

Washington University Law Review

Volume 1978

Issue 4 A *Tribute to Arno Cumming Becht*

January 1978

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Recommended Citation

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CASE COMMENTS

UNIFIED JURISDICTIONAL TEST APPLIED TO IN PERSONAM JURISDICTION

Kulko v. Superior Court, 436 U.S. 84 (1978)

In *Kulko v. Superior Court*,¹ the Supreme Court clarified the application of the unified jurisdictional standard² to assertions of in personam jurisdiction.

The Kulkos, while domiciled in New York, were married in California in 1959 during Mr. Kulko's brief stopover en route to overseas military duty.³ Mrs. Kulko immediately returned to New York and Mr. Kulko joined her there upon completing his overseas service. In 1972 Mrs. Kulko moved to California while Mr. Kulko and their two children remained in New York. Shortly thereafter, she returned to New York to execute a separation agreement, which provided that the children would remain in their father's custody during the school year but would spend vacation periods with her. The agreement, which also provided for Mr. Kulko's payment of child support, was incorporated into the terms of a Haitian divorce decree Mrs. Kulko subsequently obtained.⁴

In 1973 when their daughter expressed her desire to reverse the custody schedule—to live with her mother during the school year and with her father during vacation periods—Mr. Kulko acquiesced and purchased a one-way plane ticket to California for her.⁵ In 1976 the former Mrs. Kulko, at her son's request and without Mr. Kulko's knowledge, sent her son a one-way plane ticket, which he used to join his sister and mother in California.⁶ She then brought an action in California to establish the Haitian divorce decree as a California judgment and to modify it to grant her custody of the children and an increase in child support payments.⁷

Appearing specially to contest the California court's assertion of personal jurisdiction, Kulko moved to quash service, arguing that he lack-

1. 436 U.S. 84 (1978).

2. *See Shaffer v. Heitner*, 433 U.S. 186 (1977).

3. 436 U.S. at 86.

4. *Id.* at 86-87.

5. *Id.* at 87.

6. *Id.* at 88.

7. *Id.* at 86-88.

ed sufficient "minimum contacts" with California to be required to defend a child support and custody suit there.⁸ Upon summary denial of his motion,⁹ Kulko petitioned the California Court of Appeal for a writ of mandate.¹⁰ The appellate court affirmed the trial court's denial, as did the California Supreme Court.¹¹ Treating the appeal as a petition for a writ of certiorari,¹² the United States Supreme Court reversed and *held*: A nonresident's acquiescence in his child's desire to live with her mother in the forum and his purchase of a one-way plane ticket for that purpose is not sufficient contact to justify the assertion of in personam jurisdiction in a claim for increased child support.¹³

The fourteenth amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law.¹⁴ The seminal decision in *Pennoyer v. Neff*¹⁵ introduced the notion of due process into modern jurisdictional law. Bringing an ejectment action in federal court in Oregon, Neff collaterally attacked an Oregon state

8. *Id.*

9. *Id.*

10. 63 Cal. App. 3d 417, 133 Cal. Rptr. 627 (1976).

11. 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977).

12. 436 U.S. at 90 n.4.

13. *Id.* at 93, 95-96.

14. U.S. CONST. amend. XIV, § 1, provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." The operative phrase, "due process of law," comes from chapter 3 of the Statute of 28 Edward III (1355), which provided: "No man of what state or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought in answer by due process of the law." See E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 90-91 (1948). Historically, due process of law was an "authoritative term for the established ways of justice." Hamilton, *The Path of Due Process of Law*, in *AMERICAN CONSTITUTIONAL LAW* 132 (L. Levy ed. 1966). See also *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting).

One of the most established of judicial procedures inherited from the common law was the theory that a sovereign state may exercise jurisdiction only over persons or property within its territory. A corollary is that if a sovereign state asserted extraterritorial jurisdiction over persons or property, that act was contrary to the established ways of justice and therefore void. E. CORWIN, *THE CONSTITUTION* 262 (1954). Under the United States Constitution, any judgment so procured is not entitled to full faith and credit. U.S. CONST. art. IV provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." See, e.g., *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1851); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915 (1960). See generally J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 754 (8th ed. 1883). Consequently, the common law recognized two bases for asserting jurisdiction over nonresident defendants: presence within the territory and actual consent to be bound by the judgment of the court. *Developments in the Law, supra*, at 916-17.

