Personal Jurisdiction and Child Support: Establishing the Parent-Child Relationship as Minimum Contacts

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Rosemarie T. Ring

In Kulko v. Superior Court of California,[1] *the United States Supreme Court held that the parent-child relationship does not constitute minimum contacts between a nonresident parent and the state in which the child resides in actions for child support.*[2] *Rather, there must be some act of purposeful availment by the nonresident parent in order to sustain a state court's assertion of personal jurisdiction. Thus, where their child's presence is the only contact with the forum state, nonresident parents may avoid a court's jurisdiction in a child support action by simply claiming that they lack "minimum contacts" with that state.*

In order to address adequately the issue of personal jurisdiction in the context of child support actions, the barriers created by Kulko *must be overcome. This comment proposes a two-pronged approach. First, Congress should modify the current uniform long-arm statute, enacted as part of the Uniform Interstate Family Support Act, to include a provision establishing the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides.*

Second, the Supreme Court should uphold the states' adoption of this long-arm statute by overruling Kulko. *The Could should particularize the analytic framework for assessing minimum contacts in the context of child support actions by at last acknowledging that the rule announced in* Kulko *was not required by* International Shoe *and has proven untenable in its application. While due process may require purposeful availment when minimum contacts are based on a nonresident defendant's activities in relation to the forum state, this requirement is wholly inappropriate in the context of actions for child support. The obligation to financially support one's child does not arise out of a contractual arrangement or tortious conduct. Thus, it cannot be traced or tied to a particular state. By*

1. 436 U.S. 84, 91 (1978).
2. *Id.* at 101.

acknowledging the parent-child relationship as an alternate basis upon which to establish minimum contacts, the Court can finally restore common sense to this area of the law.

INTRODUCTION

The realities of the modern family have magnified the importance of ensuring effective means for establishing and enforcing child support obligations. Roughly half of all marriages end in divorce and nonmarital pregnancies have increased sharply.[3] As a result, the majority of children in this country will live at least part of their lives in single-parent households.

Children living in single-parent households face a greater risk of growing up in poverty than children living in households with two parents. The U.S. Census Bureau reports that children living with a single mother face a one-in-three chance of living in poverty.[4] If the child's mother was never married to the father, the likelihood jumps to one-in-two.[5] The failure of noncustodial parents to support their children financially has contributed significantly to these shocking statistics. Approximately forty-three percent of women without child support awards live at poverty level as compared to twenty-four percent of women with child support awards.[6]

When parents no longer live in the same state, the challenges faced by custodial parents in establishing child support orders are even more difficult to overcome. In cases where the presence of the nonresident parent's child is the only contact with the state in which the child resides, the courts of that state cannot enter a binding child support order because they are unable to obtain personal jurisdiction over the nonresident parent.[7] Only about fifty-nine percent of custodial parents in interstate cases, cases in which the noncustodial parent resides in a different state from the custodial parent, have valid child support orders, and these individuals only receive approximately sixty percent of the amount awarded.[8] While enforcement of existing child support orders would help alleviate the problem, it is also critical to eliminate all unnecessary barriers to the establishment of child support orders.

Before a court can enter a valid child support order, it must have personal jurisdiction over the noncustodial parent upon whom the obligation of child support will be imposed.[9] However, the Due Process Clause of the

3. U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 5 (1992) [hereinafter SUPPORTING OUR CHILDREN].
4. *Id.* at 2.
5. *Id.*
6. *Id.* at 6.
7. Kulko v. Superior Court, 436 U.S. 84, 91 (1978).
8. SUPPORTING OUR CHILDREN, *supra* note 3, at 4.
9. *Kulko*, 436 U.S. at 91 (1978).

Fourteenth Amendment[10] limits the ability of state courts to assert personal jurisdiction over a defendant who does not reside in the forum state.[11] In *International Shoe Co. v. Washington*,[12] the Supreme Court held that in order for a state to assert personal jurisdiction over a nonresident defendant in accordance with the demands of due process, the defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[13] Thus, it is a violation of due process for any state to make binding a personal judgment against a nonresident defendant with which the state has no "contacts, ties, or relations."[14]

In cases following *International Shoe*, the Court further developed the analytic framework for assessing minimum contacts. By the time the Court addressed the issue of personal jurisdiction in the context of a child support action, it had significantly narrowed the focus of this analytic framework, declaring it "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[15] In doing so, the Court wrongly concluded that a nonresident defendant's act of purposeful availment was the only relevant basis for assessing minimum contacts. *International Shoe* did not mandate this narrow focus. On the contrary, *International Shoe* sought to create a more flexible standard for analyzing due process limitations on state court jurisdiction.

Rather than evaluating the applicability of the purposeful availment requirement in the context of an action for child support, the Supreme Court mechanically applied this analytic framework in *Kulko v. Superior Court of California*.[16] In *Kulko*, the Court held that the parent-child relationship does not establish minimum contacts between a nonresident parent and the state in which the child resides in an action concerning the financial support of a minor child.[17] Rather, there must be some act by which the nonresident parent purposefully avails himself or herself of the benefits and protections of the forum state.[18] In so holding, the Court erected a significant barrier to the assertion of personal jurisdiction over a nonresident parent whose only contact with the forum state is the presence of the child.

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10. The Fourteenth Amendment guarantees that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 3.
11. *Kulko*, 436 U.S. at 91.
12. 326 U.S. 310 (1945).
13. *Id.* at 316 (citations omitted).
14. *Id.* at 318.
15. Hanson v. Denckla, 357 U.S. 235, 253 (1958).
16. 436 U.S. 84, 91 (1978).
17. *Id.* at 101.
18. *Id.* at 100-01.

The Court's failure to recognize the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides has forced courts and legislatures to focus on the nonresident parent's activities in relation to the forum state, to the total exclusion of the parent-child relationship. As a result, where their child's presence is the only contact with the forum state, nonresident parents may avoid personal jurisdiction by simply claiming that they lack "minimum contacts" with that state. Thus, *Kulko* not only stands as a barrier to establishing interstate child support orders, it sends the disturbing message that the parent-child relationship has less legal significance than relationships arranged by contract or arising from a single business transaction. According to Professor Clark: "A rule of law which gives greater weight to the enforcement of commercial contracts than to the enforcement of duties of support in the family can only be characterized as enacting a topsy-turvy system of values."[19]

While attempting to address what they perceive as an injustice, courts and legislatures have struggled to remain faithful to the rule in *Kulko*. To find some act of purposeful availment upon which to base their assertion of personal jurisdiction, courts have been forced to consider issues such as whether nonresident parents engaged in sexual intercourse in the forum state or whether the child resides in the forum state as a result of the nonresident parent's acts or directives.[20] Likewise, legislatures have sought to address the problem by codifying such acts in long-arm statutes specifically designed to allow courts to assert jurisdiction in child support actions.[21]

The limits of this approach and the inapplicability of the analytic framework requiring purposeful availment become painfully obvious in practice. One of the most disturbing examples of the consequences of *Kulko* is in its application to cases involving domestic violence. While courts are allowed to assert jurisdiction in cases where an abused mother and her children relocate to the forum state after being expelled from their home by the nonresident parent,[22] they are prohibited from doing so where an abused mother leaves of her own volition.[23] After *Kulko*, unless the

19. 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13.4 761-(2d ed. 1987).

20. *See infra* Part II.B.1.

21. *See infra* Part II.B.2.

22. Franklin v. Commonwealth, 497 S.E.2d 881, 886 (Va. Ct. App. 1998) (asserting personal jurisdiction where a mother and her children had become residents of the forum state "as a result of [the nonresident parent's] acts").

23. *E.g.*, Miles v. Perroncel, 598 So. 2d 662 (La. Ct. App. 1992) (interpreting Texas statute and declining to exercise jurisdiction over father who failed to object when mother moved child out of state); Ford v. Durham, 624 S.W.2d 737 (Tex. App. 1981) (finding no jurisdiction over father who acquiesced to mother's move with child).

mother and her children have been ordered to leave by the defendant, there is no act of purposeful availment, and, thus, no personal jurisdiction.[24]

There is no doubt that the limitations imposed by *Kulko* must be overcome in order to adequately address the issue of personal jurisdiction in the context of actions for child support. However, the question of how this is to be accomplished remains unanswered. Some proponents for change urge the Supreme Court to overrule *International Shoe* and the minimum contacts test entirely.[25] Given the Court's consistent adherence to the minimum contacts test, this type of drastic shift in the law of personal jurisdiction is unlikely to succeed. Following the approach taken in the context of child custody actions, others urge Congress to legislate around *Kulko*.[26] Proponents of this approach assume that the Supreme Court will either refrain from disrupting an act by Congress or be inclined to treat child support as an exception to the minimum contacts test of *International Shoe*. The likelihood of success in following this course is equally discouraging. Not only are the issues involved in actions for child support readily distinguishable from those implicated in child custody cases, but the Supreme Court has indicated that child custody may not, in fact, qualify as an exception.

This Comment proposes a two-pronged approach. First, Congress should modify the current uniform long-arm statute, enacted as part of the Uniform Interstate Family Support Act ("UIFSA"), to establish the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides in cases concerning the financial support of a minor child. Second, the Supreme Court should uphold the states' adoption of this long-arm statute, recoguizing that the analytic framework for assessing minimum contacts requiring purposeful availment was misapplied in *Kulko*.

