"Show Me the Money": State v. Western Union Financial Services and the Jurisdictional Significance of Electronic Debts

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“SHOW ME THE MONEY”:
STATE V. WESTERN UNION FINANCIAL SERVICES AND THE JURISDICTIONAL SIGNIFICANCE OF ELECTRONIC DEBTS

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INTRODUCTION

Consider the following hypothetical: A resident of Tijuana, Mexico harvests large amounts of marijuana on farmland a few hundred miles south of the California border. A Las Vegas resident enters into an agreement with this farmer to have certain amounts of this crop smuggled across the California border and transported north to Las Vegas by his associate. The buyer agrees to pay the seller when the buyer's associate enters the United States with the marijuana. The parties agree that the buyer will “wire” money via Western Union into an account created by the seller, which the seller can retrieve at any Western Union business location in the United States or Mexico.

In an effort to stymie the use of its border as a conduit for illegal drug smuggling, the California Attorney General applies for a seizure warrant, which would freeze the transmittal of electronic funds that represent the proceeds of the sale. What result?

These circumstances present a significant jurisdictional impediment to the confiscation of the drug-related funds: the ability to successfully exercise personal jurisdiction.†

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† This Note explores the jurisdictional issues raised in civil forfeiture actions only. See infra Part I.B. To that end, all discussion of personal jurisdiction assumes that the individual participants to the underlying conduct are not being criminally prosecuted or civilly adjudged.

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It is axiomatic that before a court may adjudicate a claim against an individual—or, in this instance, order the seizure of her assets—two criteria must be met: The court must establish its jurisdiction over both the subject matter of the lawsuit and the parties involved therein. This Note addresses the latter requirement.

Before a California court can determine the rights of the non-residents in the hypothetical above, fundamental notions of state sovereignty require some meaningful nexus between the non-resident and the state. In other words, yielding only the "power to determine . . . the civil status and capacities of its inhabitants," a state's ability to adjudge non-residents is justified by those individuals' activities there. This justification lays the jurisdictional foundation for the institution of a lawsuit and the authority of the forum state to properly issue or enforce binding orders on the parties. However, the parties in the hypothetical did not engage in any significant conduct in California: Neither party is domiciled in the state; no drugs were produced in state; no money or drugs were exchanged in the state; and, it is unlikely these particular parties have done business there before. More likely, the California border was crossed purely as a matter of convenience and therefore bears no discernible relationship to the participants of the underlying conduct.

Where jurisdiction over potential parties is unavailable, however, each state statutorily recognizes an alternative basis for intervention: jurisdiction over property, or jurisdiction in rem. So, in the hypothetical, California may, to the fullest

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2 See 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1063.1 (3d ed. 2011) (“It is well-established that a federal court must have jurisdiction over both the person of the defendant . . . and the subject matter of the action before deciding the merits of the dispute.”).

3 Id. at § 1063 (“[T]he current philosophy is that the defendant must have sufficient contacts with the forum so that the maintenance of a suit against her in that locale does not offend traditional notions of ‘fair play and substantial justice.’” (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945))).


5 See id. at 720.

6 These laws, often called “long arm” statutes, permit the exercise of jurisdiction over non-residents under certain circumstances. See, e.g., N.Y. C.P.L.R. 302(a)(4) (McKinney 2010) (allowing for the exercise of jurisdiction over “any non-domiciliary . . . who in person or through an agent . . . owns, uses or possesses . . . property situated within the state”). For a comprehensive survey of all
extent allowed by the Constitution, exercise its jurisdiction over the wire transfer itself in an attempt to halt the trafficking of drugs across its border. Unfortunately, much of the law interpreting the constitutional boundaries of personal jurisdiction adheres to territorial limitations that have been rigidly in place for centuries. Generally, the presence of particular property in a given state is necessary for courts of that state to adjudicate the rights to it. Thus, intangible forms of property—for example, a Western Union wire transfer—present unique challenges to prevailing notions of in rem jurisdiction. Indeed, courts continue to struggle over situations like our hypothetical, where a state attempts to exercise in rem jurisdiction to seize property that is not physically “there.” Recently, in State v. Western Union Financial Services, Inc., the Arizona Supreme Court grappled with just such a situation, except the transaction was not one for marijuana; it was for humans.

The southwestern states are frequently used as corridors through which immigrants from Mexico gain illegal entry into the United States. States’ attempts to combat the profitable human trafficking enterprise have proven futile, largely because
the elusiveness of the culprits often makes prosecution economically and judicially unfeasible. Similarly, smuggling operations have been facilitated by modern technological trends in financial transactions, that is, the ability to instantly and inexpensively “wire” money long distances via services like Western Union. As noted, the ability to intercept these payments turns on a fundamental concept of personal jurisdiction: where the property, in this case “electronic credits” representing a monetary transaction, is located.

Wire transfers exemplify a type of intangible property unique to the twenty-first century. To the extent that wired funds are retrievable in multiple locations simultaneously, they are unlike the intangibles contemplated by traditional in rem jurisprudence. This Note argues for the revival of a century-old doctrine in order to effectively “locate” contemporary species of ubiquitous property. The Supreme Court’s 1905 decision in Harris v. Balk relied on the legal fiction that “a debt follows its debtor” in order to uphold a Maryland court’s jurisdiction over an out-of-state resident. Beginning from the premise that Western Union is essentially a debtor that undertakes to pay sums of money owed to creditors, this Note argues that Harris’ central underpinning—situating a debt with its debtor—should be applied to permit the seizure of electronic funds wherever Western Union does business. With the contemporary issue of human smuggling as a backdrop, and the characters of the drug-

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11 See, e.g., Sean Holstege, Human-Smuggling Rings Change Tactics, TUSCAN CITIZEN.COM (July 14, 2008), http://www.tucsoncitizen.com/ss/byauthor/90846 ("[Investigators crack down and the smugglers counter, shifting where and how they collect payments from illegal immigrants. The two sides repeat their sparring, like two grand masters mapping out their paths on a chessboard.").
12 Id.
13 See State v. Kaufman, 201 N.W.2d 722, 723 (Iowa 1972) (“Search warrant proceedings are in rem, directed primarily against the property, not the owner.”).
14 See infra notes 110–11.
15 See, e.g., Hanson v. Denckla, 357 U.S. 235, 247 nn.16–17 (1958) (recognizing that stocks, bonds and notes, although intangible, are embodied in documents and therefore “makes them partake of the nature of tangibles” capable of being located in one place).
16 198 U.S. 215 (1905).
18 Harris is discussed at greater length infra Part I.A.
trafficking hypothetical as guides, this Note explores the tension between an antiquated personal jurisdiction framework and a never-before-seen brand of intangible property.

Part I discusses the evolution of personal jurisdiction jurisprudence and the difficulties that modern varieties of intangible property pose to established analyses. Specifically, while most jurisdictions have acknowledged the difficulties inherent in assigning a "location" to intangible property, few have attempted to update existing precedent to accommodate modern scenarios.

Part II examines the recent Arizona decision in State v. Western Union Financial Services, Inc., where the Supreme Court of Arizona confronted the "location" of electronic debts as an issue of first impression.

Part III argues for the Harris fiction’s relevance in the modern era. The complexities of modern society demand the resuscitation of the doctrine to adequately cope with an emerging brand of intangible property. This Part posits that Harris applies more than ever, as innovative forms of property are becoming accessible any and everywhere; the holding of Harris is, then, no longer a fiction at all. This section also advances a two-pronged inquiry for assessing a state’s legal basis to exercise jurisdiction over such property: (1) whether the property at issue

19 See, e.g., Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714 (5th Cir. 1968) ("The situs of intangible property is about as intangible a concept as is known to the law."); WRIGHT ET AL., supra note 2, § 1071 ("[D]etermining the situs of intangible property, such as notes, bonds, and debts, let alone even more evanescent forms of property, for jurisdictional purposes long has been a source of difficulty and confusion.").

20 See Juliet M. Moringiello, Seizing Domain Names To Enforce Judgments: Looking Back To Look to the Future, 72 U. CIN. L. REV. 95, 95 (2003) ("One of the challenges faced by lawyers, judges, and legislators is determining whether the rights created by the movement of business to the Internet are truly new rights that need new governing laws or variations of existing rights to which existing legal concepts are easily adapted. Today we watch the law struggle to adapt traditional contract law to electronic transactions, to mold the action of trespass to chattels to cover unauthorized use of a web site, and to find an electronic equivalent to negotiable instruments."); cf. Fred Galves, Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure, 2009 U. ILL. J.L. TECH. & POLY 1, 3 ("Courts in the U.S. have been desperately trying to adapt their pre-Internet legal systems to adjudicate post-Internet online legal disputes.").

is simultaneously accessible in multiple locations simultaneously; and (2) whether the property exhibits a meaningful connection with the forum state.