15. 95 U.S. 714 (1877).

court default judgment entered against him.¹⁶ On appeal, the Supreme Court declared the state court judgment void because procured without jurisdiction over either Neff's person or property¹⁷ and restated the territorial bases for in personam and in rem jurisdiction.¹⁸ *Pennoyer's* pervasive influence on the development of personal jurisdiction law is attributable to Justice Field's defining of "full faith and credit"¹⁹ in terms of due process;²⁰ that is, a judgment is entitled to full faith and credit only if the jurisdictional requirements of due process have first been satisfied.²¹ On the one hand, full faith and credit is fundamentally a power concept.²² Based on territoriality, it is designed to permit sov-

16. *Id.* at 715-16.

17. The state court action had been brought by one Mitchell for less than \$300, which Neff allegedly owed him for legal services. The state court asserted in personam jurisdiction over Neff pursuant to an Oregon statute that provided for service of process by publication in suits against nonresidents who owned property within the state. Mitchell did not seek attachment of the property prior to his suit, relying instead on the Oregon statute's provision for in personam jurisdiction. Upon Neff's default, plaintiff executed his judgment against Neff's land, which was then sold to Pennoyer at a sheriff's sale. *Id.* at 719-20.

The Supreme Court held that the state court never acquired in personam jurisdiction because there was no personal service of process within the state. "Process sent to [a person] out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Id.* at 727. Because Neff's land was not attached prior to the default judgment, the Oregon court did not have in rem jurisdiction, and the Court concluded that "[i]f the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it." *Id.* at 728.

18. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

Id. at 722. See note 14 *supra* and accompanying text.

19. U.S. CONST. art. IV, § 1, cl. 1. See note 14 *supra*.

20. 95 U.S. at 729-33.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Id. at 733.

21. See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 568, 572 (1958); *Developments in the Law*, *supra* note 14, at 917.

22. See THE FEDERALIST NO. 42 (J. Madison); NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 546-47 (J. Madison rpt. 1966).

ereigns to coexist within a federal system.²³ On the other hand, due process, when reduced to its lowest common denominator, connotes fairness.²⁴ Phrasing the power concept in terms implying fairness, the emergent rule obscured the underlying tension. The result was a dichotomy of interpretation as courts strove to apply both the letter and the spirit of *Pennoyer* to an increasingly complex socio-economic milieu.²⁵

Multistate corporations²⁶ and a newly mobile public²⁷ forced the courts to modify the rigid jurisdictional rules inherited from *Pennoyer*. Notions of fictional or implied consent²⁸ facilitated local litigation and thereby guaranteed that the nonresident motorist or the foreign corporation would be accountable for its activities in the forum state.²⁹ First, courts recognized that it was unfair and inconvenient, if not cost pro-

23. See *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). See generally E. CORWIN, *THE CONSTITUTION*, *supra* note 14, at 157-59.

24. See 436 U.S. at 91; *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940). See also E. CORWIN, *THE CONSTITUTION*, *supra* note 14, at 247.

25. See notes 26-33 *infra* and accompanying text.

26. See, e.g., *Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264 (1916); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). See generally Kurland, *supra* note 21.

27. See *Young v. Masci*, 289 U.S. 253 (1933); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Hendrick v. Maryland*, 235 U.S. 610 (1915). See generally A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956).

28. See, e.g., *Young v. Masci*, 289 U.S. 253, 258 (1933) (owner's permitting another to use his automobile and drive into another state manifests his consent to suit in the other state's courts for highway torts committed by the driver); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (use of state highways implies consent to suit in state for causes of action arising from use of the highways); *St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218, 227 (1913) (extent and character of the corporation's activity determines whether it has impliedly consented to the jurisdiction and laws of the forum); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 254 (1909) (presumption that corporate agent sent into state represents the corporation for the purpose of service of process); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 108 (1898) (amenability of foreign corporation to suit is implicit in statutes granting it permission to do business in the territory); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (foreign corporations cannot do business in another state without the latter's consent, which may be accompanied by any reasonable conditions); *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915) (implied consent is a "mere creature of justice" and is, therefore, as broadly inclusive as justice requires). Compare *Flexner v. Farson*, 248 U.S. 289, 293 (1919) (states cannot exclude nonresidents; therefore nonresidents cannot be presumed to have impliedly consented to the jurisdiction of the forum state), with *Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28 (1935) (state may exclude nonresident individuals from engaging in certain regulable businesses, and engaging in those businesses is deemed consent to suit in the jurisdiction). But see *International Textbook Co. v. Pigg*, 217 U.S. 91, 110 (1910) (state may not exclude corporations engaged in interstate commerce).

