

1990

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Recommended Citation

Call, Dale Floyd (1990) "Civil Procedure - Ropin'em on the Range in the Cowboy State: Should Assertions of Transient Jurisdiction Be Subject to Minimum Contracts Analysis - Nutri-West v. Gibson," *Land & Water Law Review*. Vol. 25 : Iss. 1 , pp. 239 - 249.

Available at: https://scholarship.law.uwyo.edu/land_water/vol25/iss1/14

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CASENOTES

CIVIL PROCEDURE—Ropin'em on the Range in the Cowboy State: Should Assertions of Transient Jurisdiction be Subject to “Minimum Contacts” Analysis? *Nutri-West v. Gibson*, 764 P.2d 693 (Wyo. 1988).

Paul White, manager of a Wyoming business known as Nutri-West, contacted Betty Gibson in her home state of California, by phone and in person, to offer her an exclusive in-state distributorship of Nutri-West's health care products.¹ Mr. White eventually convinced Ms. Gibson to accept the offer and thereafter mailed her a distributorship contract.²

Ms. Gibson, her spouse James Gibson, Robert Davies, and his spouse Kathleen Davies signed the contract in California and formed a partnership known as Nutri-West of California.³ The partnership solicited sales of Nutri-West products, ordered them by mail or phone from Nutri-West's Douglas, Wyoming headquarters, and sold them in California.⁴

By June of 1987, Nutri-West had become dismayed with the partnership's contractual performance.⁵ Nutri-West filed a complaint in Wyoming District Court seeking a declaration of the rights of the parties under the agreement and an injunction prohibiting the partnership from acting as distributors.⁶ On June 27, 1987, Ms. Gibson attended a convention held at Nutri-West headquarters in Douglas, Wyoming.⁷ At the convention, a deputy sheriff of Converse County, Wyoming, served Ms. Gibson personally, and as agent for Mr. Gibson, Mr. Davies, and Ms. Davies, with four copies of the complaint and four summonses.⁸ The Gibsons and Davies entered a special appearance to quash service and contest jurisdiction.⁹ They contended that neither Ms. Gibson, the other partners, nor the partnership Nutri-West of California had sufficient contacts with Wyoming to permit a Wyoming court to assert jurisdiction constitutionally over them.¹⁰ The district court agreed and dismissed the case.¹¹

1. *Nutri-West v. Gibson*, 764 P.2d 693, 694 (Wyo. 1988).

2. *Id.*

3. *Id.* The contract agreement was entered into on or about February 10, 1985. Brief of Appellees at 6, *Nutri-West v. Gibson*, 764 P.2d 693 (Wyo. 1988) (No. 87-266).

4. *Nutri-West*, 764 P.2d at 694.

5. *Id.*

6. Brief of Appellees at 1.

7. *Nutri-West*, 764 P.2d at 694.

8. *Id.*

9. *Id.*

10. Brief of Appellees at 2. Appellees contended that they did not reside in Wyoming, that they did no business in Wyoming, that they solicited no sales in Wyoming, that they owned no real or personal property in Wyoming, and that, except for Ms. Gibson's temporary presence at the convention, they had never been to Wyoming. *Id.* at 25.

11. *Nutri-West*, 764 P.2d at 694. The district court concluded that “the defendants [did] not have sufficient contacts with this state to allow a Wyoming court to exercise jurisdiction over them.” *Id.*

On appeal, Nutri-West argued that the district court erred in applying the "minimum contacts" standard.¹² Nutri-West contended that a state can exercise *in personam* jurisdiction over any non-resident defendant who is served with process while temporarily within the forum.¹³

Siding with Nutri-West, the Wyoming Supreme Court unanimously held that minimum contacts analysis is inappropriate when considering transient jurisdiction.¹⁴ Additionally, the court held that the exercise of *in personam* jurisdiction over Ms. Gibson, based solely on her transitory presence and personal service within Wyoming, was constitutional.¹⁵

Heated debate surrounds the continued validity of the transient jurisdiction doctrine.¹⁶ This casenote evaluates the constitutional viability of transient jurisdiction under contemporary notions of due process.