I. THE DOCTRINAL EVOLUTION OF PERSONAL JURISDICTION

A. A Historical Context

Personal jurisdiction doctrine has undergone significant transformation and expansion since its inception in the 1800s. Still, "some historical perspective is necessary as a background against which to view the present jurisdictional standards." Thus, before one can fully appreciate the jurisdictional quagmire intangibles present, a deeper understanding of personal jurisdiction jurisprudence throughout the last century is crucial.

1. Pennoyer and Place Theory

Although the groundwork for modern personal jurisdiction analysis was in place prior to the enactment of the Fourteenth Amendment, the Supreme Court's 1877 decision in Pennoyer v. Neff marked its first attempt to develop a framework for determining the constitutional parameters of personal jurisdiction. Pennoyer became the fountainhead for a wealth of cases that would eventually attempt to define the breadth of a state's power to reach potential defendants outside of its territorial borders. The Pennoyer Court, per Justice Field, recognized four bases for a state's exercise of jurisdiction over a defendant. An individual was not subject to a state's jurisdiction unless he (1) appeared in a court of the state; (2) was found within the state; (3) was a resident of the state; or (4) owned property in the state. Thus, Pennoyer adopted a

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22 WRIGHT ET AL., supra note 2, § 1064.
23 See, e.g., Dunham, supra note 8, at 561 n.5 (noting Pennoyer's reliance on several cases decided before the enactment of the Fourteenth Amendment concerning issues of personal jurisdiction).
24 95 U.S. 714 (1877).
25 See WRIGHT ET AL., supra note 2, § 1064.
26 See Pennoyer, 95 U.S. at 720.
27 Id.
“distinctly territorial approach to establish the constitutional limits,” focusing the inquiry on whether a person or her property were physically in the state.28

2. International Shoe and the Birth of a Mobile Nation

The next significant development in the field came nearly seventy years later in the form of International Shoe Co. v. Washington,29 from which the widely-accepted “minimum contacts” analysis was born. There, a Delaware corporation that employed a handful of traveling salesmen in Washington was amenable to suit there.30 Despite the fact that the company had no offices in Washington, made no contracts for sale there, and kept no merchandise there, the Court found that International Shoe’s business in Washington was of such a substantial nature as to make it “reasonable and just according to [its] traditional conception of fair play and substantial justice to permit [Washington] to enforce the obligations which [International Shoe had] incurred there.”31 The Court, per Justice Stone, endorsed a theory of personal jurisdiction that eschewed Pennoyer’s reliance on “place” and instead hinged on the meaningful activities an individual conducted within a state—the “minimum contacts” necessary to hale her into court there. The Court’s approach envisioned the exercise of jurisdiction over non-residents based upon “the quality and nature of [their] activity in relation to the fair and orderly administration of the laws . . . .”32 Thus, the constitutional inquiry announced in Pennoyer was expanded to contemplate a measure of fairness as opposed to

29 326 U.S. 310 (1945).
30 Id. at 313–14.
31 Id. at 320.
32 Id. at 319.
strictly territorial concerns. For the first time, jurisdiction could properly be obtained over a non-resident whose activities in a state made it "reasonable and just" to adjudicate claims arising from those activities.\(^{33}\)

Significantly, while appearing at first blush to deviate from a one-dimensional analysis, many have been reluctant to view *International Shoe* as "a wholesale abandonment of the territoriality framework of *Pennoyer*.\(^{34}\) Rather, commentators contend that the development stood for little more than merely a progression in a "longstanding theory of territoriality," noting that "[t]he very essence of the minimum contacts test is an evaluation of the defendant's physical contacts within the forum state. . . . Thus, the minimum contacts analysis is rooted in the notion of 'place,' just as the Court's analysis in . . . *Pennoyer*\(^{35}\) was.\(^{35}\)

Moving forward after *International Shoe*, the Court's body of personal jurisdiction law snowballed to eventually spawn a long line of decisions augmenting the original "minimum contacts" analysis.\(^{36}\) However, the effects of *International Shoe* and its progeny were felt only in the realm of cases dealing with so-called "in personam" jurisdiction—that is, jurisdiction over the person. While the Court worked to refine the various tests to determine the constitutionality of a state's jurisdictional power over a person, one of the foundational bases for exercising

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\(^{33}\) *Id.* at 320. *International Shoe* recognized two different "types" of personal jurisdiction that could be exercised depending on the quality and nature of a defendant's activities within a state. On the one hand, so-called "general jurisdiction" exists where a defendant's activities in the forum state represent continuous operations that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.* at 318 (emphasis added). On the other hand, where the "continuous and systematic" activities of a defendant "also give rise to the liabilities sued on," so-called "specific jurisdiction" exists. *Id.* at 317.


\(^{35}\) Dunham, *supra* note 8, at 565.

\(^{36}\) See *id.* ("[*International Shoe's*] structure has been refined and updated with more detailed interpretations of the test, including the development of sub-tests for purposeful availment through contracting and placing products into the stream of commerce."); see, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).
jurisdiction announced in Pennoyer—jurisdiction over her property—was left intact and remained contingent upon the presence of that property within the state.37

a. In Rem and Quasi in Rem Jurisdiction

Surviving the overhaul of personal jurisdiction doctrine was the notion that a state court can take jurisdiction over property “when one or more of the defendants or persons with potential claims to the property are nonresidents or jurisdiction over their person cannot be secured in the forum state.”38 Such property-based jurisdiction is commonly divided into two broad categories: in rem and quasi in rem.39 The former permits a court to “take[ ] jurisdiction over the property so as to adjudicate ownership of that property.”40 Therefore, in a “true” in rem situation, the property itself is the subject of the litigation.41 Quasi in rem proceedings, however, are “basically what the name implies—a halfway house between in rem and in personam jurisdiction.”42 In these types of actions, although jurisdiction is grounded in the defendant’s property, the claim asserted is unrelated to the property itself.43 So, paradoxically, even after the Court countenanced a meaningful nexus between the forum and the subject of litigation in International Shoe, a plaintiff could nevertheless obtain jurisdiction over a non-resident merely by attaching her in-state property and subsequently suing on a completely unrelated claim.

b. The Harris Doctrine and Due Process Implications

Prior to International Shoe, the due process problems inherent in adjudicating claims against non-residents for conduct unrelated to the forum state were apparent. In Harris v. Balk,44 decided forty years before International Shoe, the Supreme Court

37 See supra note 15 and accompanying text.
38 WRIGHT ET AL., supra note 2, § 1070.
39 See FREER & PERDUE, supra note 5, at 29.
40 Id.
41 See WRIGHT ET AL., supra note 2, § 1070 (“Conceptually, in rem jurisdiction operates directly on the property and the court's judgment is effective against all persons who have an interest in the property.”).
42 Id.
43 Id.
44 198 U.S. 215 (1905).
was confronted with determining the constitutionality of a state’s finding of jurisdiction over a transient debtor. Harris, a North Carolina resident, owed money to Balk. Balk, in turn, owed money to Epstein, a Maryland resident. When Harris traveled to Maryland, Epstein served him with process and a Maryland court entered judgment requiring Harris to pay Epstein the money Harris owed to Balk. The Supreme Court, invoking a theory of quasi in rem jurisdiction, upheld the judgment as constitutional, characterizing the debt as intangible property that followed its debtor and was therefore “located” wherever Harris was found. It followed, the Court explained, that so long as this property was present in Maryland, the state had a proper foundation for exercising jurisdiction over Harris and issuing a binding judgment. Harris’s jurisdictional significance was paramount: For the first time, a state could exercise jurisdiction over “not only all claims involving persons and property within its borders[,] but also claims involving intangible obligations arising” therein. The new doctrine was immediately controversial, as it often “permitted quasi-in-rem jurisdiction to be exercised over a defendant in a forum with which neither he nor his activities had any logical connection.” Significantly, a plaintiff could suddenly “garnish a defendant’s . . . debtors wherever they happened to be doing business.”

