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The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction

Cody Jacobs

Boston University School of Law

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Authors: Cody James Jacobs

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THE STREAM OF VIOLENCE: A NEW APPROACH TO DOMESTIC VIOLENCE PERSONAL JURISDICTION

*Cody J. Jacobs**

Abstract

There is a split among state courts about whether personal jurisdiction over an alleged domestic violence perpetrator is required in order to obtain a civil protection order preventing the defendant from contacting the victim. Some courts have held that such orders interfere with the defendant's liberty interests, and therefore personal jurisdiction is a requirement under the Due Process Clause for the validity of such orders. Other courts have held that personal jurisdiction is not required because such protection orders are analogous to custody and divorce orders which have historically been entered by courts without establishing personal jurisdiction over the other party under the "status exception." This Article argues that the focus on the status exception is misplaced and that instead, courts should reframe the way they look at personal jurisdiction in domestic violence cases by applying the principals embedded in the stream of commerce doctrine and the effects test. Drawing upon common threads from each line of cases, the Article proposes a test for domestic violence jurisdiction that focuses on the knowledge of the defendant about the victim's likely destination if she is forced to flee to another state.

* Abraham L. Freedman Fellow, Temple University James E. Beasley School of Law.

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I. INTRODUCTION

Alan Burnett had a history of making violent threats against his wife. He repeatedly told Caren Burnett throughout their seven year marriage that if she ever left him, he would kill her and “go to jail” leaving their three children to live with his parents. At one point, he even described a gruesome plan to kill her and hide the evidence using a wood chipper. Caren finally decided she had enough and fled from her husband in Florida to her father’s house in Sandusky County, Ohio. Upon arriving in Ohio, she promptly filed a motion for a domestic violence civil protection order and presented evidence of Alan’s serious threats and the fact that he “knew all the places she would go” to flee from him. The trial court entered an order of protection, but the Court of Appeals of Ohio reversed, finding that the trial court lacked personal jurisdiction over Alan, leaving Caren with an impossible choice: either risk her own safety by traveling to Florida to seek an order of protection or wait for Alan to come to Ohio and threaten her and her children sufficiently to give rise to jurisdiction in Ohio.

This Article argues that people like Caren should not be forced into such a difficult decision. The Due Process Clause of the Fourteenth Amendment does protect out of state residents from being subject to personal jurisdiction in states with which they have no connection, but when a person engages in conduct that they know or should know is likely to have an impact in another state, courts have shown a willingness in other contexts to allow the assertion of personal jurisdiction in those states. Manufacturers may be subject to jurisdiction when they place a product into the stream of commerce that they know or should know will end up in a particular forum even if the manufacturer never sold products directly to a buyer in that forum. Intentional tortfeasors may be subject to personal jurisdiction when they engage in tortious conduct that they know will have an effect in another forum, even if the tortfeasor never set foot in that forum.

When a person like Alan Burnett engages in a pattern of threatening conduct toward a person he knows will be likely to seek refuge in a particular place—the place he knows her family lives—he should likewise be subject to personal jurisdiction in that place. This Article argues that courts should reframe the personal jurisdiction inquiry in the context of domestic violence in the same way they have framed that inquiry in these other contexts: by holding the defendant responsible for the knowledge he possesses about the likely results of his actions. This approach is a more coherent one than the “status” approach, which has been at the center of this debate in lower courts and which seeks to exempt domestic violence

restraining orders from personal jurisdiction requirements altogether by analogizing those orders to divorce and custody actions.

Part II.A will describe the historical context in which the status exception arose and its current justifications. Part II.B will examine the debate in the courts over whether the status exception should apply to domestic violence cases.¹ Part III will explain why the status exception is not an appropriate vehicle for dealing with interstate domestic violence cases. Part IV will describe the development of the stream of commerce doctrine and the effects test and draw common threads from those lines of cases that are applicable to the domestic violence context. Part V will weave those common threads into a “Knowledge Test” for domestic violence cases that asks whether the defendant was aware the victim was likely to flee to the forum. Part VI will address potential objections to the Knowledge Test.

II. PERSONAL JURISDICTION & DOMESTIC VIOLENCE RESTRAINING ORDERS

In most civil actions, it is a prerequisite to entering a judgment against a defendant that the court have personal jurisdiction over the defendant.² Personal jurisdiction can be acquired by in-state service on a defendant voluntarily present in the state,³ with the defendant’s consent,⁴ or by establishing that the defendant has minimum contacts with the forum such that haling the defendant into court there is consistent with traditional notions of fair play and substantial justice.⁵

However, there has long been an exception to these requirements for cases that concern a determination of the plaintiff’s “status.” This status

¹ This article uses the phrase “domestic violence cases” to refer to civil proceedings by plaintiffs seeking domestic violence restraining orders, not criminal cases where the defendant is charged with a domestic violence related offense.

² See, e.g., 20 AM. JUR. 2D *Courts* § 68 (“[P]ersonal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.”).

³ See *Burnham v. Superior Court of California, Cty. of Marin*, 495 U.S. 604, 616-19 (1990) (opinion of Scalia, J.); *id.* at 628-29 (opinion of Brennan, J.); Cody Jacobs, *If Corporations Are People, Why Can’t They Play Tag?*, 46 N.M. L. REV. (forthcoming 2016) (manuscript at 12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560553).

⁴ See, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . . A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court.”).

⁵ See, e.g., *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945).

exception allows a court to determine the legal status of a person properly before the court, even if that status has an impact on another person over whom the court may not be able to obtain personal jurisdiction.⁶ Courts have relied upon this exception to grant divorces even in situations where the court has jurisdiction over only one of the spouses.⁷ Similarly, courts have entered child custody orders when the children at issue reside in a forum even when the court lacks jurisdiction over one of the parents.⁸

There is a split in the lower courts over whether the status exception applies to actions seeking domestic violence restraining orders against out of state defendants.⁹ Some courts hold that such orders do not fall into the status exception at all and that, therefore, in the absence of personal jurisdiction over the defendant, no restraining order may be issued.¹⁰ Other courts hold that the exception does apply to such orders because they merely concern the protected “status” of the person seeking the order.¹¹ However, many of the courts that have found the status exception applicable to domestic violence restraining orders have held that due process requires some serious limitations on the scope of such orders when the court lacks personal jurisdiction over the defendant.¹²

A. *The Status Exception*

Although a version of the status exception was already followed by state courts at the time,¹³ the exception was fully entrenched in jurisdictional jurisprudence by dicta in the Supreme Court’s decision in *Pennoyer v. Neff*.¹⁴ In that case, the Court declared for the first time that the recently ratified Fourteenth Amendment placed constitutional limits on state courts’

⁶ See Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 815-16 & n.10 (1995).