I
DEVELOPMENT OF GENERAL PRINCIPLES OF PERSONAL JURISDICTION

A. Pennoyer *and "Presence"*

In *Pennoyer v. Neff*,[27] the Supreme Court announced that the Due Process Clause of the newly adopted Fourteenth Amendment imposed limits on the jurisdictional reach of state courts. To enter judgments affecting the rights or interests of nonresident defendants, state courts had to have personal jurisdiction over them.[28] In *Pennoyer*, the Court considered the validity of a default judgment entered by an Oregon state court against a

24. *Kulko*, 436 U.S. at 86.
25. *See infra* Part III.A.
26. *See infra* Part III.B.
27. 95 U.S. 714 (1877).
28. *Id.* at 732-33.

nonresident defendant served by publication.[29] The Court held that Oregon's assertion of personal jurisdiction violated due process.[30]

Defining the limits of state court jurisdiction, the Court relied on public law principles used to regulate relationships among independent sovereigns. The Court asserted that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "no State can exercise direct jurisdiction and authority over persons or property without its territory."[31] Applying these principles, the Court concluded that state courts derive jurisdiction from the state's power over the defendant's person. Accordingly, a state court's ability to assert jurisdiction was "necessarily restricted by the territorial limits of the State in which it is established."[32]

Pennoyer's rigid territorial framework severely limited the ability of state courts to assert personal jurisdiction over defendants who were not physically present in the forum state. In addition, the Court's reliance on interstate sovereignty, state sovereiguty vis-à-vis other States, as a rationale for due process limitations on state court jurisdiction created uncertainty, as the Court alternately embraced and rejected it in the years that followed.[33] Over the next century, *Pennoyer*'s rigid territorial framework proved too inflexible for a developing national economy.

B. International Shoe *and its Progeny: Developing the Analytic Framework for Assessing Minimum Contacts*

During the period between *Pennoyer* and *International Shoe*,[34] industrialization and the rise of the modern corporation transformed the national economy. As corporations grew in size and influence, they developed new ways of transacting business on a national scale.[35] In addition, the stock market crash of 1929 and the Great Depression led to a general loss of faith

29. *Id.* at 714-16.
30. *Id.* at 734.
31. *Id.* at 722.
32. *Id.* at 720.
33. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982) (stating that the Due Process Clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (stating that due process limitations "act[] to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (stating that due process limitations concern "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States"); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (stating that due process limits on state court jurisdiction "are a consequence of territorial limitations on the power of the respective States").
34. 326 U.S. 310 (1945).
35. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957) (describing "the fundamental transformation of our national economy over the years" by pointing to the fact that "many commercial transactions touch two or more States and may involve parties separated by the full continent"); *see also* Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1176-82 (1978).

in business and demands for the protection of individuals from economic forces beyond their control.[36]

During the initial stages of corporate development, it was generally accepted that a corporation was only subject to personal jurisdiction in the state in which it was chartered.[37] Although this approach was consistent with *Pennoyer's* focus on a defendant's presence in the forum state, the realities of interstate corporate activities led courts to develop legal fictions based on theories such as "implied consent" and "doing business," which allowed state courts to assert personal jurisdiction over foreign corporations in limited situations.[38] As a result, courts turned out "a cornucopia of conflicting decisions" as they attempted to accommodate the consequences of interstate activities while remaining loyal to *Pennoyer's* rigid territorial scheme.[39] By the time *International Shoe* was decided, the Court recognized that a more flexible standard for analyzing due process limitations on state court jurisdiction was required in order to allow for "the social change and growth that had been inhibited by [*Pennoyer*'s] rigid, conservative formalism."[40]

In *International Shoe*, the Court considered whether the State of Washington could assert personal jurisdiction over the International Shoe Company, a corporation incorporated in Delaware and headquartered in St. Louis, Missouri.[41] Although the corporation did not maintain any permanent physical presence in the state, it did employ several salesmen in Washington.[42] Orders were taken in Washington and sent to St. Louis for acceptance or rejection.[43] Pursuant to a statute authorizing the collection and assessment of required employer contributions to the state unemployment fund, Washington filed suit in its own courts to collect the funds after a notice of assessment was personally served upon one of International

36. Kalo, *supra* note 35, at 1182. The demand for protection of the individual from economic forces beyond his or her control drove the development of a new social welfare philosophy as well demands for legislative limitations on corporate power culminating in legislative efforts including: Emergency Farm Mortgage Act of 1933, ch. 25, tit. II, 48 Stat. 41; Public Works Administration Act, ch. 90, tit. II, 48 Stat. 195 (1933); Social Security Act, ch. 531, 49 Stat. 620 (1935); Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58; National Labor Relations Act, ch. 373, 49 Stat. 449 (1935); Reconstruction Finance Corporation Act, ch. 8, 47 Stat. 5 (1932); Securities Act of 1933, ch. 38, tit. I, 48 Stat. 74; Securities Exchange Act of 1934, ch. 404, 48 Stat. 881; Banking Act of 1933, ch. 89, 48 Stat. 162. *See* Kalo, *supra* note 35, at 1182-83 n.224.

37. Kalo, *supra* note 35, at 1162.

38. *Id.* at 1171-72. "Consent" was one such legal fiction by which a foreign corporation doing business in the state was deemed to have consented to being sued in that State. *Id.* Other fictions and theories relied upon included whether a corporation's conduct amounted to "presence" in the state and whether it was "doing business" in the state. *Id.* at 1176-82.

39. Christoper D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 784-85 (1995) (describing various examples of the confusion and inconsistency resulting from the Court's various attempts to provide flexibility within *Pennoyer*'s strict territorialism).

40. Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 825 (1991).

41. Int'l Shoe Co. v. Washington, 326 U.S. at 311-13 (1945).

42. *Id.* at 313.

43. *Id.*

Shoe's salesmen.[44] The company moved to set aside the order and the notice of assessment, arguing that Washington could not assert personal jurisdiction over it because it was not a Washington corporation and did not have a designated agent in the state on whom service could be made.[45]

The United States Supreme Court upheld Washington's assertion of personal jurisdiction, stating:

> [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."[46]

According to the Court, minimum contacts between a nonresident defendant and the forum state were required in order to ensure that a state does not enter a judgment "against an individual or corporate defendant with which the state has no contacts, ties, or relations."[47]

The Court concluded that "systematic and continuous" activities conducted on behalf of the corporation within Washington State had established minimum contacts so as to satisfy due process.[48] Although the Court found minimum contacts based on the corporate defendant's activities in *International Shoe*, there is no indication that the Court intended this to be the only basis upon which to establish minimum contacts in the future. Indeed, the Court expressly stated that the defendant's status as a corporation dictated its focus on the defendant's activities in relation to the state as the sole basis for establishing minimum contacts.[49]

Applying the minimum contacts test in *McGee v. International Life Insurance Co.*,[50] the Court held that a single insurance contract with a "substantial connection" to the forum state established minimum contacts so as to satisfy the demands of due process.[51] Upon assuming the insurance obligations of an insurance company it had acquired, International Life Insurance Company ("International") mailed a reinsurance certificate to a California resident offering to insure him in accordance with the terms of his policy with the acquired company.[52] The insured accepted and mailed premiums from his home in California to International's office in Texas

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44. *Id.*
45. *Id.*
46. *Id.* at 316.
47. *Id.* at 319.
48. *Id.* at 320.
49. *Id.* at 316 ("Since the corporate personality is a fiction...it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.").
50. 355 U.S. 220 (1957).
51. *Id.* at 223.
52. *Id.* at 221.

until the time of his death.[53] The beneficiary of the policy sued to enforce its terms after International refused to pay.[54]

Although International did not have an office or agent in California and had never solicited business in California apart from the policy at issue in the case,[55] the Court upheld California's assertion of personal jurisdiction.[56] According to the Court, it was "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."[57] In addition to the fact that International had solicited the reinsurance agreement in California, the Court relied on the additional facts that the premiums were mailed from California and that the insured was a resident of California when he died in finding that the insurance contract had a "substantial connection" to the State of California.[58] Thus, it appeared that the Court would continue the trend in allowing state courts to consider a wide variety of factors in evaluating whether its assertion of personal jurisdiction in a particular case would comport with the demands of due process.

Only one year later, the Court's potentially broad holding in *McGee* was severely restricted in *Hanson v. Denckla.*[59] In *Hanson*, the Court held that Florida could not assert jurisdiction over a Delaware trustee in an action regarding the validity of a trust established in Delaware by a Pennsylvania resident who later moved to Florida.[60] Despite the fact that the settlor had administered the trust from her residence in Florida and that the trustee had remitted trust income to the settlor in Florida, the Court fonnd that the trust agreement at issue did not have a "substantial connection" to Florida.[61] According to the Court, jurisdiction could not be based on the plaintiff's "unilateral activity" of moving to Florida after entering into the trust arrangement in Delaware.[62] Instead, the Court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[63]

Distinguishing *McGee*, the Court stated that there was "no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee.*"[64] Thus, while *McGee* appeared to allow state courts some discretion in determining

53. *Id.* at 221-22.
54. *Id.* at 222.
55. *Id.* at 221-22.
56. *Id.* at 223.
57. *Id.*
58. *Id.*
59. 357 U.S. 235 (1958).
60. *Id.* at 256.
61. *Id.*
62. *Id.* at 253.
63. *Id.*
64. *Id.* at 252.

whether the contract at issue had a substantial connection to the forum state, *Hanson* definitively established that the substantial connection required by due process could only be established through a nonresident defendant's act of purposeful availment in relation to the forum state. As in *International Shoe*, the Court's emphasis on the defendant's activities was driven by the facts of the case. The nonresident defendant was a corporation and the underlying action involved the validity of a contract arising out of transactions that did not occur in the forum state. While due process might require some act of purposeful availment in order to justify the forum state's assertion of personal jurisdiction under such circumstances, this did not foreclose the possibility of alternate bases upon which to assess minimum contacts in cases involving "contacts, ties or relations" which were not transactional in nature.

Rather than evaluating the various "contacts, ties, or relations" that may exist between a nonresident defendant and the forum state in cases following *International Shoe*,[65] the Court focused exclusively on the nonresident defendant's activities in relation to the forum state. As long as the Court applied this analytic framework in the context of cases involving contract disputes or tort injuries, the Court's narrow focus on the defendant's activities had only minimal negative impacts. However, when applied in the context of an action for child support, the failure to recognize alternate bases for assessing minimum contacts had serious and far-reaching consequences.

