

**Discarding Immunity from Service of Process Doctrine**  
**40 Ohio N. U. L. Rev. 87 (2013)**

PROFESSOR JOHN MARTINEZ\*

TABLE OF CONTENTS

I. Introduction.....	88
II. The Origins of the Immunity Doctrine .....	90
A. <i>Capias ad Respondendum</i> .....	90
B. Territorial Jurisdiction as Physical Power.....	90
III. Immunity Doctrine Under the Theory of Territorial Jurisdiction as Physical Power .....	91
IV. The Evolution of Territorial Jurisdiction Doctrine From Physical Power to Fairness.....	93
V. Reconstructing Immunity Doctrine in Accordance with the Fairness Theory of Territorial Jurisdiction .....	96
A. The Nonresident Motorist Exception .....	96
1. Immunity Doctrine Rationale .....	96
2. Fairness Theory Rationale .....	97
B. Other Immunity Doctrine Exceptions .....	98
1. The “Related Litigation” Exception .....	98
2. The “Sole Purpose” or “Main Controlling Purpose” Exception.....	99
a. Where the Nonresident is a Party in S1.....	100
b. Where the Nonresident is a Witness in S1 .....	101
(1) The Disinterested, Public-Spirited Witness .....	101
(2) The Independent Transaction and Interested Witness Variants .....	102
3. The Waiver Exception to the Immunity Rule .....	104
VI. Conclusion .....	104

---

\* Professor of Law, S.J. Quinney College of Law at the University of Utah. This article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund. I would like to thank my wife Karen Martinez for encouraging me to finish this project.

## I. INTRODUCTION

The “immunity from service of process” doctrine provides that a person who attends a judicial<sup>1</sup> proceeding as a witness, party, or counsel cannot be served with process with respect to a second<sup>2</sup> proceeding.<sup>3</sup> In the typical situation, the person claiming immunity is a nonresident of the state where the ongoing proceeding is pending.<sup>4</sup> The immunity applies while the nonresident attends the ongoing proceeding, and for a reasonable period of time while he or she travels to and from the site where the proceeding is being held.<sup>5</sup> The primary purpose of the doctrine is to protect the orderly administration of justice by preventing service of process activity from disrupting the dignity of ongoing judicial proceedings.<sup>6</sup> A secondary purpose is to encourage witnesses, parties, and counsel to attend judicial proceedings without fear that they will be served with process.<sup>7</sup>

This article suggests that the immunity from service of process doctrine has outlived its usefulness.<sup>8</sup> The doctrine operates under the assumption that a person served where he or she is found—no matter how long or for what purpose he or she was there—is subject to the territorial jurisdiction of the state where such service occurs.<sup>9</sup> The doctrine seeks to prevent aggressive suitors from pouncing on nonresidents who are “present” in the state merely to attend other ongoing judicial proceedings.<sup>10</sup> Service of

---

1. The question of immunity has arisen primarily in the context of judicial proceedings. However, immunity from service of process has also been claimed in the context of criminal investigations. *See, e.g., Santos v. Figueroa*, 208 A.2d 810, 812-14 (N.J. 1965); *Lester v. Bennett*, 333 S.E.2d 366 (Va. Ct. App. 1985).

2. The service of process is usually intended to cast the person served as a defendant in a civil suit. Cases have arisen, however, in which the person served was resisting being subpoenaed as a witness. *See, e.g., Marxe v. Marxe*, 558 A.2d 522, 524 (N.J. Super. Ct. Ch. Div. 1989).

3. *See, e.g., Wearb v. Luks*, 708 So. 2d 181, 184 (Ala. Civ. App. 1997); *Severn v. Adidas Sportschuhfabriken*, 109 Cal. Rptr. 328, 329 (1973); *Weihing v. Dodsworth*, 917 A.2d 53, 57 (Conn. App. Ct. 2007); *DuPont v. DuPont*, 216 A.2d 674, 679 (Del. 1966); *Stokes v. Bell*, 441 So. 2d 146, 146-47 (Fla. 1983); *Higgins v. Garcia*, 522 So. 2d 95, 96 (Fla. Dist. Ct. App. 1988); *LaRose v. Curoe*, 343 N.W.2d 153, 155 (Iowa 1983); *Winter v. Crowley*, 226 A.2d 304, 306 (Md. 1967); *Moch v. Nelsen*, 609 N.W.2d 848, 849 (Mich. Ct. App. 2000); *Wangler v. Harvey*, 196 A.2d 513, 516 (N.J. 1963); *North Fork Bank v. Grover*, 773 N.Y.S.2d 231, 234-35 (2004); *State ex rel. Medlin v. Ferris*, 405 P.2d 156, 158 (Okla. 1965); *Gekoski v. Starer*, 302 A.2d 398, 399 (Pa. Super. Ct. 1973); *Rheaume v. Rheaume*, 268 A.2d 437, 441 (R.I. 1970); *Beckham v. Johnson*, 421 S.W.2d 94, 97 (Tenn. 1967); *Franklin v. Wolfe*, 483 S.W.2d 17, 19 (Tex. App. 1972).

4. Florida extends the immunity doctrine to residents as well. *See, e.g., Stokes*, 441 So. 2d at 146-47.

5. *Sofge v. Lowe*, 176 S.W. 106, 106 (Tenn. 1915).

6. *See generally Stokes*, 441 So. 2d at 146-47; *Severn*, 109 Cal. Rptr. at 329; *Wangler*, 196 A.2d at 516.

7. *See, e.g., Wangler*, 196 A.2d at 281 (“[T]he doctrine encourages attendance of persons necessary to the exercise of the judicial function.” (citing *Massey v. Colville*, 45 N.J.L. 199 (N.J. 1883))).

8. *See infra* Part VI.

9. *See Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990).