⁷ *Id.* at 815-18.

⁸ *Id.*

⁹ Some courts style the person seeking a restraining order as the “petitioner” and the person against whom the order is sought as the “respondent,” while others refer to the parties simply as the plaintiff and defendant respectively. For clarity, this article adopts the latter nomenclature throughout.

¹⁰ See, e.g., *Fox v. Fox*, 106 A.3d 919, 926-27 (Vt. 2014) *cert. denied*, 135 S. Ct. 952 (2015); *Becker v. Johnson*, 937 So. 2d 1128, 1130-32 (Fla. Dist. Ct. App. 2006); *T.L. v. W.L.*, 820 A.2d 506, 512-15 (Del. Fam. Ct. 2003).

¹¹ See, e.g., *Hemenway v. Hemenway*, 992 A.2d 575, 581-82 (N.H. 2010); *Caplan v. Donovan*, 879 N.E.2d 117, 122-25 (Mass. 2008); *Bartsch v. Bartsch*, 636 N.W.2d 3, 10 (Iowa 2001).

¹² See Part II.B.1, *infra*.

¹³ Wasserman, *supra* note 6, at 824

¹⁴ 95 U.S. 714 (1877).

exercise of personal jurisdiction. The Court held that the Fourteenth Amendment's Due Process Clause prevented state courts from exercising personal jurisdiction over non-resident defendants unless the defendant made a voluntary appearance in court or was served with process while physically present in the state.¹⁵ However, the Court described an important limitation on its holding:

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory.¹⁶

Thus, the Court carved out a special exception for cases involving the status of the plaintiff as opposed to the personal rights of the defendant. In those cases, the Court found no due process problem with state courts determining the status of in-state plaintiffs even where the adjudication of that status would have a clear impact on the defendant.

The status exception has been widely accepted by courts as a means of conducting what scholars call “ex parte divorce” actions—divorces where the state lacks personal jurisdiction over the non-resident defendant spouse.¹⁷ The status exception has also been used to justify the adjudication of child custody disputes where the child is physically present in the forum

¹⁵ *Id.* at 733. As discussed in Part IV, *infra*, these traditional bases of jurisdiction have since been augmented by the minimum contacts framework. See *Int'l Shoe*, 326 U.S. at 316.

¹⁶ *Id.* at 734 (emphasis in original).

¹⁷ See Wasserman, *supra* note 6, at 816 n.13 (noting that the phrase “ex parte divorce” is something of a misnomer because—at least in modern times—courts do require notice to the defendant in such cases even if they do not have personal jurisdiction over the defendant).

state but the forum lacks personal jurisdiction over one of the parents.¹⁸ In order to understand why courts disagree about whether this exception applies to domestic violence cases, it is first necessary to understand why it does apply in these contexts and to examine the limitations courts have placed on its application.

1. Divorce & Child Custody

The application of the status exception to divorces rose to prominence during the nineteenth century—a time when society and the law took a very different view of marriage than today. Once a man and woman were married, they essentially became a single unit in the eyes of the law, but it was the husband who had almost all of the power to control this marital unit.¹⁹ The husband became the sole owner of all of his wife’s property upon marriage, and was entitled to all wages, bequests, and gifts the wife received during marriage.²⁰ A married woman had no right to make contracts and—at least in some states—no right to work at all without the permission of her husband.²¹ At the same time, the number of divorces was rising dramatically²² and the most common ground²³ for divorce was desertion or abandonment.²⁴

A woman who found herself abandoned by her husband was left in a precarious situation if the husband fled to another state. She would be unable to support herself financially because of patriarchal marital laws, but also unable to obtain a divorce from her absent husband because of the territorial view of personal jurisdiction that prevailed at that time. This concern at least partially motivated the *Pennoyer* court’s entrenchment of the status exception for divorces.²⁵

In the child custody context, many courts historically held that personal

¹⁸ See *id.* at 816-18.

¹⁹ See *id.* at 824-25 (“[I]n the eyes of the law the husband and wife were one person — the husband.”) (quoting NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 42 (1982)).

²⁰ See Wasserman, *supra* note 6, at 824-25.

²¹ See *id.* at 825-26.

²² See *id.* at 828 & n.73.

²³ The first “no fault” divorce law did not go into effect until over a century after *Pennoyer*. See, e.g., Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U.L. REV. 79, 83 (1991).

²⁴ See Wasserman, *supra* note 6, at 830; Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 123 (1990).

²⁵ See Wasserman, *supra* note 6, at 832.

jurisdiction over both parents was not required where the child was subject to personal jurisdiction in the forum.²⁶ However, courts were divided about the rationale for doing so. Some relied on the “status” rationale while others relied on a “physical presence” rationale that analogized the child to property.²⁷ Still other courts held that personal jurisdiction over both parents was in fact required in child custody cases.²⁸

The confusion among courts on this point was clarified²⁹ by the Uniform Child Custody Jurisdiction Act (“UCCJA”), which was enacted by all 50 states by 1981.³⁰ The UCCJA adopted the view that the status exception applied to child custody determinations, making the assertion of personal jurisdiction over both parents unnecessary for a court to render a custody judgment.³¹ Although some commentators have questioned the UCCJA’s

²⁶ See Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 378 (1991).

²⁷ Wasserman, *supra* note 6, at 867-68; Atwood, *supra* note 26, at 377-78.