II
PERSONAL JURISDICTION AND CHILD SUPPORT

A. Kulko v. Superior Court: *Establishing That the Parent-Child Relationship Does Not Constitute Minimum Contacts*

While *International Shoe* did not require the Court's narrow focus on the activities of a nonresident defendant in determining whether there were "contacts, ties, or relations" sufficient to satisfy the demands of due process,[66] alternate bases for assessing minimum contacts remained hidden in the shadow of *Hanson's* proclamation that some act of purposeful availment was "essential."[67] As a result, in *Kulko*, the Court mechanically applied this standard without any concern or inquiry as to whether it was appropriate to analogize obligations arising out of the parent-child relationship with those arising out of a contractual relationship or the commission of a tort. In holding that the parent-child relationship does not constitute minimum contacts between a nonresident parent and the state in which the

65. Int'l Shoe Co. v. Washington, 326 U.S. at 319.
66. *Id.*
67. 357 U.S. at 253.

child resides,[68] the Court undermined the importance of that connection and erected a barrier to securing child support obligations from absent parents that remains in place today.

In 1959, Ezra and Sharon Kulko were married in California during a three-day military stopover en route to an overseas assignment.[69] At the time, both were New York residents.[70] Immediately following their marriage, Mrs. Kulko returned to New York, as did her husband following his tour of duty.[71] The Kulkos had two children in New York where they resided as a family until 1972, when the Kulkos separated.[72] Following the separation, Mrs. Kulko moved to California.[73] According to their separation agreement, the children would remain with their father during the school year but would spend Christmas, Easter, and summer vacations with their mother.[74] Mr. Kulko agreed to pay Mrs. Kulko three thousand dollars per year in child support for periods when the children were in her custody.[75] Mrs. Kulko obtained a divorce in Haiti incorporating the terms of the separation agreement and returned to California.[76]

In 1973, the Kulkos' daughter told her father that she wanted to move to California to live with her mother.[77] Mr. Kulko consented and bought her a one-way plane ticket to California where she remained during the school year, spending vacations and holidays in New York with her father.[78] In 1976, the Kulkos' son called his mother from New York and informed her that he also wanted to live with her in California.[79] Without Mr. Kulko's consent, Mrs. Kulko arranged for their son to join her in California.[80] Less than a month later, she commenced an action in California to modify the divorce decree to award her full custody of the children and to increase Mr. Kulko's child support obligations.[81] Mr. Kulko made a special appearance to contest California's assertion of personal jurisdiction over him, claiming that he lacked the necessary minimum contacts with that state.[82]

The California Supreme Court upheld the lower court's assertion of jurisdiction, stating that "where a nonresident defendant has caused an effect in the State by an act or omission outside the State, personal juris-

68. Kulko v. Superior Court, 436 U.S. 84, 94 (1978).
69. *Id.* at 86.
70. *Id.*
71. *Id.* at 86-87.
72. *Id.* at 87.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 86-87.
77. *Id.* at 87.
78. *Id.* at 88.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 87-88.

diction over the defendant in causes arising from that effect may be exercised whenever reasonable."[83] According to the California Supreme Court, such an exercise was "reasonable" in this case because Mr. Kulko "purposefully availed himself of the full protection of California laws" by sending his daughter to live with her mother in California.[84]

The United States Supreme Court overruled this decision, holding that "[a] father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections of California's laws.'"[85] According to the Court, any benefit to Mr. Kulko resulting from the fact that his child support payments remained unchanged while his yearly expenses for supporting his daughter significantly decreased did not derive from his daughter's presence in California, but rather from her absence from New York.[86] Likewise, benefits to the child from services provided by California's police and fire departments, school systems, hospitals, libraries and museums, could not be imputed to the father because they "were essentially benefits to the child, not the father, and in any event were not benefits that [the father] purposefully sought for himself."[87] Thus, the Court concluded that "the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."[88]

After *Kulko*, a nonresident parent's act of purposeful availment became the only relevant basis upon which to assess minimum contacts in child support actions. While an action concerning obligations arising out of a contractual agreement may require the forum state to have a substantial connection to the underlying contract so as to assert jurisdiction over its enforcement, the obligation to support one's child financially bears no resemblance to such obligations. Unlike a contractual relationship, the parent-child relationship does not exist in relation to any one state. It is not the result of a transaction carried out under the laws of a particular state. There is no "choice of law" provision selected in advance to govern performance of the obligations arising out of the parent-child relationship. Moreover, the parent-child relationship is not based on an agreement entered into by two concerned parties capable of negotiating in their own best interests. By ignoring the parent-child relationship in favor of the mechanical applica-

83. Kulko v. Superior Court, 564 P.2d 353, 356 (Cal. 1977).
84. *Id.* at 356, 358.
85. *Kulko*, 436 U.S. at 94.
86. *Id.* at 95.
87. *Id.* at 94 n.7 (quoting *Kulko*, 564 P.2d at 356).
88. *Id.* at 101.

tion of the purposeful availment requirement, the Court produced an outcome that left courts and legislatures struggling to apply a rule of law incapable of addressing the realities of obligations arising out of the parent-child relationship.

B. *Aftermath of* Kulko*: Interpreting and Enacting Long-Arm Statutes Based on "Purposeful Availment"*

The Court's holding in *Kulko* not only impacted the authority of state courts to assert jurisdiction over nonresident parents under existing long-arm statutes, but severely limited how legislatures could approach the problem in the future. Because the parent-child relationship was not a relevant basis for asserting jurisdiction, purposeful availment became the focus of courts and legislatures seeking to hold nonresident parents responsible for the financial support of their minor children. Accordingly, state courts struggled to find purposeful availment by analogizing the child support obligation to obligations arising out of relationships based on contractual arrangements or tortious conduct.[89] In addition, legislatures enacted new long-arm statutes incorporating acts of purposeful availment considered to be especially relevant in the context of child support actions.[90] Despite these efforts, courts and legislatures continue to struggle as they are forced to disregard the parent-child relationship in favor of finding some act of purposeful availment in order to navigate the barriers created by *Kulko*. Indeed, upon closer examination, these efforts confirm that the rule announced in *Kulko* is untenable and ought to be overruled.

1. *Lower Courts Struggling to Find Purposeful Availment under Existing Long-Arm Statutes*

State legislatures authorize the exercise of state power over nonresidents by enacting long-arm statutes.[91] Thus, all assertions of personal jurisdiction must satisfy the forum state's long-arm statute and comport with due process.[92] While many states authorize their courts to exercise personal jurisdiction over nonresident defendants on any basis that is constitutionally permissible, others allow courts to assert jurisdiction based on specific acts or circumstances, such as tortious conduct by a nonresident defendant causing injury within the state.[93] Following *Kulko*, courts attempted to assert jurisdiction over nonresident parents under both types of long-arm

89. Susan Weinstein, *Reaching Nonresident Defendants in Child Support Actions: A Survey of State Long Arm Statutes*, 9 PROB. L.J. 81, 95-100 (1989).

90. *See id.* at 103-14.

91. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *Kulko*, 436 U.S. at 89.

92. *See* Weinstein, *supra* note 89, at 83.

93. *Id.* at 92.

statutes by identifying various acts of purposeful availment related to the parent-child relationship.

Long-arm statutes based on specific acts or circumstances typically allow states to assert jurisdiction based on a nonresident's business transactions or tortious conduct.[94] Although these statutes were designed to protect state citizens in interstate business transactions and to allow recovery for physical injuries resulting from torts committed by nonresidents, following *Kulko* courts employed "judicial creativity" in extending these provisions to child support actions.[95] Unfortunately, because an existing divorce decree or child support order is required to assert jurisdiction under these statutes,[96] this approach is limited in its ability to address the problems created by *Kulko* in establishing child support orders in cases involving a nonresident parent.

Under "transacting business" long-arm statutes, courts typically assert jurisdiction based on the existence of a separation or divorce agreement with a "substantial connection" to the forum state.[97] Relying on the separation or divorce agreement, the court is able to treat the dispute as a contract case from which the support obligation arises.[98] This approach obscures the real significance of the dispute as being primarily concerned with the activities of the nonresident parent as opposed to an obligation arising out of the parent-child relationship. Moreover, it is only available to resident parents whose divorce or separation agreement has been entered into in the forum state. It does nothing to aid parents who have left the state of marital domicile, as in *Kulko*.[99]

Courts have also relied on "tortious conduct" long-arm statutes in asserting personal jurisdiction over nonresident parents. Some courts have

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94. For example, New York's long-arm statute provides:

> Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;
> 4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. 302(a) (McKinney 1990 & Supp. 2001).

95. *See* Weinstein, *supra* note 89, at 96.

96. *Id.* at 96-97.

97. *Id.* at 96.

98. *Id.* (quoting Lynch v. Austin, 469 N.Y.S.2d 228, 229 (N.Y. 1983)) ("A New York court observed, 'It is by now settled that the negotiation, execution or performance of a separation agreement . . . may constitute the transaction of business for long arm jurisdictional purposes.'").

99. *Id.*

construed "tortious conduct" provisions broadly to include failure to support a minor child. For example, in *In re Custody of Miller*,[100] the Washington Supreme Court held that "the failure of a parent to support his or her children constitutes a tort" within the meaning of the long-arm statute.[101] Unfortunately, this case is an exception to the rule. Most courts require an existing support order before finding that the nonresident defendant is in violation of a duty or has engaged in tortious conduct, reasoning that in the absence of a valid court order no duty has been violated because no support amount has been set.[102] As a result, long-arm statutes based on tortious conduct can usually only be used to enforce existing orders.