10. *See Stewart v. Ramsay*, 242 U.S. 128, 129 (1916).

process in those circumstances is deemed to threaten disruption of ongoing proceedings and to discourage nonresidents from attending such proceedings.<sup>11</sup> The “immunity” doctrine, therefore, was developed to prevent overzealous suitors from interfering with ongoing litigation.<sup>12</sup>

The notion of “fairness,” by comparison, which bases jurisdiction upon a multiplicity of factors, including the interests of the parties, the interests of the states, and the interstate administration of laws,<sup>13</sup> has supplanted the assumption underlying the immunity from service of process doctrine—that “physical power” suffices for territorial jurisdiction.<sup>14</sup> Under the “territorial-jurisdiction-as-fairness” doctrine, a nonresident served while attending an ongoing proceeding—unlike under the physical power idea of jurisdiction—is not necessarily subject to jurisdiction with respect to another proceeding.<sup>15</sup> The factors considered are the interests of the forum state in the orderly administration of justice, and the interest of the nonresident in not being unduly subjected to litigation in an inconvenient forum.<sup>16</sup> The concerns that gave rise to the immunity doctrine, therefore, are now subsumed under the modern, multi-factor, territorial jurisdiction inquiry.<sup>17</sup> Thus, there is no further need for an independent doctrine. Moreover, as presently administered, the immunity doctrine often leads to absurd results when considered in the broader perspective of modern territorial jurisdiction principles.<sup>18</sup>

This article describes the development of the immunity doctrine and territorial jurisdiction theory, examines the shortcomings of contemporary immunity law, and suggests that the modern territorial jurisdiction approach more properly addresses the concerns that gave rise to the independent immunity doctrine.<sup>19</sup> The article concludes that the immunity doctrine has outlived its usefulness and should be discarded.<sup>20</sup>

---

11. *Lamb v. Schmitt*, 285 U.S. 222, 225 (1932).

12. *See id.*

13. *See* Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 406 (2012); *see also Burnham*, 495 U.S. at 618-19; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

14. *See generally* Rhodes, *supra* note 13, at 406.

15. *See id.*; *Burnham*, 495 U.S. at 618-19; *Lamb*, 285 U.S. at 225.

16. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987).

17. *See Lamb*, 285 U.S. at 225. *See also* Rhodes, *supra* note 13, at 406; *Asahi*, 480 U.S. at 113.

18. *See generally* Arthur John Keefe & John J. Roscia, *Immunity and Sentimentality*, 32 CORNELL L. Q. 471, 489 (1947). *See also Lamb*, 285 U.S. at 225; Rhodes, *supra* note 13, at 406.

19. *See infra* Part V.

20. *See generally* STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 22 (2011) (discussing abolition of various legal doctrines in property law when they have outlived their usefulness).

## II. THE ORIGINS OF THE IMMUNITY DOCTRINE

The immunity doctrine developed in response to two interconnected factors. The first factor was the civil arrest character of the early methods of service of process.<sup>21</sup> The second factor was the now obsolete notion of territorial jurisdiction based on physical—or “grab”—power over the defendant.<sup>22</sup>

### A. *Capias ad Respondendum*

Under the judicial writ of *capias ad respondendum*, service of civil process did not differ materially from what we know today as criminal arrest.<sup>23</sup> The sheriff physically restrained the person served and jailed him or her while he or she awaited disposition of the action.<sup>24</sup> *Capias* service upon a person participating in a judicial proceeding as a witness, party, or counsel was therefore embarrassing and disruptive.<sup>25</sup> The immunity doctrine developed in order to protect the administration of justice from such interruptions.<sup>26</sup>

Today, however, service of process does not entail actual physical constraint, but merely consists of a procedure for giving notice.<sup>27</sup> Civilized, unobtrusive procedures for service of process on those attending judicial proceedings can be developed.<sup>28</sup> For example, local court rules can provide that service cannot be effected on a person who is sitting beyond the railing separating counsel, the court, and the jury from the public part of a courtroom.

### B. *Territorial Jurisdiction as Physical Power*

In *Pennoyer v. Neff*,<sup>29</sup> the United States Supreme Court held that assertion of personal jurisdiction over a defendant required the defendant’s physical presence within the territorial boundaries of the forum state.<sup>30</sup> While *Pennoyer* was the prevailing theory, the power of courts to declare the law with respect to litigants—commonly known as territorial jurisdiction—was based on physical power over the defendant.<sup>31</sup> Physical

---

21. *Percival v. Philadelphia*, 317 A.2d 667, 669 (1973).

22. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

23. *See Percival*, 317 A.2d at 669 (quoting 12 PA. STAT. ANN. § 181 (West 2013)).

24. *See id.* (quoting 12 PA. STAT. ANN. § 181).

25. *See Parker v. Hotchkiss*, 18 F. Cas. 1137, 1138 (Cir. Ct. E.D. Pa. 1849).

26. *See Lamb*, 285 U.S. at 225.

27. FED. R. CIV. P. 4(c); *Burnham*, 495 U.S. at 618.

28. FED. R. CIV. P. 4(c); *Burnham*, 495 U.S. at 618.

29. 95 U.S. 714.

30. *Id.* at 720.

31. *See id.* at 722.

power was most ensured when the defendant was both within the territorial boundaries of the forum state and properly “served.”<sup>32</sup> The *capias ad respondendum* method of service, whereby a sheriff physically constrained and jailed the defendant pending a civil trial, was no longer in general use in the United States in the late 19th Century when the Supreme Court decided *Pennoyer*.<sup>33</sup> In *Pennoyer*, the Court nevertheless adopted a theory of territorial jurisdiction in which judicial power depended on the physical presence of the defendant or his assets within the forum state.<sup>34</sup> Thus, although physical constraint as a method of service of process was no longer a part of the assertion of jurisdiction, physical presence as a basis for territorial jurisdiction remained.<sup>35</sup>