²⁸ Wasserman, *supra* note 6, at 863-64; Atwood, *supra* note 26, at 377. The Supreme Court’s decision in *May v. Anderson*, 345 U.S. 528 (1953) appeared to adopt this position when a five Justice majority held that Ohio courts did not have to recognize a custody judgment entered by a Wisconsin court awarding sole custody of three children to their father when the Wisconsin court lacked personal jurisdiction over the mother. *Id.* at 528-29. However, in a concurring opinion Justice Frankfurter stated that he was joining the Court’s opinion with the understanding that the Court’s only holding was that the Full Faith and Credit clause did not require Ohio to recognize Wisconsin’s judgment, but that nothing (presumably including the Due Process Clause) prevented Ohio from choosing to recognize that judgment if it had wanted to do so. *Id.* at 535-36 (Frankfurter, J., concurring). While some courts read *May* expansively as precluding child custody judgments without jurisdiction over both parents, others followed Justice Frankfurter’s interpretation, while still others ignored *May* altogether. 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, 132 (1991); Atwood, *supra* note 26, at 370. Thus, *May* ultimately failed to provide much clarity on this issue. See, e.g., Benson, *supra* note 28, at 132; see also *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 452 (1981). (noting that *May* “has been of relatively slight importance” in the evolution of child custody jurisdiction jurisprudence).

²⁹ Atwood, *supra* note 26, at 403 n.4 (“One cannot deny that the jurisdictional landscape is much more ordered today than in pre-UCCJA times.”); but see Christopher L. Blakesley, *Child Custody-Jurisdiction and Procedure*, 35 EMORY L.J. 291, 361-62 (1986) (noting that even after the UCCJA, “problems still remain” and “many questions must still be answered before one may assess the effectuality of the legislative scheme to resolve the problems of child custody jurisdiction.”).

³⁰ See BALDWIN’S OH. PRAC. DOM. REL. L., § 17:23 *History of the UCCJEA* (4th ed.).

³¹ See Unif. Child Custody Jurisdiction Act § 12 cmt. (amended 1999), 9-1 U.L.A. at 274 (“There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations . . . are proceedings in rem or proceedings affecting status.”); see also Atwood, *supra* note 26, at 378-79 (“Many modern courts, relying on assertions in the commentary to the UCCJA, have likewise embraced the status doctrine, reasoning that

constitutionality on this point,³² modern courts have largely upheld the application of the status exception to custody determinations.³³

2. Justification & Limitations

The status exception is primarily justified by the sovereignty a state possesses over persons within its borders. As the Supreme Court argued in the early twentieth century, it would improperly abrogate that sovereignty if a state were “deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that status.”³⁴ The basic idea is that states have a special interest in making sure that the status of its residents with respect to important matters such as child custody and divorce is not left unclear.³⁵ A related justification that has been commonly offered for the status exception is a practical one: if personal jurisdiction were required to obtain a divorce or make a child custody determination, it may be very difficult or impractical for such cases to be litigated at all in cases where no forum has

personal jurisdiction is unnecessary because child custody determinations are determinations of a child’s familial status, similar to determinations ‘in rem.’”)

³² See, e.g., Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 507 (1998); Wasserman, *supra* note 6, at 868, 891-92.

³³ See, e.g., *In re R.W.*, 39 A.3d 682, 696-98 (Vt. 2011); *Balestrieri v. Maliska*, 622 So. 2d 561, 562-63 (Fla. Dist. Ct. App. 1993); *In Interest of S.A.V.*, 837 S.W.2d 80, 84 (Tex. 1992); *Matter of Interest of M.L.K.*, 768 P.2d 316, 319-20 (Kan. App. 1989); *Leonard*, 122 Cal. App. 3d at 457-59; *Goldfarb v. Goldfarb*, 268 S.E.2d 648, 650-51 (Ga. 1980); *but see Ex parte Dean*, 447 So. 2d 733, 735 (Ala. 1984) (“A child custody determination is an in personam proceeding requiring in personam jurisdiction over the affected parties.”) (citations omitted).

³⁴ *Atherton v. Atherton*, 181 U.S. 155, 166 (1901) (quotations and citation omitted); *see also, e.g., Williams v. State of N. Carolina*, 317 U.S. 287, 298-99 (1942) (“[I]t is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”).

³⁵ See *R.W.*, 39 A.3d at 696 (“In its role as *parens patriae*, Vermont is responsible for the welfare of resident children and has a strong interest in assuring they are safe and well cared for.”) (collecting cases); *Von Schack v. Von Schack*, 893 A.2d 1004, 1011 (Me. 2006) (“Maine has a unique interest in assuring that its citizens are not compelled to remain in such personal relationships against their wills[.]”); Jessica Miles, *We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. REV. 141, 172 (2013) (noting that “the underlying rationale of allowing a state to adjudicate the status of a relationship . . . to protect vulnerable persons within its borders.”); *see also May*, 345 U.S. at 536 (Frankfurter, J., concurring) (“Children have a very special place in life which law should reflect.”).

personal jurisdiction over both spouses or parents.³⁶

While these reasons and others³⁷ have justified courts' exercise of jurisdiction for the purpose of terminating a marriage or determining child custody, they have not been deemed sufficient to justify courts' exercise of jurisdiction over ancillary matters such as alimony and child support that involve the property interests of people over whom the court lacks personal jurisdiction.³⁸ This is because, as the Supreme Court explained in *Estin v. Estin*, the case that established this dichotomy with respect to divorce, the considerations that justify the application of the status exception to divorce proceedings have "little relevancy" when it comes to disputes over property interests.³⁹ Instead, the Court held, such disputes—even though they may involve marital property or children—were more analogous to disputes over other financial issues, and states have "no power . . . to determine the personal rights of" a defendant in the absence of personal jurisdiction.⁴⁰ Thus, the Court made divorce "divisible"—giving effect to divorce decrees entered without personal jurisdiction over one spouse but refusing to do the same with respect to other aspects of divorce such as property division and alimony.⁴¹ The Court has similarly held that personal jurisdiction is required to render a judgment for child support against a non-resident defendant even where the child resides in the forum.⁴²

³⁶ See, e.g., *In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734, 744 (Wis. 2003) ("A conclusion that minimum contacts are necessary for child custody determinations ignores the realities of child custody proceedings A requirement of minimum contacts would necessitate that a child travel to the state in which his or her parent resides. . . . In the case of an abandoned child whose parents live in different states, the child might be required to travel to both states to have his or her rights determined. Custody determinations involving parents living in foreign nations would pose further complications.") (citations omitted); Wasserman, *supra* note 6, at 832 ("The *Pennoyer* Court was concerned that an abandoned spouse might be unable to obtain a divorce under the laws of the state to which her partner had fled, and thus would be unable to divorce. . . . In cases in which the husband's whereabouts were unknown, an ex parte divorce was the wife's only avenue of redress; personal service was not possible.") (citation omitted).