In addition to their limited applicability, "tortious conduct" long-arm statutes can take a variety of forms, introducing unnecessary confusion into a court's analysis. Some statutes explicitly include tortious acts that occur outside the forum state but have effects inside the state.[103] Others limit their application to torts occurring within the forum state.[104] Still others distinguish between acts and omissions occurring both within and without the forum state.[105] As a result, in determining whether they may assert personal jurisdiction over a nonresident parent in a particular case, courts may have to determine where the failure to support occurs.[106] In addition, they may be required to decide whether the failure to support is an act or an omission.[107] While the custodial parent is likely to argue that the failure to support is an act occurring in the child's state of residence, the nonresident parent is likely to argue that it is an omission occurring in the nonresident parent's state of residence.[108] Thus, before courts can even consider the child support obligation at issue, they must spend considerable time and

100. 548 P.2d 542 (Wash. 1976).

101. *Id.* at 718; *see also* Poindexter v. Willis, 231 N.E.2d 1, 3 (Ill. App. Ct. 1967) (stating that "the word 'tortious' . . . is not restricted to the technical definition of a tort, but includes any act committed in this state which involves a breach of duty to another and makes the one committing the act liable to respondent in damages").

102. An Illinois appellate court found that failure to pay back support under an existing order was a tort sufficient to assert personal jurisdiction over a nonresident parent. Boyer v. Boyer, 373 N.E.2d 441, 445 (Ill. App. Ct. 1978). However, on appeal, the Illinois Supreme Court rejected this assertion of jurisdiction holding that "as in *Kulko*, the quality and nature of the defendant's activities in Illinois were not such that it would be reasonable and fair to require him to conduct his defense [in Illinois]." Boyer v. Boyer, 383 N.E.2d 223, 226 (Ill. 1978).

103. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.725(2) (West 1996); MINN. STAT. ANN. § 543.19(d) (West 2000).

104. *See, e.g.*, NEV. REV. STAT. ANN. 14.065(2)(b) (Lexis 1998); OHIO REV. CODE ANN. § 2307.382(a)(3) (Anderson Supp. 1999); TENN. CODE ANN. § 20-2-214(2) (1994).

105. While some long-arm statutes refer only to acts, other explicitly include omissions. *See, e.g.*, ALASKA STAT. § 9.05.015(3) (Michie 1983); OHIO REV. CODE ANN. § 2307.382(a)(3) (Anderson Supp. 1999).

106. *See id.*

107. *See* Ann Bradford Stevens, *Is Failure to Support a Minor Child in the State Sufficient Contact with that State to Justify In Personam Jurisdiction?*, 17 S. ILL. U. L.J. 491, 516 (1993).

108. *See id.* at 515-16.

effort in working through the above intricacies of long-arm statutes based on tortious conduct.

Both "transacting business" and "tortious conduct" long-arm statutes are of limited use to courts seeking to assert personal jurisdiction over a nonresident parent. Unless the nonresident parent has entered into a divorce agreement in the forum state, there is no act of purposeful availment. Likewise, even if a court is willing to find that the nonresident parent's failure to support the child constitutes an act of purposeful availment, it is of limited use unless there is an existing child support order. In addition to the limited applicability of these long-arm statutes, both approaches focus on the nonresident parent's activities to the total exclusion of the parent-child relationship. The obligation to financially support one's child does not arise out of the activities of a nonresident parent in relation to the state in which the child resides. The parent-child relationship is the source of that obligation and should be the focus of the court's inquiry.

At the other end of the spectrum, some states enact long-arm statutes allowing state courts to assert jurisdiction on any basis not inconsistent with the demands of due process.[109] *Kulko*'s extension of the purposeful availment requirement to child support actions also severely limited the reach of long-arm statutes authorizing the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state of or the United States."[110] By its holding, *Kulko* required courts to disregard the parent-child relationship. Thus, even courts presumably given the greatest degree of latitude in asserting jurisdiction were limited by *Kulko*.

2. *Limiting Legislative Efforts to Respond to Issues of Personal Jurisdiction in the Context of Child Support Actions*

The holding in *Kulko* not only served as a barrier to courts asserting personal jurisdiction under existing long-arm statutes, but also dictated how legislatures could approach the problem in the future. While courts have struggled to find acts of purposeful availment comparable to a breach of contract or tortious conduct, legislatures have endeavored to enact new long-arm statutes specifically designed to confer jurisdiction based on activities held to constitute minimum contacts in actions for child support.[111] However, despite these efforts *Kulko*'s purposeful availment requirement remains a barrier to real change.

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109. For example, California's long-arm statute provides, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973).

110. *Id.*

111. Weinstein, *supra* note 89, at 104 n.128, 110 n.164, 112 n.175 (discussing statutes which address activities such as the maintenance of a marital domicile within the forum state, acts of sexual intercourse in the forum state which may have resulted in conception of the child who is the subject to the action, and failure to support a child residing in the forum state).

These specialized statutes do offer some benefit over traditional long-arm statutes in that they clearly indicate the legislature's intent to assert jurisdiction over nonresident parents in child support actions.[112] However, courts are still forced to disregard the parent-child relationship in assessing minimum contacts. Instead, courts must find some act of purposeful availment by analyzing issues such as whether a child is present in the forum state as a result of the actions of the defendant or whether the defendant engaged in sexual intercourse in the state that may have resulted in the conception of the child who is the subject of the child support action.

One act of purposeful availment identified in these specialized long-arm statutes is where the child resides in the forum state because of the acts or directives of the nonresident parent.[113] In *Franklin v. Commonwealth*,[114] a case in which a mother and her two children had relocated to Virginia after the nonresident defendant abused and finally expelled them from their home, a Virginia appellate court held that it could assert personal jurisdiction over the nonresident father because the children had become residents of Virginia "as a result of his acts."[115] Although the defendant did not contest the fact that he had abused and expelled his family from their home, he argued that he had not purposefully availed himself of the benefits and protections of the forum state because he had not specifically directed them to relocate to Virginia.[116] The court dismissed this argument, stating that

> [t]o allow [a] husband to escape his support obligations merely because he failed to dictate the specific destination when he ordered his family to leave the marital home would frustrate the purpose of the legislature . . . to create an economical and expedient means of enforcing support orders for parties located in different states.[117]

The court distinguished cases in which other courts declined to exercise jurisdiction over nonresident fathers under similar long-arm provisions by stating that in each of those cases "the children resided in [the forum state] after their mother chose to move out of state without any urging from their fathers."[118]

This distinction has no basis in reality and is an example of why forcing courts to show purposeful availment in the context of an action for

112. *See id.* at 103.

113. VA. CODE ANN. § 20-88.35 (Michie 2000) ("In a proceeding to establish . . . a support order . . . a tribunal of this Commonwealth may exercise personal jurisdiction over a nonresident individual . . . [if the] child resides in this Commonwealth as a result of the act or directives of the individual.").

114. 497 S.E.2d 881 (Va. Ct. App. 1998).

115. *Id.* at 886.

116. *Id.*

117. *Id.*

118. *Id.* at 885 (citing Miles v. Perroncel, 598 So. 2d 662 (La. Ct. App. 1992); Ford v. Durham, 624 S.W.2d 737 (Tex. Ct. App. 1981)).

child support is inappropriate. As dictated by *Kulko*, unless a court can point to some act of purposeful availment, there can be no basis for finding minimum contacts.[119] Under this logic, it is significantly more difficult for a mother who leaves an abusive husband of her own volition, as opposed to being ordered out of the home by her abuser, to obtain personal jurisdiction over him should she and her children move to another state.

A nonresident parent's act of sexual intercourse in the forum state, where the act may have resulted in conception of a child who is the subject of the action, is another act of purposeful availment often identified in specialized long-arm statutes.[120] In *Phillips v. Fallen*,[121] a Missouri appellate court upheld the validity of a support order issued by a Washington court asserting personal jurisdiction over a nonresident defendant where he had "not overcome adequately [the resident mother's] averment that the couple had sexual intercourse in Washington which may have resulted in their child's conception."[122] The defendant father acknowledged visiting Washington with the plaintiff mother around Thanksgiving 1982, but contended that he "did not remember" having sexual intercourse and that "the child's conception could not have occurred during the couple's visit to Washington."[123]

Relying on a medical dictionary and the mother's medical records, the court held that the Washington court had not erred in asserting personal jurisdiction over the nonresident father:

> While the medical records suggest that the child was born prematurely by approximately three weeks, these records were not authenticated, and [defendant] did not present any medical testimony supporting his interpretation of them. We discern no basis for concluding that the decision erred in rejecting Phillips' interpretation. The child was born 271 days after Thanksgiving 1982. A normal gestational period is 280 days, but a range of 250 to 310 days is not abnormal.[124]

In struggling to find some act of purposeful availment, rather than focusing on the parent-child relationship and the child support obligation arising

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119. Kulko v. Superior Court, 436 U.S. 84, 100-01 (1978) (citation omitted). The Court stated that while

> [i]t cannot be disputed that California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children . . . these interests simply do not make California a "fair forum" in which to require [the nonresident father], who derives no personal or commercial benefit from his child's presence in Califoruia and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default.

Id.

120. *See* Weinstein, *supra* note 89, at 110-12.

121. No. WD 55199, 1999 Mo. App. LEXIS 86 (W.D. Mo. Jan. 26, 1999).

122. *Id.* at *17.

123. *Id.* at *14.

124. *Id.* at *14-15 (citing BLAKISTON'S GOULD MEDICAL DICTIONARY 556 (4th ed. 1979)).

from it, the court spent the majority of its opinion analyzing the definition of a normal gestational period.

The *Phillips* case is yet another example of how requiring purposeful availment in the context of actions for child support can distort the true nature of the child support obligation and require courts to engage in meaningless analysis. When and where a nonresident parent engaged in sexual intercourse is a private matter and should be irrelevant in child support actions once paternity has been established. Thus, even under long-arm statutes specifically designed to confer jurisdiction in child support actions, *Kulko*'s focus on purposeful availment obscures the real significance of the child support obligation. Courts and legislatures are forced to spend time analyzing the nonresident parent's activities in relation to the forum state, rather than focusing on the parent-child relationship as the source of the obligation.