The notion that physical presence and service of process within the forum were essential to jurisdiction unfortunately led to the illogical conclusion that they were also sufficient.<sup>36</sup> Thus the notion of “transient jurisdiction” was born, whereby presence in the jurisdiction—no matter how temporary or attenuated—if confirmed through service of process while the defendant was in the jurisdiction, conferred territorial jurisdiction on a forum court.<sup>37</sup> For example, suppose a Utah resident assaulted a California resident in Sacramento, and then made a hasty retreat to Salt Lake City. Although the Californian could sue in Utah—where the defendant resided and could be served—if the Utahn never again set foot in California and did not acquire property there, he or she was, literally and figuratively, “home free.”<sup>38</sup> But if the Utahn made a quick, one-hour business trip to California, and the ever-vigilant Californian “tagged” him or her with a summons and complaint, then California would have jurisdiction.<sup>39</sup>

### III. IMMUNITY DOCTRINE UNDER THE THEORY OF TERRITORIAL JURISDICTION AS PHYSICAL POWER

Suppose that instead of staying home in Utah, the Utahn subsequently went to the California side of Lake Tahoe to testify as a witness in a completely unrelated lawsuit. Suppose further that while attending that proceeding (“S1”), the Californian served the Utahn with respect to the assault case (“S2”). Under those circumstances, the interests of the S1 court in securing the nonresident’s attendance to ensure the disposition of S1 was

---

32. *Id.*

33. *Id.* See also Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige*, 74 MINN. L. REV. 37, 49-50 (1989).

34. *Pennoyer*, 95 U.S. at 722-24.

35. See *id.* at 722.

36. See *Burnham*, 495 U.S. at 619.

37. *Id.* at 629 & n.1, 637 (Brennan, J., concurring).

38. See *id.* at 619.

39. See *id.*

based on all possible evidence would override the California resident's interest in seeking relief in California courts.<sup>40</sup> The perceived danger was not that the California plaintiff would dramatically force his or her way into the S1 courtroom and ceremoniously drop a summons and complaint on the Utahn's lap; rather, it was that the Utahn would simply never re-enter California if he or she was not secure in his or her immunity for the reasonable amount of time required to travel to and from the S1 court.<sup>41</sup>

When the nonresident was a party rather than a witness in the S1 litigation, however, the immunity rationale began to break down.<sup>42</sup> Suppose the Utahn had contracted to purchase land from another California resident and had been served by that resident in San Francisco while there on a business trip. Suppose further that the assaulted Californian learned that the Utahn planned to travel through Sacramento to San Francisco to defend against the S1 land contract litigation. The state would be interested in adjudicating the S1 litigation with the Utahn present to ensure full exploration of the facts involved, especially if the Utahn testified on his own behalf.<sup>43</sup> Therefore, the same "orderly administration of justice" rationale applicable to the situation where the nonresident was only a witness would apply.<sup>44</sup> However, the Utahn's primary motivation for being in the state would have been to prevent the entry of a default judgment, which would thereafter be fully enforceable in Utah,<sup>45</sup> because the prior service in San Francisco clearly conferred territorial jurisdiction on California courts with respect to S1.<sup>46</sup> Thus, the "orderly administration" interest in these circumstances would have helped the nonresident as much—if not more—than it benefitted judicial administration in California. Yet, the immunity doctrine would have protected the nonresident from being served with respect to S2 in these circumstances as well.<sup>47</sup>

Situations in which the nonresident was the plaintiff in S1 proved even more troublesome.<sup>48</sup> Suppose that instead of being sued on a land sale contract, the Utahn was the plaintiff in a suit against a San Franciscan. Could the assaulted Californian serve the Utahn? Even more clearly than when the nonresident was the defendant in S1, courts began to recognize

---

40. See *Lamb*, 285 U.S. at 225 (citing *Brooks v. State*, 79 A. 790 (Del. 1911)).

41. See *id.* (citing *Bridges v. Sheldon*, 7 F. 17, 43 (Cir. Ct. Vt. 1880)); see also *Sofge*, 176 S.W. at 106.

42. *Caldwell v. Caldwell*, 70 N.Y.S.2d 601, 603-07 (N.Y. Fam. Ct. 1947).

43. See *Parker*, 18 F. Cas. at 1138.

44. See *Lamb*, 285 U.S. at 225 (citing *Bridges*, 7 F. at 43).

45. See U.S. CONST. art. IV, § 1.

46. FED R. CIV. P. 55; see *Burnham*, 495 U.S. at 619.

47. See *Lamb*, 285 U.S. at 225 (citing *Bridges*, 7 F. at 43).

48. See generally *Wangler*, 196 A.2d at 517 (citing *Korff v. G & G Corp.*, 122 A.2d 889,891-92 (1956)).

that nonresident S1 plaintiffs were getting far more out of the immunity doctrine than the judicial system's interest in "orderly administration of justice" could bear.<sup>49</sup> After all, preventing service of process with respect to S2 came at the expense of the prospective S2 plaintiff. If that plaintiff was a state resident, as in our example, the cost to resident plaintiffs was quite real.<sup>50</sup> Moreover, even if the prospective plaintiff was a nonresident, but the action was properly laid in California because the altercation had occurred in Sacramento, the opportunity to discourage such altercations in the state through the adjudication of such disputes in California courts was still being sacrificed.<sup>51</sup>

Mitigating theories evolved slowly.<sup>52</sup> Where S2 was "related" to S1, as when the S1 plaintiff was a second Californian assaulted by the Utahn, the latter was not immune from service of process with respect to S2 brought by the original, bloodied Californian.<sup>53</sup> Another mitigating theory considered the purpose that brought the nonresident to the forum. The nonresident was immune if the "sole" or "main controlling purpose" was to participate in the S1 litigation.<sup>54</sup> Finally, the concept of waiver provided for denial of immunity when a nonresident dallied too long or engaged in extracurricular activities too far removed from the business of attending the S1 litigation.<sup>55</sup> These theories, however, had no overriding rationale. Courts merely referred to the vaguely defined notion that the immunity exception to jurisdiction should not be extended beyond its purpose.<sup>56</sup> The problem, however, was not with the proper scope of the exceptions to the immunity rule, nor even with the scope of the immunity rule itself, but with the basis of the rule; the notion of territorial jurisdiction.