29. See *Washington v. Superior Court*, 289 U.S. 361, 364-65 (1933) (consent extends to actions brought after the corporation has withdrawn from the forum state); note 28 *supra*. See also Kurland, *supra* note 21, at 576-77.

hibitive, to compel the plaintiff to litigate in a distant forum simply because the defendant was incorporated or resided there.³⁰ Second, courts recognized that the states, by enacting particularized jurisdictional statutes, had expressed interest in providing a forum for subjects of special responsibility.³¹ In addition to implied consent, various tests gained limited currency.³² All were reducible, however, to the basic question whether the defendant's activities were of a kind and quantity sufficient to make it reasonable to require defense of suit in the forum.³³

*International Shoe Co. v. Washington*³⁴ signaled a shift from the rigid doctrinal rules engendered by *Pennoyer* to a pragmatic approach. Synthesizing preceding jurisdictional law, the Court held that due process permits a state to assert in personam jurisdiction over a nonresident defendant, provided he has "minimum contacts" with the forum, and "maintenance of the suit does not offend traditional notions of fair play and substantial justice."³⁵ As courts struggled to apply this ambiguous

30. See *Byham v. National Cibo House Corp.*, 265 N.C. 50, 60, 143 S.E.2d 225, 234 (1965). See generally *Hess v. Pawloski*, 274 U.S. 352, 356 (1927); *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930). See also von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1167 (1966); *Developments in the Law, supra* note 14, at 920.

31. See, e.g., *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935) (securities regulation); *Young v. Masci*, 289 U.S. 253 (1933) (nonresident owner of motor vehicle); *Hess v. Pawloski*, 274 U.S. 352 (1927) (nonresident motorist); *Kane v. New Jersey*, 242 U.S. 160 (1916) (same); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245 (1909) (foreign insurance companies); *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148 (S.D.N.Y. 1915) (corporations doing business in state must be licensed).

32. See, e.g., *Milliken v. Meyer*, 311 U.S. 457 (1940) (domicile); *Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264 (1917) (doing business); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1916) (same); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914) (fictive corporate presence); *St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218 (1913) (doing business); *Frene v. Louisville Cement Co.*, 134 F.2d 511 (D.C. Cir. 1943) (solicitation); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917) (same). See generally *Kurland, supra* note 21, at 577-86.

33. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (single contact with forum state by mail is sufficient); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) ("[t]he amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case"); *Reynolds v. Missouri K. & T.R. Co.*, 224 Mass. 379, 113 N.E. 413 (1916) ("while many of these elements alone might be held not to be doing business, we think that, grouped in combination, they constitute a doing of business within the commonwealth sufficient to subject it to the service of process"). See generally *Developments in the Law, supra* note 14, at 923.

34. 326 U.S. 310 (1945).

35. *Id.* at 316.

standard, what emerged was an all-inclusive balancing test.³⁶ On the facts of each case, courts assessed such factors as the nature and quality of the contacts with the forum state,³⁷ the quantity of contacts with the forum state,³⁸ the relation of the cause of action to the forum state,³⁹ whether the test should be applied uniformly where the parties were of disparate resources,⁴⁰ the need of the forum state to protect specific interests,⁴¹ the foreseeability that the action sued upon would accrue in

36. See *Kilpatrick v. Texas & P. Ry.*, 166 F.2d 788, 790-91 (2d Cir.), *cert. denied*, 335 U.S. 814 (1948). See generally *Developments in the Law*, *supra* note 14, at 924.