³⁷ See Wasserman, *supra* note 6, at 851-53 (discussing other rationales for the status exception).

³⁸ See, e.g., *Estin v. Estin*, 334 U.S. 541, 549 (1948); *Jurado v. Brashear*, 782 So. 2d 575, 576 n.2 (La. 2001).

³⁹ *Estin*, 334 U.S. at 547.

⁴⁰ *Id.* at 548-49.

⁴¹ See *id.* at 549.

⁴² See *Kulko v. Superior Court*, 436 U.S. 84, 92, 101 (1978). *Kulko* did not directly address the applicability of the status exception. See *id.* at 92 (noting that the parties were in agreement that the minimum contacts test governed the case). However, since *Kulko* was decided, courts have uniformly refused to allow the entry of orders for child support under the status exception. See, e.g., *In re Termination of Parental Rights to Thomas J.R.*,

Even with these limitations—and perhaps in part because of them—the status exception has been subject to significant criticism by scholars. Some have argued that the doctrine improperly privileges property rights over substantive due process rights associated with familial relationships by requiring personal jurisdiction when the former is at issue, but not requiring it when the latter is at issue.⁴³ Others have argued that the status exception has outlived the reasoning that justified its creation.⁴⁴ Finally, some scholars have argued that the status exception is inconsistent with modern personal jurisdiction doctrine’s focus on fairness instead of states’ sovereign authority over people within their borders.⁴⁵ Nevertheless, the status exception remains deeply embedded in family law practice.

B. *Domestic Violence Restraining Orders & The Status Exception*

Because of the close link between the law of domestic violence and family law,⁴⁶ courts have debated whether the status exception should be expanded to cover the entering of restraining orders against out of state domestic violence perpetrators. Some courts have applied the status exception to domestic violence restraining orders on the theory that such orders merely concern the protected “status” of the plaintiff.⁴⁷ Most courts embracing this rationale have limited the relief available in such restraining orders by refusing to include “affirmative” relief in those orders.⁴⁸ Other courts have

262 Wis. 2d 217, 229, 663 N.W.2d 734, 740 n.5 (Wis. 2003); *Warwick v. Gluck*, 751 P.2d 1042, 1045 (Kan. Ct. App. 1988); Rosemarie T. Ring, *Personal Jurisdiction and Child Support: Establishing the Parent-Child Relationship As Minimum Contacts*, 89 CAL. L. REV. 1125, 1152 (2001).

⁴³ See, e.g., Wasserman, *supra* note 6, at 821.

⁴⁴ See Section III.A, *infra*; see also Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1710-11 (2011) (“[T]here are no longer any persuasive justifications for exempting a claim for divorce from the rules that apply to other civil actions.”).

⁴⁵ See, e.g., Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 52 (1984) (“After *Shaffer*, *Rush*, and *Ireland*, the ‘res’ and ‘forum state interest’ justifications for casual jurisdiction in divorce cases simply will not suffice.”).

⁴⁶ See Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COLUM. J. GENDER & L. 220, 223-31 (2011); see also Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are we Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 10-11 (2005) (“Many states have incorporated the protective order statute within the domestic relations code. . . . Within the exclusive confines of family law are many statutory enactments that address the impact of abuse on families.”) (citation omitted).

⁴⁷ See, e.g., *Bartsch*, 636 N.W.2d at 6-10.

⁴⁸ See, e.g., *Caplan*, 450 Mass. at 468-72.

refused to apply the status exception to domestic violence restraining orders at all, finding that restraining orders are not analogous to mere declarations of the plaintiff's status because they are restraints on the defendant's liberty.⁴⁹

1. Domestic Violence Restraining Orders: A Protected Status?

In *Bartsch v. Bartsch*,⁵⁰ the plaintiff and defendant both grew up in Iowa, met at Iowa State University, and were married in Iowa.⁵¹ Although the parties moved to Utah shortly after their marriage, both of their families remained in Iowa.⁵² After the move to Utah, the plaintiff alleged that the defendant physically abused her by—among other things—pushing her and threatening her with a gun.⁵³ Likely in an effort to flee from her abuser, the plaintiff moved with her child back to Iowa and filed an application for a protective order shortly after arriving.⁵⁴ The defendant moved to dismiss the application on the grounds that the Iowa court lacked personal jurisdiction over him.⁵⁵

The Iowa Supreme Court first summarily rejected the plaintiff's argument that Iowa courts did in fact have personal jurisdiction over the defendant based on his contacts with Iowa.⁵⁶ The court simply noted that—although the defendant “maintained substantial ties to Iowa prior to” moving, “he has had virtually no ties to Iowa since that time, except that his wife and child now” lived there.⁵⁷

However, the court held that personal jurisdiction over the defendant was unnecessary for the entry of a protective order.⁵⁸ After laying out the status exception and examining its application to divorce and child custody matters, the court drew parallels to these areas to justify extending the exception to domestic violence restraining orders.⁵⁹ The court noted that

⁴⁹ See, e.g., *Fox*, 106 A.3d at 926.

⁵⁰ 636 N.W.2d 3 (Iowa 2001).

⁵¹ Appellee's Final Brief at 4, *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001) (No. 00-0068).

⁵² *Id.*

⁵³ *Id.* at 5. The defendant also allegedly physically abused the parties' minor child. *Id.* at 6.