#### IV. THE EVOLUTION OF TERRITORIAL JURISDICTION DOCTRINE FROM PHYSICAL POWER TO FAIRNESS

In 1877, when the Supreme Court decided *Pennoyer*, most people lived their entire lives within a few miles of the place where they were born.<sup>57</sup> A theory of territorial jurisdiction based on physical power, whereby a defendant could only be sued if he or she could be found and "tagged" with

---

49. See Keeffe & Roscia, *supra* note 19, at 474.

50. See *Lamb*, 285 U.S. at 226.

51. See *id.* at 225.

52. See *infra* Part V.B.

53. See *infra* Part V.B.1.

54. See *infra* Part V.B.2.

55. See *infra* Part V.B.3.

56. See *Lamb*, 285 U.S. at 225 (quoting *Stewart*, 242 U.S. at 130).

57. See Michael R. Haines, *The Population of the United States, 1790-1920* 48 (Nat'l Bureau of Economic Research, Working Paper No. 56, 1994).

process, operated reasonably well.<sup>58</sup> The automobile, however, created the phenomenon of peripatetic defendants.<sup>59</sup> The classic example involved a motorist who traveled to another state, injured someone in that state, and then returned home. *Pennoyer's* physical power theory, whereby the nonresident motorist had to be served while present in the state of the accident, seriously disadvantaged plaintiffs.<sup>60</sup> State legislatures responded by enacting nonresident motorist statutes, which provided that by using the state's highways the nonresident implicitly designated the Secretary of State as his or her agent for service of process with respect to litigation arising out of his or her use of the automobile in the state.<sup>61</sup>

Assertion of jurisdiction in the nonresident motorist situation was inconsistent with the physical power theory: the nonresident motorist was surely not within the territorial boundaries of the forum state when served. In *Hess v. Pawloski*,<sup>62</sup> however, the Supreme Court upheld the assertion of territorial jurisdiction under nonresident motorist statutes.<sup>63</sup> The Court overcame the difficulties of the strict requirements of the physical power theory through the fiction that the nonresident "consented" to the appointment of the secretary of state as his or her agent for service of process.<sup>64</sup>

In *International Shoe Co. v. Washington*,<sup>65</sup> the Supreme Court abandoned the notion that territorial jurisdiction is based on physical power.<sup>66</sup> The Court explained that such a notion was inextricably tied to the *capias ad respondendum* form of service, whereby a sheriff physically constrained the defendant in order to "respond" to the proceedings.<sup>67</sup> The Court held that service of process no longer serves that purpose in 20th Century society, but, instead, merely confirms service and notifies the defendant of the inception of litigation.<sup>68</sup> However, the Court concluded that its holding did not preclude some other foundation for territorial jurisdiction.<sup>69</sup>

---

58. See, e.g., *Pennoyer*, 95 U.S. at 722.

59. See *The Age of the Automobile*, U.S. HISTORY.ORG, <http://www.ushistory.org/us/46a.asp> (last visited Oct. 27, 2013); see also *Worldwide Volkswagen*.

60. See *Pennoyer*, 95 U.S. at 722; see also *supra* notes 39-40 and accompanying text.

61. In *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), the Court held that the nonresidents' constitutional right to notice, in these circumstances, required that the secretary of state take steps to notify the nonresident.

62. 274 U.S. 352 (1927).

63. *Hess v. Pawloski*, 274 U.S. at 356.

64. *Id.* at 356-57.

65. 326 U.S. 310 (1945).

66. See *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

67. See *id.* (quoting *Milliken*, 311 U.S. at 463).

68. *Id.* at 316, 320.

69. See *id.* at 316 (quoting *Milliken*, 311 U.S. at 463).



The Court reviewed the evolution of territorial jurisdiction doctrine as applied in the nonresident motorist situation in which it was clear that a “pure” physical power theory did not justify the assertion of jurisdiction.<sup>70</sup> The Court acknowledged that the physical power theory did not justify the fictional appointment of the Secretary of State for service of process, but concluded that taking all the relevant interests into account, it was “fair” to assert jurisdiction.<sup>71</sup> The plaintiff, if a resident of the forum state, had an interest in having the case adjudicated in a home court.<sup>72</sup> If the plaintiff was a nonresident, he or she might want the benefit of trying the case where witnesses and other evidence might be readily available.<sup>73</sup> The forum state had an interest in making its courts available for the adjudication of cases arising from accidents within its territory, and, when the plaintiff was a resident, also in providing courts for its residents.<sup>74</sup>

The fact that the defendant was, by definition, a relatively mobile motorist who had, on at least one occasion, visited the forum state, substantially negated the nonresident’s interest in having the case adjudicated at a relatively more convenient court in his or her home state.<sup>75</sup> In sum, it was not “unfair” to require the nonresident defendant to return to the forum state to defend the action that arose out of his or her operation of a motor vehicle in the forum state.<sup>76</sup> The Court held that the balance of all those factors justified the fiction that the nonresident had “consented” to service on the Secretary of State.<sup>77</sup> More fundamentally, the advent of a more mobile society made the *Pennoyer* theory of territorial jurisdiction, which assumed a relatively immobile society, obsolete.<sup>78</sup> The deeper significance of *International Shoe* for the nonresident motorist situation, however, is that there is no further need for a fictional consent; assertion of jurisdiction falls within the mainstream of the “fairness” theory.<sup>79</sup> The adoption of the fairness theory also signaled the change from a single-factor

---

70. See generally *Hess*, 274 U.S. at 356-57. Another example concerned the evolution of interstate business by national corporations, which were not “present” anywhere except through their places of incorporation and through their officers. See generally *Severn*, 109 Cal. Rptr. at 329, 333 (asserting that a California court had jurisdiction over the subject matter of the action and that the individual served was one of the persons authorized to receive service of summons on behalf of defendant corporations); *Wangler*, 196 A.2d at 517-18 (stating that jurisdiction over a non-resident litigant is best determined by application of the doctrine of *forum non conveniens*).