C. *Supreme Court Developments Following* Kulko*: Undermining "Family Harmony" by Requiring Purposeful Availment*

Burnham v. Superior Court[125] was the only other Supreme Court case to address the issue of personal jurisdiction in the context of an action for child support. The Court's adherence to the analytic framework requiring purposeful availment led the Court to rely on transient jurisdiction in upholding California's assertion of personal jurisdiction over a nonresident parent. The perverse incentives created by the Court's holding in *Burnham* highlight the unique problems encountered in this area of the law and provide yet additional support for the need for reform.

In *Burnham*, the Court upheld California's assertion of personal jurisdiction to issue a binding child support order against a nonresident parent who was served within the forum state.[126] Mr. and Mrs. Burnham's marital domicile was New Jersey.[127] Upon their separation, Mrs. Burnham and their children relocated to California with Mr. Burnham's consent.[128] The following year, Mrs. Burnham filed for divorce in a California court.[129] While in California on business and to visit his children, his only contacts with the state, Mr. Burnham was served with a summons notifying him of the divorce action.[130] Arguing that he lacked minimum contacts with California, Mr. Burnham challenged the California court's assertion of personal jurisdiction over him.[131]

125. 495 U.S. 604 (1990).
126. *Id.* at 628.
127. *Id.* at 607.
128. *Id.*
129. *Id.* at 607-08.
130. *Id.* at 608.
131. *Id.*

While the Supreme Court unanimously upheld California's assertion of personal jurisdiction over Mr. Burnham based on service of process within the forum state,[132] a majority of the Court could not agree on a single rationale. Four Justices held that the assertion of personal jurisdiction based on presence in the state is always justified, regardless of minimum contacts, because in-state service of process is a traditional basis of jurisdiction.[133] Focusing on the defendant's state of mind, another Justice held that as long as the defendant's presence in the jurisdiction was intentional, no individual determination of fairness was necessary.[134] Finally, another Justice insisted upon the application of the minimum contacts test, holding that Burnham had purposefully availed himself of the forum state's benefits during his three-day visit to California.[135]

In contrast to *Kulko*, the Court did not rely on, or even make reference to, the fact that Mr. Burnham's children resided in California. Thus, *Burnham* appears to conform with *Kulko*, discounting the parent-child relationship as constituting minimum contacts. However, the practical consequences of the Court's failure to consider the impact of applying even the traditional basis of jurisdiction in a family law context further undermines the Court's apparent assumption that family law does not require any kind of special treatment.

In *Kulko*, the Court emphasized that Mr. Kulko was acting "in the interests of family harmony" when he acquiesced to his daughter's desire to live with her mother in California.[136] In addition, the Court stated that "[t]o make jurisdiction in a case such as this turn on whether [the defendant] bought his daughter her ticket or instead unsuccessfully sought to prevent her departure would impose an unreasonable burden on family relations."[137] However, in *Burnham*, the Court did not appear to concern itself with the even greater burden that its application of transient jurisdiction might impose on family relations. Under *Burnham*, a parent can only visit a child residing in another state at the risk of subjecting himself to personal jurisdiction in that state. Accordingly, the *Burnham* Court "effectively ensures that the nonresident father who is inclined to avoid enforcement of his financial obligations will take care to avoid his emotional obligations as well."[138]

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132. *Id.* at 628.

133. *Id.* at 621. Chief Justice Rehnquist, Justice Kennedy, and Justice White joined Justice Scalia's opinion. *Id.* at 607.

134. *Id.* at 628 (White, J., concurring).

135. *Id.* at 634-35 (Brennan, J., concurring). Justice Marshall, Justice Blackmun, and Justice O'Connor joined Justice Brennan's opinion.

136. Kulko v. Superior Court, 436 U.S. 84, 94 (1978).

137. *Id.* at 98.

138. Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 FAM. L.Q. 293, 300 (1992).

III
OVERCOMING *Kulko*: ALLOWING STATE COURTS TO ASSERT PERSONAL JURISDICTION OVER A NONRESIDENT PARENT BASED ON THE PARENT-CHILD RELATIONSHIP

As a result of the Court's failure to recognize the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides in actions for child support, courts and legislatures have struggled to address what they perceive as an injustice. *Kulko* will remain a barrier to creating effective solutions as long as courts and legislatures are forced to disregard the fundamental importance of the parent-child relationship in favor of finding some act of purposeful availment. While there is no doubt that the limitations imposed by *Kulko* must be overcome to adequately address the issue of personal jurisdiction in the context of actions for child support, the question of how this is to be accomplished remains unanswered.

Some proponents for change urge the Supreme Court to overrule *International Shoe* and the minimum contacts test entirely.[139] However, this approach seems unlikely to succeed, given the Court's consistent adherence to the minimum contacts test. Others compel Congress to follow the approach taken in the area of child custody. Predicting that the Supreme Court will either refrain from disrupting an act by Congress or be inclined to treat child support as an exception to the minimum contacts test of *International Shoe,* they urge Congress to simply legislate around *Kulko*.[140] The likelihood of success in following this course is equally discouraging. Not only is child support readily distingnishable from child custody, but the Supreme Court has indicated that child custody may not, in fact, qualify as an exception.

This Comment proposes a two-pronged approach to the problem.[141] First, Congress should modify the current uniform long-arm statute, enacted as part of the UIFSA, to include a provision stating that the parent-child relationship constitutes minimum contacts between a nonresident parent and the state in which the child resides in actions concerning the financial support of a minor child.

Second, the Supreme Court should uphold the states' adoption of the long-arm statute by overruling *Kulko*. The Court should particularize the analytic framework for assessing minimum contacts in the context of child support actions by at last acknowledging that the rule announced in *Kulko* was not required by *International Shoe* and has proven untenable in its application. While due process may require purposeful availment when minimum contacts are based on a nonresident defendant's activities in

139. *Infra* Part III.A.
140. *Infra* Part III.B.
141. *Infra* Part III.C

relation to the forum state, this requirement is wholly inappropriate in an action for child support. The obligation to financially support one's child does not arise out of a contractual arrangement or tortious conduct. Thus, it cannot be traced or tied to a particular state. By acknowledging the parent-child relationship as an alternate basis upon which to establish minimum contacts, the Court can finally restore common sense to this area of the law.

A. Overruling International Shoe *and the Minimum Contacts Test*

Many commentators have suggested a total repudiation of *International Shoe* and the minimum contacts test, arguing that the Court has never been able to "overcome the vagueness of the minimum-contacts general principle."[142] In addition, they contend that the theoretical structure of minimum contacts analysis has led to even more confusion as the Court has alternately embraced and rejected interstate sovereignty as a rationale for limiting state court jurisdiction.[143]

Although critics of *International Shoe* have no trouble identifying the many failings of the minimum contacts test and uniformly advocate that the Court overrule the *International Shoe* line of cases, there is considerably less agreement on how the Court should proceed in crafting a new standard. Some reject "constitutionalized personal jurisdiction" altogether, arguing that *Pennoyer* does not stand for the proposition that the Due Process Clause of the Fourteenth Amendment operates as a direct limitation on state court jurisdiction.[144] They advocate legislative action, either by the states or Congress, to address the "jurisdictional jigsaw puzzle" created by the Court's due process analysis.[145]

Emphasizing that such an approach would require "dumping nearly 120 years of Supreme Court precedent,"[146] other critics argue that abandonment of *International Shoe* ignores that jurisdictional rules frequently implicate constitutional regulation in order to protect individual rights or federal structure.[147] Still others advocate an approach that falls somewhere in the middle, focusing on fairness to the nonresident defendant rather than federal structure. While they do not advocate rejection of the premise that the Due Process Clause imposes limits on state court jurisdiction, they do urge the Supreme Court "to dismantle the many barriers to personal

142. *E.g.*, Rex R. Perschbacher, Symposium: *Fifty Years of* International Shoe: *The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513, 514 (1995).

143. *See* Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983).

144. *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 87-105 (1990).

145. *Id.* at 105.

146. Perschbacher, *supra* note 142, at 520.

147. *See* John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borcher's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591, 643-44 (1995).

jurisdiction erected under the supposed aegis of the Constitution and interfere only in the unlikely event that a state court has offended basic concepts of fairness to absent defendants."[148]

Kulko relied on *International Shoe* and its progeny in holding that the presence of a nonresident defendant's child in a state does not constitute minimum contacts with the state for actions involving the financial support of that child. While there is no doubt that overruling *International Shoe* and its progeny would eliminate *Kulko* and the burden imposed on courts and legislatures seeking to assert personal jurisdiction over nonresident parents, the prospect of success in taking this approach is extremely unlikely. There is no indication that the Supreme Court will overrule *International Shoe* in the near future.[149] Rather than expending the considerable energy it would take to wage a war against *International Shoe* and the minimum contacts test, those interested in reforming the law of personal jurisdiction in the area of child support should instead emphasize that *International Shoe* did not mandate the outcome in *Kulko*.

International Shoe did not preclude the possibility that later Courts would recognize the parent-child relationship as constituting minimum contacts between a nonresident parent and the forum state in actions concerning the financial support of a minor child. Rather than evaluating the applicability of the purposeful availment requirement in the context of an action for child support, the Court mechanically applied this analytic framework in *Kulko*.[150] Viewed in this way, proponents for change in the area of child support need only fight the *Kulko* "battle" in order to achieve the desired end and should leave the *International Shoe* "war" for another day.

B. Legislating around Kulko: *Child-State Jurisdiction*

Other commentators suggest that in approaching the limitations imposed on courts in asserting personal jurisdiction in child support actions we should not "overlook important opportunities for refining or revising *International Shoe* through legislative enactments at the state level that are inconsistent with announced doctrine, but sufficiently well-grounded to

148. Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 532 (1995); *see also* Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 759-60 (1995) (arguing that the separation of minimum contacts from reasonability factors in *Burger King* and *Asahi* unnecessarily complicates due process analysis).