In its 1977 decision Shaffer v. Heitner, the Court attempted to synch the gap in its reasoning between Pennoyer and International Shoe that caused the jurisdictional loophole exploited in Harris. In Shaffer, the Court declared that “all assertions of state court jurisdiction,” whether in rem, quasi in rem, or in personam, “must be evaluated according to the

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45 Id. at 216.
46 Id.
47 Id.
48 Id. at 222–23; see also Baker, supra note 28, at 659–60 ("[The Harris Court] found that the intangible obligation to repay ‘clings to and accompanies the [debtor] wherever he goes.’ Thus, Harris’ debt to Balk was ‘property’ that was ripe for attachment by the courts of any state into which Harris happened to wander." (second alteration in original) (quoting Harris, 198 U.S. at 222)).
49 Baker, supra note 28, at 660.
50 See WRIGHT ET AL., supra note 2, § 1071 at 297.
51 See Baker, supra note 28, at 660 n.41.
[minimum contacts analysis] set forth in International Shoe [sic] and its progeny." On its face, Shaffer appeared to reject the curious Harris fiction and abolish the practice of taking jurisdiction over a non-resident on attenuated bases. More importantly, this pronouncement seemed to disclaim wholesale a core Pennoyer principle: that in rem jurisdiction may, without more, be validly based on property's presence in a particular state.

Notwithstanding its matter-of-fact language, the Court backpedaled on the issue of "true" in rem jurisdiction, explaining that its holding was, after all, true to Pennoyer's territorial principle. "When claims to...property itself are the source of the underlying controversy," the Court implored, "it would be unusual for the State where the property is located not to have jurisdiction." Consistent with International Shoe's teachings, "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[...]
and therefore satisfy the requirement that a minimum nexus be demonstrated between himself and the forum.

Therefore, Shaffer's import is narrower than its sweeping language suggests. Rather than espouse a uniform standard for exercising personal jurisdiction, the Court conceded the limited reach of its decision: "[J]urisdiction over many types of

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53 Id. at 212; see also Andrew J. Grotto, Note, Due Process and In Rem Jurisdiction Under the Anti-Cybersquatting Consumer Protection Act, 2 COLUM. SCI. & TECH. L. REV. 1, 9 (2001) ("In Shaffer, the Supreme Court found that assertions of quasi in rem jurisdiction must be accompanied by a showing of minimum contacts equivalent to those necessary for personal jurisdiction under International Shoe Co. v. Washington.").


The Court has never overruled or disavowed the underpinning of Harris—the common law doctrine that the legal situs of an intangible obligation is the situs of the obligor. Rather, the Court has simply pointed out the due process problems with attempting to ground jurisdiction over individuals on nothing more than the theoretical location of a debt.

55 Shaffer, 433 U.S. at 207 (emphasis added).

56 Id. at 207–08.
actions ... brought in rem would not be affected by [our] holding that any assertion of state-court jurisdiction must satisfy the International Shoe [sic] standard. 57

In effect, Shaffer was reactionary to the surprising result reached in Harris. Indeed, it made clear that "the presence of... property alone would not support the State's jurisdiction" only with regard to the limited "type of quasi in rem action typified by Harris v. Balk[,]... where the property which... serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action." 58 Thus, Shaffer eschewed the purely territorial approach touted in Pennoyer only to the extent it applied to quasi in rem actions, that is, where no logical nexus existed to connect the subject of litigation to the forum state. Left unscathed was the conventional expectation that "true" in rem jurisdiction—where the property itself is the subject of litigation—may still rest on the presence of property in the forum state alone. 59

B. Seizure Warrants and Civil Forfeiture

The issuance of seizure warrants in civil actions necessarily implicates the principles of in rem jurisdiction. A civil seizure warrant, at its core, is a type of civil forfeiture, which is in fact a misnomer. A civil forfeiture describes the power of the government, through the Attorney General or some other law enforcement entity, to confiscate property alleged to have been used in the commission of a crime. 60 Indeed, criminal forfeiture is a wholly separate animal. The quasi-criminal nature of civil forfeiture proceedings notwithstanding, it is well-settled that the issuance of seizure warrants are civil actions governed by principles of civil procedure. 61 Confusing though the admittedly

57 Id. at 208.
58 Id. at 208–09 (emphasis added).
59 See Dickstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 685 A.2d 943, 948 n.5 (N.J. Super. Ct. App. Div. 1996) ("Shaffer held that a forum could not use quasi in rem jurisdiction to obtain personal jurisdiction over a defendant when the property had no nexus to the litigation.").
related concepts appear, courts have illuminated their similarities and marked their doctrinal differences. As the Ninth Circuit explained:

Civil forfeiture is an in rem proceeding against the _res_, on the legal fiction that the property itself is "guilty." To achieve civil forfeiture, the government generally must prove, by a preponderance of the evidence, the culpability of the owner and a nexus between the property and the illegal activity.

By contrast, criminal forfeiture is an in personam proceeding against the defendant personally and is part of the defendant's punishment. Accordingly, to achieve criminal forfeiture, the government first must prove, beyond a reasonable doubt, that the defendant is guilty of the crime. The government then must prove, by a preponderance of the evidence, a nexus between the property and the crime.

The two types of forfeiture actions have much in common. Both seek the same result: forfeiture of the property. Both arise from exactly the same facts: the owner's illegal activities. Both involve the same plaintiff: the government. Both require that the government establish the same general determination: proof by preponderance of the evidence of a nexus between the property and the illegal activity. The law "ascrib[es] to the property a certain personality, a power of complicity and guilt in the wrong." While the possessor of the property may not be adjudged guilty of any criminal offense, the property seized is "of such a nature that it should

punishment against a party guilty of committing a crime. For example, a law authorizing a judge to forfeit the automobile of an individual convicted of driving while intoxicated is a criminal forfeiture. See United States v. Fleet, 498 F.3d 1225, 1231–32 (11th Cir. 2007).


64 Von Hofe, 492 F.3d at 184 (alteration in original) (internal quotation marks omitted) (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510 (1921)).
be...confiscated by the [government].”65 In other words, the doctrine serves a remedial purpose, allowing the government to take control of property that was used for unlawful purposes, whether or not the person in control of the property has been found guilty of a crime.66

Nevertheless, the parallel concepts diverge in one important respect:

To achieve criminal forfeiture, the government must prove culpability beyond a reasonable doubt; to achieve civil forfeiture, however, the government must prove culpability only by a preponderance of the evidence. For that reason, if the government’s criminal prosecution of the property owner fails, that failure does not prevent the government from pursuing civil forfeiture. The government may pursue civil forfeiture even after a failed criminal prosecution.67

Accordingly, a seizure warrant may appropriately be issued pre-conviction or without a conviction at all. This notion of proceeding against the property, rather than the individual culprit, coupled with the less stringent burden of proof applied in personal jurisdiction proceedings—a fair preponderance of the evidence—clarifies the actions of the California Attorney General in our hypothetical. Recall that, when tasked with combating a multi-national drug enterprise, the Attorney General found itself bedeviled by unidentified criminals masterfully evading prosecution. Civil forfeiture emerges as a powerfully efficient weapon of the law: Though prosecution is unsuccessful, a state may, by satisfying a relatively lenient evidentiary burden, nevertheless get its hands on the proceeds of illicit activity.

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67 Liquidators of European Fed. Credit Bank, 630 F.3d at 1150 (emphasis added) (citation omitted).
The law of forfeiture is a creature of statute. Arguably
dating back to the Old Testament, statutory in rem forfeiture is
the only action of England’s three forfeiture laws that this
country adopted. Currently, modern statutes confer broad
forfeiture power to both state and federal law enforcement.

Arizona’s civil forfeiture statute was the catalyst for
Western Union. Section 13-2314 of the Arizona Revised Statutes
mirrors the federal Racketeer Influenced and Corrupt
Organizations (“RICO”) statute, which criminalizes far-flung
activities ranging from murder and kidnapping to bribery, fraud,
and drug-dealing. Like the RICO statute, the Arizona version
provides for, in addition to criminal liability, civil penalties for
these activities. It reads, in pertinent part:

The superior court has jurisdiction to prevent, restrain, and
remedy racketeering ... by issuing appropriate orders.
Prior to a determination of liability such orders may include,
but are not limited to, issuing seizure warrants . . . .

. . . [T]he attorney general or a county attorney may file an in
rem action . . . for forfeiture . . . of:

. . .
All proceeds traceable to an offense . . . and all monies,
negotiable instruments, securities and other property used or
intended to be used in any manner or part to facilitate the
commission of the offense.

Accordingly, the superior court is authorized, upon
application of the Arizona Attorney General, to issue a pre-
judgment in rem warrant to seize the proceeds of racketeering

68 United States v. Gilbert, 244 F.3d 888, 918 (11th Cir. 2001).
69 See United States v. $10,409.00 in U.S. Currency, 585 F. Supp. 2d 10, 12
pre-judgment seizure of property); N.Y. C.P.L.R. 1311(b) (McKinney 2011)
(emporwing law enforcement officials to institute civil forfeiture actions against
proceeds of criminal conduct before any individual has been charged).
71 See ARIZ. REV. STAT. ANN. § 13-2314(A)-(C), (G)(3) (2011) (authorizing the
issuance of, inter alia, seizure warrants “prior to a determination of liability”).
74 ARIZ. REV. STAT. ANN. § 13-2314(B)-(C), (G)(3) (2011) (footnote omitted).
operations within the state. As we will see, in its application for a seizure warrant pursuant to this section, the Attorney General alleged that the Western Union transfers at issue represented not only the proceeds of illegal human trafficking, but also narcotics trafficking. While these illicit activities fall comfortably within the range of punishable behavior, exercising the requisite jurisdiction over such proceeds prove especially difficult when it came to “locating” them.