BACKGROUND

The transient jurisdiction doctrine holds that a state court may exercise *in personam* jurisdiction over a nonresident defendant who is personally served with process while temporarily present in the forum state.¹⁷ Typically, no inquiry is made regarding the relationship between the defendant, the forum, and the subject matter of the litigation.¹⁸

Transient jurisdiction is premised upon the territorial theory of judicial power propounded in the classic case *Pennoyer v. Neff*.¹⁹ Under this

12. Brief of Appellant at 4, *Nutri-West v. Gibson*, 764 P.2d 693 (Wyo. 1988) (No. 87-266) [hereinafter Brief of Appellant]. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) states that "minimum contacts" must be established if the defendant "be not present within the territory of the forum."

13. Brief of Appellant at 7 (citing RESTATEMENT OF JUDGMENTS § 15 (1942)).

14. *Nutri-West*, 764 P.2d at 695.

15. *Id.* at 695-96.

16. The United States Supreme Court may decide the constitutionality of transient jurisdiction this term in *Burnham v. California Superior Court*, No. 89-44, *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989).

17. RESTATEMENT (SECOND) CONFLICT OF LAWS § 28 (Supp. 1989) states the general rule 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." *Id.*

18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 comment a (1971). *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 82-84 (1971) for exceptions.

19. 95 U.S. 714 (1877).

Pennoyer was an ejectment action brought in federal court under the diversity jurisdiction. *Pennoyer*, the defendant in that action, held the land under a deed purchased in a sheriff's sale conducted to realize on a judgment for attorney's fees obtained against *Neff* in a previous action by one *Mitchell*. At the time of *Mitchell's* suit in an Oregon State court, *Neff* was a nonresident of Oregon. An Oregon statute allowed service by publication on nonresidents who had property in the State, and *Mitchell* had used that procedure to bring *Neff* before the court. The United States Circuit Court for the District of Oregon, in which *Neff* brought his ejectment action, refused to recognize the validity of the judgment against *Neff* in *Mitchell's* suit, and accordingly awarded the land to *Neff*.

Shaffer v. Heitner, 433 U.S. 186, 196-97 (1977).

theory, the *Pennoyer* Court espoused three forms of jurisdiction: *in personam*, in which judgments are personally binding on an individual; *in rem*, in which judgments are good against the world as to rights to a thing; and, *quasi in rem*, in which judgments declare the rights of particular individuals in regard to a specific thing.²⁰ According to *Pennoyer*, a state court could exercise jurisdiction over any individual or property physically present within the sovereign's territory.²¹ A state court, however, was jurisdictionally powerless outside of its boundaries.²² Thus, provided procedural due process requirements were met, physical presence within a sovereign's territory became both essential and sufficient to confer state court jurisdiction.²³

As technology advanced and interstate activity became more practical, *Pennoyer's* strict territorial approach to jurisdiction proved unsatisfactory.²⁴ Motorists would enter a state, commit a tort, and be out of the state before process could be served. Corporations, too, were troublesome. According to prevalent legal thinking, a corporation existed as a fictional entity only in the state of its incorporation and was amenable to suit only in that state.²⁵ To deal with these problems, courts devised theories of fictional presence²⁶ and implied consent²⁷ to gain jurisdiction over persons and corporations not served with process when physically present within the state's boundaries.

International Shoe Co. v. Washington greatly liberalized *Pennoyer's* strict territorial doctrine.²⁸ According to *International Shoe*, the defendant's physical presence within the forum's territory was no longer essential to the exercise of *in personam* jurisdiction.²⁹ Rather, if the defendant was not present within the state, due process required only that the state have certain "minimum contacts" with the defendant

20. *Pennoyer*, 95 U.S. at 724-34.

21. *Id.* at 722.

22. *Id.*

23. *Id.*

24. See 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1064-1067 (1987) for an excellent discussion on the evolution of the territorial theory of judicial power.