37. See, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1957) ("[i]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws"); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (mail-order contacts sufficient); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974) (physical act in forum is unnecessary, deliberate contacts suffice); *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184 (2d Cir.) (local activities must be continuous), *cert. denied*, 338 U.S. 867 (1949); *Grace v. MacArthur*, 170 F. Supp. 42 (E.D. Ark. 1959) (service of process while flying over state sufficient); *Storey v. United Ins. Co.*, 64 F. Supp. 896 (E.D.S.C. 1946) (mail-order contacts sufficient); *Unicorn Invs. v. Fisco, Inc.*, 137 N.J. Super. 395, 349 A.2d 117 (1975) (physical act or business transaction in the forum unnecessary). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971); 2 MOORE'S FEDERAL PRACTICE ¶¶ 4.25-1 & 4.41-1, at 230-32, 405-508 (2d ed. 1978).

38. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (single contact sufficient); *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956) (single shipment into state insufficient). See generally *von Mehren & Trautman*, *supra* note 30, at 1172 (jurisdiction may be proper when there are no contacts).

39. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (Constitution does not prohibit state from exercising in personam jurisdiction over cause of action not arising out of corporation's activities in forum state); *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 225, 347 P.2d 1, 3, 1 Cal. Rptr. 1, 3 (1959) (courts can exercise jurisdiction to enforce causes of action not arising out of the corporation's activities in the state but more contacts are required). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971); *Hazard, A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; *Developments in the Law*, *supra* note 14, at 928-32.

40. See, e.g., *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554 (3d Cir. 1977) ("[a]bsent disparity in bargaining power, in a dispute growing out of a commercial contractual undertaking, that issue [the unfairness of compelling a foreign corporation to defend in the forum state] can be best decided, we think, by reference to the expectations of the parties to the transactions"); *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962) (distinction between suing a resident seller and invoking a long-arm statute against a non-resident buyer); *J.W. Sparks & Co. v. Gallos*, 47 N.J. 295, 220 A.2d 673 (1966) (no distinction between nonresident individuals and foreign corporations); *Conn v. Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959) (consumer's response to mail-order solicitation from foreign corporation does not constitute consent to suit in the state of incorporation). See generally R. LEFLAR, *AMERICAN CONFLICTS LAW* § 32 (3d ed. 1977); *von Mehren & Trautman*, *supra* note 30, at 1127, 1167, 1172 (in "domestic situations a general and almost universally accepted maxim favors the attacked over the complainant at least when the parties enjoy relatively equal economic strength and social standing"); *Developments in the Law*, *supra* note 14, at 929, 935-37; *Annot.*, 20 A.L.R.3d 1201, 1216 (1968).

41. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 214-15 (1977) ("[i]f Delaware perceived its

the forum state,⁴² the interest of the forum state in providing a forum for resident plaintiffs,⁴³ the expectation of the parties,⁴⁴ the convenience of the parties,⁴⁵ fairness and basic equities,⁴⁶ and whether there were

interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest"); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (statute asserting jurisdiction over foreign insurance companies); *Aetna Cas. & Sur. Co. v. Schmitt*, 441 F. Supp. 440 (N.D. Cal. 1977) (state interest in consumer fraud protected by asserting jurisdiction through licensing of certain foreign businesses); *Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951) (insurance); *Storey v. United Ins. Co.*, 64 F. Supp. 896 (E.D.S.C. 1946) (mail-order insurance); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S. 2d 418 (1953) (insurance); note 31 *supra* and accompanying text. See generally Brief for Appellant at 25-26, *Kulko v. Superior Court*, 436 U.S. 84 (1978) (interest in discouraging forum shopping).

42. See *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir. 1974) ("activities outside the State can provide adequate contacts if they have reasonably foreseeable consequences within the State"); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 902, 458 P.2d 57, 64, 80 Cal. Rptr. 113, 120 (1969) ("[i]f the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state"); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961) ("it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here"); *DeCook v. Environmental Sec. Corp.*, 258 N.W.2d 721 (Iowa 1977) (conspiracy of nonresidents to deplete the assets of an Iowa corporation has reasonably foreseeable consequences in the state); *Unicorn Invs. v. Fisco, Inc.*, 137 N.J. Super. 395, 349 A.2d 117 (1975) (out-of-state agreement with reasonably foreseeable consequences in-state). See generally Note, *Shaffer v. Heitner—Reshaping the Contours of State Court Jurisdiction*, 11 Loy. L.A.L. Rev. 87 (1977).

