 86-88 and accompanying text.

53 355 U.S. at 222.

54 357 U.S. 235 (1958). The rather convoluted facts of *Hanson* involved the probate of Dora Donner's will after her death in Florida. While domiciled in Pennsylvania Mrs. Donner executed a trust instrument naming a Delaware trust company as trustee. *Id.* at 238. Mrs. Donner later became domiciled in Florida. From time to time she sent orders to Delaware regarding the trust, and received income from the trust while in Florida. *Id.* at 253. After her death, two of her daughters, residuary legatees under the will, brought an action in Florida seeking to have the testamentary appointment of probate property to the trust set aside. *Id.* at 240. A separate action was brought in Delaware by the executrix of the will to determine who was entitled to the trust assets. *Id.* at 242. These cases reached contrary conclusions. The Florida Supreme Court in its holding asserted jurisdiction over the Delaware trustees. *Id.* at 241. The Supreme Court ruled that Florida did not have jurisdiction over the trustees and reversed the Florida ruling. *Id.* at 251.

55 *Id.* at 251.

56 The restraints are not merely to protect defendants against inconvenient litigation, but "[t]hey are a consequence of territorial limitations on the power of the respective States." *Id.*

57 *Id.* at 253.

58 For example, the Minnesota Supreme Court in Nielson v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963), upheld a Minnesota court's exercise of jurisdiction over an Iowa resident on a cause of action arising in Iowa based on service of process while the defendant was temporarily in Minnesota for lunch. *Id.* at 482, 119 N.W.2d at 738. The Minnesota Supreme Court dismissed the defendant's objection to jurisdiction as frivolous. *Id.* at 484, 119 N.W.2d at 739. The court stated

over any individual present in the state, whether permanently or even "for an instant."[59] The exercise of transient jurisdiction reached absurd heights in *Grace v. MacArthur*[60] where residents of Arkansas planned to serve a resident of Illinois on a cause of action arising in Illinois while he was stopped in an Arkansas airport on a flight from Memphis, Tennessee to Dallas, Texas. The flight plan of the commercial airliner changed and the plane did not land in Arkansas.[61] Instead, the process server handed the process to the defendant while the airplane was in flight over Arkansas.[62] The district court found that this constituted service of process within the territorial limits of Arkansas and upheld jurisdiction.[63]

One year before the Supreme Court's decision in *Shaffer v. Heitner*,[64] the First Circuit in *Donald Manter Co., Inc. v. Davis*[65] unambiguously approved transient jurisdiction. A New Hampshire corporation brought suit in New Hampshire against two individuals on a contract made and to be performed in Vermont. The defendant Davis was personally served with process while temporarily in New Hampshire on unrelated business. The other individual was not served and dismissal of the action against him on jurisdictional grounds was unquestioned. The New Hampshire district court also granted Davis' motion to dismiss on grounds that New Hampshire lacked personal jurisdiction.[66] The Court of Appeals, citing "black letter law,"[67] reversed.[68] The First Circuit rejected the defendant's argument that the *International Shoe* line of cases and considerations of fairness rejected transient jurisdiction.[69] The court stated that those cases were concerned "with expanding jurisdiction beyond traditional limits, not with contracting it."[70]

II. The Supreme Court's Recent Reassessment

A. *The* Shaffer *Decision*

The Supreme Court's most important recent decision on personal jurisdiction came a century after *Pennoyer* was decided. *Shaffer v. Heitner*[71]

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that *International Shoe* only dealt with substituted service of process out of state, not personal service while physically present in the state. *Id.* at 483, 119 N.W.2d at 738.

59 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 & comment a (1971). The drafters found this true even if the result is unfair to the defendant or inconsistent with the basic principle of reasonableness underlying jurisdiction. *Id.* Three factors form the basis for the existing rules of jurisdiction. In addition to concerns for fair play and substantial justice, and for protecting interstate relations, the comment cites the force of usage and tradition as the reason for the continuing use of a traditional rule that may no longer comport with modern ideas. *Id.* § 24 comment b (1971).

60 170 F. Supp. 442 (E.D. Ark. 1959).

61 J. MARTIN, CONFLICT OF LAWS 512 n.12 (1978).

62 170 F. Supp. at 443.

63 *Id.* at 447-48.

64 433 U.S. 186 (1977).

65 543 F.2d 419 (1st Cir. 1976).

66 *Id.* at 419-20.

67 *Id.* at 420.

68 *Id.* The court stated that the defendant's remedy for an unfair forum was to move for a change of venue which would protect the defendant "without impinging on an established principle of jurisdiction." *Id.*

69 *Id.*

70 *Id.*

71 433 U.S. 186 (1977).

involved a shareholder's derivative action against twenty-eight current and former directors and officers of the Greyhound Corporation, a Delaware corporation with its principal place of business in Arizona, for breach of fiduciary duty involving certain actions in Oregon.[72] The suit, quasi in rem in nature,[73] was based on the sequestration of common stock in the Greyhound corporation owned by the defendants pursuant to a state statute that all stock in a Delaware corporation is located in Delaware regardless of the actual situs of the certificates.[74] The Supreme Court held that Delaware did not have jurisdiction over the defendants.[75]

Shaffer, like all of the Supreme Court cases discussed in this section, did not involve a defendant personally served with process in the forum state, but Justice Marshall, who wrote the Court's opinion in *Shaffer*, went out of his way to give a holding that purported to bind all applications of jurisdiction, arguably far broader than necessary to dispose of the case.[76] However, since the Supreme Court has not specifically spoken on transient jurisdiction, it is necessary to apply the concepts used in *Shaffer* and its progeny to the physical presence rule. Justice Marshall wrote the Court's decison with seemingly extreme breadth: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[77]

Several aspects of the *Shaffer* opinion have an important bearing on the transient presence basis of jurisdiction. The Court first concluded that state sovereignty, which formed the basis of *Pennoyer*, no longer is the central concern of personal jurisdiction.[78] The Court concluded that

72 The actions led to a significant civil antitrust judgment and criminal contempt fines against the company. *Id.* at 189-90.

