***Class 14 (September 19, 2017)***

**Where do we stand…?**

1. Rule: Can’t be called on when it’s your birthday
2. After this class we’ll be exactly one-third of the way through the semester
3. In approx. two weeks or so we’ll be done with jurisdiction/venue. Soon after we will have our practice midterm.
   1. For the midterm everyone can use the book, notes, and outlines you created (or from a study group in which you participated). The same rules apply to the final.

***Overview of Personal Jurisdiction:***

1. PJ cases that can be answered within the Int’l Shoe framework, without considering the relationship to the Pennoyer framework:
   1. Specific personal jurisdiction (with the addition of the McGee factors. (E.g. McGee, Burger King, Worldwide VW, Asahi, McIntyre)
   2. General personal jurisdiction over corporations (E.g. Goodyear, Daimler)
2. PJ under the Pennoyer framework that is unproblematic under Int’l Shoe
   1. Domicile as a source of general in personam jurisdiction over individuals
   2. In rem jurisdiction/quasi in rem of first type
      1. Although problems can arise when it’s unclear where the property is located (i.e. stocks, copyrights) but there has to be some place where a determination of the ownership of the property can be brought
         1. (If Shaffer were only about ownership of the shares it would probably have been okay.)

*Remember*: All sources of PJ in Pennoyer were general PJ, but under Shoe the requirements for general PJ have been raised

1. The problematic cases are when PJ exists under the Pennoyer framework but does not satisfy Int’l Shoe
   1. Some we know are unconstitutional. For example certain types of quasi in rem of second type - Shaffer
      1. Shaffer has a double problem– don’t know where the stocks are located *and* not related to the cause of action
      2. Shaffer upends the order because it strikes down PJ good under Pennoyer bc it is not good under International Shoe
         1. How far does this go?
   2. Quasi in rem (second type)- we don’t know definitively if it’s unconstitutional - examples of quasi in rem 2nd type where property is clearly in forum state, eg real property or bank accounts still go on to some extent

***Why no PJ in Shaffer?***

Because all forms of PJ must satisfy Int’l Shoe? (Shaffer, Brennan in Burnham)

But this explanation doesn’t account for the law as it is right now. For example, tagging is good, bank accounts/real property as property for quasi in rem.

**Three ways or theories of distinguishing Shaffer from tagging and maybe quasi in rem involving real property/bank accounts**

1. Because all forms of PJ over an-out-of-state defendant must satisfy Int’l Shoe? (Scalia in Burnham)  
   - tagging does not have to satisfy Int’l Shoe because the defendant is in state  
   - all forms of quasi in rem are unconstitutional though
2. Because all forms of PJ over an out-of-state defendant in which in personam jurisdiction is ultimately asserted must satisfy Int’l Shoe? (Scalia in Burnham)   
     
   - tagging does not have to satisfy Int’l Shoe because the defendant is in state  
   - quasi in rem in Shaffer was a problem because limited appearances were not allowed  
   - had they been allowed it would have been constitutional
3. Alterative theory (slightly different from Int’l Shoe): There is PJ if a defendant can reasonably anticipate being subject to PJ on the basis of his actions. Basically, if a form of PJ is **both** traditional and currently being used in most states, you shouldn’t be surprised.
   1. This accounts for Schaffer, in which they were surprised and had no idea they were subject to PJ.
   2. Language of this sort can be found in Brennan in Burnham: You knowingly assume you could be tagged, the reasonable anticipation standard.

If you don’t like Schaffer where it says blanket phrase that all actions of PJ must use International Shoe there are lots of ways and subtle ways to distinguish it. (Professor Green leans towards supporting the last suggestion).

Scalia in Burnham: Distinguishes quasi in rem in Shaffer from tagging.

* Constitutionally permissible if it was accepted at the time of the 14th Amend. **and** is still used today. This theory explains PJ well because it knocks out the stocks in Schaffer, but not tagging or quasi in rem involving real property/bank accounts

*Additional Notes:*

1. This topic in general offers options for creativity in a possible exam question, (but only do it if it is a form of PJ that is okay under Pennoyer and problematic under Int’l Shoe). Don’t mention any of this in a specific PJ, this is always okay because it was created by Int’l Shoe.
2. Be grudging about dicta in the Supreme Court.. (E.g. *All* cases must use Int’l Shoe, *all* property must be attached before the action, etc.) Focus on what they wrote that is necessary to actually settle the case
3. Even if it’s a specific jurisdiction case focus on the type of specific PJ. If it’s a stream of commerce case focus on those cases we read, not (for example) Burger King case about contracts, not related to stream of commerce.