25. *Bank of Augusta v. Earle*, 38 U.S. 519 (1839). "[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." *Id.* at 588.

26. See, e.g., *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264 (1917). "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." *Id.* at 265.

27. See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927). *Hess* was the beginning of numerous state statutes under which nonresidents entering a foreign state to engage in dangerous activities (operating motor vehicles, aircraft, watercraft, selling securities, or engaging in dangerous construction) were deemed to appoint a state official as their attorney for purposes of process in regard to injuries caused within the state. C. WRIGHT & A. MILLER, *supra* note 24, § 1065 at 237, 239.

28. 326 U.S. 310 (1945). *International Shoe Company* was a Delaware corporation with its principal place of business in Missouri. *Id.* at 313. The United States Supreme Court allowed the State of Washington to assert jurisdiction over *International Shoe Company* based upon solicitation activities of Shoe salesmen within the State. *Id.* at 321.

29. *Id.* at 316.

such that the exercise of *in personam* jurisdiction would not offend "traditional notions of fair play and substantial justice."³⁰

International Shoe marked an era of changing judicial philosophy. Reasonableness and fairness to the defendant rather than territorial power became a growing concern of the Court.³¹ *International Shoe's* minimum contacts standard, however, augmented rather than replaced physical presence as a basis for *in personam* jurisdiction.³² Courts continued to exercise *in personam*, *in rem* and *quasi in rem* jurisdiction based solely upon territorial presence.

The territorial theory of judicial power sometimes resulted in fortuitous, irrational assertions of jurisdiction. *Grace v. MacArthur*³³ and *Seider v. Roth*³⁴ are classic examples. In *Grace*, an Arkansas court asserted *in personam* jurisdiction over an Illinois resident served with process while flying over Arkansas.³⁵ And, in *Seider*, a New York court asserted *quasi in rem* jurisdiction over a Canadian by attaching his insurance policy which had been issued by a company doing business in New York.³⁶ These assertions of jurisdiction apparently offended the United States Supreme Court, for the Court in *Shaffer v. Heitner* declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."³⁷ Although this mandate appears simple, considerable controversy exists over its exact contours.³⁸

Shaffer was a shareholder derivative suit brought against the officers and directors of a Delaware corporation.³⁹ The Delaware corporation had its principal place of business in Arizona,⁴⁰ and the alleged improprieties constituting the subject matter of the suit occurred in

30. *Id.* *International Shoe's* explicit language is:

[D]ue process requires only 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."

Id. (emphasis added).

31. *Id.* at 317. Due process demands are met by "such contacts . . . with the state . . . as make it reasonable, in the context of our federal system, to require [a defendant] . . . to defend the particular suit . . . brought there." *Id.*

32. *Id.* at 316.

33. 170 F. Supp. 442 (E.D. Ark. 1959).

34. 17 N.Y.2d. 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

35. *Grace*, 170 F. Supp. at 443, 447.

36. *Seider*, 216 N.E.2d at 313-14.

37. 433 U.S. 186, 122 (1977).

38. See generally, Fyr, *Shaffer v. Heitner: The Supreme Courts Latest Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607 (1979); Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997 (1978).

39. *Shaffer*, 433 U.S. at 189.

40. *Id.*

Oregon.⁴¹ In Delaware, the shareholder obtained *quasi in rem* jurisdiction over the nonresident defendants by attaching their stock which was statutorily present within the state.⁴² The defendant stock owners contested jurisdiction arguing that they had insufficient contacts with Delaware to support a constitutional assertion of jurisdiction over them.⁴³ The trial court rejected these arguments,⁴⁴ and the Delaware Supreme Court affirmed, holding *International Shoe* inapplicable to *quasi in rem* jurisdiction.⁴⁵