⁵⁴ See *Bartsch*, 636 N.W.2d at 5.

⁵⁵ *Id.*

⁵⁶ *Id.* at 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 7-8.

one of the justifications for the status exception in the marriage context is the state's interest in preventing bigamy and protecting the offspring of such marriages from being illegitimate and observed that the "greater and more immediate risk of harm" involved in domestic violence was an "even more compelling" reason for applying the status exception in the domestic violence context.⁶⁰ The court also argued that one of the primary justifications for the status exception in the child custody context—protecting child residents of the state—was equally applicable to protecting adult residents from domestic violence.⁶¹ Thus, the court concluded that in light of the special solicitude Iowa's domestic violence statute aims to provide victims and the court's belief that "[f]uture violence ought to be constrained in any state in which the victim is located," Iowa courts should be able to enter protective orders in the absence of personal jurisdiction over the defendant.⁶²

The *Bartsch* decision was the first to explicitly adopt this approach,⁶³ and it has proven influential as courts in several states have cited *Bartsch* to enter domestic violence restraining orders in cases where the court purportedly could not assert personal jurisdiction over the defendant under traditional rules.⁶⁴ However, many of these cases have limited *Bartsch* by refusing to apply the status exception to aspects of domestic violence restraining orders that include what can be characterized as affirmative obligations on the defendant.

A leading case making this distinction is *Shah v. Shah*.⁶⁵ There, the plaintiff sought a restraining order against her husband in a New Jersey court after fleeing from the couple's marital home in Illinois.⁶⁶ The plaintiff fled to New Jersey to stay with family friends there after allegedly being threatened and falsely imprisoned by her husband.⁶⁷ The trial court granted a temporary restraining order prohibiting the defendant from harassing the

⁶⁰ *Id.* at 9.

⁶¹ *See id.* at 7-9.

⁶² *Id.* at 9-10 (quotations and citation omitted).

⁶³ At least one state—Illinois—had previously enacted a statute which tied jurisdiction in domestic violence cases to the jurisdictional test used in child custody cases under the Uniform Child Custody Jurisdiction Act. *See Gasaway v. Gasaway*, 246 Ill. App. 3d 531, 534 (1993). As in Section II.A.1, *supra*, that test is premised upon the applicability of the status exception.

⁶⁴ *See, e.g., Hemenway*, 992 A.2d at 581-82; *Caplan*, 879 N.E.2d at 122-25.

⁶⁵ 875 A.2d 931 (N.J. 2005).

⁶⁶ *Id.* at 933.

⁶⁷ *Id.*; *Shah v. Shah*, 860 A.2d 940, 942 (N.J. Super. Ct. App. Div. 2004) (noting that the charges in the original petition included "terroristic threats, criminal restraint, false imprisonment, and harassment[.]").

plaintiff or otherwise having any contact with her and prohibiting the defendant from possessing any firearms.⁶⁸ The order also required the defendant to surrender firearms he currently possessed, and to continue medical coverage for the plaintiff under his health plan.⁶⁹ The defendant argued that the trial court lacked personal jurisdiction over him because he had “never set foot in New Jersey.”⁷⁰

The Supreme Court of New Jersey agreed that New Jersey courts could not exercise personal jurisdiction over the defendant under these circumstances but nevertheless approved the entry of a protective order.⁷¹ Like the court in *Bartsch*, the court held that orders prohibiting acts of domestic violence are “addressed not to the defendant but to the victim [because such orders] provid[e] the victim the very protection the law specifically allows, and prohibi[t] the defendant from engaging in behavior already specifically outlawed” and therefore do not impact the defendant’s “substantive rights.”⁷² However, the court held that the same was not true of portions of the order that constituted “attempts to exercise [the court’s] coercive power to compel action by a defendant over whom the court lacks personal jurisdiction.”⁷³ Thus, the order was affirmed to the extent it simply prohibited the defendant from contacting the plaintiff, but reversed to the extent it placed other requirements on him such as requiring him to surrender his firearms.⁷⁴

Other courts have followed *Shah*’s approach by requiring personal jurisdiction for portions of protective orders that impose “affirmative” obligations on defendants but not requiring it for orders that merely prohibit the defendant harassing or abusing the plaintiff.⁷⁵ For example, in *Spencer v. Spencer*,⁷⁶ the Court of Appeals of Kentucky held that the distinction made by the *Shah* court “represents the fairest balance between protecting

⁶⁸ *Shah*, 875 A.2d at 933.

⁶⁹ *Id.*

⁷⁰ *Id.* at 936.

⁷¹ *Id.* at 940.

⁷² *Shah*, 875 A.2d. at 939. Although the court declined to rely explicitly on the status exception, *see id.* at 940 n.5, its rationale—that the plaintiff is being granted “protection” and the defendant’s rights are not substantively impacted—is the same rationale supporting the applicability of the status exception. *See Fox*, 106 A.3d at 925 (“Although the ‘status’ rationale and the ‘it’s-a-mere-prohibitory-order’ rationale are analytically distinct, they are connected.”).

⁷³ *Shah*, 875 A.2d at 939.

⁷⁴ *See id.* at 939-42.

⁷⁵ *See, e.g., Hemenway*, 992 A.2d at 581-82; *Caplan*, 879 N.E.2d at 123-24; *Spencer v. Spencer*, 191 S.W.3d 14, 19 (Ky. Ct. App. 2006).

⁷⁶ 191 S.W.3d 14 (Ky. Ct. App. 2006).

the due process rights of the nonresident defendant and the state's clearly-articulated interest in protecting" victims of domestic violence.⁷⁷ Thus, in that case, which also involved a plaintiff who had obtained a protective order against a defendant over whom the court found it lacked personal jurisdiction, the court affirmed the portions of the order that prevented the defendant from contacting the plaintiff, but reversed those portions of the order preventing the defendant from possessing firearms and ordering him to attend domestic violence counseling.⁷⁸

The reasoning of some of these cases is curious since even the purportedly "negative" portions of these orders typically do more than merely prevent the defendant from doing something that is already illegal. For example, the orders in both *Shah* and *Spencer* prevented the defendants in those cases from contacting the plaintiffs altogether, not merely from engaging in illegal harassment.⁷⁹ Although it is not fully articulated in all the cases, the implicit justification for bridging this gap between what is already forbidden by law and the extra protections these orders provide is the status exception. As one court explained:

A court order that prohibits the defendant from abusing the plaintiff and orders him to have no contact with and to stay away from her . . . serves a role analogous to custody or marital determinations, except that the order focuses on the plaintiff's protected status rather than her marital or parental status.⁸⁰

And, just like those other contexts where the status exception applies, the relief available in domestic violence cases is limited to this purportedly "status determining" relief as opposed to relief that directly impacts the defendant's liberty or property.