43. See, e.g., *Ashe v. Pepsico, Inc.*, 443 F. Supp. 84 (S.D.N.Y. 1977) (witness convenience); *Aetna Cas. & Sur. Co. v. Schmitt*, 441 F. Supp. 440 (N.D. Cal. 1977) (presence of important records and witnesses); *Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951) (state forum necessary since resort to distant forum would pose an "insuperable obstacle"); *Storey v. United Ins. Co.*, 64 F. Supp. 896 (E.D.S.C. 1946) (without local forum those with small claims or those who would have to travel long distances would not litigate); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (substantial contacts provide a legitimate interest for the state to exercise jurisdiction); *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965) (witnesses, evidence, and small claims make actions in defendant's forum prohibitively expensive).

44. See, e.g., *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554 (3d Cir. 1977) (commercial contract can specify where enforceable); *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956) (commercial contract may designate state where jurisdiction will lie).

45. See, e.g., *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184 (2d Cir.), cert. denied, 338 U.S. 867 (1949); *Kilpatrick v. Texas & Pac. Ry.*, 166 F.2d 788 (2d Cir.), cert. denied, 335 U.S. 814 (1947); *Ashe v. Pepsico, Inc.*, 443 F. Supp. 84 (S.D.N.Y. 1977); *Aetna Cas. & Sur. Co. v. Schmitt*, 441 F. Supp. 440 (N.D. Cal. 1977); *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959); *Moon Carrier v. Reliance Ins. Co.*, 153 N.J. Super. 312, 379 A.2d 517 (1977); *Smyth v. Twin States Improvement Co.*, 116 Vt. 569, 80 A.2d 664 (1951); Brief for Appellant at 24-26, *Kulko v. Superior Court*, 436 U.S. 84 (1978). See generally R. LEFLAR, *supra* note 40, at 68-71;

alternate fora available.⁴⁷

Since *International Shoe*, the Court has acted at least twice to delimit the due process boundaries of its minimum contacts test. In *Hanson v. Denckla*,⁴⁸ the Court held the exercise of jurisdiction improper even where the forum had a strong interest in protecting the rights of resident plaintiffs because defendant had not "purposefully availed" itself of the privilege of conducting activities in the forum.⁴⁹ *Shaffer v. Heitner*⁵⁰ marked a substantial departure from *Pennoyer* by bringing the exercise of quasi in rem and in rem jurisdiction within the strictures of *International Shoe*.⁵¹ The *Shaffer* Court also shifted the focus of the *International Shoe* fair play-substantial justice test from a requirement of minimum contacts to a requirement of a nexus among the forum, the litigation, and the defendant.⁵²

In *Kulko v. Superior Court*,⁵³ the Supreme Court indicated that the absence of a strong forum-defendant nexus precludes the exercise of in personam jurisdiction even where the forum-plaintiff and forum-litiga-

Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Ehrenzweig, *supra* note 27, at 312; Kurland, *supra* note 21, at 574; Morely, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973); von Mehren & Trautman, *supra* note 30, at 1167, 1172.

46. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444-45 (1952); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 (5th Cir. 1974). See generally *Block Indus. v. DHJ Indus., Inc.*, 495 F.2d 256 (8th Cir. 1974); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957), cert. denied, 357 U.S. 235 (1958); Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHNS L. REV. 668, 677 (1975).

47. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554 (3d Cir. 1977); *Carr v. Carr*, 60 App. Div. 2d 63, 400 N.Y.S.2d 105 (1977).

48. 357 U.S. 235 (1958).

49. "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protection of its laws." *Id.* at 253. See Kurland, *supra* note 21, at 621; Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 702 (1959); *Developments in the Law, supra* note 14, at 964.