Alternative theories:

* Be sure to check if more than one type of PJ will work
* Eg if quasi in rem is a problem in Shaffer can set aside property in Del and look at other contacts (defendants in Shaffer had other contacts with Delaware), arguing for specific PJ.
* Same point was true of Burnham. If tagging is a problem, look to see if there is specific PJ.

**Burnham v. Superior Court (U.S. 1990)**

Issue: Is tagging still a good form of personal jurisdiction?

Brennan: tagging is okay in this case – a person should reasonably expect they could be tagged and subject to PJ when in state. Also Burnham gets all of the benefits from the state, commensurate with PJ obligation under Int’l Shoe

Scalia – Burnham not really getting sufficient benefits to be sued on any cause of action, only three days is not enough on this basis to justify PJ under Unt’l Shoe theory

Glannon: “Justice Scalia and three other justices concluded that the *Shaffer* opinion really meant to say that assertions of in personam, quasi in rem, and in rem jurisdiction had to meet the *Int’l Shoe* standard, not that *Int’l Shoe* applied to *other* bases for personal jurisdiction, like transient presence.”

Professor Green: Glannon makes a mistake - transient presence *is an example* of in personam

Remember three kinds of personal jurisdiction: in personam, quasi in rem, in rem. The vast majority of all cases are in personam.

Set aside the question of tagging and look to another possible story why PJ in Burnham satisfies Int’l Shoe

* His family is there, the cause of action is *related* to his family. Maybe the real issue depends on whether Burnham consented for the family moving to California? He gets a lot from a state, but not from a state that he chose. Could possibly created specific PJ independently of tagging.

Burnham sounds a little like Burger King. The other side is compelling his contact with the state. Not a contract case, but BK would still be relevant. Kids aspect makes it very difficult to figure out.

(But the case is about the divorce, not necessarily related to the kids)

**Scalia on Brennan?**

Scalia complaints: Scalia sounds like J. Black in International Shoe, concerns about judges’ moral whims deciding cases.

Brennan’s answer: Not my moral whims -incredibly long tradition of standard in Int’l Shoe. These aren’t just his moral thoughts, long “common law” tradition about what is required.

**What about McGee factors? (When tagging)**

* Remember in specific jurisdiction must “reach out” etc. and *also* must satisfy the McGee factors\
* Not clear that they are relevant

Question: Could the McGee factors also knock out PJ under tagging?

Answer: This wouldn’t work under Scalia’s definition, but maybe under another explanation for tagging as an acceptable form of PJ

*Note: Work out in your own mind about the current state of PJ under Constitutional law and be able to justify it based on what we’ve read. The big problem is figuring out the extent to which old Pennoyer forms of PJ are still good law*

***Tagging Practice Examples:***

D is lured into a state and tagged.

PJ?

Professor Green: Glannon makes a mistake. Case he sites says it is no PJ under NY law. The question is whether there is no PJ under 14th Amendment

We said this was good law under Pennoyer – is that so now?

Look to various approaches in Burnham

Brennan: Using Int’l Shoe standard - doesn’t satisfy International Shoe so probably no PJ…?

Reasonably anticipate PJ standard – maybe PJ? Even though you were lured you could probably anticipate tagging…?

Scalia side: Traditionally accepted by the 14th Amend. BUT not accepted modern day states do not assert it so would most likely be unconstitutional…?

The CEO of the D. Corp is tagged in CA (Corp is the one being sued.)  
PJ in CA?

No! Tagging a human being is not a source of PJ over corporations (unless they’re an agent for service of process, which is generally created only through state statutes – and whether they create PJ is itself a constitutional issue post-Int’l Shoe)

Remember for PJ it’s much better to be a corporation than a human. Humans can be subject to PJ for any cause of action wherever they are tagged (probably, given Burnham) – but a a corp can be subject to general PJ only where it is “at home” under Daimler

A, a partner of the partnership, A & B, is tagged in CA  
PJ in CA over partnership?