149. The Supreme Court has consistently applied *International Shoe's* minimum contacts test in deciding issues of personal jurisdiction. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

150. Kulko v. Superior Court, 436 U.S. 84, 91 (1978).

inspire constitutional respect."[151] They argue that rather than trying to preserve or make sense of the analytic framework for assessing minimum contacts, we should simply legislate around it when necessary.[152] Supporters of this approach point to the Uniform Child Custody Jurisdiction Act ("UCCJA")[153] in the area of child custody as a "fine example of the ways that constitutional doctrine can be shaped through legislation in the service of sound policy."[154]

In *May v. Anderson*,[155] the Supreme Court held that a state was not required to give full faith and credit to another state's custody decision when that state did not have personal jurisdiction over both parents.[156] Justice Burton and three other Justices concurring in the opinion relied on due process analysis, stating that personal jurisdiction over both parents was required for the custody order to be binding.[157] Justice Frankfurter, as the decisive voter, relied solely on the Full Faith and Credit Clause, concluding that whether or not a state court recognized the custody order of another state was a question of comity.[158] While states were free to iguore a custody order entered by another state lacking personal jurisdiction over both parents,[159] a state's decision to recognize such an order "would not offend the Due Process Clause."[160] Thus, it appeared that personal jurisdiction over both parents was not absolutely required for a state to enter a binding judgment.

As a result of *May v. Anderson*, states were free to iguore custody orders entered by courts in other states in favor of entering new orders with different terms. Criticizing the Court's holding in *May*, one commentator called it a "double-barreled weapon for assaulting custody decrees."[161] In response to the "jurisdictional free-for-all in custody litigation" created by multiple custody orders being entered by different states,[162] the National Conference of Commissioners on Uniform Laws adopted the UCCJA in

151. Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting* International Shoe *to Family Law*, 28 U.C. DAVIS L. REV. 1047, 1047 (1995).
152. *Id.* at 1053.
153. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999) [hereinafter UCCJA].
154. Bruch, *supra* note 151, at 1053.
155. 345 U.S. 528 (1953).
156. *Id.* at 533-35.
157. *Id.* at 533.
158. *Id.* at 535-36.
159. *Id.* at 535.
160. *Id.* at 535-36.
161. Geoffrey C. Hazard, Jr., May v. Anderson: *Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 390-91 (1959) ("If the parent attacking the decree [can claim that the issuing court did not have personal jurisdiction over him], he relies on Justice Burton's jurisdictional language and claims himself not bound. . . . If the parent *was* before the rendering court, then he relies on Justice Frankfurter's concurrence and claims that the local court should make an independent inquiry regarding the child's custody.").
162. *Id*; *see also* Stevens, *supra* note 107, at 510.

1968.[163] According to Professor Bruch: "Only creativity born of necessity removed custody law from the resulting doctrinal confusion."[164]

The drafters abandoned their efforts to find a long-arm statute that would meet the conflicting requirements of *May v. Anderson.* As Professor Bruch explains, "They fixed their eyes instead on the substantive legal question, which required that a court determine the child's best interests. . . . The solution they developed was to define the *best* possible place to litigate—a place with the most information about the child and possible custodial arrangements."[165] Under the UCCJA, a court is not required to obtain personal jurisdiction over both parents in order to issue a valid and binding custody order.[166] Rather, state courts are permitted to assert jurisdiction over child custody actions in the "home-state" of the child whose custody is at issue.[167]

The drafters of the UCCJA were aware that home-state jurisdiction could lead to a constitutional challenge, because it was arguably inconsistent with announced doctrine. They justified "home-state" jurisdiction by characterizing child custody as a status determination, which, like divorce, is an exception to *International Shoe* and the minimum contacts test.[168] While the Supreme Court has not addressed the issue of whether due process mandates personal jurisdiction over both parents in child custody actions, most courts simply assume that the UCCJA satisfies due process concerns.[169] Commentators are divided in their assessment of this problem. Some urge the Court to strike down the UCCJA, arguing that custody is not a status determination and that home-state jurisdiction is therefore unconstitutional.[170] However, others believe that "the Court would be loathe to overrule such a thoughtful accommodation of substantive and jurisdictional needs, particularly after the scheme has proven popular and successful in practice."[171]

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163. In 1997, the UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1999) (hereinafter UCCJEA), was adopted by the National Conference of Commissioners on Uniform States Laws. The jurisdictional provisions of the UCCJEA are identical to those of the UCCJA for the purposes of this discussion.

164. Bruch, *supra* note 151, at 1051.

165. *Id.*

166. A commissioner's note states that "[t]here is no requirement for technical personal jurisdiction" in child custody cases. UNIF. CHILD CUSTODY JURISDICTION ACT § 12 cmt. 9, U.L.A. 557 (1999).

167. The "home state" of the child is generally the place where the child and custodial parent have lived for the preceding six months. UNIF. CHILD CUSTODY JURISDICTION ACT § 2, 9 U.L.A. 286 (1999).

168. In *Williams v. North Carolina*, 325 U.S. 226 (1945), the Court held that a binding divorce order can be entered wherever the plaintiff spouse is domiciled "because divorce is a decision as to a person's status." Similarly, in *Shaffer v. Heitner*, 422 U.S. 186, 209 n.30 (1977), the Court acknowledged that status determinations are an exception to *International Shoe* and minimum contacts.

169. Bruch, *supra* note 151, at 1053 n.22.

170. Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 854-91 (1995); *see also* Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 742-53 (1982).

171. Bruch, *supra* note 151, at 1053.

Supporters of the UCCJA have suggested that jurisdictional reform efforts in the area of child support should follow the child custody model in legislating around announced doctrine since the focus of the action is again on the best interests of the child.[172] In 1992, the United States Commission on Interstate Child Support[173] ("Commission") urged Congress to adopt a finding that "a state where a child is domiciled is declared to have satisfied due process when asserting personal jurisdiction over a nonresident defendant who is the parent or presumed parent of a child in a parentage or support order."[174] This innovation in jurisdictional doctrine is referred to as "child-state" jurisdiction and would allow the state in which a child resides to assert jurisdiction over a nonresident parent, even if the parent had no other contacts with the forum state.[175]

In recognition of the fact that "child-state" jurisdiction was inconsistent with the Supreme Court's holding in *Kulko*, the Commission further recommended that Congress provide for an expedited appeal to the Supreme Court directly from a federal district court to test the constitutionality of this assertion of jurisdiction.[176] If the Supreme Court upheld the constitutionality of "child-state" jurisdiction, the Commission recommended that Congress "require all states to include explicitly a 'child-state' long-arm provision reflecting the expanded scope based on a child's residence."[177] While the Commission understood that *Kulko* would have to be overruled in order for child-state jurisdiction to survive a constitutional challenge, it relied almost exclusively on the success of "home-state" jurisdiction in the context of child custody disputes as an indicator of the likelihood that the Supreme Court would uphold a similar standard in the context of child support.[178]

It would be a mistake to rely on the success of "home-state" jurisdiction in the context of child custody actions to predict the fate of "child-state" jurisdiction in the context of child support. While some argue that child support is a collateral effect of child custody and should fall within the status exception to the personal jurisdiction requirement,[179] it is well

172. *See* David J. Benson, *Can a Case Be Made for the Use of the Uniform Child Custody Jurisdiction Act in Child Support Determinations?*, 26 GONZ. L. REV. 125 (1990-1991).

173. The Commission was established pursuant to the Family Support Act of 1988, 42 U.S.C. § 652(a)(8) (1988). The Commission was charged by Congress to make recommendations on improvements to the interstate establishment and enforcement of child support awards. In 1992, the Commission introduced a report into Congress called SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM (1992), containing extensive recommendations addressing the problem of interstate child support obligations.

174. SUPPORTING OUR CHILDREN, *supra* note 3, at 86. The Commission proposed that Congress adopt this finding pursuant to its powers under the Due Process Clause, the Commerce Clause, the General Welfare Clause, and the Full Faith and Credit Clause. *Id.*

175. *Id.* at 82-84.

176. *Id.*

177. *Id.*

178. *See id.* at 86.

179. Allen, *supra* note 138, at 305-07 (arguing that "[t]he parent's obligation to support the child is not merely related to the status determination; it is an inevitable concomitant of custody decisions").

established that child support is a personal obligation.[180] Thus, the child support obligation is readily distinguishable from child custody and therefore does not provide the Court with an acceptable basis upon which to overrule *Kulko*.

There may be yet another reason not to follow the child custody model. In *Burnham v. Superior Court*, the Court questioned the validity of custody decisions where the forum does not have personal jurisdiction over both parents.[181] Justice Scalia stated that the nonresident parent's three-day presence in the forum state would not establish minimum contacts so as to allow the forum state's assertion of personal jurisdiction to be fair.[182] Although it is clear that courts and legislatures must be relieved of the burden imposed by the Court's holding in *Kulko*, relying on the concept of "child-state" jurisdiction in legislating around it, however tempting, may not be the best means to accomplish this end.

C. *This Comment's Proposal: Establishing the Parent-Child Relationship as Constituting Minimum Contacts in Child Support Actions*

This Comment proposes a two-pronged approach to resolving the problems flowing from the Court's holding in *Kulko*. First, Congress should modify the current uniform long-arm statute, enacted as part of the UIFSA, to include a provision establishing the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides in cases concerning the financial support of a minor child. Second, the Supreme Court should uphold the states' adoption of this uniform long-arm statute by overruling *Kulko*.

By the time the Court decided *Kulko*, the prominence of the purposeful availment requirement in the analytic framework for assessing minimum contacts was the result of both the context in which previous cases had been decided and the Court's struggle to define the role of interstate sovereignty in due process analysis. Rather than evaluating the various "contacts, ties or relations" that may exist between a nonresident defendant and the forum state in *International Shoe* and its progeny, the Court focused on refining the analytic framework for assessing minimum contacts based on a nonresident defendant's activities, concluding that purposeful availment was "essential" in each case.