73 An action quasi in rem is one in which some property of the defendant is found in the forum state and held to satisfy the plaintiff's claim. The presence of the property alone was thought to provide the jurisdictional basis for the state to exercise judicial jurisdiction over a claim unrelated to that property. The action is not in personam in that any judgment is limited to the amount of the property attached and the defendant's property in other states is not affected. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 3 introductory note (1971).

74 433 U.S. at 190 (citing DEL. CODE ANN., tit. 10, § 366 (1975)). This type of statute declaring that the situs of stock in a corporation is located in the state of incorporation was contrary to § 13 of the Uniform Stock Transfer Act and unique to Delaware. Commentators have criticized this approach. *See* Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973); Note, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579 (1960). In addition to the conceptual problems, the statute did not provide any procedures for a hearing prior to the seizure or permit the defendant to make a limited appearance. Defendants had to either submit to the state's full in personam jurisdiction or forfeit the property. The Delaware state courts focused on the issue of whether the statute violated procedural due process and gave the personal jurisdiction question only summary treatment. Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976).

75 433 U.S. at 216-17.

76 *Id.* at 219 (Stevens, J., concurring). The Court could have based its decision on the issue of the Delaware sequestration statute which was the basis for the state court opinion. Instead, the Court decided the case on a minimum contacts issue that "was never pleaded by appellee, made the subject of discovery, or ruled on by the Delaware courts." *Id.* at 220 (Brennan, J., concurring in part and dissenting in part).

77 *Id.* at 212. The Court did not discuss whether the assertions of jurisdiction upheld in previous cases would be valid under this standard. Instead, it merely stated that to "the extent that prior decisions are inconsistent with this standard, they are overruled." *Id.* n.39.

78 *Id.* at 204. The Court recognized that state power formed the basis for jurisdiction under the *Pennoyer* regime. The state had power over all persons or property found within its borders. *Id.* at 199. Justice Marshall in a footnote dismissed the concerns of the *Hanson* Court 20 years earlier that

International Shoe displaced *Pennoyer* as the basis for in personam jurisdiction.[79] Indeed, Justice Marshall speaks of "the collapse of the in personam wing of *Pennoyer*."[80] The Court explicitly stated that concerns for fairness demands more than the mere presence of property in a state to confer jurisdiction.[81] The presence of property may suggest other ties sufficient to satisfy a minimum contacts test and thus confer jurisdiction, but the plaintiff must establish them.[82]

Justice Marshall emphasized concerns for fairness that the single factor of presence cannot satisfy.[83] Given this concern, and the sweeping language of the opinion, it is perhaps fair to conclude that the Court in *Shaffer* intended for the minimum contacts test to apply to the single factor analysis of personal jurisdiction based on physical presence as well as to quasi in rem actions. But even if the Court intended this, it remains pure dictum since the Court was faced with a case of quasi in rem jurisdiction, not transient presence. Moreover, while the Court intimated that the minimum contacts test, requiring a relationship between the defendant, the forum, and the litigation, had been the correct test for personal jurisdiction since *International Shoe*,[84] the state of the law in the period between *International Shoe* and *Shaffer* differed. Lower courts asserted jurisdiction over defendants based on nothing more than in-state service of process without a minimum contacts analysis.[85] Thus, it is at least questionable whether the Court intended to change the rules regarding transient presence.[86]

Justice Stevens, in a concurring opinion, came to a different conclusion. He viewed the question of jurisdiction as one of fair notice; a person voluntarily entering a state assumes the risk that that state will exercise jurisdiction over him.[87] Thus, the issue to Justice Stevens was one of purposeful availment. This view obviously permits the maintenance of actions based solely on physical presence. Jurisdiction is not

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states would encroach on other states judicial prerogatives. "The *Hanson* Court's statement that restrictions on state jurisdiction 'are a consequence of territorial limitations on the power of respective States,' simply makes the point that the States are defined by their geographic territory." *Id.* at 204 n.20 (citation omitted). *See* note 56 *supra*. It is doubtful that the *Hanson* Court regarded its statement on state sovereignty to be the mere truism that Justice Marshall dismissed. *See* Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 710-11 (1983).

79 433 U.S. at 206.

80 *Id.* at 205.

81 *Id.* at 209.

82 *Id.*

83 *Id.* at 212.

84 *Id.* at 204.

85 *See supra* text accompanying notes 58-70. It is fair to assume that the Court was aware of the state of the law concerning the transient presence rule.

86 This argument is buttressed by combining the holdings of *Shaffer* and *International Shoe*. *Shaffer* held that courts must evaluate all assertions of jurisdiction according to the standards of *International Shoe*. 433 U.S. at 212. However, *International Shoe* expressly removed jurisdiction based on physical presence in the forum state from the scope of its holding. 326 U.S. at 316. The Court in *Shaffer* at a different point described the standard for assessing in personam jurisdiction as "the minimum contacts standard elucidated in *International Shoe*." 433 U.S. at 207. It is unclear whether the Court, in making this statement, took into account the limiting language in *International Shoe* regarding physical presence.

87 433 U.S. at 218 (Stevens, J., concurring).

based on ideas of state power, but on a more modern standard, one of purposeful availment.[88] Under this view, physical presence in the state becomes the one significant contact necessary to support jurisdiction.