The United States Supreme Court reversed the Delaware Supreme Court, holding that *in rem* jurisdiction based solely upon the presence of property within the forum state was no longer sufficient to pass constitutional muster.⁴⁶ Justice Marshall, writing for the Court, noted that an assertion of *in rem* jurisdiction over property was of no less significance than an assertion of *in personam* jurisdiction over the property owner.⁴⁷ Hence, the standards of fairness and reasonableness set out in *International Shoe* must apply to all assertions of state court jurisdiction.⁴⁸ Justice Marshall stressed that the relationship among the defendant, the forum and the litigation was the center of concern when assessing the constitutionality of an assertion of judicial jurisdiction.⁴⁹ Presence, he noted, was a factor to be considered, but was no longer dispositive.⁵⁰

Many legal scholars have interpreted the *Shaffer* opinion to be the obituary of transient jurisdiction.⁵¹ They argue that since the mere presence of property is no longer sufficient for *in rem* jurisdiction, an individual's mere presence must likewise be insufficient for *in personam* jurisdiction under *International Shoe's* minimum contacts standard.⁵² Courts, however, have been loath to interpret *Shaffer* so broadly. The majority of lower federal and state courts addressing the issue post-

41. *Id.* at 190.

42. *Id.* at 190-92.

43. *Id.* at 193.

44. *Id.*

45. *Id.* at 194-95.

46. *Id.* at 215.

47. *Id.* at 207.

48. *Id.* at 212.

49. *Id.* at 204.

50. *Id.* at 207, 211-12.

51. See, e.g., Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979-80) [hereinafter Bernstine]; Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

52. See, e.g., Bernstine, *supra* note 51, at 66. Bernstine noted:

[I]t would be somewhat odd that a nonresident defendant, whose property is located in the forum, would not be subject to jurisdiction there because his property does not give rise to sufficient minimum contacts, while another nonresident defendant, who owns no property in the forum, does no business in the state, and does not otherwise avail himself of the state's benefits and protection, will nevertheless be subject to the court's jurisdiction merely because of his transient presence.

Id.

Shaffer have held that transient jurisdiction remains valid,⁵³ and a minority have held that it does not.⁵⁴

PRINCIPAL CASE

Consistent with the majority, the Wyoming Supreme Court upheld the transient jurisdiction doctrine in *Nutri-West v. Gibson*.⁵⁵ The District Court of Converse County, however, applied minimum contacts analysis and found that Ms. Gibson, her partners, and the partnership Nutri-West of California had insufficient contacts with Wyoming to support a constitutional assertion of *in personam* jurisdiction over them.⁵⁶

On appeal, the Wyoming Supreme Court cited Wyoming Statute section 5-1-107(a)⁵⁷ which gives Wyoming courts the authority to exercise jurisdiction to the constitutionally permissible limits.⁵⁸ Defining those limits, the court stated that an assertion of *in personam* jurisdiction is constitutional if proper service is made and if notions of due process are not offended.⁵⁹

The *Nutri-West* court concluded that proper service had been made upon Ms. Gibson and the partnership, but not upon the individual partners.⁶⁰ Addressing the due process issue, the court found that: 1) minimum contacts analysis is inappropriate when *in personam* jurisdiction is based upon personal service within the forum;⁶¹ and 2) *in personam* jurisdiction based on presence alone comports with traditional notions of fair play and substantial justice and, hence, does not offend due process.⁶²

Minimum Contacts Analysis

The *Nutri-West* court cited *Shaffer's* mandate that all assertions of state court jurisdiction must be analyzed according to standards set forth by *International Shoe* and its progeny.⁶³ The court noted, however, that *International Shoe's* language explicitly excuses from minimum contacts analysis assertions of *in personam* jurisdiction based on phys-

53. See, e.g., *Rittenhouse v. Mabry*, 832 F.2d 1380, 1388-89 (5th Cir. 1987); *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 268-70 (5th Cir. 1985); *Opert v. Schmid*, 535 F. Supp. 591, 593-94 (S.D.N.Y. 1982); *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581, 583 (1987).

54. See, e.g., *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42 (3rd Cir. 1985); *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305 (N.D. Ill. 1986).

55. *Nutri-West*, 764 P.2d at 696.

