Death to Immunity From Service Of Process Doctrine!

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By Professor John Martinez

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Introduction

The immunity from service of process doctrine provides that a person who attends a judicial proceeding as a witness, party or counsel cannot be served with process with respect to a second proceeding. In the typical situation the person claiming immunity is a nonresident of the state where the ongoing proceeding is being held. The immunity applies while the nonresident attends the ongoing proceeding and for a reasonable period of time while going to and from the site where the proceeding is being held. 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.


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, 233 N.J.Super. 247 (N.J. Super. Ch. 1989).


4. Florida extends the immunity doctrine to residents as well. See, e.g., Stokes v. Bell, 441 So.2d 146 (Fla. 1983).

5. See generally Stokes v. Bell, 441 So.2d 146 (Fla. 1983); Severn v. Adidas Sportschuhabriken, 33 Cal. App. 3d 754, 109 Cal. Rptr. 328 (Cal. Ct. App. 1973); Wangler v. Harvey,
secondary purpose is to encourage witnesses, parties and counsel to attend judicial proceedings without fear that they will be served with process.⁶

This article suggests that the immunity from service of process doctrine has outlived its usefulness. The doctrine operates under the assumption that a person served where he/she is found—no matter how transiently or for what purposes he/she is there—is subject to the territorial jurisdiction of the state where such service occurs. The doctrine seeks to counter the resulting evil that vigilant suitors can thereby pounce on nonresidents who are "present" in the state merely to attend other ongoing judicial proceedings. Service of process in those circumstances is deemed to threaten disruption of ongoing proceedings and to discourage nonresidents from attending such proceedings. The immunity doctrine therefore evolved to prevent overzealous suitors from interfering with ongoing litigation.

⁶. See, e.g., Wangler v. Harvey, 41 N.J. 277, 196 A.2d 513, 281 (1963)("the doctrine encourages attendance of persons necessary to the exercise of the judicial function").
However, the assumption underlying the immunity from service of process doctrine--that "physical power" suffices for territorial jurisdiction, has been supplanted by the notion of "fairness," whereby such jurisdiction depends upon a multiplicity of factors, including the interests of the parties, the states and the interstate administration of laws. Under territorial-jurisdiction-as-fairness, 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. Among the factors considered are the interest of the forum state in orderly administration of justice and the interest of the nonresident in not being unduly subjected to litigation in an inconvenient forum. The concerns that gave rise to the immunity doctrine are now subsumed under the modern, multi-factor, territorial jurisdiction inquiry. 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.

This article describes the development of the fields of 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 an independent immunity doctrine. The article concludes that the immunity doctrine has outlived its usefulness and should be discarded.

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8. See generally Stuart Banner, AMERICAN PROPERTY, A HISTORY OF HOW, WHY, AND WHAT WE OWN (2011)(discussing abolition of various legal doctrines in property law when they have outlived their usefulness).
I. 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. The second factor was the now obsolete notion of territorial jurisdiction based on physical, or "grab," power over the defendant.

A. Capias Ad Respondendum

Under the capias ad respondendum, service of civil process did not differ materially from what we know today as criminal arrest. The person served was physically restrained by the sheriff and jailed awaiting disposition of the action. Capias service upon a person participating in a judicial proceeding as a witness, party or counsel was therefore embarrassing and disruptive. The immunity doctrine was developed to protect the administration of justice from such interruptions.

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

B. Territorial Jurisdiction as Physical Power

In Pennoyer v. Neff, the United States Supreme Court held that assertion of personal jurisdiction over a defendant required that the defendant be physically present with territorial

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boundaries of the forum state. While Pennoyer held sway, 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. Physical power was most assured when the defendant was both within the territorial boundaries of the forum state and properly "served". The capias ad respondendum method of service, whereby the defendant was physically constrained and jailed pending a civil trial, was no longer in general use in the United States by the latter part of the 19th Century, when Pennoyer was decided. In Pennoyer, however, the Court nevertheless adopted a theory of territorial jurisdiction which provided that judicial power depended on the physical presence of the defendant or his assets within the forum state. Thus, although physical constraint as a method of service of process was no longer a part of the assertion of jurisdiction, physical presence was.