50. 433 U.S. 186 (1977). See generally Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977); Fischer, "Minimum Contacts": *Shaffer's Unified Jurisdictional Test*, 12 VAL. U.L. REV. 25 (1977); Friedenthal, *A Comment on the Impact of Shaffer v. Heitner in the Classroom*, 1978 WASH. U.L.Q. 319; Olsen, *Shaffer v. Heitner: A Survey of Its Effects on Washington Jurisdiction*, 13 GONZ. L. REV. 72 (1977); Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 329; Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273; Note, *Shaffer v. Heitner: Reshaping the Contours of State Jurisdiction*, 11 LOY. L.A.L. REV. 87 (1977); 13 TULSA L.J. 82 (1977).

51. "[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212.

52. *Id.* at 204. See also Vernon, *supra* note 50, at 298.

53. 436 U.S. 84 (1978).

tion nexuses are strong.⁵⁴ Justice Marshall, writing for the Court, rejected the California court's rationale that by "actively and fully consenting"⁵⁵ to his daughter's living in California with her mother, Kulko had committed a "purposeful act"⁵⁶ warranting California's exercise of in personam jurisdiction over him.⁵⁷ A purposeful act sufficient to provide the requisite forum-defendant nexus required more than Kulko's permitting his child to remain with the mother beyond the time specified in the separation agreement.⁵⁸ Further, Kulko had not, as the California Supreme Court asserted,⁵⁹ derived financial benefit from his acquiescence in his child's desire to live in California.⁶⁰ The Court observed that "[a]ny diminution in appellant's household costs resulted, not from the child's presence in California, but rather from her absence from appellant's home."⁶¹ The Court reaffirmed that the threshold test for determining the existence of a constitutionally sufficient forum-defendant nexus is that the defendant must have "purposefully avail[ed]" himself of the privilege of conducting activities in the forum state.⁶² "But the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's jurisdiction."⁶³

The majority then rejected the argument that jurisdiction should lie because Kulko had caused an effect in the forum.⁶⁴ California's asser-

54. *Id.* at 98. See Vernon, *supra* note 50, at 317.

55. 19 Cal. 3d 514, 524, 564 P.2d 353, 358, 138 Cal. Rptr. 586, 591 (1977).

56. *Id.*

57. 436 U.S. at 94.

58. *Id.*

59. 19 Cal. 3d at 524-25, 564 P.2d at 358, 138 Cal. Rptr. at 591.

60. 436 U.S. at 94.

61. *Id.* at 95.

62. *Id.* at 94 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1957)).

63. *Id.* at 101.

64. The Court found that the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971) was inapplicable. "[T]his section was intended to reach wrongful activity outside of the State causing injury within the State . . . or commercial activity affecting state residents . . ." 436 U.S. at 96. Section 37 provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

California's jurisdictional statute allows California courts to exercise personal jurisdiction on any basis not inconsistent with either the state or federal constitutions. CAL. CIV. PROC. CODE § 410.10 (Deering 1972). The Judicial Council Comment accompanying § 410.10 indicates that the "cause and effect" test is subsumed under the general approach of the California statute.

tion of jurisdiction on this basis was unreasonable because there was "no claim that appellant [had] visited physical injury on either property or persons within the State of California."⁶⁵

Noting that New York was the reasonable forum,⁶⁶ the Court emphasized that California's participation in the Uniform Reciprocal Enforcement of Support Act of 1968 (URESA)⁶⁷ protected its interest "in ensuring the support of children resident in California."⁶⁸

Kulko's significance lies in its refusal to extend state jurisdictional power beyond the parameters established by *Hanson* and *Shaffer*.⁶⁹

65. 436 U.S. at 96-97.

66. *Id.* at 97-98.

Finally, basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlying claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. Appellant has at all times resided in New York State, and, until the separation and appellee's move to California, his entire family resided there as well. As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "haled before a [California] court." To make jurisdiction in a case such as this turn on whether appellant bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations, and one wholly unjustified by the "quality and nature" of appellant's activities in or relating to the State of California.

Id. (citations and footnote omitted) (brackets in original).