56. *Id.* at 694.

57. WYO. STAT. § 5-1-107(a) (1977) provides: "A Wyoming court may exercise jurisdiction on any basis not inconsistent with the Wyoming or United States constitution."

58. *Nutri-West*, 764 P.2d at 695.

59. *Id.* at 694 (citing *First Wyoming Bank, N.A.*, *Rawlins v. Trans Mountain Sales & Leasing, Inc.*, 602 P.2d 1219 (Wyo. 1979)).

60. *Nutri-West*, 764 P.2d at 696-97.

61. *Id.* at 695 (citing *Amusement Equip.*, 779 F.2d at 269).

62. *Nutri-West*, 764 P.2d at 695-96.

63. *Id.* at 695.

ical presence and personal service within the forum.⁶⁴ Thus, the court concluded that an assertion of transient jurisdiction is not subject to minimum contacts analysis.⁶⁵

Due Process Analysis

The Wyoming Supreme Court also recognized that due process requires that assertions of jurisdiction not offend traditional notions of fair play and substantial justice.⁶⁶ Since *in personam* jurisdiction based upon mere presence was a traditional notion of fair play and substantial justice, the court concluded that the exercise of transient jurisdiction was constitutional.⁶⁷ To buttress this conclusion, the court stated that *in personam* jurisdiction based on mere presence was historically accepted and easy to apply.⁶⁸ Additionally, the *Nutri-West* court noted that Ms. Gibson came to Wyoming voluntarily, that she benefited from being there, and that therefore she was jurisdictionally at risk.⁶⁹ The court also stated that the exercise of jurisdiction is an act of sovereign power which due process concerns limit but do not eradicate.⁷⁰

Concluding, the Wyoming Supreme Court held that there was no unfairness in predicating *in personam* jurisdiction upon the transient presence of an individual within the State,⁷¹ and added that it would not reject the transient jurisdiction doctrine without direction from higher authority.⁷²

ANALYSIS

The Wyoming Supreme Court's decision that *in personam* jurisdiction may constitutionally be predicated on mere presence and service of process within the forum is analytically flawed. Admittedly, a cursory treatment of *Shaffer* and *International Shoe* could lead to the conclusion that minimum contacts analysis is applicable only if the defendant is not present within the forum state.⁷³ The Wyoming Supreme Court, however, would have concluded that transient jurisdiction is no longer constitutionally viable absent minimum contacts analysis had it: first, critically considered *Shaffer's* impact on the validity of using mere presence as a constitutional basis for jurisdiction; second, made an effort to determine the status of defendants' rights under contem-

64. *Id.*

65. *Id.*

66. *Id.* (citing *Amusement Equip.*, 779 F.2d at 269 (discussing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982))).

67. *Nutri-West*, 764 P.2d at 695-96.

68. *Id.* at 696.

69. *Id.*

70. *Id.* (citing *Amusement Equip.*, 779 F.2d at 270).

71. *Nutri-West*, 764 P.2d at 696.

72. *Id.* (citing *Opert*, 535 F. Supp. at 594).

73. *See, e.g., Rittenhouse v. Mabry*, 832 F.2d 1380 (5th Cir. 1987); *Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264 (5th Cir. 1985); *Opert v. Schmid*, 535 F. Supp. 591 (S.D.N.Y. 1982); *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987).

porary notions of due process; and third, recognized that transient jurisdiction serves no important purpose within current jurisdictional schemes.