⁷⁷ *Id.* at 19.

⁷⁸ *Id.*

⁷⁹ *See id.* at 19 (noting that the order prevented the defendant from approaching within 1000 feet of the plaintiff or members of her family or household); *Shah*, 184 N.J. at 329 (noting that the order prevented the defendant from "having any oral, written, personal, electronic or other form of contact with plaintiff") (quotations omitted).

⁸⁰ *Caplan*, 879 N.E.2d at 123.

2. Harsh Results: No Status Exception, No Protection

Not all courts have agreed that the status exception should apply to domestic violence cases. Several courts have found that protective orders—no matter what relief they include—are direct restraints on defendants’ liberty that require personal jurisdiction over the defendant. Unfortunately, the courts reaching this conclusion have not explored other avenues of asserting personal jurisdiction over nonresident defendants, leaving the victims in those cases without any relief at all.

For example, in *Fox v. Fox*,⁸¹ the plaintiff, a Vermont resident, was severely beaten by the defendant, his nephew, after a contentious probate hearing in New Hampshire involving the financial affairs and competency of the defendant’s father.⁸² In the process of the confrontation and beating, which took place in a parking lot, the defendant noted that the plaintiff had Vermont license plates on his car and told the plaintiff that he was recording the license plate number “should [he] need it again.”⁸³ The plaintiff then filed a petition for a protective order back in his home state of Vermont and the defendant objected that Vermont lacked personal jurisdiction over him.⁸⁴

The Supreme Court of Vermont held that a final protective order could not be issued without obtaining personal jurisdiction over the defendant.⁸⁵ In rejecting the conclusions reached by other courts, the court noted that protective orders—even to the extent they merely prevent contact with the plaintiff—do “more than prohibit [the] defendant from engaging in behavior already specifically outlawed. [Such orders] prohibit[t] him from engaging in behavior that would be entirely legal but for the court’s order.”⁸⁶ The court concluded that this restraint on the defendant’s liberty is not only a

⁸¹ 106 A.3d 919 (Vt. 2014).

⁸² See Brief of Plaintiff-Appellee at 5, *Fox*, 106 A.3d 919 (No. 13-147), 2013 WL 3874104 (Vt.).

⁸³ *Id.*

⁸⁴ *Fox*, 106 A.3d at 921-22.

⁸⁵ *Id.* at 923-26. The court explicitly declined to decide whether a temporary order could issue without personal jurisdiction. *Id.* at 926. The court frames this conclusion as being in accord with *Shah*, *see id.*, however, the *Shah* court excluded permanent protective orders based on the distinction that court drew between affirmative and prohibitory portions of protective orders because permanent orders in New Jersey automatically include numerous forms of affirmative relief. *See Shah*, 184 N.J. at 140 (“A final restraining order must, by statutory definition, include affirmative relief.”) (citations omitted). As described below, the *Fox* court explicitly rejected the affirmative/negative relief distinction.

⁸⁶ *Fox*, 106 A.3d at 926.

declaration of the plaintiff's status, but is also "an enforcement of a liability arising from such a status" which could not be entered without obtaining personal jurisdiction over the defendant under a traditional due process analysis.⁸⁷

The court acknowledged that it was reaching a "harsh result" and that forcing a domestic violence victim to return to the state in which the abuse occurred "may in some cases be logistically challenging, psychologically difficult, or even personally dangerous."⁸⁸ However, the court was more concerned with the "unpalatable possibilities" presented by the alternative approach:

[A] Vermonter with no connection to, for example, California could be forced to choose between traveling from Vermont to California to defend against civil charges of domestic violence and accepting the consequences of a judicial finding of abuse and an abuse prevention order in California because an alleged victim of domestic violence chose to relocate to California. Such a scenario challenges "traditional notions of fair play and substantial justice" protected by the personal jurisdiction requirement[.]⁸⁹

The court also rejected the plaintiff's argument that Vermont could assert personal jurisdiction over the defendant under traditional jurisdictional principals because of his apparent threat with respect to the plaintiff's Vermont license plate.⁹⁰ The court held that because the defendant never actually travelled to Vermont or attempted to contact the plaintiff in Vermont, he did not purposefully avail himself of the privilege of conducting activities in Vermont and therefore could not be subject to personal jurisdiction by Vermont courts.⁹¹

Other courts have similarly refused to enter protective orders of any kind without personal jurisdiction.⁹² For example, in *Burnett v. Burnett*,⁹³ the

⁸⁷ *See id.*

⁸⁸ *Id.* at 927, 929.

⁸⁹ *Id.* at 927 (quoting *Int'l Shoe*, 326 U.S. at 316).

⁹⁰ *Fox*, 106 A.2d at 927-29.

⁹¹ *Id.* at 928-29.

⁹² *See, e.g., Burnett v. Burnett*, 2012-Ohio-2673, ¶¶ 11-23, 2012 WL 2196336, at *4-7

troubling facts of which are described at the beginning of this Article, the Court of Appeals of Ohio refused to assert jurisdiction over the non-resident defendant unless the plaintiff could establish that Ohio courts had personal jurisdiction over him.⁹⁴ Although the defendant was well aware the plaintiff had fled to Ohio and in fact had sent her threatening text messages since she arrived there, the court refused to allow the entry of a protective order.⁹⁵ The court's decision left the plaintiff with no protective order at all despite the obvious danger she faced from her husband.