Yes. Getting in personam over a partner is enough to get it over the partnership (remember to distinguish from SMJ)

A is domiciled in CT  
B is domiciled in NJ  
A & B’s offices and all of its work is done out of NY  
where is there in personam PJ (setting aside tagging)?

In CT and NJ. Also, there could possibly be general in personam over partnership in NY if you cite Daimler. (Even though Daimler was over corporations). Remember you can probably get general in personam jurisdiction in the states where unincorporated associations and partnerships are “at home” –

NY makes the appointment of an agent for service of process a condition for doing business in NY  
can this create general jurisdiction?

Clarification: The cause of action is unrelated to NY. Business is a Cal corp with Cal PPB

Seems like even though there is consent, NY is being coercive when usually doing business does not create general PJ normally, given Daimler.

Answer: This was good under Pennoyer so do the methods mentioned in Burnham, eg the Scalia method! Since it was good under Pennoyer we must ask is it generally used by states today.

Note: Plaintiffs don’t like Daimler so they are taking advantage of these statutes in some states. Should eventually go to the S.Ct. Remember, absent consent usually only general jurisdiction in business’s principal place of business and place of incorporation.

***Waiver/Consent***

Consent: Choice of forum clauses in a contract (like hitting okay on internet contracts) – this is consent to PJ before litigation arises – tends to be enforced

Can also consent to PJH in litigation by waiver - by failing to mention lack of PJ

* + - Generally lack of PJ be brought up *immediately*.

**State long arm statutes**

* Remember long arm statutes: Cannot go beyond the 14th Amend. They can be less though. In fact, many states do less.
* California and other states have state longarm statutes that goes up to the limits of the 14th Amendment.
* Illinois style – Take each S.Ct. case and add it into their state’s long arm statute. However, this still leaves out a lot of different areas of possible jurisdiction.
* Some courts have said about their Illinois-style long arm statute - “Read up to the limit of Due Process/” This means, read the language as generously as possible. But this still doesn’t mean the state has a Cal. version of incorporating everything allowed in the Constitution.

***Tagging Practice Examples:***

P sues D in state court in New York  
D defaults  
P sues on the default judgment in state court in CA  
D argues that NY state court did not have PJ under the 14th Amendment  
should D offer any other arguments?

He should argue that there was no PJ under NY long arm statutes! Also should say that there is no PJ under NY Constitution. NY Constitution and limits on Due Process might be more restrictive than the U.S. Constitution.

(Sometimes state judges like to make it more restrictive to show their Constitution matters)

Question arose whether there is PJ for suit on default judgment in Cal. We are assuming here that there is jurisdiction in Cal. The source of PJ is most likely property of the defendant that the Plaintiff is trying to get in Cal.

***PJ in Federal Court***

* We’ve been saying federal court has PJ whenever the state court in which it is located has PJ. That is because of FRCP 4(k)(1)(A)
* As a constitutional matter all that matters in federal court is 5th Amendment Due Process contacts with US – matters only when you have D who is abroad
  + Furthermore, there is a tendency in federal courts to set aside International Shoe and use International Law standards when trying to bring in international defendants.
* 4K1A exists to keep people from suing in really inconvenient places.
* Rule 4K1C – some federal statutes have their own personal jurisdiction provisions that override 4K1A

***A few exceptions* to the 4k1A rule**

-Claim that arises under federal law when no state court can have personal jurisdiction. Almost always over something that happened abroad, BUT the United States has personal jurisdiction.

More expansive reading of the 5th amendment than the 14th amendment of “contacts” Could have connections to US but not a specific state.

P (Va.) brings suit in federal court in Virginia against D, a German domiciliary residing in Germany, for a battery that the German committed against him in New York  
- D has no other contacts with the United States besides the brief trip to NY during which the alleged battery occurred  
- D is served in Germany  
Is there PJ?

Will 4K1A work here? No! No connections under any theory to VA

Could 4K2? No! Not under federal law AND there IS PJ in NY

Saudi terrorist is sued under a federal antiterrorism act allowing for American victims of foreign terrorism to sue for damages  
- the alleged acts of terrorism in this case occurred in Saudi Arabia  
- the action is brought in federal court in New York. Is there PJ?

This is an example where 4K2 might be used. Hard to find a story where a state would have PJ.