C. Modern Difficulties: Obtaining Jurisdiction over Intangible Property in the Twenty-First Century

Bob Dylan famously sang, “the times, they are a-changin,” a sentiment that aptly describes a modern society that has witnessed groundbreaking legal developments. For example, consider the modern transformation of an age-old fixture of the law: service of process. In recent years, American courts have approved the expansion of methods of service to include fax, then e-mail, and may one day join the growing international trend of service via social networking sites like Facebook. Indeed, the legal climate has no choice but to adapt to a hyper-mobile, globalized society. Despite courts’ best efforts to modernize their approaches, the substantive law governing jurisdiction over intangible property has made little headway since its once-controversial inception in the 1900s. This has resulted in the judiciary’s use of inconsistent and antiquated methods for analyzing the jurisdictional authority of state and federal government over state-of-the-art property. Of particular

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75 Id. § 13-2314(A)–(C), (G)(3).
76 See id. § 13-2301(D)(4)(b)(xi), (xxx).
78 It has been recognized “that the judiciary, both domestic and abroad, has begun to accept electronic methods of communication.” Id. at 1498 (internal quotation marks omitted).
79 See id. at 1499–1500 (“In the decades that followed [Pennoyer] . . . the growth and commercial expansion of the country rendered Pennoyer’s conception of personal jurisdiction unworkable.”); Galves, supra note 20, at 6–7; Lee, supra note 34, at 145 (“[P]rinciples of territorial jurisdiction have been stretched by the increased globalization effected by new technology.”).}

80 The issue of uncertainty has already arisen as courts are increasingly called upon to adjudicate disputes originating on the Internet. See Teresa J. Cassidy, Note, Effects of the “Effects Test”: Problems of Personal Jurisdiction and the Internet;
importance to this Note is the continued use, or lack thereof, of the Harris fiction in determining the "location" of ubiquitous varieties of intangible property.81

Although there is a dearth of recent case law that purports to determine the jurisdictional significance of "new" forms of intangible property, the judges that decided Western Union focused their respective arguments on two federal cases: United States v. Daccarett82 and Rush v. Savchuk.83 Some discussion of these cases is critical to an understanding of the Western Union decision.

1. United States v. Daccarett

Daccarett considered the "location" of electronic fund transfers ("EFTs") in a civil forfeiture proceeding.84 There, the

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81 This Note will only deal with common law developments in the area and will not analyze individual states' statutory schemes for addressing the location of intangible property.

82 6 F.3d 37 (2d Cir. 1993).


84 The Second Circuit explained the meaning of EFTs and how they are used:

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indicating the amount of money to be transferred, the sending bank, the receiving bank, and the intended beneficiary. The central computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, if the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

Daccarett, 6 F.3d at 43–44.
claimants were associates of a Columbian drug-trafficking enterprise that was responsible for importing thousands of kilograms of cocaine each month into the United States.\textsuperscript{85} To that end, it maintained bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds.\textsuperscript{86} Three members of the cartel were arrested in Luxembourg and, "[a]nticipating that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Luxembourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel."\textsuperscript{87} Through both oral orders and a series of eight in rem warrants, government agents instructed the intermediary banks in New York to freeze the seized funds.\textsuperscript{88} Eventually, $12 million were seized in the United States, representing the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks.\textsuperscript{89}

In determining the propriety of this law enforcement measure, the Court of Appeals for the Second Circuit upheld a New York district court's exercise of in rem jurisdiction, relying on the fiction that the EFTs had physically "stopped" at the New York intermediary bank where they were seized.\textsuperscript{90} In doing so, the court rejected the rationale advanced by the defendants: that EFTs represent nothing more than electronic communications between banks; mere series of contractual obligations to pay

\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 43.
\textsuperscript{87} \textit{Id.} at 44.
\textsuperscript{88} \textit{See id.}
\textsuperscript{89} \textit{See id.}
\textsuperscript{90} \textit{See id.} at 54.

While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. . . . Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

\textit{Id.}
money. By defendants’ logic—which would later be echoed in a dissenting opinion to *Western Union*—the intercepted funds could not logically be considered “property” capable of seizure when they were transferred through the New York intermediary banks. Instead, the court held that EFTs become seizable property in a particular state if and when they take the form of bank credits at a particular bank.

The court’s rationale in *Daccarett* exemplifies the judiciary’s reticence to deviate from traditional property notions when confronted with modern technological trends. The court conceptualized the electronic money transfers as tangible property—“bank credits” capable of “stopping” at an intermediary bank—rather than as a debt owed by one bank to another, thereby sidestepping the *Harris* inquiry altogether. Indeed, the *Western Union* court cited *Daccarett* with approval when remarking that “[t]he technical complexities of the electronic age should not blind courts to the substance of transactions in conducting jurisdictional analyses.” Despite the reality that the electronic money transfers were no more “present” in New York than any other place, the court treated the New York bank’s routing of the credits as embodying a physical transaction that could be located in the forum state for seizure purposes.

2. *Rush v. Savchuk*

*Rush* came much closer than *Daccarett* to squarely conducting a modern *Harris* inquiry. In *Rush*, the Plaintiff, an Indiana resident, was a passenger in a car driven by another Indiana citizen when the car was involved in an automobile accident in Indiana. Savchuk, the vehicle’s passenger, brought

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91 See id.
93 See infra note 121 (explaining the meaning and significance of “electronic credit”).
94 *Daccarett*, 6 F.3d at 54–55.
95 Id. at 54.
96 *W. Union*, 208 P.3d at 223–24.
suit in Minnesota after attaching the obligation of the driver's insurer, State Farm, to pay its insurance claims. State Farm, like Western Union, conducts business in every state.88

The Plaintiff's argument for proper jurisdiction was derived from "combining the legal fiction that assigns a situs to a debt . . . wherever the debtor is found with the legal fiction that a corporation is 'present,' for jurisdictional purposes, wherever it does business . . . ."99 Therefore, he argued, State Farm's contractual obligation to defend and indemnify Rush in connection with liability claims should be treated as a debt owed by State Farm that is "located" anywhere the claim may be paid.100 As indicated, given State Farm's extensive presence in the industry, Savchuk's reasoning would permit the claim to be paid wherever State Farm does business: everywhere in the United States. It follows, then, that Minnesota was as legitimate a forum as any to demand payment.

The Supreme Court disagreed, holding that an exercise of quasi in rem jurisdiction was improper because the driver had no Minnesota contacts.101 Invoking the spirit of International Shoe, the Court, per Justice Marshall, concluded that since the defendant did not engage in any purposeful activity related to Minnesota, the exercise of jurisdiction founded merely upon his insurer's business in the state would offend notions of fairness, justice, and reasonableness.102 Further, the mere contractual arrangement between the defendant and his insurer was insufficient to invoke the court's jurisdiction unless meaningful ties between the defendant and the forum were shown.103 Thus, the Court concluded, the fictitious presence of the insurer's obligation in Minnesota did not, without more, provide a basis for concluding that there was any contact between Minnesota and the defendant.104

88 Id. at 322 n.4, 330.
99 Id. at 321.
100 Id. at 328.
101 Id. at 328-31.
102 Id. at 329.
103 Id.
104 Id. at 329-30.
Essentially, Rush's holding affirmed the holding in Shaffer: "[T]he mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action."105 Again, the notion of "true" in rem jurisdiction escaped the reach of the decision. Thus, a familiar rule was reiterated: In quasi in rem actions, "[j]urisdiction is lacking . . . unless there are sufficient contacts to satisfy the fairness standard of International Shoe."106

As indicated above, Rush's holding falls short of explaining how to proceed in actions in rem, where jurisdiction may be predicated on presence alone. The Court stated:

To say that "a debt follows the debtor" is simply to say that intangible property has no actual situs, and a debt may be sued on wherever there is jurisdiction over the debtor. State Farm is "found," in the sense of doing business, in all 50 States and the District of Columbia. Under [plaintiff]'s theory, the "debt" owed to Rush would be "present" in each of those jurisdictions simultaneously. It is apparent that such a "contact" can have no jurisdictional significance.107

Thus, the Court rejected the Harris fiction as a substitute for due process and a minimum contacts analysis in a quasi in rem action as it had in Shaffer.108 Unfortunately, it did not go so far as to suggest circumstances, if any exist, under which Harris' notion of situating a debt with its debtor would in fact prove a practical and effective method of locating intangible property.109
3. Application of Daccarett and Rush to the Above Hypothetical

So, where do these cases leave the California government in the above hypothetical? At the outset, let us characterize Western Union as a corporate debtor, which contracted with the Las Vegas buyer to deliver funds to the Mexican farmer. Under the rationale of Daccarett, the funds could only be seized either at their origin in Mexico or their final destination in Las Vegas, since there was no other opportunity for them to "stop" and be seized. Under Rush, the debt owed by Western Union would have no jurisdictional significance in and of itself. Since Western Union does business in all fifty states, the Rush court would require a "contact in the International Shoe sense" between Western Union and California. Therefore, the in rem inquiry would become an in personam inquiry to determine whether Western Union is amenable to suit in California. This outcome is directly at odds with the fundamental purpose of in rem jurisdiction as a substitute form of jurisdiction: "to allow courts to reach intangible property in the hands of out-of-state defendants" over whom in personam jurisdiction is unachievable. Adding further uncertainty to the equation are the many jurisdictions that purport to hold true to the Harris fiction.