* * * * *

Thus, courts remain quite divided on the applicability of the status exception to domestic violence cases and even those courts applying the status exception have placed serious limitations on the scope of the restraining orders issued in those cases. Although the next section argues that the courts refusing to apply the status exception at all have the better of the argument, courts on both sides of this debate do a disservice to domestic violence victims by focusing solely on the status exception at the expense of more carefully considering whether in personam jurisdiction may in fact be available.

III. NO EASY WAY OUT: DOMESTIC VIOLENCE INVOLVES NO STATUS

When courts believe they are forced to choose between either applying the status exception or denying an alleged victim of domestic violence any relief at all, it is understandable that many courts have chosen to apply the status exception. However, the status exception is not the "easy way out" it appears to be. The status exception may no longer be consistent with modern due process requirements. Even if the status exception remains constitutionally valid, domestic violence protective orders are not adjudications of status in the same sense as divorce and custody orders because protective orders place real restraints on the defendant's liberty. Moreover, the limited relief courts are able to grant when operating under the status exception in domestic violence cases is woefully inadequate to protect victims and prevent further violence since courts are unable to grant

(Ohio Ct. App. 2012); *Becker*, 937 So. 2d at 1130-31; *T.L.*, 820 A.2d at 512-15.

⁹³ 2012-Ohio-2673, 2012 WL 2196336.

⁹⁴ *See id.* at *4.

⁹⁵ 2012 WL 2196336, at *6-7. Although the plaintiff attempted to argue that the text messages provided a basis for the assertion of personal jurisdiction under traditional principals, the court held that the messages were not properly in evidence so it did not reach that issue. *Id.*

so-called affirmative relief such as requiring defendants to relinquish firearms or undergo counseling.

A. *The Status Exception: Unconstitutional?*

The Due Process Clause’s restriction on states’ ability to exercise personal jurisdiction serves to protect individual liberty by ensuring that no person is “subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.”⁹⁶ The status exception boldly purports to exempt divorce, custody, and (possibly) domestic violence related disputes from this restriction and allow courts to render judgements in those matters that are binding even over individuals who have not targeted the forum where the court sits in any way. Even if the status exception may have been justified when it was recognized by the Court in *Pennoyer*, those justifications have been severely undercut by developments in family law, technology, the law of personal jurisdiction, and constitutional law that have occurred since that decision.

The status exception arose long ago in a time when both family law and the law of personal jurisdiction were quite different than they are today. As discussed in Part II.A, *supra*, in the Nineteenth Century, a wife who was unable to obtain a divorce from her husband was often prevented by law from supporting herself financially.⁹⁷ Without the status exception, if a woman’s husband left the state and the woman either did not know where her husband went or was unable to travel there to file for a divorce, she would have faced a very difficult situation. The status exception was seen as a way to fix this problem by allowing a woman to obtain a determination of her “status” as a single person, thus freeing her to support herself without her husband.⁹⁸

Of course, today, the law—and indeed constitutional law—takes a very different view of women and marriage.⁹⁹ The abandonment of one spouse by the other does not alter the abandoned spouse’s ability to make a living.

⁹⁶ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quotations and citation omitted).

⁹⁷ *Supra*, section II.A.1; but see 10 A.L.R. 778 (Originally published in 1921) (“The general rule is to the effect that a wife who has been abandoned by her husband is entitled to her subsequent earnings.”) (collecting cases dating as far back as 1737).

⁹⁸ *Supra*, section II.A.1.

⁹⁹ See *Kerry v. Din*, No. 13-1402, 2015 WL 2473334, at *7 (U.S. June 15, 2015) (opinion of Scalia, J.) (“Modern equal-protection doctrine casts substantial doubt on the permissibility of [coverture laws that create] such asymmetric treatment of women citizens . . . and modern moral judgment rejects the premises of such a legal order.”).

¹⁰⁰ Moreover, because of massive technological changes, it is much easier for an abandoned spouse to locate a wayward partner and, if necessary, to travel to another state to litigate than it was in the Nineteenth Century. It is still true that the status of being married changes—and in some ways impairs—the property rights of each spouse¹⁰¹ and restricts the ability of each spouse to remarry.¹⁰² However, these injuries are no worse than those felt by potential plaintiffs with other kinds of claims who have to leave their home state to litigate in another forum when their home state lacks personal jurisdiction over the defendant.

Perhaps the most significant change of all that has occurred since the status exception was first established in *Pennoyer* is the rapid expansion of the ability of states to assert jurisdiction over out of state defendants. At the time *Pennoyer* was decided, personal jurisdiction could be established by a court only if the defendant was served while physically present in the forum or if the defendant consented to the exercise of the court's jurisdiction.¹⁰³ Under this scheme, in the absence of the status exception, a spouse could bring a divorce action only in the place where the other spouse happened to be. This essentially would have given an abandoning spouse the ability to unilaterally choose the forum for any divorce simply by deciding where to go.¹⁰⁴ Recognizing the status exception allowed courts to avoid this inherently unfair consequence of the prevailing jurisdictional rules.

Today, although in-state service is still sufficient to confer jurisdiction, it is not required.¹⁰⁵ Instead, the scope of personal jurisdiction is much broader as courts are able to assert jurisdiction over any person who has minimum contacts with a forum such that the assertion of jurisdiction is consistent with traditional notions of fair play and substantial justice.¹⁰⁶ In the divorce

¹⁰⁰ Modern developments have similarly undermined the rationale of preventing illegitimacy—mentioned by the Iowa Supreme Court in *Bartsch*. Illegitimacy no longer carries the social stigma that it once did, *see, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting), nor does it carry the legal consequences it once did. *See, e.g., Mills v. Habluetzel*, 456 U.S. 91, 97-99 (1982).

¹⁰¹ For example, under some state laws, certain marital property cannot be alienated without the consent of both spouses. *See, e.g., La. Civ. Code Ann. art. 2347; Wash. Rev. Code Ann. § 26.16.030;*

¹⁰² *See* 10 C.J.S. *Bigamy and Related Offenses* § 2 (collecting anti-bigamy statutes).