67. *Id.* See CAL. CIV. PROC. CODE §§ 1650-1697 (Deering 1972). URESA allows an obligee of a support duty to file a complaint to enforce that duty in the courts of his home state, *i.e.*, the "initiating state." *Id.* § 1673. After the initiating state court certifies the complaint, it transmits copies to the state court where the obligor resides, *i.e.*, the "responding state." *Id.* § 1676. The prosecuting attorney in the responding state then locates the obligor, serves him with process, and prosecutes the case. *Id.* §§ 1680-1681. If the court in the responding state determines that there is a duty of support, it issues an order to furnish support or reimbursement. The court and prosecuting attorney in the issuing (responding) state have a continuing duty to enforce the support order or forward a copy of that order to courts in states capable of enforcing the order. *Id.* § 1682. The Act also provides for criminal enforcement of support duties in a similar manner. *Id.* §§ 1660-1661. See generally W. BROCKELBANK & F. INFAUSTO, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT (2d ed. 1971); COUNCIL OF STATE GOVERNMENTS, RECIPROCAL STATE LEGISLATION TO ENFORCE SUPPORT OF DEPENDENTS (1964); Note, *Domestic Relations: Interstate Enforcement of Support Orders: Necessity and Feasibility of Federal Legislation*, 48 CORNELL L.Q. 541 (1963).

68. 436 U.S. at 98.

69. *Id.* The *Shaffer* Court intentionally cast off the remnants of *Pennoyer* to the extent that its reference to "acts in the forum" was interpreted by courts and commentators to require physical acts to support a state's exercise of judicial jurisdiction. 433 U.S. at 213. See *Bethany Auto Sales, Inc. v. Aptco Auto Auction, Inc.*, 564 F.2d 895 (9th Cir. 1977) (construing *Shaffer* to require both a physical act in the forum and resulting injury); *Pavlo v. James*, 437 F. Supp. 125 (S.D.N.Y. 1977) ("This court will not exercise jurisdiction under the New York long-arm statute upon mere conclusory and indiscriminating allegations of New York transactions by a defendant, especially

Rigorously consistent with a continually developing body of case law, *Kulko* represents the Court's first application of *Shaffer's* unified jurisdictional test to an in personam action. Although in future cases the Court will certainly balance the particular facts in issue, its warning in *Hanson* is apposite: "[I]t is a mistake to assume that this trend toward enlarging in personam jurisdiction heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."⁷⁰

in light of the new caution currently being portrayed in measuring the constitutionality of assertions of extraterritorial jurisdiction in general."); *Dennett v. First Continental Inv. Corp.*, 559 S.W.2d 384 (Tex. Ct. App. 1977) (interpreting *Shaffer* as requiring defendant to have purposefully done some act or consummated some transaction in the forum). See generally Note, *supra* note 50.

70. 357 U.S. at 251. See *Boyer v. Boyer*, — Ill. —, 383 N.E.2d 223 (1978). In *Boyer*, plaintiff alleged that the nonresident defendant owed arrearages in child support and alimony and that failure to pay such arrearages constituted a "tortious act" sufficient to justify Illinois' assertion of in personam jurisdiction over the defendant under the Illinois jurisdictional statute. ILL. ANN. STAT. ch.110, § 17 (Smith-Hurd Supp. 1978) (conferring jurisdiction upon Illinois courts over defendants who, *inter alia*, commit tortious acts within Illinois). Relying on *Poindexter v. Willis*, 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967) (upholding jurisdiction in a case involving a nonresident defendant's failure to support his illegitimate child, fathered in Illinois, and an Illinois resident), the lower court upheld jurisdiction. *Boyer v. Boyer*, 57 Ill. App. 3d 555, 373 N.E.2d 441 (1978). The Illinois Supreme Court noted that although language in *Poindexter* would support jurisdiction upon the *Boyer* facts, *Poindexter* involved more substantial contacts between the defendant and the forum. — Ill. at —, 383 N.E.2d at 225. Moreover, the court asserted that, in light of *Kulko*, jurisdiction was lacking even if nonpayment of support by a nonresident was a tortious act in Illinois. "[T]he quality and nature of the defendant's activities in Illinois were not such that it would be reasonable and fair to require him to conduct his defense here." *Id.* at —, 383 N.E.2d at 226. Again relying on *Kulko*, the court noted the availability of a URESA proceeding as one of the factors justifying its holding. *Id.* at —, 383 N.E.2d at 227; see note 67 *supra* and accompanying text.