10 Id. at 720.
The notion that physical presence and service of process within the forum were essential to jurisdiction led to the illogical conclusion that they were sufficient. Thus was born the notion of "transient jurisdiction", 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. For example, suppose a Utah resident assaulted a California resident in Sacramento, then beat a hasty retreat to Salt Lake City. Although the Californian could sue in Utah, where the defendant was present and could be served, if the Utahn never again set foot in California and did not acquire property there, he/she was, literally and figuratively, "home free." But if the Utahn made a quick, one-hour business trip to California and the ever-vigilant Californian "tagged" him/her with a summons and complaint, then California had jurisdiction.

II. 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 lawsuit. Suppose further that while attending that proceeding, (which we may refer to as "S1"), he/she was served by the Californian with respect to the assault case, (which we may refer to as "S2"). Under those circumstances, the interests of the S1 court in securing the nonresident's attendance in order to assure the disposition of S1 with all possible evidence would override the California resident's interest in seeking relief in California courts. The perceived danger was not that the California plaintiff would dramatically force his/her way into the S1 courtroom and ceremoniously drop a summons and complaint on the Utahn's lap, but that if the Utahn was not assured of immunity from the moment he/she entered California, for a reasonable amount of time required to travel to and from the S1 court and until he/she exited the state, he/she simply would
not re-enter the state.

When the nonresident was a party rather than a witness in the S1 litigation, however, the immunity rationale began to break down. 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 that the assaulted Californian found out the Utahn would 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 assure full exploration of the facts involved, especially if the Utahn testified in his own behalf. Therefore, the same "orderly administration of justice" rationale applicable to the situation where the nonresident was only a witness would apply. However, the Utahn's primary motivation for being in the state was to prevent the entry of a judgment by default which could thereafter be fully enforceable in Utah, since there was no question that the prior service in San Francisco clearly conferred territorial jurisdiction on California courts with respect to S1. Thus, the "orderly administration" interest in these circumstances helped the nonresident as much---if not more---than it benefitted judicial administration in California. Yet the immunity doctrine protected the nonresident from being served with respect to S2 in these circumstances as well.

Situations in which the nonresident was the plaintiff in S1 proved even more troublesome. 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 in the circumstances where the nonresident was the defendant in S1, courts began to recognize 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. 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. 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.

Mitigating theories evolved slowly. Where S2 was "related" to S1, as when the S1 plaintiff was a second Californian beaten up by the Utahn, the latter was not immune from service of process with respect to S2 brought by the original bloodied Californian. Another mitigating theory considered the purpose that brought the nonresident to the forum. If the sole or main controlling purpose was to participate in the S1 litigation, then immunity was extended; if not, the nonresident was not immune. Finally, the concept of waiver provided that if a nonresident dallied too long or engaged in extracurricular activities too far removed from the business of attending the S1 litigation, immunity would be denied. These theories had no overriding rationale, however. The courts merely referred to the vaguely defined notion that the immunity exception to jurisdiction should not be extended beyond its purposes.

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 notion of territorial jurisdiction upon which the rule was based.

III. The Evolution of Territorial Jurisdiction Doctrine From Physical Power to Fairness

In 1877, when Pennoyer was decided, people pretty much lived out their entire lives within a
few miles of the place where they were born. A theory of territorial jurisdiction based on physical power, whereby a defendant could only be sued where he could be found and "tagged" with process, operated reasonably well. The automobile, however, created the phenomenon of peripatetic defendants. The classic example involved a motorist who travelled to another state, injured someone in that state, then returned home. Pennoyer's physical power theory, whereby the nonresident motorist had to be served while present in the state of the accident, left plaintiffs at a serious disadvantage.