71. See *Hess*, 274 U.S. at 356-57.

72. See *id.* at 356.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *Hess*, 274 U.S. at 356.

77. See *id.* at 356-57.

78. See *supra* Part II.B.

79. See *Int’l Shoe*, 326 U.S. at 316-19.

analysis to a multi-factor territorial jurisdiction analysis.<sup>80</sup> No longer could jurisdiction be determined simply by ascertaining the situs of the defendant; one had to consider all the relevant factors.<sup>81</sup> This has produced a less determinate territorial jurisdiction jurisprudence, perhaps, but one that takes many more considerations into account.<sup>82</sup>

## V. RECONSTRUCTING IMMUNITY DOCTRINE IN ACCORDANCE WITH THE FAIRNESS THEORY OF TERRITORIAL JURISDICTION

### A. *The Nonresident Motorist Exception*

#### 1. *Immunity Doctrine Rationale*

Courts have begun to appreciate the implications of the reconceptualization of territorial jurisdiction theory for the immunity doctrine. In *Silfin v. Rose*,<sup>83</sup> for example, a California motorist was involved in an automobile accident in New York state.<sup>84</sup> He later re-entered the state to testify as a defendant in another action,<sup>85</sup> and was served in the courthouse with a summons and complaint for S2, an action that arose out of the vehicle accident.<sup>86</sup> The court held that the Californian was not immune from service with respect to S2 because, under New York's nonresident motorist law, he could have been served through substituted service on the Secretary of State, or through registered mail or personal service, even if he had remained outside the state.<sup>87</sup>

The court in *Silfin* concluded that the nonresident motorist situation was a limitation on the immunity rule.<sup>88</sup> Analysis of the re-entering nonresident motorist setting under the fairness theory of territorial jurisdiction, however, provides a more complete explanation for the assertion of jurisdiction.<sup>89</sup> *Silfin* was not wrongly decided; it just does not show the full picture.

---

80. Compare *Pennoyer*, 95 U.S. at 720 with *Int'l Shoe*, 326 U.S. at 316.

81. See *Int'l Shoe*, 326 U.S. at 316-18.

82. See generally Keefe & Roscia, *supra* note 19, at 471-72 (analyzing the perplexing application of the immunity doctrine within the framework of multiple-factor jurisdiction). But see *Burnham*, 495 U.S. at 618-19 (suggesting retention of single-factor analysis); see also *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard*, 804 P.2d 627, 631 (Wash. Ct. App. 1991) (declining to follow *Burnham*).

83. 185 N.Y.S.2d 90 (1959).

84. *Silfin v. Rose*, 185 N.Y.S.2d at 91.

85. Three lawsuits arose out of the accident. *Silfin*, 185 N.Y.S.2d at 91. The Court does not make clear whether the S1 action with respect to which the California resident was sought to be served was one of these. See *id.* If it had been, then the "related litigation" exception to the immunity rule might have applied as well. See *infra* Part V.B.1.

86. *Silfin*, 185 N.Y.S.2d at 91.

87. *Id.* at 91-92. Service in these circumstances, as discussed above, would be purely for purposes of notice, not territorial jurisdiction. See *supra* Part II.

88. See *Silfin*, 185 N.Y.S.2d at 91-92.

89. See *infra* Part V.A.2.

## 2. Fairness Theory Rationale

The fairness theory, as it has evolved since *International Shoe*, begins with the requirement that the nonresident have a “minimum contact” with the forum state.<sup>90</sup> The nonresident motorist’s prior excursion into the state clearly suffices.<sup>91</sup> In determining jurisdiction with respect to the S2 litigation, it is not necessary to “count” the nonresident’s subsequent entry into the state to testify as a witness in S1. Territorial jurisdiction in these circumstances does not depend on the defendant’s physical presence in the state when served, but on the fairness of subjecting the nonresident to territorial jurisdiction in light of all the circumstances.<sup>92</sup>

The fairness theory also requires examination of the relationship between the plaintiff’s claim and the defendant’s contact with the state.<sup>93</sup> In the nonresident motorist setting, the plaintiff’s claim arises from the accident, so it is, therefore, clearly a “related” cause of action.<sup>94</sup> Finally, the “fairness” theory requires consideration of the interests of the parties, the states, and the judicial system.<sup>95</sup> That portion of the analysis does not differ significantly from that set out above in the discussion of *International Shoe*.<sup>96</sup> The balance of all these factors demonstrates that it is “fair” to subject the nonresident motorist to litigation arising from an accident in the forum state.<sup>97</sup>

In summary, application of the fairness theory of territorial jurisdiction to the nonresident motorist setting demonstrates clearly that the *Silfin* court arrived at the right result using immunity doctrine analysis.<sup>98</sup> Perhaps that is the easy situation, in which the high-profile evolution of nonresident motorist statutes played a significant part.<sup>99</sup> In more mundane settings, however, where other exceptions to the immunity doctrine have developed, courts are not as likely to arrive at correct results using immunity doctrine analysis.<sup>100</sup> On the contrary, “fairness” theory analysis shows that courts are quite likely to reach the wrong conclusions in these more ordinary settings.<sup>101</sup>

---

90. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985).

91. See *Owens v. Superior Court*, 345 P.2d 921, 924-25 (1959).

92. See *Silfin*, 185 N.Y.S.2d at 91. In other settings, however, as discussed next in the text, the subsequent entry is relevant and has to be closely considered. See *infra* Part V.B.

93. *Burger King*, 471 U.S. at 474-75.

94. *Owens*, 345 P.2d at 925.