Shaffer casts an ominous shadow on the sanctity of using mere presence as a constitutional basis for jurisdiction.⁷⁴ Although basing *in rem* jurisdiction on mere presence was traditionally considered to comport with fair play and substantial justice,⁷⁵ the United States Supreme Court flatly rejected the contention that such was still the case.⁷⁶ Rather, the *Shaffer* Court noted that a defendant's due process rights could be readily offended by the "perpetuation of ancient forms" of jurisdiction.⁷⁷ Consequently, Justice Marshall went well beyond the necessary holding in *Shaffer* to declare that *all* assertions of state court jurisdiction must be evaluated by *International Shoe's* fairness standard.⁷⁸ Justice Marshall recognized that the relationship between the defendant, the forum and the litigation, rather than sovereign power, was the proper focus when assessing the fairness, and therefore the constitutionality, of any particular assertion of state court jurisdiction.⁷⁹

Significantly, the *Shaffer* opinion also rejected the very arguments which the Wyoming Supreme Court presented in support of transient jurisdiction. *In rem* jurisdiction based upon mere presence was also historically entrenched, easy to apply and predictable. Yet, as Justice Marshall noted, defendants' due process rights precluded the continued recognition of mere presence as a constitutional basis of jurisdiction.⁸⁰

The Wyoming Supreme Court refused to extend *Shaffer's* logic and strike mere presence as a sufficient basis for a constitutional exercise of *in personam* jurisdiction.⁸¹ Instead, the Wyoming court relied on a wooden interpretation of *International Shoe's* language and concluded that minimum contacts analysis is appropriate only if the individual "be not present within the territory of the forum."⁸²

Despite holding that minimum contacts analysis is inappropriate when considering transient jurisdiction, the Wyoming Supreme Court did acknowledge that any assertion of state court jurisdiction must comply with due process.⁸³ The *Nutri-West* court, however, failed to cor-

74. See R. LEFLAR, L. McDOUGAL, & R. FELIX, *AMERICAN CONFLICTS LAW* § 25 (4th ed. 1986). The authors comment that "[a] new cloud...has been cast over the validity of transient jurisdiction. The cloud is the pronouncement in *Shaffer v. Heitner* that all state court exercises of jurisdiction must be compatible with the standards of *International Shoe* and its progeny." *Id.*

75. See *Pennoyer*, 95 U.S. at 723.

76. *Shaffer*, 433 U.S. at 211-12.

77. *Id.* at 212.

78. *Id.* (emphasis added). Justice Marshall prefaced this mandate by stating: "Its [*in rem* jurisdiction based on mere presence] continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." *Id.*

79. *Id.* at 204.

80. *Id.* at 212.

81. *Nutri-West*, 764 P.2d at 696.

82. *Id.* at 695.

83. *Id.*

rectly define the scope of defendants' due process protections as currently viewed by the United States Supreme Court.

Beginning with *International Shoe*, the United States Supreme Court has consistently held that reasonableness and fairness to the defendant are the standards against which the constitutionality of an assertion of jurisdiction must be evaluated.⁸⁴ As noted in *International Shoe*, the demands of due process are met if a defendant has such contacts with the forum state as would make it reasonable to require him to defend suit there.⁸⁵ The Court, in accord with these propositions, has expressed the view that due process protects an individual's liberty interest in not being compelled to defend a suit in a substantially unrelated forum.⁸⁶

The Wyoming Supreme Court's assertion that *in personam* jurisdiction based upon mere presence is constitutional largely disregards these contemporary notions of due process. A little imagination can surely hypothesize situations in which presence-based jurisdiction would be unfair and unreasonable. Concrete examples also exist. *Grace v. MacArthur*, where an Illinois defendant was served with process while flying over Arkansas,⁸⁷ is an example; *Amusement Equipment v. Mordelt*, where an agent of a West German corporation was served with process while in Louisiana attending a trade show,⁸⁸ is another; and *Nutri-West v. Gibson*⁸⁹ may also fall into this category.

Because jurisdiction based on mere presence can do violence to defendants' contemporary due process rights, the continued recognition of the transient jurisdiction doctrine is no longer wise.⁹⁰ Presence-based jurisdiction is a remnant of an era when interstate and international travel were impracticable.⁹¹ Suits were generally between neighbors and imposed no unreasonable burden on the defendant.⁹² Today, by contrast, interstate and international travel are the norm, and a defendant can experience substantial unfairness and burden if he is amenable to suit through service of process in every state he enters.⁹³

Additionally, adherence to the transient jurisdiction doctrine is no longer necessary.⁹⁴ Long-arm statutes enable a plaintiff to reach beyond state boundaries and, through extraterritorial service and a showing

84. See, e.g., *Asahi Metal Indus. Co. v. California Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Hanson v. Denckla*, 357 U.S. 235 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

85. *International Shoe*, 326 U.S. at 316.