B. Shaffer *Refined*

Justice Marshall's dismissal of state sovereignty concerns seemingly was forgotten three years later in *World-Wide Volkswagen Corp. v. Woodson*.[89] While noting that recent cases have relaxed the limits on jurisdiction, Justice White, writing for the majority, asserted that "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we and remain faithful to the principles of interstate federalism embodied in the Constitution."[90]

The case not only illustrated a rebirth of concern for sovereignty by the court, but also demonstrated the change in focus in the sovereignty issue since *Pennoyer*.[91] The primary focus of sovereignty is no longer to *confer* power on a state based on the presence of persons or property within its territory. Rather, it acts to *divest* a state of power over something that is arguably present within its borders, based on concerns for the interests of sister states. However, Justice White defined the minimum contacts standard as having a bifurcated function. The functions are related, but distinguishable, according to Justice White. It not only "protects the defendant against the burdens of litigating in a distant or inconvenient forum," it also "acts to ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[92] Indeed, in some cir-

88 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). Although not at all clear from the opinion, it is possible to read Justice Stevens' concurrence alternately as supporting a continuation of the physical presence exception to the minimum contacts rule explicitly contained in *International Shoe*, 326 U.S. at 316, and possibly contained implicitly in *Shaffer*. This reading would corroborate the conclusion that the ambiguous, though sweeping, language of Justice Marshall in the majority opinion did not signal that the Court intended to do away with the time honored basis of physical presence.

89 444 U.S. 286 (1980). The case involved a products liability action that Harry and Kay Robinson brought for injuries sustained when another car rear-ended their Audi, causing a fire. The accident occurred in Oklahoma where the Robinsons were enroute to Arizona from their former residence in New York. They purchased the car in New York. *Id.* at 288. The Robinsons sued the manufacturer, Audi, the importer, Volkswagen of America, the regional distributer, World-Wide Volkswagen, and the retail dealer, Seaway. *Id.* Judge Woodson of the Oklahoma state district court exercised jurisdiction over all defendants based on the Oklahoma long-arm statute. *Id.* at 289. The Oklahoma Supreme Court upheld this determination. *Id.* at 289-90. Audi and Volkswagen did not appeal. The case came to the Supreme Court on appeal from Seaway and World-Wide. *Id.* at 288-89. The Supreme Court reversed. *Id.* at 299.

90 *Id.* at 292. The Court's reliance on *Hanson* for its sovereignty conclusions is particularly surprising since Justice White totally ignored the *Shaffer* Court's summary dismissal of *Hanson*'s sovereignty concerns. *See supra* note 78.

91 One conclusion was that *World-Wide Volkswagen* transformed sovereignty from a "self-contained quality designed simply to preserve the dignity of the individual state," to "an essential element of interstate federalism." Ripple & Murphy, World-Wide Volkswagen Corp. v. Woodson: *Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65, 75 (1980). Another commentator, speaking with the benefit of added time, concluded bluntly that "the neo-sovereign utterances of the Court since *International Shoe* enjoy scant standing in precedent, amount to little more than fanciful obiter dicta on facts that fell short of satisfying party-fairness standards, and make no discernible decisional difference." Lewis, *supra* note 78, at 716.

92 444 U.S. at 291-92.

cumstances, sovereignty concerns may divest a state of jurisdiction, even if litigation in that state would cause the defendant little or no inconvenience.[93] This view of sovereignty conflicts with the territorial power theory[94] that formed the historical basis of transient jurisdiction.[95]

While *World-Wide Volkswagen* seems to take away jurisdiction based on physical presence with one hand, the decision with the other hand breathes new life into transient jurisdiction with its dicussion of minimum contacts. The Court focused on foreseeability in looking for minimum contacts.[96] Justice White first stated that foreseeability in the sense that a producer should foresee a product finding its way into a state is not by itself sufficient.[97] Foreseeability can, however, form the basis for the exercise of jurisdiction. If the defendant should reasonably foresee that his activities could subject him to the jurisdiction of a state, then a court can exercise jurisdiction consistently with due process.[98] In support of this proposition the Court cited with approval Justice Stevens' concurring opinion in *Shaffer*[99] and also used the purposeful availment language of *Hanson*.[100]

This argument seems to implicitly support the exercise of transient jurisdiction. A court could exercise jurisdiction based on the single act of the defendant if that act gave him notice he was subject to a state's jurisdiction. Justice Stevens pointed out in *Shaffer* that a person should reasonably expect to be subject to a state's jurisdiction based solely on his physical presence there.[101]

The Supreme Court repudiated state sovereignty concerns in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.[102] The case came to the Supreme Court on the issue of whether a Pennsylvania district court could establish personal jurisdiction over a defendant as a sanction for failing to comply with discovery orders regarding jurisdictional facts.[103] The Court upheld jurisdiction.[104]

93 *Id.* at 294.

94 Justice Marshall called it the "mutually exclusive sovereignty of the States." 433 U.S. at 204.

95 Judge Ripple and Ms. Murphy conclude that transient jurisdiction permits judicial overreaching by states that have mere transitory jurisdiction. This deprives states with minimum contacts over the parties and thus a possibly more desirable forum, of their opportunity to litigate the dispute. This in turn creates significant strains on the system of interstate federalism that formed the main concern in *World-Wide Volkswagen*. Ripple & Murphy, *supra* note 91, at 76-77.

96 The Court first looked for "affiliating circumstances" between the defendant and the forum state as the test for minimum contacts. 444 U.S. at 295. The term "affiliating circumstances" is one that the Court also used in defeating the exercise of jurisdiction in Hanson v. Denckla, 357 U.S. 235, 246 (1958), and Kulko v. Superior Court, 436 U.S. 84, 92 (1978).