95. See *Burger King*, 471 U.S. at 476-78 (citing *World-Wide Volkswagen*, 444 U.S. at 292).

96. See *supra* Part IV.

97. See *Burger King*, 471 U.S. at 473-74; see *Owens*, 345 P.2d at 924-25.

98. See *Silfin*, 185 N.Y.S.2d at 91-92.

99. See *supra* Part V.A.1-2.

100. See *infra* Part V.B.

101. See *infra* Part V.B.

*B. Other Immunity Doctrine Exceptions*

*1. The “Related Litigation” Exception*

Where the S2 litigation is “related” to the S1 suit, such as when the S1 plaintiff is another Californian that the Utahn assaulted, immunity doctrine provides that the Utahn is not immune from service of process with respect to S2, brought by the first Californian.<sup>102</sup> Courts have had difficulty precisely defining what relationship between the first and second lawsuits will trigger the exception.<sup>103</sup> Some courts hold the two lawsuits must involve identical parties and issues;<sup>104</sup> other courts hold that mere similarity between the lawsuits will suffice.<sup>105</sup> This disparity results in inconsistent application of the exception.<sup>106</sup>

Under territorial jurisdiction analysis, the nonresident’s prior trip to California, during which the altercation occurred, is a jurisdictionally significant contact.<sup>107</sup> The S2 claim, of course, is related to that contact because it is an action for injuries resulting from the altercation.<sup>108</sup> Finally, the balance of all the interests involved justifies the assertion of territorial jurisdiction. The plaintiff in S2 has an interest in having the assault and battery case adjudicated in a convenient California forum,<sup>109</sup> while California has an interest in adjudicating both actions in order to discourage such altercations from occurring in California. Moreover, because the S1 litigation is already pending, it makes sense from an efficiency standpoint to adjudicate the S2 lawsuit in California as well. The Utahn has an interest in not having to litigate in California, but that interest is minimized by the fact that he previously traveled to Sacramento.<sup>110</sup> On balance, therefore, it is fair to subject the Utahn to the S2 litigation in California.

The fact that the S2 action is “related” to the S1 litigation is important under fairness analysis, but not essential.<sup>111</sup> In contrast, the “related[ness]” factor is indispensable for the immunity doctrine’s “related litigation” exception to apply, because, under that theory, jurisdiction over S2 is, in a sense, derived from jurisdiction over S1.<sup>112</sup> Accordingly, the connection between S1 and S2 is pivotal. More fundamentally, the immunity doctrine,

---

102. See *supra* Part III.

103. See Keeffe & Roscia, *supra* note 19, at 476-77.

104. See *LaRose*, 343 N.W.2d at 157.

105. See *Anderson v. Ivarsson*, 462 P.2d 914, 915-16 (1969).

106. See *Davis v. Davis*, 708 P.2d 1102, 1109-10 (1985).

107. See *supra* Part II.B.

108. See *supra* Part III.

109. See *supra* Part III.

110. See *supra* Part II.B-III.

111. See *supra* Part V.A.2.

112. See *LaRose*, 343 N.W.2d at 156-57.

perhaps only implicitly, presupposes that in the absence of a close connection between the S1 and S2 lawsuits, a court would have territorial jurisdiction in S2 only because of the nonresident's presence in the state to participate in S1.<sup>113</sup> As the fairness analysis demonstrates, however, the presence of the Utahn in California to participate in the S1 litigation is only incidental to whether California has territorial jurisdiction in S2.<sup>114</sup> Under that theory, courts need not engage in the troublesome definitional task of determining how close a relationship between S1 and S2 will suffice to warrant jurisdiction over S2.<sup>115</sup>

### 2. *The "Sole Purpose" or "Main Controlling Purpose" Exception*

Another exception to the immunity rule subjects the nonresident to jurisdiction with respect to S2 unless his or her main controlling purpose in traveling to the forum state is to participate in the S1 litigation.<sup>116</sup> The former rule was that immunity was unavailable unless the

sole purpose for entering the forum state was to participate in the S1 litigation.<sup>117</sup> It is unclear, however, whether the nonresident's purpose is ascertained only from facts available to the nonresident before he or she decided to enter the forum, or whether the nonresident's conduct and facts available to him or her after entering the forum are also pertinent.<sup>118</sup>

More fundamentally, like the related litigation exception, the sole or main controlling purpose exception presupposes that jurisdiction will be premised on the defendant's presence in the state if the immunity rule does not apply.<sup>119</sup> Territorial jurisdiction analysis more fully explores the reasons why jurisdiction should or should not be asserted in particular cases.<sup>120</sup> That analysis reveals that in some circumstances the sole or main controlling purpose exception is clearly wrong.<sup>121</sup>

113. See *Anderson*, 462 P.2d at 916-17.

114. See *supra* Part V.A.2.

115. See *supra* Part V.A.2. Application of the fairness analysis, of course, will also lead to a balancing of factors that is less than determinate. However, the fairness analysis will broaden the inquiry to many more considerations, thus likely to achieve justice in more circumstances than a single-factor analysis, as is now the case with respect to the administration of the "related litigation" exception under the immunity doctrine.

116. See *Gerard v. Superior Court*, 205 P. 2d 109, 112-13 (Cal. Dist. Ct. App. 1949) (discussing the main controlling purpose doctrine).

117. See, e.g., *Union Water Dev. Co. v. Stevenson*, 256 F. 981, 982-83 (N.D. Calif. 1919) (adopting sole purpose rationale).

118. See, e.g., *Keeffe & Roscia*, *supra* note 19, at 477-80.

119. See *Gerard*, 205 P.2d at 111-12.

120. See *infra* Part V.B.2.

121. See *infra* Part V.B.2.

## a. Where the Nonresident is a Party in S1

“Territorial jurisdiction” theory first asks whether the nonresident had a “contact” with the forum state.<sup>122</sup> If there is a contact other than the nonresident’s presence in the forum to participate in S1, as in the discussion of the two other exceptions to the immunity doctrine above, courts will examine that contact first.<sup>123</sup> But suppose there is no other contact with the state. Is the nonresident’s presence in the state to participate in S1 jurisdictionally significant for purposes of S2?

In subsequent refinements to the “contact” requirement, the Supreme Court has explained that a jurisdictionally significant contact is one that demonstrates that the nonresident has “purposefully availed” him or herself of the benefits and protections of the laws of the forum state.<sup>124</sup> One example would be the nonresident’s filing of an action as a plaintiff in the forum state’s courts.<sup>125</sup> This nonresident plaintiff could be said to be “purposefully avail[ing]” him or herself of the forum state’s courts to obtain relief.<sup>126</sup> However, if the transaction out of which the S1 lawsuit arose occurred in the forum state, and the defendant was a resident of the forum state who never traveled interstate, then the nonresident may have had no choice but to file in a state or federal court<sup>127</sup> in the forum state.<sup>128</sup> In those circumstances, perhaps, forces beyond the nonresident’s control might have compelled him or her to sue in the forum state.