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110 See supra Introduction.
111 See Dickstein v. Merrill Lynch, Pierce, Fenner & Smith, 685 A.2d 943, 947 (N.J. Super. Ct. App. Div. 1996) ("When, as here, an investor deposits money with a financial institution a debtor/creditor relationship is created with the investor retaining intangible property of a debt owed to him by the institution."). "Cash balances held in an account are considered debts owed by the financial institution to the investor." Id. at 948.
112 Rush, 444 U.S. at 329.
114 See, e.g., Af-Cap Inc. v. Republic of Congo, 383 F.3d 361, 371 (5th Cir. 2004) ("[C]ourts consistently hold that the situs of a debt obligation is the situs of the debtor."); Barker v. Smith, 290 F. Supp. 709, 711–12 (S.D.N.Y. 1968) ("[I]t is elementary that if [an] obligation ... constitutes a 'debt,' then an attachable res exists in any jurisdiction wherein the debtor ... may be found."); Perez v. Chase Manhattan Bank, N.A., 61 N.Y.2d 460, 469 n.1, 463 N.E.2d 5, 8 n.1, 474 N.Y.S.2d 689, 693 n.1 (1984) (citation omitted) ("Although another aspect of Harris v. Balk has been overruled, the debt-situs holding remains unimpaired.").
The current hodgepodge of case law on the situs of modern forms of debt has created a degree of uncertainty embodied in the dueling opinions of Western Union.

II. ARIZONA RULES ON THE JURISDICTIONAL SIGNIFICANCE OF ELECTRONIC DEBTS

This Part analyzes the 2009 Arizona decision in *State v. Western Union Financial Services, Inc.*,115 where the Supreme Court of Arizona confronted the “location” of electronic debts as an issue of first impression. Section A introduces Western Union, the corporation, whose obligation to pay a transnational exchange became the subject of the court’s jurisdictional debate. This Section briefly discusses the process by which Western Union facilitated the transfer of money between a sender and recipient. Section B sets the stage for the court’s decision. Plagued by illegal operations at its borders, the Arizona Attorney General sought to halt the exchange of monies representing the proceeds of human smuggling and racketeering by executing a seizure warrant over the wired funds. Finally, Section C undertakes an in-depth analysis of the court’s opinion. It explores the rationale behind the court’s refusal to recognize the lasting utility of *Harris v. Balk* and, ultimately, to issue the seizure warrants sought.

A. Western Union Financial Services, Inc.

Western Union is a multinational corporation, specializing in providing wire money transfers between individuals and businesses.116 It is a Colorado corporation, whose principal place of business is in that state.117 Nevertheless, Western Union conducts its business throughout the United States and in more than 195 foreign countries.118

A customer initiates a “wire” money transfer by paying a Western Union agent the amount to be transferred and a service fee.119 “The payment is made to a Western Union office either in

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115 208 P.3d 218 (Ariz. 2009) (en banc).
116 Id. at 218; see also Western Union Services, http://corporate.westernunion.com/services.html (last visited Sept. 2, 2011).
117 W. Union, 208 P.3d at 219.
118 Id.
119 Id.
person, by telephone, or over the Internet, and that office makes the specified sum of money available at...any one of thousands of similar locations throughout the nation, hemisphere, and, indeed, nearly the entire world." The agent enters the information into Western Union's computer system, which assigns a control number to the transaction. The money—now represented in Western Union’s computer system as electronic credits—may then be accessed by the intended recipient upon presenting personal identification and the designated control number at any Western Union location. The transaction may be cancelled by the sender and refunded until the moment the money is actually paid to the recipient.

B. Background on Arizona's Human Trafficking Problem

In recent years, human smuggling has emerged as an “organized business” in Arizona. Facilitated by an abundance of Western Union locations throughout Arizona and its neighboring Mexican states, an estimated $1.7 billion is

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120 Id. at 230.
121 Id. at 219.
122 See id. at 230. “Electronic credit” is a modern banking industry term used to describe “internal communications” which represent transfers of money. Id.; see also Joseph H. Sommer, Where Is a Bank Account?, 57 Md. L. Rev. 1, 7 (1998). (“The rules governing bank money operate on nothing but communications: Money is (carefully regulated) talk. . . . [T]he location of electronic bank monies can have no existence outside these communications. Bank money exists when we say it exists, and it exists where we say it exists. Therefore, the location of bank money can only have significance as a conflict-of-law rule.”). These communications have obviated the need for any “cash, currency, check, note, or bank draft of any sort [to be] sent, transported, or routed through any geographic channels between the sender and receiver.” W. Union, 208 P.3d at 230. Rather, they function as “authorization to pay to a designated receiver a specified amount of money under certain circumstances.” Id. For our purposes, these communications will be analyzed in terms of a debt: “[Western Union’s] contractual obligation represented by the [electronic credits] to pay monies used or intended to be used to facilitate human smuggling or narcotics trafficking . . . .” State v. W. Union Fin. Servs., Inc., 199 P.3d 592, 602 (Ariz. Ct. App. 2008); see also W. Union, 208 P.3d at 229 (Espinosa, J., dissenting) (“Western Union contracts with senders to transmit—in actuality, to make available—specified funds to remote receivers. The resulting electronic credits are thus conceptually and pragmatically debts or obligations while on the books of Western Union before they are paid out.”).
123 W. Union, 208 P.3d at 219.
124 Id.
125 Holstege, supra note 11.
exchanged annually for the services of "coyotes," or professional human traffickers. This illegal enterprise formed the impetus for Western Union. In September, 2006, the Arizona Attorney General applied to the Arizona Superior Court for a warrant authorizing the seizure for forfeiture of various Western Union transfers sent to or from Arizona. The Attorney General alleged that certain Western Union transfers represented the proceeds of illegal human and narcotics trafficking in violation of the state's civil forfeiture law. According to the State's supporting affidavit, "[o]nce in Arizona, immigrants often are detained by force in secured locations until sponsors (family, friends, or prospective employers) wire money to associates of the smugglers." Furthermore, "[a]fter payment, the immigrants are released and make their way to destinations in Arizona or elsewhere." The affidavit also alleged that similar transfers represented the proceeds of sales of drugs smuggled into the United States via the Arizona border.

C. The Jurisdictional Battle: Seizure Warrants and Territorial Complications

1. Procedural History

The Arizona Superior Court granted the State's warrant request that same day, finding "that there [was] probable cause to believe that conduct giving rise to forfeiture ha[d] occurred with respect to all of the property described . . . and that forfeiture [was] authorized . . . ." The warrant authorized agents of the state to seize "person-to-person" wire transfers originating in twenty-eight states other than Arizona, with destinations in twenty-six locations in the state of Sonora.

126 "SHOW ME THE MONEY" 821

126 Id. ("Statewide, about [five] percent of Western Union outlets were responsible for [eighty] percent of the most suspicious transactions . . . .").
127 W. Union, 208 P.3d at 219.
128 Id.
129 Id.
130 Id.
131 Id.
132 State v. W. Union Fin. Servs., Inc., 199 P.3d 592, 598 (Ariz. Ct. App. 2008) (first omission in original) (internal quotation marks omitted). Whether the action by the superior court is authorized by Arizona's civil forfeiture statutes is beyond the scope of this Note.
By the terms of the warrant, Western Union was ordered to stop payment whenever payment of a transfer covered by the warrant was sought, and to deposit the funds into a state-created detention account.