97 444 U.S. at 295-97.

98 *Id.* at 297.

99 *See supra* notes 87-88 and accompanying text.

100 *See supra* notes 54-57 and accompanying text.

101 433 U.S. at 218 (Stevens, J., concurring).

102 456 U.S. 694 (1982). Given the Court's recent shifting on the issue, it remains to be seen how long the decision in *Insurance Corp.* will last. At the time of this writing, however, it is the Supreme Court's last pronouncement on the sovereignty issue.

103 *Id.* at 697. The case involved an action by a Delaware mining corporation with its principal place of business in the Republic of Guinea to collect on business interruption insurance. The defendants were 14 foreign insurance companies that challenged the personal jurisdiction of the Pennsylvania court. *Id.*

104 *Id.* at 710. The Court went to great lengths to reach the sovereignty issue. *See id.* at 711 (Powell, J., concurring). The Court did not discuss minimum contacts.

Justice White, writing the majority opinion, stated that jurisdictional restrictions are a function of due process which acts to protect individual liberty and not federalism.[105] Justice White explained that the constitutional requirement of personal jurisdiction is a right that protects the individual. If it were otherwise, he reasoned, a defendant could not waive the requirement and a court could not estop a defendant from asserting it.[106]

This language seemingly does away with jurisdiction based on the concepts of sovereignty or state power that had supported physical presence since *Pennoyer*. If personal jurisdiction is a purely personal right, then a state has no authority to assert power over an individual based on its right of sovereignty since sovereignty is not a jurisdictional concern. If the transient presence doctrine continues to have any theoretical validity, it must be based on the purposeful availment and foreseeability test of the minimum contacts analysis of *International Shoe*, or on another theory taking physical presence outside the minimum contacts requirement altogether.

III. The Post-*Shaffer* Transient Presence Cases

After the *Shaffer* decision several commentators quickly declared the death of personal jurisdiction based solely on physical presence.[107] Lower courts are split. But most courts claim that jurisdiction based on physical presence remains alive and well.[108] Courts that support the continued viability of the transient presence rule rely on the state sovereignty concept[109] or an interpretation of *Shaffer* that takes the rule outside the scope of the holding.[110]

A. *Transient Jurisdiction Affirmed*

In 1978, the year after *Shaffer*, the First Circuit in *Driver v. Helms*[111] held that personal jurisdiction established by national service of process under Rule 4 of the Federal Rules of Civil Procedure[112] was proper by placing it under the sovereign power basis.[113] The court found that *Inter-*

105 *Id.* at 703 n.10.

106 *Id.* at 704.

107 *See supra* note 3.

108 *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985); Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982); Ruggieri v. General Well Serv., Inc., 535 F. Supp. 525, 529 (D. Colo. 1982) (dictum); O'Brien v. Eubanks, 701 P.2d 614, 616 (Colo. Ct. App. 1984), *cert. denied*, 106 S. Ct. 272 (1985); Hutto v. Plagens, 254 Ga. 512, 513, 330 S.E.2d 341, 343 (1985); Gant v. Gant, 254 Ga. 239, 327 S.E.2d 723, 725 (1985); Humphrey v. Langford, 246 Ga. 732, 733-34, 273 S.E.2d 22, 23-24 (1980); McLeod v. McLeod, 383 A.2d 39 (Me. 1978); Mannio v. Davenport, 99 Wis. 2d 602, 299 N.W.2d 823, 826 (1981) (dictum); Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 273 N.W.2d 285, 287 (1979) (dictum).

109 *See supra* notes 77-82 and accompanying text.

110 *See supra* notes 84-86 and accompanying text.

111 577 F.2d 147 (1st Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

112 "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." FED. R. CIV. P. 4(f).

113 577 F.2d at 156. The court analogized the United States to a single state for jurisdictional purposes under statutes that allow service against defendants anywhere in the country. *Id.* The

national Shoe and *Shaffer* did not change the physical presence rule: "The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries."[114] The court clearly adopted the view that *Shaffer* did not disturb the physical presence exception included in the *International Shoe* holding,[115] and thus the power of a state over all persons present within its boundaries remains intact.

The Fifth Circuit squarely faced the issue of transient jurisdiction in *Amusement Equipment, Inc. v. Mordelt*.[116] Defendant Mordelt was personally served while temporarily in New Orleans, Louisiana. The Fifth Circuit exercised jurisdiction solely on service of process; the court noted that the defendant did not have sufficient minimum contacts with Louisiana to support jurisdiction.[117]

Judge Goldberg, writing for a unanimous panel, asserted both sovereignty concerns, and an interpretation of *Shaffer* taking transient presence outside of the minimum contacts requirement, to hold that "the rule of transient jurisdiction has life left in it yet."[118] The court agreed with the First Circuit's view of sovereignty in *Driver*[119] and elaborated on why transient presence jurisdiction did not violate due process.[120] The court distinguished exercises of sovereignty through jurisdiction from limitations on sovereignty.[121] The court reasoned that since states undeniably retain some sovereignty, even after recent Supreme Court cases limiting it, they may still exercise it in the quintessential sovereign act—the assertion of power over persons within their territory.[122] The court found that *Shaffer* did not mandate elimination of the transient presence rule. The court noted that none of the line of Supreme Court personal jurisdiction cases dealt with an individual served within the state.[123] Instead, the Supreme Court in *Shaffer* directed attention to *International Shoe* which explicitly recognized a physical presence exception to the minimum contacts rule.[124]

Judge Goldberg, however, recognized that the recent Supreme Court cases have left a wooden, mechanical application of the physical

court stated that the authority of the United States as a unit was the same as a single state within its territory. *Id.* n.25. The case involved a class action suit against federal government officials in their individual and official capacities for illegal interference with the mails. *Id.* at 149. The court allowed jurisdiction based on service of process. *Id.* at 155.