Unless the Supreme Court interprets “purposeful avail[ment]” more narrowly, however,<sup>129</sup> or unless courts retreat to a single-factor territorial jurisdiction analysis,<sup>130</sup> it would seem reasonable to consider the filing of an action by the nonresident as a jurisdictionally significant contact and proceed with the remainder of the fairness analysis.<sup>131</sup> For similar reasons, a nonresident who enters the forum state to participate as a defendant in S1 should be considered to have a jurisdictionally significant contact. On one hand, because probably no one rejoices at the thought of having to defend a

---

122. *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

123. *See supra* Parts V.B.1-2.

124. *See, e.g., Asahi*, 480 U.S. at 109 (quoting *Burger King*, 471 U.S. at 475).

125. *See Wangler*, 196 A.2d at 517 (citing *Korff*, 122 A.2d at 891-92).

126. *See Asahi*, 480 U.S. at 109 (quoting *Burger King*, 471 U.S. at 475).

127. State immunity doctrine, like state territorial jurisdiction doctrine, applies in federal courts in diversity actions. *See generally* *Erie R. R. v. Tompkins*, 304 U.S. 64, 78 (1938).

128. *See Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

129. The Court has at times seemed to interpret the “purposeful availment” criterion to require what approaches subjective consent to be sued in the forum state. At other times, the requirement has been interpreted as a rather minimal threshold, with the ultimate question of jurisdiction decided after consideration of all the other fairness analysis factors. *Compare Asahi*, 480 U.S. at 108-09, with *Burger King*, 471 U.S. at 472-74.

130. *See supra* Parts II-III.

131. *See Burger King*, 471 U.S. at 474-75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

lawsuit, the nonresident is there involuntarily. On the other hand, this nonresident could be said to be participating in S1 in order to avoid the entry of a default judgment.<sup>132</sup> Thus, arguably, the nonresident is “purposefully avail[ing]” himself or herself of the benefits and protections of the forum state’s courts.

The territorial jurisdiction theory then asks whether the claim in the S2 litigation is related to the jurisdictionally significant contact.<sup>133</sup> One would want to know, therefore, whether the prospective plaintiff’s claim in S2 is connected to, or arises out of, the same transaction as the nonresident’s claims or defenses in S1.<sup>134</sup> Finally, one would ask whether the balance of all the relevant interests made the assertion of jurisdiction in S2 “fair.”<sup>135</sup>

#### b. Where the Nonresident is a Witness in S1

When the nonresident participates in the S1 litigation only as a witness and has had no other contact with the forum state, the question of whether a jurisdictionally significant contact is involved becomes more problematic.<sup>136</sup>

##### (1) The Disinterested, Public-Spirited Witness

If the nonresident is not beneficially interested in the outcome of the S1 litigation, but is in the forum state only to assist with proper adjudication of that litigation, it is unlikely that his or her presence in the state with respect to the S1 litigation would ever represent a jurisdictionally significant contact with respect to S2.<sup>137</sup> In those circumstances, the nonresident can hardly be said to be “purposefully avail[ing]” him or herself of the benefits and protections of the forum state’s laws.<sup>138</sup> Further consideration under the fairness analysis confirms this result: whether or not the S2 action is related to the nonresident’s trip to the forum to testify as a witness in S1, the balance of factors clearly weighs in favor of refusing to assert

---

132. The hypothetical presupposes that there is no question that the forum state court has territorial jurisdiction with respect to S1, of course.

133. See *La Rose*, 343 N.W.2d at 157 (quoting *Lamb*, 285 U.S. at 226).

134. See *id.* (quoting *Lamb*, 285 U.S. at 226).

135. See *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

136. See *infra* Part V.B.2.

137. See *N. Light Tech., Inc. v. N. Lights Club*, 236 F.3d 57, 62 (1st Cir. 2001); see also *Lamb*, 285 U.S. at 225 (listing the interests served by applying the immunity doctrine).

138. This would be true either under a standard that limits jurisdiction, as where “purposeful availment” is defined as the functional equivalent of consent to jurisdiction, or under a standard that expands jurisdiction, as where “purposeful avail[ment]” is defined more loosely as any connection with the state. See *supra* note 117 and accompanying text (discussing the Supreme Court’s ambivalence in this regard).

jurisdiction.<sup>139</sup> The only factor in favor of jurisdiction is the prospective S2 plaintiff's interest in a local forum, and that is clearly outweighed by the forum state's interest in having the nonresident testify in S1 and the nonresident's interest in not being sued in the forum state.<sup>140</sup> Accordingly, contrary to the result under immunity doctrine, even if the disinterested nonresident witness's sole or main controlling purpose for entering the forum state is not to testify in S1, that contact alone should be deemed insufficient to justify jurisdiction with respect to S2.

## (2) The Independent Transaction and Interested Witness Variants

Two situations should be distinguished from the disinterested nonresident witness context. The first situation occurs in the "independent transaction" setting, and the second situation occurs in the "interested witness" setting. Suppose that a disinterested nonresident witness stayed at a hotel while in the state to testify. Suppose further that the S2 litigation is brought by the innkeeper to recover the lodging costs, which the nonresident refuses to pay.<sup>141</sup> The hotel transaction may be viewed as independent of the attendance at the S1 litigation.<sup>142</sup> Applying territorial jurisdiction analysis, it could be said that by staying at the hotel, the nonresident "purposefully availed" him or herself of the benefits and protections of the state's laws with respect to fire protection codes, the prospect of landlord liability for tortious failure to maintain habitable lodgings, and the like.<sup>143</sup> In short, by entering into the guest-host relationship with the hotel owner, the nonresident could be said to have fully expected that the state's laws with respect to the hotel owner's duties would be enforceable against the hotel owner; it seems reasonable to infer that the nonresident should have expected that his or her obligations with respect to the hotel owner would be enforceable as well.<sup>144</sup>