International Shoe and cases leading up to *Kulko* involved defendants whose only contacts with the forum state were commercial or transactional in nature, as opposed to personal and enduring.[183] In such cases, the con-

180. Kulko v. Superior Court, 436 U.S. 84, 91 (1978).
181. 495 U.S. 604 (1990).
182. *Id.* at 619.
183. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945) (action concerning a nonresident defendant's obligation to contribute to the forum state's unemployment compensation as a result of business activities conducted within the forum state); McGee v. Int'l Life Insur. Co., 355 U.S.

nection between the nonresident defendant and the forum state could only be based on the activities of the nonresident defendant in relation to the forum state. Because not all activities rise to the level of establishing minimum contacts with the forum state so as to satisfy the demands of due process, it was necessary to distinguish between those activities that were substantial enough to establish minimum contacts and those that were not. As a result, the Court focused on developing an analytic framework by which it could assess minimum contacts based on a nonresident defendant's activities directed toward the forum state, as opposed to fully exploring alternate bases upon which minimum contacts may exist.

The Court's reliance on interstate sovereignty as a justification for limitations on state court jurisdiction further underscored the Court's focus on purposeful availment. Under this rationale, "contacts, ties, or relations" between a nonresident defendant and the forum state were required to ensure more than fairness to the individual.[184] They were required to justify the state's exercise of power over the nonresident defendant.[185] According to the Court, the forum state's exercise of power could only be justified where a nonresident defendant had purposefully availed himself or herself of the benefits and protections of the laws of the forum state.[186] In doing so, it could be said that the nonresident defendant had implicitly consented to the assertion of jurisdiction through his or her own actions.[187]

In *Kulko*, the Court failed to recognize that *International Shoe* and its progeny allowed for alternate bases upon which to find minimum contacts between a nonresident defendant and the forum state so as to satisfy the demands of due process. Rather than questioning the applicability of the purposeful availment requirement in the context of child support actions, the Court mechanically applied this analytic framework in holding that the parent-child relationship did not constitute minimum contacts between a nonresident parent and the forum state in which the child resides. Despite the Court's obvious belief that it was simply following precedent, *International Shoe* and its progeny did not foreclose the possibility of alternate bases upon which to establish minimum contacts between a defendant and the forum state, nor did it require purposeful availment where minimum contacts could be established on such alternate bases.

220, 221 (1957) (action concerning a nonresident defendant's obligation to pay benefits under a life insurance contract); Hanson v. Denckla, 357 U.S. 235, 238 (1958) (action concerning the right to principal of a trust established outside the forum state); Shaffer v. Heitner, 433 U.S. 186, 189-90 (1977) (corporate shareholder's derivative action).

184. *Int'l Shoe*, 326 U.S. at 319.

185. *Hanson*, 357 U.S. at 251.

186. *Id.* at 253.

187. Weinstein, *supra* note 89, at 86 ("The purposeful availment requirement may be understood as implicit consent . . . or it may be understood as a social contract. In other words, the nonresident's relationship with a state justifies the state's making a demand of the nonresident.") (citations omitted).

On the contrary, *International Shoe* attempted to create a more flexible approach to personal jurisdiction in order to accommodate social and economic changes occurring in the twentieth century. While cases following *International Shoe* are typically presented as the "inexorable working out of *International Shoe* standards via the minimum contacts/fair-play doctrine," in reality they have undermined its vision of allowing more flexibility in the assertion of personal jurisdiction.[188] *International Shoe* required only certain minimum contacts between a non-resident and the forum state so as to satisfy the demands of due process. Whether minimum contacts were established by the defendant's activities directed at the forum state or on some other basis, the Court emphasized that the primary concern of the Due Process Clause is that states do not "make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."[189]

Because *International Shoe* involved a corporate defendant, the activities of corporate agents were the only basis upon which to assess the contacts, ties, or relations that existed between the defendant and the forum state. As noted by the Court, "[s]ince the corporate personality is a fiction . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[190] After reviewing various types of activities that may or may not rise to the level of establishing minimum contacts,[191] the Court emphasized that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."[192] Rather, the Court must evaluate the "quality and nature of the activity in relation to the fair and orderly administration of the laws."[193] Where the defendant's activities allow him to enjoy the "benefits and protection of the laws" of the forum state, the activities establish minimum contacts between the defendant and the forum state so as to satisfy the demands of due process.[194]

The Court's focus on the activities of the corporate defendant in *International Shoe* in no way stands for the proposition that a defendant's activities are the only relevant basis upon which to establish minimum contacts. *International Shoe* established the general rule that states may not

188. Reynolds, *supra* note 40, at 822.
189. *Int'l Shoe*, 326 U.S. at 319.
190. *Id.* at 316.
191. The Court noted that where a corporation's activities within a state are continuous and systematic, and give rise to the liabilities sued upon, the corporation is "present" for jurisdictional purposes, and the demands of due process are satisfied. Conversely, where a corporation's activities within a state are "casual," involving only "single or isolated items of activities," and are not related to the lawsuit, the corporation is not considered "present." *Id.* at 317-18.
192. *Id.* at 319.
193. *Id.*
194. *Id.*

assert personal jurisdiction over nonresident defendants with whom they have no contacts, ties, or relations.[195] It also established the more specific rule that where minimum contacts are based on a nonresident defendant's activities, not all activities are substantial enough to establish minimum contacts with the forum state.[196]

In *McGee v. International Life Insurance Company*,[197] the Court upheld a California court's assertion of personal jurisdiction based on a single contractual agreement with a "substantial connection" to the State of California.[198] Although the Court noted that the contract was "delivered in California," the fact that the premiums were mailed from California and that the insured was a resident of California when he died were also important factors in the Court's finding that the contract had a substantial connection to California.[199] Rather than limiting its analysis to only the activities of the nonresident defendant, the Court appeared to acknowledge other factors in determining whether there were minimum contacts with the forum state.

In *Hanson v. Denckla*,[200] the Court redirected its focus back to the activities of the nonresident defendant. As in *McGee*, the Court required that the trust agreement at issue have a "substantial connection" with the forum state.[201] However, the potentially broad holding in *McGee* was severely restricted, as the Court held that a substantial connection could only be established through the activities of the nonresident defendant, relating to the trust agreement and directed toward the forum state.[202] Thus, the Court announced that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws."[203]

Despite its announcement that purposeful availment is "essential,"[204] even *Hanson* did not foreclose alternate bases upon which to assess minimum contacts. Rather, *Hanson* should be interpreted to hold simply that where minimum contacts are based on a nonresident defendant's activities in relation to the forum state, purposeful availment is required. Accordingly, where minimum contacts are based on other "contacts, ties, or relations" to the forum state, purposeful availment may not be required.

195. *Id.*
196. *Id.* at 318-19.
197. 355 U.S. 220 (1957).
198. *Id.* at 223.
199. *Id.*
200. 357 U.S. 235 (1958).
201. *Id.* at 252.
202. *Id.* at 253.
203. *Id.*
204. *Id.*

The Court's reliance on interstate sovereignty as a rationale for due process restrictions on state court jurisdiction also played a significant role in *Hanson*. Referring to the discussion in *McGee* regarding the trend of expanding personal jurisdiction over nonresidents,[205] the Court cautioned that it would be "a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[206] According to the Court, due process restrictions on state court jurisdiction functioned as an instrument of interstate sovereignty:

> Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.[207]

Under this rationale, minimum contacts between a nonresident defendant and the forum state were required to ensure more than fairness to the individual. Minimum contacts were required to justify the state's exercise of power over the nonresident defendant.[208]

The Court again acknowledged that a nonresident defendant's activities may not be the only relevant basis upon which to assess minimum contacts in *Shaffer v. Heitner*.[209] In *Shaffer*, the plaintiff filed a stockholder derivative suit in Delaware alleging violation of fiduciary duties against individual directors of a Delaware corporation that maintained its principal office in Arizona.[210] Defendants' only contacts with Delaware were their positions as officers of the corporation and their ownership of stock whose legal situs was in Delaware.[211] Plaintiffs attempted to obtain jurisdiction by seizing the defendants' stock under a Delaware statute designed to secure jurisdiction by the seizure of property within the state, even if the property was unrelated to the claim.[212] Defendants argued that they lacked the necessary minimum contacts with the state of Delaware to sustain jurisdiction.[213]

Emphasizing that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,"[214] the Court held that personal jurisdiction could not be based

205. *Id.* at 250-51.
206. *Id.* at 251.
207. *Id.*
208. *Id.*
209. 433 U.S. 186 (1977).
210. *Id.* at 189.
211. *Id.* at 213.
212. *Id.* at 191-93.
213. *Id.*
214. *Id.* at 212.

solely on the defendant's ownership of property within the state.[215] However, the Court did state that ownership of property in the forum state may favor jurisdiction in cases where the property is related to the claim:

> [W]hen claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest . . . . The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.[216]

Where the claim concerns ownership rights in property located in the forum state or is otherwise related to rights or obligations growing out of ownership, minimum contacts exist and jurisdiction is proper in most cases.[217] Although the facts do not indicate either way, it seems likely that the Court's conclusion in this regard would have been the same whether the property was acquired as a result of the activities of the defendants or simply inherited. This suggests that the Court may have been willing to recognize ownership, the "relationship" between a nonresident defendant and property located in the forum state, as an alternate basis for establishing minimum contacts in future cases.