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/her agent for service of process with respect to litigation arising out of his/her use of the automobile in the state.\textsuperscript{11}

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,\textsuperscript{12} however, the Supreme Court nevertheless upheld the assertion of territorial jurisdiction under nonresident motorist statutes. 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/her agent for service of process.

\textsuperscript{11} In Wuchter v. Pizzutti, 276 U.S. 13, 48 S. Ct. 259 (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.

\textsuperscript{12} 274 U.S. 352, 47 S. Ct. 632 (1927).
In International Shoe, the Supreme Court abandoned the notion that territorial jurisdiction is based on physical power. The Court explained that such a notion was inextricably tied to the *capias ad respondendum* form of service, whereby the defendant was physically constrained in order to "respond" to the proceedings. Service of process no longer served that purpose in 20th Century society, the Court held, but instead merely notified the defendant of the inception of litigation and confirms that the defendant has been served. Accordingly, the Court concluded, some other foundation for territorial jurisdiction was not precluded.

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The Court then 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\textsuperscript{14}. The Court acknowledged that the physical power theory did not justify the fictional appointment of the secretary of state for service of process, but that taking all the relevant interests into account, it was "fair" to assert jurisdiction. The plaintiff, if a resident of the forum state, had an interest in having the case adjudicated in a home court. If the plaintiff was also a nonresident, he/she might also want the benefit of trying the case where witnesses and other evidence might be readily available. The forum state had an interest in making its courts available for the adjudication of cases arising from accidents within its territory and, if the plaintiff was a resident, also in providing courts for its residents. The nonresident clearly had an interest in having the case adjudicated at a relatively more convenient court in his/her home state, but that was substantially negated by the fact that the defendant was, by definition, a relatively mobile motorist who had, on at least one occasion, visited the forum state. In sum, it was not "unfair" to require the nonresident defendant to return to the forum state to defend the action which arose out of his/her operation of a motor vehicle in the forum state.

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. More fundamentally, the advent of a more mobile society made the Pennoyer theory of territorial jurisdiction, which assumed a relatively non-mobile

\textsuperscript{14}. 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 v. Adidas Sportschuhfabriken, 33 Cal. App. 3d 754, 109 Cal. Rptr. 328 (Cal. Ct. App. 1973), Wangler v. Harvey, 41 N.J. 277, 196 A.2d 513 (1963).
society, obsolete. 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.

The adoption of the fairness theory also signalled the change from a single-factor analysis to a multiple-factor territorial jurisdiction analysis. No longer could jurisdiction be determined simply by ascertaining the situs of the defendant; one had to consider all the relevant factors. This has produced a less determinate territorial jurisdiction jurisprudence, perhaps, but one which takes many more considerations into account.\textsuperscript{15}

IV. 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 for immunity doctrine of the reconceptualization of territorial jurisdiction theory. In Silfin v. Rose,\textsuperscript{16} for example, a California motorist was involved in an automobile accident in New York state. He later re-entered the state to testify as a defendant in another action\textsuperscript{17} and was served in the courthouse with summons and


\textsuperscript{16} 17 Misc. 2d 243, 185 N.Y.S.2d 90 (N.Y. Sup. Ct. 1959).

\textsuperscript{17} Three lawsuits arose out of the accident. 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. If it had been, then the "related litigation" exception to the immunity rule might have applied as well. See infra
complaint for S2, an action which arose out of the vehicle accident. 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.\textsuperscript{18}

\textsuperscript{18}. Service in these circumstances, as discussed above, would be purely for purposes of notice, not territorial jurisdiction.  \textit{See supra} Section I.
The court in Silfin concluded that the nonresident motorist situation was a limitation on the immunity rule. 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. The Silfin decision is not wrong, it just does not show the full picture.