Upon Western Union’s motion to quash the warrant, the Arizona Superior Court ordered an evidentiary hearing, during which the court granted Western Union’s motions, finding that the Due Process Clause of the Fourteenth Amendment barred its exercise of jurisdiction over money transfers directed to Mexico that originated in neighboring states. Upon review, the Court of Appeals of Arizona vacated the Superior Court’s judgment. Western Union had conceded that its “continuous and systematic” activities within Arizona rendered it amenable to general jurisdiction there. Therefore, the Arizona Court of Appeals concluded that its debts could be considered present in the state for purposes of in rem jurisdiction. The court of appeals also conducted a “minimum contacts” analysis to determine that the nexus between the smuggling operations and the state of Arizona was sufficient to pass constitutional muster under International Shoe.

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134 See id. Specifically:
Western Union was required to (1) stop payment and transfer the funds to a detention account, (2) notify the intended recipient of the detention and provide that person with information to contact the seizing agency, (3) retain the funds, except those released by the seizing agency, in the detention account for twenty-one days after the warrant expired, and (4) convey any remaining detained funds to the clerk of the superior court in Maricopa County upon the expiration of the twenty-one-day period.
135 Id. at 220.
138 See W. Union, 208 P.3d at 220.
139 See supra Part I.C and note 16 (providing support for determination that issuance of seizure warrant is a proceeding in rem).
140 See W. Union, 199 P.3d at 605–06.

The res constitutes proceeds from human smuggling and narcotics trafficking activities that predominantly occurred in Arizona.... [The undocumented immigrants, “UDIs,”] are brought into Arizona, held hostage in Arizona, an agreement for release is negotiated from Arizona with the
2. Arizona’s Supreme Court Rules

In quite circuitous fashion, the state’s high court rejected the possibility that the targeted money transfers were “located” in Arizona for jurisdictional purposes. The court began its analysis by noting that Western Union’s activities in Arizona allow for the exercise of general jurisdiction over it, a finding that presumably would weigh in the State’s favor since “the Fourteenth Amendment poses no bar to an Arizona court . . . issuing in personam orders to Western Union governing the disposition of wire transfers involving the proceeds of racketeering conducted” there. Thus, the court framed the issue as a procedural one, elevating form over substance, and suggested that, had the State pursued in personam action against Western Union, the location of the funds would prove no obstacle to their seizure. The court then engaged in a historical discussion of personal jurisdiction jurisprudence, reciting the post-Shaffer doctrine as it applied to quasi in rem jurisdiction, to wit, jurisdiction could no longer be premised solely on “location” and “the end question [is] whether there [is] jurisdiction over the party against whom the plaintiff ultimately asserted liability.” Nevertheless, location within the forum state remains a necessary predicate to the achievement of “true” in rem jurisdiction.

Simply put, the court used Shaffer as a demarcation between forms of action where location is not germane to an exercise of jurisdiction—in personam—and those where it is—true in rem. As discussed above, quasi in rem jurisdiction is caught somewhere between the two—in personam and in rem

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sponsor, and the coyote performs the agreement in Arizona by releasing the UDI upon notification of payment by the sponsor. The owners or beneficial interest holders in the [electronic credits], who are parties to this illegal enterprise, purposefully facilitated illegal acts in Arizona and should expect therefore to adjudicate their rights to the res in Arizona.

Id. at 606.

141 W. Union, 208 P.3d at 226.

142 Id. at 220.

143 Id. at 222 (citing Shaffer v. Heitner, 433 U.S. 186, 212 (1977)). The court explained that “since Shaffer, the Harris fiction no longer has any relevance in quasi in rem actions; the focus is now on the defendant’s contacts with the forum state.” Id. at 225.

144 Id. at 222.
jurisdiction—where location is relevant to the extent it provides a contact in the *International Shoe* sense. Thus, location is irrelevant where a claim is unrelated to the property at issue because the constitutional inquiry now focuses on the contacts of the party over whom liability is sought. However, “the Supreme Court’s post-*International Shoe* jurisprudence makes plain that a necessary prerequisite to ‘true’ in rem jurisdiction [where the suit is related to the property itself] is the location of the subject property within the forum state.”

The court questioned the aptness of the *Harris* fiction in analyzing the location of this property. It distinguished *Harris* factually, differentiating between the “ordinary debt” owed in *Harris*—which it characterized as a contractual obligation to the creditor—from Western Union’s contractual obligation to the debtor to deliver funds to a given recipient. “Western Union’s role in the wire transfers is more akin to that of a courier,” reasoned the court. Just as Arizona could not exercise jurisdiction over a package sent from Colorado to Mexico via UPS, the State could not seize electronic funds merely “deliver[ed]” via Western Union.

The court also rejected *Harris* doctrinally. Relying on its reasoning above, the court distinguished *Rush* as irrelevant to a discussion of *Harris* since “the situs of intangible property unrelated to a plaintiff’s claim has no application whatsoever after *Shaffer* to the constitutional analysis.” Essentially the court recognized that location, in and of itself, has been replaced in the quasi in rem analysis by minimum contacts—*Shaffer*, as we have seen, vitiates the need for the property’s presence in the forum state when the claim is unrelated. As such, courts need

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145 *See Shaffer*, 433 U.S. at 207 (“[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation.”).
146 *W. Union*, 208 P.3d at 222.
147 *Id.* at 223.
148 *See id.*
149 *Id.*
150 *See id.* This would be true, the court said, even if the contents of the package contained proceeds of racketeering committed in Arizona and if UPS was amenable to general jurisdiction there. *See id.*
151 *Id.* at 224 (emphasis added). Presumably, the court’s dismissal of *Rush* would apply to all instances of quasi in rem jurisdiction.
not concern themselves with *Harris*, or any other method of locating property, for that matter: "If those with interests in the property are subject to in personam jurisdiction in the forum state, a court in that state undoubtedly has jurisdiction consistent with the Due Process Clause to enter orders relating to the property."152

Unfortunately, curiously similar to the *Rush* Court, the Arizona court ended its reasoning there. Though correctly recognizing *Shaffer*'s consequences on quasi in rem jurisdiction, both courts stopped short of ruling on *Harris*' applicability to in rem actions when presence in the state is a necessary predicate to jurisdiction. Even if location is largely immaterial to a quasi in rem action, it is still the linchpin of exercising "true" in rem jurisdiction. Thus, some legal apparatus will inevitably be necessary for ascertaining the location of intangible property related to the litigation.

In the end, acquiescing that the Supreme Court has "expressly pretermitted whether in rem jurisdiction over intangibles... can be exercised in more than one state,"153 the court concluded by refusing to accept that "a wire transfer originated in another state by [a nonresident] and directed to a recipient in a foreign country who also [is a nonresident] is 'located' in Arizona simply because Western Union, a foreign corporation, is amenable to suit here."154

The court declined to recognize that perhaps these facts presented an opportunity to modernize its analysis, explaining that "[t]he technical complexities of the electronic age should not blind courts to the substance of transactions in conducting

152 *Id.* at 225. Although suggesting that those with "interests" in the property are undoubtedly "subject to in personam jurisdiction in the forum state," the court used the term "interests" to the State's disadvantage earlier in the opinion. *Id.* Arizona's forfeiture statute provides for jurisdiction "if the courts of this state have in personam jurisdiction of an owner of or interest holder in the property." ARIZ. REV. STAT. ANN. § 13-4302 (2011) (emphasis added). However, the "Definitions" section of the statute defines an "[i]nterest holder" as "a person in whose favor there is a security interest or who is the beneficiary of a perfected encumbrance pertaining to an interest in property." ARIZ. REV. STAT. ANN. § 13-4301(4) (2011). In the court of appeals' proceedings, it was held that Western Union did not satisfy this category. *W. Union*, 208 P.3d at 220 n.2. Clearly, therefore, the court's reasoning for rejecting *Harris* is too narrow since it does not even include Western Union.

153 *W. Union*, 208 P.3d at 225.

154 *Id.* at 226.
jurisdictional analyses.” This author disagrees. The court unwisely rejected the occasion to espouse the very technological complexities it dismissed, by ironically snubbing the possibility of a debt being “simultaneously located in every state in which Western Union can be sued” as “mechanical” and “outworn.”