In holding that Delaware could not assert jurisdiction over the nonresident defendants based on the seizure of property unrelated to the claim, the *Shaffer* Court considered two additional theories put forward by the plaintiff.[218] First, the plaintiff argued that the defendants' status as directors and officers of a corporation chartered in Delaware "provide[d] sufficient 'contacts, ties, or relations' with that State to give its courts jurisdiction."[219] Second, the plaintiff argued that "by accepting positions as officers or directors of a Delaware corporation, [the nonresident defendants] performed the acts required by *Hanson v. Denckla*."[220]

Rather than simply dismissing the plaintiff's first argument, by stating that a nonresident's status is not a relevant basis for assessing minimum contacts because there is no act of purposeful availment, the Court addressed the merits of the argument.[221] Delaware's "strong interest . . . in supervising the management of a Delaware corporation" was central to the

215. *Id.* at 208-09.
216. *Id.* at 207-08 (footnotes omitted).
217. *Id.*
218. *Id.* at 213-16.
219. *Id.* 213-14 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
220. *Id.* at 215.
221. *Id.* at 213-15.

plaintiff's argument.[222] According to the plaintiff, this interest was derived from "the role of Delaware law in establishing the corporation and defining the obligations owed to it by its officers and directors" and could only be protected by allowing Delaware's courts to assert personal jurisdiction over nonresident defendants based on their positions as corporate fiduciaries of a Delaware corporation.[223]

Allowing that defendants' positions as directors and officers of a corporation chartered in Delaware may "provide sufficient contacts, ties, or relations with the State,"[224] the Court stated that the plaintiff's argument was nonetheless "undercut by the failure of the Delaware Legislature to assert the state interest [the plaintiff] finds so compelling."[225] The Delaware law on which plaintiff relied in asserting jurisdiction "base[d] jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State."[226] According to the Court, "[i]f Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as [the plaintiff] suggests, we would expect it to have enacted a statute more clearly designed to protect that interest."[227] Finally, the Court concluded that even if the plaintiff's "assessment of the importance of Delaware's interest is accepted, his argument fails to demonstrate that Delaware is a fair forum for this litigation."[228] Although the Court held that Delaware could not assert personal jurisdiction under the facts of *Shaffer*, it acknowledged that where a state has expressed an interest in adjudicating disputes arising out of the defendant's position in a state-constructed organization and establishes that it is a fair forum for the litigation, the defendant's position alone might be a valid basis for assessing minimum contacts.

Turning to the plaintiff's second argument, the Court held that the defendants' act of accepting positions as officers of a Delaware corporation failed to establish minimum contacts because there was no act of purposeful availment by the nonresident defendants.[229] While the Court rejected the interstate sovereignty rationale for requiring purposeful availment,[230] it stopped short of abandoning the requirement of purposeful availment altogether. Instead, the Court simply redefined its significance in terms of individual fairness. While the ownership of stock might be sufficient to make litigation over the stock foreseeable, it was not enough to make litigation

222. *Id.* at 214.
223. *Id.*
224. *Id.* at 213-14 (quoting *Int'l Shoe Co.*, 326 U.S. at 319).
225. *Id.* at 214.
226. *Id.*
227. *Id.* at 214-15.
228. *Id.* at 215.
229. *Id.* at 216.
230. *Id.* at 204 ("the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [are] the central concern of the inquiry into personal jurisdiction").

over their fiduciary duties foreseeable.[231] Therefore, their contacts, while purposeful, gave them "no reason to expect to be haled before a Delaware court."[232]

While both *McGee* and *Shaffer* alluded to the possibility of alternate bases for assessing minimum contacts, they remained hidden in the shadow of *Hanson*. Perhaps the Court believed that as long as it was deciding cases where minimum contacts were primarily based on the activities of the nonresident defendant, entering into a contract with or selling a product to a resident of the forum state, there was no need for a detailed discussion of alternate bases upon which there might exist minimum contacts so as to satisfy the demands of due process. In *Kulko*, the Court mechanically applied the analytic framework requiring purposeful availment, never questioning its relevance in the context of an action for child support. In doing so, the Court missed the opportunity to particularize the analytic framework for assessing minimum contacts in a way that would further the Court's stated goal of encouraging "family harmony" within the context of *International Shoe*'s minimum contacts test.

Following *Kulko*, the Court alternately embraced and rejected interstate sovereignty as a justification for due process limitations on state court jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*[233] the Court focused on forseeability as a rationale for requiring purposeful availment: "When a corporation purposefully avails itself of the privilege of conducting activities with the forum State, it has clear notice that it is subject to suit there."[234] According to the Court, "the foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[235] Under this standard, it is not enough that a nonresident defendant can foresee that a cause of action may arise in the forum State. Rather, it must be foreseeable to the nonresident defendant that he or she would be required to defend on that particular cause of action in the forum state.[236] The shift from interstate sovereignty to forseeability as the rationale for requiring purposeful availment was completed two years later in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.[237] In *Insurance Corp. of Ireland*, the Court held that due process limitations on the assertion of personal jurisdiction "represent a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[238]

231. *Id.* at 216.
232. *Id.*
233. 444 U.S. 286 (1980).
234. *Id.* at 297.
235. *Id.*
236. *Id.*
237. 456 U.S. 694 (1982).
238. *Id.* at 702-03 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

The abandonment of interstate sovereignty as a rationale for requiring purposeful availment in assessing minimum contacts may be especially helpful in establishing the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides. The demands of due process, focused solely on fairness to the individual as opposed to interstate sovereignty, could be satisfied if the presence of one's child in the forum state makes an action for child support in that state foreseeable. Applying the forseeability rationale in the manner in which it was applied in *World-Wide Volkswagen*, we ask whether a nonresident parent could reasonably anticipate having to defend an action for child support in the state in which the child resides. If the nonresident parent's only connection to the forum state is the presence of the child, the parent would argne that a child support action in that state is not foreseeable because of his or her belief that the law, as set forth in *Kulko*, does not permit such a suit.

As long as the analytic framework requiring purposeful availment is applied in the context of child support actions, a nonresident parent is free to invoke this defense. Unless we assume that the connection between a parent and child is so insignificant that once the child no longer resides in the same state as the parent, the parent takes on an "out of sight, out of mind" attitude, we must conclude that it is foreseeable to the nonresident parent that the needs of the child will arise and must be met in the child's state of residence. Where minimum contacts are based on a nonresident defendant's activities in relation to the forum state, it may indeed be fair to require those activities to be of the type that would allow the defendant to foresee being "haled into court" based on such activities. However, where minimum contacts are based on the parent-child relationship, this standard of forseeability is wholly inappropriate. The Court should no longer permit this circular argument to prevent much needed reform.

CONCLUSION

In *Kulko v. Superior Court of California,*[239] the United States Supreme Court held that the parent-child relationship does not constitute minimum contacts between a nonresident parent and the state in which the child resides in actions concerning the financial support of a minor child.[240] Rather, there must be some act of purposeful availment by the nonresident parent in order to sustain a state court's assertion of personal jurisdiction. Where a child's presence is the only contact with the forum state, nonresident parents may avoid personal jurisdiction by simply claiming that they lack "minimum contacts" with that state.

239. 436 U.S. 84, 91 (1978).
240. *Id.* at 101.

In order to address adequately the issue of personal jurisdiction in the context of actions for child support, it is clear that the barriers created by *Kulko* must be overcome. However, the question of how this is to be accomplished remains unanswered. This Comment proposes a two-pronged approach. First, Congress should modify the current uniform long-arm statute, enacted as part of the UIFSA, to include a provision establishing the parent-child relationship as constituting minimum contacts between a nonresident parent and the state in which the child resides in cases concerning the financial support of a minor child. Second, the Supreme Court should uphold the states' adoption of this uniform long-arm statute by overruling *Kulko*.

This comment offers the Court several grounds upon which to base its reconsideration of the rule announced in *Kulko*. First, *International Shoe* did not dictate that the "contacts, ties or relations" required to satisfy due process could only be established through a nonresident defendant's acts of purposeful availment directed at the forum state. The narrow holdings in cases decided after *International Shoe*, but before *Kulko*, should have been confined to their facts. While purposeful availment may have been the Court's primary focus in *Hanson*, the *Kulko* Court should not have allowed it to overshadow the possibility of alternate bases upon which to establish minimum contacts.

Second, the practical effects of the Court's holding in *Kulko* illustrate that the analytic framework requiring purposeful availment is inappropriate in the context of actions for child support. While attempting to hold nonresident parents responsible for the financial support of their minor children, courts and legislatures are prohibited from asserting jurisdiction on the basis of the parent-child relationship. Instead, they must search for some act of purposeful availment upon which to base jurisdiction. Although this approach has provided some relief to custodial parents and their children, it is limited in its application. has the inevitable effect of undermining the parent-child relationship. As courts and legislatures struggle to find ways to analogize the parent-child relationship to the relationship that exists between parties to a contract or persons involved in a tort, the uniqueness of the parent-child relationship and the nature of the obligations arising from it are disregarded and devalued.

Third, not even the Court itself has been able to apply the rule announced in *Kulko* in a way that has the effect of maintaining "family harmony." Unable to assert jurisdiction based on the parent-child relationship, the Court relied on transient jurisdiction in *Burnham v. Superior Court*. As a result, nonresident parents may only visit their children at the risk of becoming subject to the jurisdiction of the courts in the child's state of residence. Finally, the Court's abandonment of interstate sovereignty as a rationale for imposing due process limitations on state court jurisdiction

focuses the relevant inquiry on forseeability and fairness to the individual. Where minimum contacts are based on a nonresident defendant's activities in relation to the forum state, it may indeed be fair to require activities that would allow the defendant to foresee being "haled into court." However, where minimum contacts are based on the parent-child relationship, this standard of forseeability is wholly inappropriate. It is fair to assume that parents should be able to foresee that their children require their financial support, regardless of their state of residence.

The Court should particularize the analytic framework for assessing minimum contacts in the context of actions for child support by holding that the parent-child relationship constitutes minimum contacts between a nonresident parent and the state in which the child resides. As a result of efforts by courts and legislatures to find ways to analogize the parent-child relationship to the relationship that exists between parties to a contract or persons involved in a tort, the uniqueness of the parent-child relationship and obligations arising from it are disregarded and devalued. Overruling *Kulko* would finally allow courts and legislatures to decide cases and enact legislation in a way that reflects the true nature of the parent-child relationship and obligations arising from it. The connection to one's child is not transactional in nature. It is not defined by the terms of an agreement or rules of liability, and it does not exist in relation to a particular state. Rather, that connection and the obligations arising from it are personal and enduring and cannot be avoided by crossing a state line.