2. Fairness Theory Rationale

The fairness theory as it has been evolved since *International Shoe*\(^{19}\) was decided begins with the requirement that the nonresident have a "minimum contact" with the forum state. The nonresident motorist's prior excursion into the state clearly suffices. 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 because 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.\(^ {20}\)

The fairness theory next requires examination of the relationship between the plaintiff's claim and the defendant's contact with the state. In the nonresident motorist setting, the plaintiff's claim arises from the accident, so is clearly a "related" cause of action. Finally, the fairness theory requires consideration of the interests of the parties, the states and the judicial system. That portion of the analysis does not differ significantly from that set out above in the discussion of *International Shoe*\(^ {21}\).


\(^{20}\) In other settings, however, as discussed next in the text, the subsequent entry is relevant and has to be closely considered.

\(^{21}\) See *supra* notes 9-10 and accompanying text.
The balance of all these factors demonstrates that it is "fair" to subject the nonresident motorist to litigation which arises from an accident in the forum state.

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. Perhaps that is the easy situation, in which the high-profile evolution of nonresident motorist statutes played a significant part. In the more mundane settings, however, where other exceptions to the immunity doctrine have been developed, courts are not as likely to arrive at correct results using immunity doctrine analysis. On the contrary, fairness theory analysis of those more ordinary settings shows that courts are quite likely to reach the wrong conclusions in many cases.

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 a another Californian beaten up by the Utahn, immunity doctrine provides that the Utahn is not immune from service of process with respect to S2, brought by the first Californian. Courts have had difficulty defining with precision the relationship between the first and second lawsuits that will trigger the exception. Some courts hold the two lawsuits must involve identical parties and issues;\(^\text{22}\) other courts hold that mere similarity between the lawsuits will suffice\(^\text{23}\). This results in inconsistent application of the exception.\(^\text{24}\)

\(^{22}\) See, e.g., LaRose v. Curoe, 343 N.W.2d 153 (Iowa 1983).


\(^{24}\) See, e.g., Davis v. Davis, 708 P.2d 1102 (Olka. 1985).
Under territorial jurisdiction analysis, the nonresident's prior trip to California, during which the altercation occurred, is a jurisdictionally significant contact. The S2 claim, of course, is related to that contact because it is an action for injuries resulting from the altercation. 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. California has an interest in adjudicating both actions in order to discourage such altercations from occurring in California. Moreover, since 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 is minimized by the fact that he previously traveled to Sacramento. 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. In contrast, that 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. Accordingly, the connection between S1 and S2 is pivotal. More fundamentally, the immunity doctrine, 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. 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. 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 S2.²⁵

2. The "Sole Purpose" and "Main Controlling Purpose" Exception

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²⁵. 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.
Another exception to the immunity rule subjects the nonresident to jurisdiction with respect to S2 unless his/her main controlling purpose in traveling to the forum state is to participate in the S1 litigation. The former rule was that immunity was unavailable unless the sole purpose for entering the forum state was to participate in the S1 litigation. Confusion has arisen, however, regarding whether the nonresident's purpose is ascertained from facts available to the nonresident before he/she decided to enter the forum or whether the nonresident's conduct and facts available to him/her after entering the forum are also pertinent.

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

a. Where the Nonresident is a Party in S1

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Territorial jurisdiction theory first asks whether the nonresident had a "contact" with the forum state. 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 discussed above, that contact will be first examined. 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 which demonstrates that the nonresident has "purposefully availed" himself/herself of the benefits and protections of the laws of the forum state.\textsuperscript{29} One example would be the nonresident's filing of an action as a plaintiff in the forum state's courts. Such a nonresident plaintiff could be said to be "purposefully availing" himself/herself of the forum state's courts to obtain relief. However, if the transaction out of which the S1 lawsuit arose occurred in the forum state and the defendant is a resident of the forum state who never travels interstate, then the nonresident may have had no choice but to file in a state or federal court\textsuperscript{30} in the forum state. In those circumstances, perhaps, the nonresident might have been compelled to sue in the forum state by forces beyond his/her control. Unless the Supreme Court interprets the "purposeful availment" more narrowly, however,\textsuperscript{31} and unless we are prepared to retreat to a single-factor territorial jurisdiction