86. *Insurance Corp. of Ireland*, 456 U.S. at 702-03.

87. 170 F. Supp. 442 (E.D. Ark. 1959).

88. 779 F.2d 264 (5th Cir. 1985).

89. 764 P.2d 693 (Wyo. 1988).

90. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.3 (3d ed. 1986).

91. Bernstine, *supra* note 51, at 60.

92. *Id.*

93. *Id.*

94. *Id.* at 61.

of minimum contacts, compel the appearance of a nonresident defendant to a suit brought in a foreign state.⁹⁵ The only role transient jurisdiction plays, therefore, is to allow plaintiffs to compel the appearance of nonresident defendants to suits brought in states where minimum contacts could not otherwise be established.

Absent minimum contacts analysis, the recurrent danger is that transient jurisdiction will be exercised in a forum where “no part of the operative facts occurred and in which neither of the parties live.”⁹⁶ Additionally, the forum may not be “in a favorable position to deal intelligently either with the facts or the law.”⁹⁷ To avoid these unfortunate situations and to protect defendants’ due process rights, transient jurisdiction should be subject to minimum contacts analysis.⁹⁸

Adopting minimum contacts analysis as *Shaffer* suggests—across the board—will rarely result in a state having to dismiss a suit for lack of jurisdiction. Most often, the defendant served with process in a state will have other contacts with the forum sufficient to support a constitutional assertion of jurisdiction.⁹⁹ Minimum contacts analysis will, however, filter out those defendants whose only contact with the state is transient presence and protect them from having to defend a suit under circumstances that are fairly classified as oppressive, fortuitous, or attenuated.¹⁰⁰

An Illinois federal district court highlighted the illogical and oppressive nature of allowing transient jurisdiction without minimum contacts.¹⁰¹ If the minimum contacts standard were held inapplicable to transient jurisdiction, the court stated, an individual would be afforded less protection than would his property when found within a foreign state.¹⁰² “Surely the *Shaffer* Court did not intend such an illogical and unfair result.”¹⁰³

CONCLUSION

Defendants have a liberty interest in not being compelled to defend a suit in an substantially unrelated forum. This liberty interest is protected by requiring that state court assertions of jurisdiction be fair and reasonable. Minimum contacts analysis is the means by which the

95. See generally 4 C. WRIGHT & A. MILLER, *supra* note 24, § 1068.

96. W. COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* 100 (1949).

97. A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289-90 (citing Dodd, *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 438 (1929)).

98. *World-Wide Volkswagen* states that one of the essential functions on minimum contacts analysis is to protect defendants against the burdens of litigating in a distant or inconvenient forum. *World-Wide Volkswagen*, 444 U.S. at 29192.

99. Berstine, *supra* note 51, at 60.

100. RESTATEMENT (SECOND) CONFLICT OF LAWS § 28 (Supp. 1989).

101. *Harold M. Pitman Co. v. Typecraft Software*, 626 F. Supp. 305 (N.D. Ill. 1986).

102. *Id.* at 313; Berstine, *supra* note 51.

103. *Id.*

fairness and reasonableness of any particular assertion of state court jurisdiction should be evaluated.

The Wyoming Supreme Court, by holding minimum contacts analysis inapplicable to transient jurisdiction, perpetuates an anomaly that seriously undermines defendants' contemporary due process rights. Transient jurisdiction should be subject to minimum contacts analysis as a necessary check against oppressive, fortuitous and attenuated assertions of state court jurisdiction.

The Wyoming Supreme Court, however, by expressing no intention to retire the transient jurisdiction doctrine without a direct mandate, sends a clear message that would-be defendants need beware of feeling *too* at home on the range.

DALE FLOYD CALL