114 *Id.* The court also stated that when a defendant is found and served within the territorial limits of a state, "minimum contacts need not be established, and jurisdiction may be asserted on the basis of the state's sovereignty." *Id.* at 156 n.25.

115 *See supra* notes 84-86 and accompanying text.

116 779 F.2d 264 (5th Cir. 1985).

117 *Id.* at 267 n.4. The Louisiana district court made explicit findings on minimum contacts. 595 F. Supp. 125, 130-31 (E.D. La. 1984). The district court granted defendant's motion to dismiss since the court interpreted *Shaffer* as eliminating transient jurisdiction. *Id.* at 128-29 n.3.

118 779 F.2d at 271. The court first noted the conclusions of commentators that *Shaffer* severely undercut the transient presence basis and admitted that "*Shaffer* rendered the black letter gray." *Id.* at 268.

119 *Id.* at 269 n.10. *See supra* note 111.

120 779 F.2d at 268.

121 *Id.* at 270.

122 *Id.*

123 *Id.* at 268.

124 779 F.2d at 269. *See supra* notes 84-86 and accompanying text.

presence rule impossible. Judge Goldberg cited *Insurance Corp.*[125] where the Supreme Court made clear that courts must measure assertions of personal jurisdiction against the due process clause and considerations of fairness.[126] Judge Goldberg concluded that jurisdiction based on in-state service of process conformed with fairness principles.[127] The court emphasized that the defendant's purposeful act of entering the forum put him at risk of being sued there: "By entering Louisiana, he subjected himself to sovereign powers from which, had he remained outside the state, he was otherwise protected."[128] The court held that in-state service was decisive since "a traditional notion of fair play and substantial justice has been that presence alone is sufficient to support personal jurisdiction."[129] This approach clearly emphasized elements of foreseeability and echoed Justice Stevens' concurrence in *Shaffer*.[130]

Despite holding that mere presence alone comports with due process, the court found that other factors showed jurisdiction in Louisiana was fair.[131] Even though these factors would not amount to sufficient minimum contacts for an out-of-state defendant, they did mitigate against the harshness of an application of the transient presence rule.[132] Presumably, although Judge Goldberg did not address the issue, the court would not apply the transient presence rule in a situation where it would be unfair to do so.[133]

Most of the other courts holding mere presence is sufficient to confer jurisdiction also read *Shaffer* to not disturb the physical presence ex-

125 *See supra* note 102.

126 779 F.2d at 269-70.

127 *Id.* at 270.

128 *Id.*

129 *Id.*

130 *See supra* notes 87-88 and accompanying text.

131 Included among these factors were that the defendant entered the state for business reasons related to the subject matter of the litigation, the burden of litigating in Louisiana was not significantly greater than other available forums, and the defendant could protect himself from inconvenience by using forum non conveniens, change of venue, or choice of law rules. *Id.* at 271. Aluminal Indus., Inc. v. Newtown Commercial Assocs., 89 F.R.D. 326 (S.D.N.Y. 1980) takes this approach. In *Aluminal Indus.* the court routinely upheld jurisdiction based solely on service of process since minimum contacts were lacking. The court dismissed *Shaffer* as inapplicable in cases where the defendant has been personally served in the state. *Id.* at 329. However, the court mitigated the potential harshness of this interpretation by granting the defendant's motion for a change of venue, based mostly on consideration of convenience for the parties and witnesses. *Id.* at 330. Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982) similarly held that *Shaffer* did not change the black letter law that physical presence confers jurisdiction. The court stated that it was "unwilling to reject this established jurisdictional principle without direction from higher authority." *Id.* at 594. The court then went on to dismiss the action on forum non conveniens grounds. The court found that the parties should properly bring the action in a West German court, citing "public interest" factors. The court concluded that the only factor favoring jurisdiction in New York was the plaintiff's choice of forum. The court then weighed the reasons for and against retaining the case and determined that "where the burden to defendants of trying the case here is likely to be great, and there is little public interest in the case, application of the doctrine of forum non conveniens is appropriate." *Id.* at 595.

132 779 F.2d at 271.

133 This approach would eliminate absurd application of the rule, such as in *Grace*, *supra* notes 60-63 and accompanying text. The court looked at the problem as a practical one, and found that with this defendant in this situation it was fair to assert jurisdiction based on the single act of being served with process while within the state. Physical presence within a state becomes the one contact necessary under due process.

ception contained in *International Shoe*.[134] The Georgia Supreme Court in *Humphrey v. Langford*[135] stated that the Supreme Court has yet to rule on the exact issue. This court did not stop there; a unanimous court found that purposeful availment played a role. The court said that a person transiently within Georgia could expect to be protected by its laws and should therefore be subject to the jurisdiction of its courts.[136] The court mentioned, but unfortunately did not develop, the idea that physical presence alone may fulfill a minimum contacts requirement.[137] The court also discussed the public policy benefits of continuing the transient presence rule. The court indicated that due process equally protects plaintiffs' and defendants' rights.[138] If a defendant cannot be sued wherever found, he may avoid suit altogether by not establishing minimum contacts with any one state.[139]

B. *Transient Jurisdiction Rejected*

A few courts have interpreted *Shaffer* to eliminate the transient presence rule. In fact, given the widespread criticism of the rule in the literature and the pronouncements of its death following *Shaffer*, it is perhaps surprising that so few courts have taken strong stances against the rule.