\begin{itemize}
  \item \textsuperscript{29} See, e.g., Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
  \item \textsuperscript{30} State immunity doctrine, like state territorial jurisdiction doctrine, applies in federal courts in diversity actions. Erie Railroad v. Tompkins, 304 U.S. 64 (1938).
  \item \textsuperscript{31} 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
\end{itemize}
analysis,\textsuperscript{32} 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. 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, such a nonresident is there involuntarily, because no defendant probably rejoices at the thought of having to defend a lawsuit. On the other hand, such a nonresident could be said to be participating in S1 in order to avoid the entry of a judgment by default\textsuperscript{33}. Thus, arguably, the nonresident is "purposefully availing" himself/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. 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. Finally, one would ask whether the balance of all the relevant interests made the assertion of jurisdiction in S2 "fair".

\textbf{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, whether a jurisdictionally significant contact is involved becomes more problematic.

\textsuperscript{32} See supra Sections I and II.

\textsuperscript{33} The hypothetical presupposes that there is no question that the forum state court has territorial jurisdiction with respect to S1, of course.
(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, then it is unlikely that his/her presence in the state with respect to the S1 litigation would ever represent a jurisdictionally significant contact with respect to S2. In those circumstances, the nonresident can hardly be said to be "purposefully availing" himself/herself of the benefits and protections of the forum state's laws. 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 jurisdiction. 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. Accordingly, contrary to the result under immunity doctrine, even if the disinterested nonresident witness' 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. We may refer to the first as the "independent transaction" setting and to the second as the "interested

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34. 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 expand jurisdiction, as where "purposeful availment" is defined more loosely as any connection with the state. See supra note 26 and accompanying text (discussing the Supreme Court's ambivalence in this regard.)
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. The hotel transaction may be viewed as independent of the attendance at the S1 litigation. Applying territorial jurisdiction analysis, it could be said that in staying at the hotel, the nonresident "purposefully availed" himself/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. 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/her obligations with respect to the hotel owner would be enforceable as well. Accordingly, the hotel transaction should be viewed as a jurisdictionally significant contact for territorial jurisdiction purposes. The claim, of course, arises from that transaction. Whether jurisdiction would be justified would depend on the balance of the relevant interests. The ultimate determination would turn on the importance which the forum state attaches to securing the nonresident's testimony in the S1 litigation in comparison with the hotel owner's interest in securing adjudication of the claim in the forum state. Conventional immunity doctrine seems to arrive at the same conclusion, but without any principled explanation.


36. Id.; see also LaRose v. Curoe, 343 N.W.2d 153 (Iowa 1983).
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 in the state's interest in having the S2 litigation go forward in the state's courts. Although not entirely free from doubt, it would seem that the proper result is to view the nonresident's purpose in attending the forum as including the desire to "purposefully avail" himself/herself of the benefits and protections of the forums state's probate laws. This would result in treating the attendance at the S1 proceeding as a jurisdictionally significant contact, but would not be sufficient to justify assertion of jurisdiction with respect to S2. That would depend on the "relatedness" and balancing of factors involved in the remainder of the territorial jurisdiction analysis. 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. 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. 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.

3. The Waiver Exception to the Immunity Rule

Current immunity doctrine provides that if a nonresident remains in the forum state for a longer period of time than reasonably necessary for participating in the S1 litigation or engages in
activities too far removed from the business of attending the S1 litigation, immunity will be denied.\textsuperscript{37}

There are several shortcomings with immunity-waiver doctrine. First, courts do not always make clear whether they are dealing with whether immunity was acquired or whether they are dealing with whether immunity once acquired has been waived. One might therefore conclude that whether immunity has been waived is functionally indistinguishable from whether immunity existed in the first place. Second, there are no clear guidelines for determining when a person has stayed "too long" in the jurisdiction. 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.

The "immunity-waiver" doctrine is therefore analytically suspect. It may have evolved as a reaction to the existence of the immunity doctrine, but without principles to circumscribe it.

Conclusion

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

38. Id.

39. Id.