Judge Espinosa took a less traditional approach than his colleagues, arguing that the majority’s holding “avoids grappling with the key feature of the jurisdictional question presented: the implication of a relatively new species of intangible property that has no singular location.” Notwithstanding his ostensibly innovative perspective, the dissenting judge ultimately agreed with the majority that Harris does not apply, only for different reasons than those proffered in its opinion. According to Espinosa, the majority “conflates presence, a necessary component of jurisdiction, and jurisdiction itself.” Essentially, what the Court has renounced is simply quasi in rem jurisdiction predicated on presence alone, not the idea that it is logical to situate a debt where his debtor is found for jurisdictional purposes. So, Harris is inapplicable here only because it held that quasi in rem jurisdiction may be “premised on nothing more than the transitory presence of a debtor and his debt to an unrelated third party.” This is not to say, however, that there is anything troublesome, or unconstitutional, about the theoretical location of a debt residing where its owner is found. The majority confuses its principles, mistakenly assuming that by finding Western Union’s debt in every state in which it does business, it would automatically be creating jurisdiction in all of those locations. This, argued Espinosa, is the real issue

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155 Id. at 223–24.
156 Id. at 224.
157 Id. at 227 (Espinosa, J., dissenting).
158 Id. at 228.
159 Id. at 229.
160 See id. (“[W]hat has been laid to rest is the use of the debt-follows-the-debtor doctrine as a substitute for due process and minimum contacts analysis when invoking in rem or quasi in rem jurisdiction.”).
161 Id. at 228 (emphasis added).
162 See id. at 231 (“[A]cknowledging that in rem jurisdiction cannot be premised solely on the situs of a debt does not explain why multijurisdictional situs is factually or legally untenable.”).
163 See id. (“The notion that intangible electronic credits are present anywhere they can be redeemed is neither outlandish nor troublesome, as the majority
presented, and the crux of the modern jurisdictional problem: Until the courts recognize this new brand of ubiquitous intangible property, they will struggle to adequately determine the contours of its jurisdictional significance.\textsuperscript{164} Espinosa posits that the failure of the majority to capitalize on this opportunity to update existing methodology essentially builds “a straw man on the bleached bones of \textit{Harris v. Balk}, and then knock[s] it down.”\textsuperscript{165} Espinosa's conceptualization of a “new species” of intangible property, simultaneously present in every place its owner\textsuperscript{166} is found, is the fulcrum of the next section.

III. RETHINKING THE SITUS OF INTANGIBLES IN THE INTERNET AGE

This Section argues for the \textit{Harris} fiction’s lasting utility and its relevance in the modern era. In light of the complexities modern technology poses to rigid jurisdictional analyses, \textit{Harris} applies more than ever. Section A examines precisely the type of ubiquitous intangible property we have been considering. It attempts to illustrate the boundless contours of electronic credits and other “cyber property.” Section B sets forth a two-pronged inquiry for situating this type of property, which revives \textit{Harris} while remaining faithful to the concerns of \textit{Shaffer} and \textit{International Shoe}.

\begin{footnotesize}
\textsuperscript{164} See \textit{id.} at 232–33 (“[T]he majority... avoids the real-world situation presented in this case by applying traditional jurisdictional analysis and sidestepping the novel issues created by evolving technology and ever-adapting criminal methodologies. In so doing, this court misses a compelling opportunity to appropriately advance the law in accord with changing societal needs.”).

\textsuperscript{165} \textit{Id.} at 227.

\textsuperscript{166} In both \textit{W. Union} and \textit{Harris}, the issue was not focused on who the actual “owner” of the property was. Since both cases involved locating a debt, the courts applied the jurisdictional analysis developed for “owners” of property to the respective debtors who were in possession thereof. Surely, deciding who “owns” a debt is a larger issue to be left for another day.
\end{footnotesize}
A. **Electronic Debts and Other “Cyber Property”**

The “electronic credits” at issue in *Western Union* are part of a larger family of modern property interests that, as Judge Espinosa explained, “have no singular location.”\(^{167}\) Contrary to the majority’s contention that the Supreme Court has “pretermitted” whether intangibles may be legally situated in more than one state,\(^{168}\) the Court has, in fact, suggested that certain intangible properties may not be limited to a solitary location.\(^{169}\) In that respect, they are analogous to other outgrowths of the internet age, particularly e-mail and other transmittable digital data.\(^{170}\) These unique forms of attachable res exist in a “place” that is omnipresent and amorphous, rather than bound by geographic limitations.\(^{171}\) Consequently, they pose never-before-seen problems to traditional bases of jurisdiction that were rooted in the logic of physics and have, therefore, endured by situating property in a discernible time and place.\(^{172}\)

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167 *W. Union*, 208 P.3d at 227–28 (Espinosa, J., dissenting).

168 Id. at 225.


170 See *W. Union*, 208 P.3d at 230 (Espinosa, J., dissenting) (“Just like e-mail communications whose receipt is not limited to any particular location or computer, such electronic credits necessarily exist simultaneously in every place they can be instantly received.”).

171 See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (“A unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.”).

172 See WRIGHT ET AL., *supra* note 2, § 1073.1 (“Technological advances such as . . . the Internet . . . raise[] significant questions about the application of traditional personal jurisdiction doctrine.”).

[W]hen courts apply rules designed for cases filed in physical courts to Internet disputes, certain legal quagmires emerge. For instance, it is difficult, if not impossible, to determine in a legally principled way “where” an online transaction took place between a buyer and seller from different states or countries. . . . Traditional location-based legal determinations do not function well when applied to interstate e-commerce transactions.

Galves, *supra* note 20, at 6–7. Indeed, the applicability of traditional conceptions of in rem jurisdiction has been a subject of much scholarly debate, particularly in the realm of Internet domain names and the Anticybersquatting Consumer Protection Act. See generally Michael P. Allen, *In Rem Jurisdiction from Pennoyer to Shaffer to the Anticybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243 (2002); Moringiello, *supra* note 20; Lee, *supra* note 34.
Needless to say, applying place-based analyses to placeless property is an exercise in futility. Therefore, as commentators have observed, “the rule of law must keep pace with the growth of the Internet.” Although the holding in Harris was limited to quasi in rem actions, its central underpinning—situating a debt with its debtor—should be recognized as applying to “true” in rem actions as well. In fact, the actualization of a species of property that is conceptually and physically present everywhere it is instantly receivable demands the awakening of the Harris fiction to make such a thing accessible for the administration of justice. As Judge Espinosa fittingly put it:

The very term “electronic credit” illustrates the problem because it aptly describes the abstraction that is at the heart of the transactions and wire transfers involved here. If a Western Union wire transfer... cannot be found, in both a conceptual and practical sense, wherever Western Union does business and routinely pays out on such transfers, then it is nowhere to be found, because, in Western Union’s global, computerized accounting system, these electronic credits have no more “location” than does an e-mail message once the “send” button is clicked.

B. The Argument for a Two-Pronged Analysis

1. How Can You Locate Something that Is Everywhere?

Although determining the “location” of intangible property is a legal fiction, courts nevertheless undertake to assign it a situs. But, without adherence to Harris’ debt-follows-the-debtor reasoning, electronic credits—or e-mails, banking

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172 Galves, supra note 20, at 6.
174 W. Union, 208 P.3d at 228 (Espinosa, J., dissenting).
175 See People v. McGraw Elec. Co., 30 N.E.2d 903, 906 (Ill. 1940) (“When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception.” (quoting Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209 (1936))).
176 See Kaiser-Ducett Corp. v. Chicago-Joliet Livestock Mktg. Ctr., Inc., 407 N.E.2d 1149, 1152 (Ill. App. Ct. 1980) (“[F]or ease of administration, for a determination of jurisdiction, and for other reasons, intangible personal property is often presumed to have a location.”).
information, etcetera—are, in actuality, nowhere to be found. The majority in *Western Union* speculated that perhaps it would be reasonable to situate the electronic credits in either the state from which they were sent until collected; or in Colorado, Western Union's state of incorporation. Sensible though these alternatives may seem, any other state burdened by the transaction would be left without a remedy—a fundamentally unjust result. This reasoning seems to tip the scales in favor of the putative criminals, turning a blind eye to the realities of the transaction so as to not offend traditional jurisdictional analyses. Affixing Western Union's debt to the corporation's legal presence is, in many cases, the only way a state—Arizona, for example, or California in our hypothetical—seeking to exercise "true" in rem jurisdiction over money transfers can do so. Until now, property's presence within the forum state was indicative of the relationship between the cause of action and that property. Indeed, in *Harris*, the debt—although intangible—had a discernible singular location: wherever the individual debtor was. However, as was the case in *Western Union*, contemporary forms of intangible property can have a profound impact on states in which they are not physically located, as well as those to which their owner has never been. Thus, to the extent that Western Union makes its debts available in all fifty states and 195 foreign countries, the holding in *Harris* is not a fiction at all.

Therefore, in situations where it becomes necessary to commit intangible property to a singular location, *Harris* remains a logical and effective method of doing so. Indeed, utilizing the *Harris* fiction in this way does not mechanically create jurisdiction in every location a corporate debtor does...