The district court in *Schreiber v. Allis-Chalmers Corp.*[140] declared that jurisdiction based on a state's sovereign power was "conclusively declared obsolescent" by the broad language of *Shaffer*.[141] But the case involved a corporate defendant and thus cannot be read as holding that transient jurisdiction for individuals violates due process. However, the court left no doubt as to its view of the mandates of *Shaffer*. The court

134 *See, e.g.*, Ruggieri v. General Well Serv., Inc., 535 F. Supp. 525, 529 (D. Colo. 1982) (citing *Pennoyer, supra* notes 16-26) ("If a defendant is physically present in the forum state, and is properly served with process, he will normally be subject to the personal jurisdiction of that state's courts . . ."") (dictum); O'Brien v. Eubanks, 701 P.2d 614, 616 (Colo. App. 1984) (citing *International Shoe, supra* notes 39-45, and *Pennoyer, supra* notes 16-26) ("Where, as in this case, service is made upon a natural person found within the state, the minimum contacts analysis is inapplicable."); Hutto v. Plagens, 254 Ga. 512, 513, 330 S.E.2d 341, 343 (1985) (reiterates the "long-standing principle that service of process on a nonresident person who is physically present in the state, albeit briefly, is a sufficient basis for an personam jurisdiction"); Gant v. Gant, 254 Ga. 239, 327 S.E.2d 723, 725 (1985) (jurisdiction based solely on service of process is proper); Humphrey v. Langford, 246 Ga. 732, 733-34, 273 S.E.2d 22, 23-24 (1980); Mannio v. Davenport, 99 Wis. 2d 602, 299 N.W.2d 823, 826 (1981) ("The essence of personal jurisdiction is a matter of physical presence within, or minimum contacts with, the state.") (dictum); Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 273 N.W.2d 285, 287 (1979) (Supreme Court has not imposed a minimum contacts requirement on jurisdiction where there is personal service) (dictum).

135 246 Ga. 732, 273 S.E.2d 22 (1980).

136 *Id.* at 735, 273 S.E.2d at 24. It should be noted that the court stated this with no small degree of chauvinism: "This sovereign state has an adequate court system and is capable of rendering justice between litigants as well as any court system." *Id.*

137 *Id.* at 733, 273 S.E.2d at 23.

138 *Id.* at 734, 273 S.E.2d at 24.

139 *Id.* The Supreme Judicial Court of Maine used this argument to uphold jurisdiction over a defendant who resided outside of the country and had no contacts with any state. He was served while on a two week visit to his parents' home in Maine before departing for Hong Kong. The litigation did not arise out of any activities in Maine. If the court did not exercise jurisdiction based on this transient presence, then the defendant would have been immune to suit in the United States. McLeod v. McLeod, 383 A.2d 39, 41, 44 (Me. 1978).

140 448 F. Supp. 1079 (D. Kan. 1978).

141 *Id.* at 1088-89.

stated that "physical presence is no longer either necessary or sufficient for in personam actions."[142] Instead, a minimum contacts analysis is necessary.[143] *Schreiber* quotes Professor Leflar as saying that *Shaffer* "proves beyond question that old jurisdictional dogma is not sacred. If century-old law on in rem jurisdiction can be changed, so can other rules that are believed to operate unfairly."[144]

Nehemiah v. Athletics Congress of U.S.A.[145] contained similar dicta that physical presence alone may no longer be sufficient. This case involved jurisdiction over an unincorporated association based on the personal service of one of its officers while present in the forum state.[146] The Third Circuit in *Nehemiah* treated the association like a corporation.[147] Accordingly, service on its agent would not, in the absence of minimum contacts, confer jurisdiction.[148] The court based this conclusion on *Shaffer*.[149] The court explained that if the presence of property no longer is sufficient to grant jurisdiction, then "it is difficult to find a basis in logic and fairness to conclude that the more fleeting physical presence of a non-resident person can support personal jurisdiction."[150] While this language suggests that transient presence is insufficient for individuals, the court stated that courts may continue to accept a physical presence exception to the minimum contacts rule based on historical precedent.[151] Thus, courts should limit *Nehemiah*'s reasoning to corporations and unincorporated associations.

Only three cases have squarely held that the physical presence of an individual, by itself, no longer confers jurisdiction.[152] The most extensive analysis of the antiphysical presence cases came in *Harold M. Pitman Co. v. Typecraft Software*.[153] This court concluded that *International Shoe* replaced the sovereignty basis of *Pennoyer*, and *Shaffer* declared a preference that all courts judge assertions of jurisdiction by a single minimum

142 *Id.* at 1089 (quoting Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977)).

143 *Id.*

144 R. LEFLAR, *supra* note 27, § 24A, at 43. But Professor Leflar also indicated that *Shaffer* left a number of questions unanswered, and said that the decision may not be as broad as a first look at its language would indicate. *Id.* at 42.

145 765 F.2d 42 (3d Cir. 1985).

146 *Id.* at 44. The president of the association was served at the Meadowlands Sports Complex in New Jersey while attending a sports event unrelated to this litigation. The New Jersey district court denied defendant's motion to dismiss for lack of personal jurisdiction. *Id.*

147 *Id.* at 45-46.

148 *Id.* at 47.