Accordingly, the hotel transaction should be viewed as a jurisdictionally significant contact for territorial jurisdiction purposes.<sup>145</sup> The claim, of course, arises from that transaction. Whether jurisdiction would be justified would depend on the balance of the relevant interests.<sup>146</sup> The ultimate determination would turn on the importance that the forum

---

139. See *Lamb*, 285 U.S. at 225.

140. See *id.*

141. See *Anderson*, 462 P.2d at 915-16 (quoting *Nichols v. Horton*, 14 F. 327, 331 (Iowa 1882)).

142. See *id.* at 916 (quoting *Nichols*, 14 F. at 331).

143. See *Burger King*, 471 U.S. at 474-75 (quoting *Hanson*, 357 U.S. at 253).

144. See *id.* at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

145. See *Burger King*, 471 U.S. at 474-75 (quoting *Hanson*, 357 U.S. at 253).

146. See *Lamb*, 285 U.S. at 225-28.



state attaches to securing the nonresident's testimony in the S1 litigation, when balanced against the hotel owner's interest in securing adjudication of the claim in the forum state.<sup>147</sup> Conventional immunity doctrine seems to arrive at the same conclusion, but without any principled explanation.<sup>148</sup>

Suppose, on the other hand, that the nonresident witness is beneficially interested in the outcome of the S1 litigation, as would be the case where S1 involves the probate of a will in which the nonresident is a beneficiary. A balance must be struck between the forum state's interest in adjudicating the probate with all relevant evidence and the state's interest in having the S2 litigation go forward in the state's courts.<sup>149</sup> Although not entirely free from doubt, it would seem that the proper result is to view the nonresident's motives for attending the forum to include the desire to "purposefully avail" him or herself of the benefits and protections of the forum state's probate laws.<sup>150</sup> This would result in treating the attendance at the S1 proceeding as a jurisdictionally significant contact,<sup>151</sup> but would not be sufficient to justify assertion of jurisdiction with respect to S2.<sup>152</sup> That would depend on the "related[ness]" and balancing of factors involved in the remainder of the territorial jurisdiction analysis.<sup>153</sup> "Conventional immunity" doctrine fails to take these factors into account.

In summary, the nonresident's purpose in attending the S1 litigation, whether solely or primarily to participate in those proceedings as a party or witness, is not helpful for determining whether jurisdiction with respect to the S2 litigation should be asserted in the forum state.<sup>154</sup> Application of territorial jurisdiction principles demonstrates that current immunity doctrine analysis only imperfectly considers the relevant concerns and in some situations arrives at improper results.<sup>155</sup> Moreover, territorial jurisdiction analysis provides a more principled approach for resolving circumstances in which nonresidents are present in the forum state to participate in litigation.<sup>156</sup>

---

147. *See id.*

148. *Anderson*, 462 P.2d at 915-16; *see also LaRose*, 343 N.W.2d at 157.

149. *See Lamb*, 285 U.S. at 225-28.

150. *See id.* *See also Burger King*, 471 U.S. at 474-75 (quoting *Hanson*, 357 U.S. at 253).

151. *See Burger King*, 471 U.S. at 474-75 (quoting *Hanson*, 357 U.S. at 253).

152. *See Lamb*, 285 U.S. at 225-28.

153. *See id.*

154. *See supra* Part V.B.2.

155. *See id.*

156. *See Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463); *Burger King*, 471 U.S. at 474-76; *Burnham*, 495 U.S. at 609-10.

### 3. *The Waiver Exception to the Immunity Rule*

Current immunity doctrine provides that courts will deny immunity to a nonresident who remains in the forum state for a longer period of time than is reasonably necessary for participating in the S1 litigation, or engages in activities too far removed from the business of attending the S1 litigation.<sup>157</sup> There are several shortcomings with “immunity-waiver” doctrine. First, courts do not always make clear whether they are dealing with acquired immunity or with immunity that was previously acquired but ultimately waived.<sup>158</sup> One might, therefore, conclude that whether immunity has been waived is functionally indistinguishable from whether immunity existed in the first place.<sup>159</sup> Second, there are no clear guidelines for determining when a person has stayed “too long” in the jurisdiction.<sup>160</sup> Similarly, there are no clear standards for determining whether the nature of a nonresident’s activities in the forum state are too far removed from the business of participating in the S1 litigation to warrant lifting immunity protection from service of process with respect to S2.<sup>161</sup> The immunity-waiver doctrine is therefore analytically suspect.<sup>162</sup> It may have evolved as a reaction to the existence of the immunity doctrine, but without principles to circumscribe it.<sup>163</sup>

## VI. CONCLUSION

When the underlying assumptions of a theory change, so must its overlying structure. Immunity from service of process theory developed on the assumption that physical presence alone conferred territorial jurisdiction.<sup>164</sup> Territorial jurisdiction theory, however, is now based on conceptions of fairness rather than brute physical power.<sup>165</sup> Territorial jurisdiction theory has thus supplanted the notions underlying immunity-waiver law and makes immunity doctrine unnecessary.

---

157. See, e.g., *Union Water Dev. Co.*, 256 F. at 981-83; *Gerard*, 205 P.2d at 112-13.

158. See, e.g., *id.*

159. See *supra* note 160 and accompanying text.

160. See, e.g., *Union Water Dev. Co.*, 256 F. at 981-83; *Gerard*, 205 P.2d at 112-13.

161. See, e.g., *Higgins*, 522 So.2d at 95-96; *Union Water Dev. Co.*, 256 F. at 981-83; *Gerard*, 205 P.2d at 112-13.

162. See *supra* notes 160-63 and accompanying text.

163. See *supra* notes 160-63 and accompanying text.

164. See, e.g., *Wangler*, 196 A.2d at 514 (noting that the immunity from service doctrine was established earlier than 1714).

165. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).