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177 See *W. Union*, 208 P.3d at 230 (Espinosa, J., dissenting) ("The relevance of this real-world situation to the present legal issue is that... electronic credits have no actual physical location once they are created in Western Union's computer system. Instead, just like e-mail communications whose receipt is not limited to any particular location or computer, such electronic credits necessarily exist simultaneously in every place they can be instantly received.").

178 See id. at 229 ("No 'fiction' at all is needed to see that, if an intended receiver of funds can go to any Western Union station and instantly receive the money, the funds must be at that location, both conceptually and physically. That the electronic credits are therefore present "in any place where Western Union maintains an office," if that is congruent with any location where the funds can be disbursed, is simply a fact of this modern business practice...").
business. Instead, the fiction merely identifies the field of possible forums the property can be deemed “located.” It allows courts to consider the property “within” a certain territory, so that they may proceed to the second part of the inquiry, discussed below: whether the required nexus exists between the property, the forum, and the subject of the litigation.

2. Staying Faithful to International Shoe

Reviving Harris to determine the location of intangibles such as these comports with the same notions of fair play and substantial justice championed in International Shoe. The primary distinction between in rem and quasi in rem jurisdictions is that the former requires some positive nexus between the property and the subject of litigation.179 By the Western Union majority’s reasoning, even states that have been substantially affected by the intangible property—or exchange, or consequence thereof—have available to them no legal remedies vis-à-vis the property simply by virtue of the fact that the forum was not affected in some physical way by the property itself.

Powerful normative arguments, however, support the rights of Arizona against Western Union. As Judge Espinosa explained:

The unique intangible property here, while under the exclusive control of Western Union, is necessarily located at every Western Union office where it can be collected at will, including Western Union’s offices in Arizona—the forum directly connected to the litigation. The money underlying these electronic credits is payment for drugs or ransom for hostages being held and often abused in clandestine locations in Arizona. The state’s overriding interest in this money is the prevention of drug and human smuggling and the attendant violence,

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179 See Consumers United Ins. Co. v. Syverson, 738 P.2d 110, 112 (Mont. 1987) (requiring positive nexus between nonresident who wired funds to in-state bank, the state and the subject of litigation); see also FleetBoston Fin. Corp. v. FleetBostonFinancial.com, 138 F. Supp. 2d 121, 134 (D. Mass. 2001) (“The logic of Shaffer’s limitations . . . extend[s] to actions in which the existence of the property in the state cannot fairly be said to represent meaningful contacts between the forum state, the defendant, and the litigation.”); Goedmakers v. Goedmakers, 520 So. 2d 575, 578 (Fla. 1988) (“Where the action is . . . on a debt . . . a defendant has the privilege of being sued either in the county of his residence or in the county where the cause of action accrued.”) (emphasis added).
degradation, suffering, and economic harm such activities visit on Arizona's communities.... [I]f fairness is the touchstone of contemporary jurisdictional jurisprudence, it is without question fair and concordant with traditional notions of due process to anticipate that the transferred money—and, by extension, its owners—should be subject to the authority of this state's courts . . . .

The nexus between Arizona's interest in state sovereignty—that is, protecting those within its borders from the inherent consequences of human-smuggling operations—and the money representing those illegal operations would undoubtedly be sufficient under any variation of the "minimum contacts" analysis to hale the putative perpetrators into an Arizona court. As the law stands, however, absent a finding that the electronic credits are present in Arizona, such an analysis fails to invoke "true" in rem jurisdiction.

This incongruity is patently at odds with the "fairness" standard advanced in International Shoe. In International Shoe, a Delaware corporation was amenable to suit in Washington when it had its principle place of business in Missouri and employed between eleven and thirteen traveling salesmen in Washington. Despite the fact that the company had no offices in Washington, made no contracts for sale there, and kept no merchandise there, the Court found that International Shoe's business in Washington was of such a substantial nature as to make it "reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [International Shoe] [had] incurred there." Per Justice Stone, the Court articulated the constitutional inquiry as turning on "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the [Due Process Clause] to insure." By this standard, it seems difficult to imagine how, when faced with the deplorable and inhumane business of human smuggling, a court can determine that the very state

\[180\] W. Union, 208 P.3d at 232 (Espinosa, J., dissenting) (internal citations omitted).


\[182\] Id. at 320.

\[183\] Id. at 319.
through which these individuals are essentially sold has no legal device to thwart the practice. Such a result is acutely unfair. Further, Judge Espinosa suggested that if Arizona cannot exercise in rem jurisdiction over the electronic credits, no state can: Arizona seemingly has more connection to the property, and therefore better chances of satisfying a “minimum contacts” test, than any other state does.\textsuperscript{184} Thus, the money is virtually untouchable.

Indeed, concern for public policy has existed at the heart of personal jurisdiction jurisprudence since its infancy. The famed Justice Cardozo declined to divorce Harris’s reasoning from the concept of fairness that would later elevate International Shoe to the doctrine’s forefront:

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes . . . any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions.\textsuperscript{185}

The Western Union court did not so much strictly adhere to an antiquated doctrine, as it stubbornly refused to recognize the need for a new one. Failing to acknowledge the modern necessity for the Harris fiction is an impingement on states’ abilities to protect their own conceptions of public policy, not to mention an affront to the fundamental fairness that purportedly has served as the “touchstone” for modern personal jurisdiction law.\textsuperscript{186} As a

\textsuperscript{184} See W. Union, 208 P.3d at 231 (Espinosa, J., dissenting).

Only Arizona can arguably satisfy the minimum contacts requirements of International Shoe and Shaffer because the wire-transferred payments are at the very heart of the litigation here. . . . To find that jurisdiction exists in [Colorado or the transfers’ states of origin] would require application of the “mechanical rule” proscribed by Shaffer. If one accepts that Western Union’s ubiquitous electronic credits are somehow more authentically “present” in those states than in Arizona, the exercise of in rem jurisdiction in those forums would be problematic, if not flatly unconstitutional, because the intangible property would lack any meaningful contact with those jurisdictions.

\textit{Id.}


\textsuperscript{186} W. Union, 208 P.3d at 232 (Espinosa, J., dissenting).
result, the very liberties sought to be protected by the Due Process Clause of the Fourteenth Amendment may be breached by courts' reluctance to adapt to the Internet Age.\textsuperscript{187}

**CONCLUSION**

As can be expected, reliance on *Western Union* for a resolution to our hypothetical likely leaves California in about the same shoes as the Arizona Supreme Court left its Attorney General. Since the wires were neither sent nor received by California residents, and since the money was never in the "possession" of a California bank, the state is left without a jurisdictional solution to its drug and human trafficking problems. However, a judicial willingness to accept a modern form of the *Harris* fiction would allow California to flex its crime-prevention muscles. Espousing *Harris* simply as a method of situating a debt for jurisdictional purposes—rather than as a means of actually obtaining jurisdiction—courts can avoid the Due Process problems originally inherent in the principle. For instance, had Judge Espinosa's reasoning carried the day, the money representing proceeds of marijuana smuggled into California for deposit in Las Vegas would be "located" wherever the buyer could access his funds from a Western Union agent. This, as we have determined, is in every state and hundreds of destinations around the world. As the majority in *Western Union* pointed out, were this to create jurisdiction over Western Union in each of those places, certainly due process would be offended. However, requiring a sufficient nexus between the cause of action and the wires would ensure that only those locations that may fairly adjudicate the rights of the property in the interest of justice could do so. For better or worse, other "real life" examples abound.

That *Harris* was decided in 1905, *International Shoe* in 1945, and *Shaffer* in 1977 is reason enough to revisit and re-evaluate the principles announced therein. Certainly, the Court could not have anticipated at the times of these decisions a twenty-first-century society where financial transactions are completed

\textsuperscript{187} See Allen, *supra* note 172, at 266 ("When courts fail to consider the substantive interests the doctrine is meant to protect, they run the very real risk that these interests will not be safeguarded.").
instantly via computerized communications. Similarly, the reasoning underlying these seminal decisions does not contemplate the species of property at the heart of this Note—intangible interests that have obviated the notion of “cash, currency, check, note or bank draft of any sort.” At the time of *Harris* it was unnecessary and illogical to consider a transaction that was not “sent, transported, or routed through any geographic channels between the sender and receiver.” Many modern scholars would be hard-pressed to imagine a business world that still employed such antiquated methods. For these reasons, it is crucial for courts to recognize the lasting vitality of the *Harris* fiction and, perhaps, that in our modern Internet Age, it is no longer a fiction at all.

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188 *W. Union*, 208 P.3d at 230 (Espinosa, J., dissenting).
189 *Id.*