149 *Id.*

150 *Id.*

151 *Id.*

152 Harold M. Pitman Co. v. Typecraft Software, 626 F. Supp. 305 (N.D. Ill. 1986); Amusement Equip., Inc. v. Mordelt, 595 F. Supp. 125 (E.D. La. 1984), *rev'd*, 779 F.2d 264 (5th Cir. 1985); Bershaw v. Sarbacher, 40 Wash. App. 653, 700 P.2d 347 (1985). *Mordelt* was specifically overruled on this point. *See supra* text accompanying notes 116-24. The district court in *Mordelt* concluded that *Shaffer* rendered the theoretical underpinnings of physical presence, *i.e.*, the sovereignty concerns of *Pennoyer*, obsolete. 595 F. Supp. at 129 n.3.

153 626 F. Supp. 305 (N.D. Ill. 1986). This case involved an action by Pitman, an Illinois corporation with its principal place of business in New Jersey, against Typecraft, a British company, and O'Connor, individually and as an officer of Typecraft. O'Connor was personally served with process while transiently in Illinois to attend a three-day trade convention. *Id.* at 306-07.

contacts standard.[154] The court added the public policy argument that allowing jurisdiction based on presence alone over an individual but not his property accords an individual less protection than his property. The court characterized this situation as an "unfair result" that the *Shaffer* Court could not have intended.[155]

IV. A Framework Based on Purposeful Availment

The case law since *Shaffer* is fragmented and contradictory. Courts have taken conflicting positions on the impact of *Shaffer* on the transient presence rule. While it is clear that the physical presence rule no longer stands on the firm ground of *Pennoyer*, it is not clear what standard will replace the bright line rule. Since the outer limits of jurisdiction are marked by the due process clause[156] it is of vital constitutional importance to have a single standard for the assertion of in personam jurisdiction based on physical presence. Courts should not allow decisions of constitutional dimension to vary according to what part of the country suit is brought. Supreme Court guidance has been conspicuously absent in this area. However, given the Court's current direction, when the Court rules on the issue it will probably put severe limitations on the use of transitory presence jurisdiction. But it is not clear that these limitations will eliminate it.

Significant reasons remain, even in this highly mobile age, for retaining some form of a physical presence rule. Chief among these is the certainty of providing the plaintiff with a forum.[157] If a defendant does not have minimum contacts with or a domicile in any state he may be invulnerable to suit in America. While a physical presence rule will not protect a plaintiff where the defendant cannot be found anywhere, it provides a potential forum. Sufficient protections exist to prevent unfairness to the defendant.[158]

Even with the retention of a physical presence basis for jurisdiction, the theoretical basis cannot be the same as during the *Pennoyer* era. Considerations of state sovereignty that led to the power concept of jurisdiction have become outmoded. In their place the Supreme Court has put considerations of fairness.[159] Any assertion of jurisdiction based on physical presence must pass muster under one of the various tests the Supreme Court has used in describing the minimum contacts analysis.[160] Likewise, courts should not justify the physical presence rule as a contin-

154 *Id.* at 312. *See Shaffer*, 433 U.S. at 209. The court's conclusion that *Shaffer* mandates that courts judge all jurisdiction issues by the minimum contacts standard is undermined by the court's heavy reliance on the district court opinion in *Mordelt*, a decision the Fifth Circuit subsequently overruled.

155 626 F. Supp. at 313.

156 *See generally* R. WEINTRAUB, *supra* note 17, § 4.3.

157 *See* McLeod v. McLeod, 383 A.2d 39 (Me. 1978). *See also* Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

158 *See infra* notes 168-78 and accompanying text.

159 *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

160 Principally, this has been a triangular relationship between the defendant, the forum, and the litigation. *Id.*

uation of *Pennoyer* under the exception contained in *International Shoe*.[161] Recognizing physical presence as a sui generis[162] historical exception to minimum contacts undercuts the entire basis for minimum contacts jurisdiction. Surely the Court in *Shaffer* did not intend such a result when it said that all exercises of jurisdiction rest on the single standard of minimum contacts.[163] By recognizing physical presence as an exception to minimum contacts, courts are in reality continuing the outmoded theoretical framework of *Pennoyer*, a framework the Supreme Court specifically repudiated.[164]

A better rationale is the purposeful availment analysis. Under this rationale, courts base jurisdiction over a defendant on physical presence because he has purposefully availed himself of the protection of the forum state's laws by voluntarily entering it.[165] The defendant knowingly assumes the risk that he will be called into that state's courts; by entering that state he has served his own personal purpose and should not escape the responsibilities of that privilege.[166]

The revised Restatement provides a useful reformulation of the physical presence rule.[167] It provides that "[a] state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."[168] Courts may exercise jurisdiction only where the defendant's relationship to the state can be described as significant.[169] Taken literally, it is hard to see how this differs from a minimum contacts analysis. But taken in the context of the traditional physical presence rule, it is a much looser standard than minimum contacts because the presumption is in favor of finding jurisdiction when the defendant has been personally served in the forum state.

A court should hold that physical presence is prima facie evidence of a jurisdictional nexus, but not conclusive. If the defendant then produced evidence that this exercise of jurisdiction would be unreasonable, the court should refuse to take jurisdiction. While this resembles dismissal on forum non conveniens grounds,[170] the desision is actually based

161 *See supra* notes 84-86 and accompanying text.

162 Of its own kind or class. BLACK'S LAW DICTIONARY 1286 (5th ed. 1981).

163 *See supra* note 77 and accompanying text.

164 *See Shaffer*, 433 U.S. at 204.

165 *See id.* at 217-19 (Stevens, J., concurring); *supra* notes 87-88 and accompanying text.

166 *See* Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611-12 (1979). For example, a case like *Grace*, *supra* notes 60-63, could not happen under a purposeful availment analysis. The defendant there did not voluntarily enter Arkansas for any reason of his own. Rather, he was taken into Arkansas airspace by the unilateral act of another, the airline on which he was a passenger. Because he did not affirmatively place himself under the protection of Arkansas law, there is no reasonable justification for allowing Arkansas to hold him accountable in its courts, in the absence of other affiliating contacts.

167 For a discussion of the position the Second Restatement took before *Shaffer*, see *supra* note 59 and accompanying text.

168 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (Tent. Draft April 15, 1986).

169 *Id.* at comment b.

170 *See infra* notes 180-84 and accompanying text.

on jurisdictional grounds. The practical effect is negligible,[171] but the distinction is important to note. Courts will also properly retain jurisdiction based on the mere fact that the defendant would not likely be called to court in another forum.[172] If no evidence exists that jurisdiction in this forum is constitutionally unreasonable, then that court should retain jurisdiction. Of course, this does not mean that the defendant has no other relief. If the forum is seriously inconvenient, he may move for dismissal on forum non conveniens grounds.[173] Obviously, a finding that the forum is inconvenient for litigation will require a lesser standard of unreasonableness than the jurisdictional standard.[174]

In addition to the new constitutional requirement of reasonableness and the doctrine of forum non conveniens, other protections exist for the defendant to avoid suit in a state based solely on personal service there. Traditionally, courts recognize several circumstances where personal service while physically present in the forum does not confer jurisdiction.[175] Where the defendant's presence in the state is due to fraud or force, courts should not exercise jurisdiction.[176] Immunity has also been granted to nonresidents temporarily in the state to attend civil or criminal proceedings, whether as parties, witnesses, or attorneys.[177] However, many states are shifting away from the immunity concept and grouping all arguments under forum non conveniens.[178]

Much of the criticism of the transient presence rule points out that the forum may have no connection with either the defendant or the subject matter of the litigation.[179] To mitigate against the dangers of forcing the defendant to litigate in an inconvenient forum, courts should use the doctrine of forum non conveniens[180] in addition to requiring reasonable-

171 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 comment c (Tent. Draft April 15, 1986).

172 *Id.* at comment b. This result may seem self contradictory; if the court has no constitutional basis for jurisdiction in the first place, then bare necessity should not create a constitutionally acceptable basis. Under this analysis, however, special circumstances are what serve to divest a state that presumptively has jurisdiction from that jurisdiction. Since the lack of an alternative forum is in itself a special circumstance that calls for the court to retain jurisdiction, jurisdiction is simply not relinquished, rather than acquired by special circumstance.

173 *See infra* notes 180-84 and accompanying text.

174 *See* Lau v. Chicago & N.W. Ry., 14 Wis. 2d 329, 111 N.W.2d 158, 165 (1961).

175 These immunities are a matter of local law, not constitutional mandates. *See, e.g.*, R. LEFLAR, *supra* note 27, § 27.

176 *See, e.g.*, Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937). In criminal trials, force or fraud is no defense to jurisdiction. Frisbie v. Collins, 342 U.S. 519 (1952).

177 *See, e.g.*, Shapiro & Son Curtain Corp. v. Glass, 348 F.2d 460 (2d Cir. 1965); Steelman v. Fowler, 234 Ga. 706, 217 S.E.2d 285 (1975); Lyf-Alum, Inc. v. C. & M. Aluminum Supply Corp., 29 Wis. 2d 593, 139 N.W.2d 601 (1966). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 83 comment b (1971).

178 R. LEFLAR, *supra* note 27, § 27.

179 *See, e.g.*, Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 744 (1981).

180 Factors commonly examined by courts in deciding whether to grant dismissal on forum non conveniens grounds include: The relative ease of access to proof; the availability of process to obtain attendance of unwilling witnesses; the relative expenses of litigating in different forums; the administrative difficulties or burdens for the forum court in deciding a case without contacts to the forum state; and the choice of law. For the leading case in the area, see Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

Professor Ehrenzweig, one of the most vocal opponents of the transient presence rule, predicted that courts would eliminate it and replace it with a general forum non conveniens analysis.

ness. A court that finds it is a seriously inconvenient forum should dismiss the case and send the parties to another, more convenient, specified forum.[181] With this doctrine courts should refuse jurisdiction over a case that has no contacts with the forum by requiring the plaintiff to bring the action in another forum.[182] Courts are making increasing use of forum non conveniens[183] and can successfully employ it to prevent abuses of the physical presence rule.[184]

V. Conclusion

Obtaining personal jurisdiction by personally serving the defendant while he is physically present in the forum state has been one of the most enduring principles of American law. While the decision ten years ago in *Shaffer* cast significant doubt on the continued vitality of the doctrine in the eyes of scholarly commentators, the decisions of most courts have been otherwise.[185]

Given the desire of courts to maintain presence based jurisdiction, the possible advantages in doing so, and the availability of adequate safeguards to protect against unfair results, it seems clear that jurisdiction based on physical presence will continue, at least until the Supreme Court specifically holds otherwise. A superior analytical framework to historical deference exists in a purposeful availment analysis. For now, however, the ghost, if not the law, of *Pennoyer* lives on.

Eric P. Heichel

Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 310-14 (1956).

181 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

182 The court will normally condition dismissal on the defendant's agreement to submit to the alternative forum's jurisdiction, or will stay its own dismissal until the defendant meets the conditions imposed. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 comment e (1971).

183 R. WEINTRAUB, *supra* note 17, § 4.33.

184 Bernstine, *supra* note 3, at 67. *But see* Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 590 (1979).

185 One commentator referred to an "unsurmountable unwillingness . . . to deny that a person who is physically handed a summons within the territorial jurisdiction of the court cannot be made to attend and be heard." Glen, *supra* note 166, at 613-14.