¹⁰³ Jacobs, *supra* note 3, at 5-6.

¹⁰⁴ This requirement also risked the possibility that no forum would be available to adjudicate the divorce since the spouse seeking the divorce may be unable to satisfy the residency requirements of the state where the abandoning spouse fled. *See* 57 A.L.R.3D 221 (Originally published in 1974).

¹⁰⁵ *See id.* at 12.

¹⁰⁶ *See, e.g., Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

context, this means that even if one spouse flees to another state, the abandoned spouse very likely could file for divorce in her home state even without the status exception. The fact that the defendant spouse resided with the plaintiff spouse in the marriage that gave rise to the action in the forum state would likely be sufficient to establish jurisdiction under the minimum contacts test.¹⁰⁷

A final change that undercuts the validity of the status exception is the importance marriage and child rearing have gained as fundamental rights under the Due Process Clause of the Fourteenth Amendment. Beginning with *Loving v. Virginia*,¹⁰⁸ the Supreme Court has recognized the right to marry as a fundamental right that the state can only interfere with when there is a compelling justification for doing so.¹⁰⁹ Although the Court has not always been consistent about the source of this right,¹¹⁰ it is clear that at least one basis for the right to marry is that it is a fundamental liberty protected by the Due Process Clause.¹¹¹ Similarly, starting in the early Twentieth Century, the Court also recognized a fundamental right of parents to raise their children rooted in the Due Process Clause.¹¹² Such rights were

¹⁰⁷ See, e.g., *Corr v. Corr*, No. FA144124317S, 2015 WL 1758978, at *3 (Conn. Super. Ct. Mar. 24, 2015) (“The defendant’s contacts with Connecticut prior to leaving were substantial and give rise to specific jurisdiction. . . . [A] significant portion of the parties’ marital life took place here in Connecticut.”); *Oytan v. David-Oytan*, 171 Wash. App. 781, 806 (2012) (upholding the assertion of jurisdiction over a husband in an action filed against him by his wife where “[b]etween 2007 and 2010, the parties lived in a marital relationship in Washington and nowhere else.”); *Akinci-Unal v. Unal*, 64 Mass. App. Ct. 212, 217 (2005) (“The husband chose to come to Massachusetts, married here in a civil ceremony, and lived here in a marriage for close to six years. Having voluntarily engaged in a relationship that has legal consequences, the husband can scarcely be surprised by. . . this State’s enforcement of the wife’s rights (if any) that arise from that relationship. Certainly he does not defeat the Commonwealth’s power to act merely by leaving the jurisdiction[.]”).

¹⁰⁸ 388 U.S. 1 (1967)

¹⁰⁹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”) (citations omitted); *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); see also *Obergefell v. Hodges*, No. 14-556, 2015 WL 2473451, at *12 (U.S. June 26, 2015) (“Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.”) (collecting cases).

¹¹⁰ Some cases have grounded the right in the Equal Protection Clause as well as the Due Process Clause. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1386-87 (2010).

¹¹¹ See, e.g., *Obergefell*, 2015 WL 2473451 at *12-17.

¹¹² See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on

not recognized or likely even contemplated at the time *Pennoyer* was decided.¹¹³

Depriving a person of a “status” conferred at the state’s discretion is very different than depriving that person of a fundamental right. Greater procedural protections are required to satisfy due process when the state seeks to deprive a person of a fundamental right than when other benefits are at stake.¹¹⁴ The status exception does the opposite. It deprives out of state defendants of their marriage or children with *lesser* procedural protections than those afforded to defendants in other civil cases. It makes no sense for the same Due Process Clause that elevates these relationships to fundamental rights to also allow a state’s courts to end those relationships without the minimum contacts the Clause requires in all other contexts.

Thus, the status exception was born out of particular circumstances that existed at the time of its creation that are largely no longer applicable. Without these special circumstances, it is hard to justify continuing to adhere to such a radical departure from ordinary jurisdictional rules. Although there are arguments for the continuing validity of the status exception that are based on modern concerns, they are not entirely convincing.

numerous occasions that the relationship between parent and child is constitutionally protected.”) (collecting cases).

¹¹³ See, e.g., *Pennoyer*, 95 U.S. at 734-35 (“The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”); Merry Jean Chan, Comment, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1192 (2003) (noting that the Supreme Court did not recognize parental rights under the Due Process Clause until the 1920s); see also *Obergefell*, 2015 WL 2473451, at *48 (“This Court’s earliest Fourteenth Amendment decisions appear to interpret the [Due Process] Clause as using “liberty” to mean [only] freedom from physical restraint.”) (Thomas, J., dissenting).

¹¹⁴ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17, 121 (1996) (“M. L. B.’s case, involving the State’s authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake. . . . Similarly here, the stakes for petitioner M. L. B.—forced dissolution of her parental rights—are large, more substantial than mere loss of money.) (quotations and citations omitted); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”).

In the divorce context, some may argue that with the advent of no fault divorce, a defendant has a lesser interest in divorce proceedings.¹¹⁵ Since the plaintiff will be able to obtain a divorce regardless of any defenses the defendant might raise, the argument goes, there is no point in requiring courts to have personal jurisdiction over the defendant.¹¹⁶ However, as Professor Rhonda Wasserman points out in an article arguing that the status exception is unconstitutional, although every state has no fault divorce, some states require the consent of both spouses in order to grant a divorce on that basis.¹¹⁷ Moreover, the fact that a defendant is unlikely to have a meritorious defense has never been a factor in personal jurisdiction analysis in any other context.¹¹⁸ In fact, the Supreme Court has specifically held that where a person has been deprived of something in a way that is contrary to due process, “it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.”¹¹⁹

In the child custody context, proponents of the status exception argue that child custody is unique in that the interests of a third person—the child—are primarily at stake rather than the interests of the parties.¹²⁰ Accordingly, a jurisdictional test that is “child-centered” rather than “defendant-centered” is more appropriate and jurisdiction should be available wherever a child resides whose custody needs to be determined.¹²¹ Without such a test—proponents argue—it would be difficult if not impossible in at least some cases to find a forum with personal jurisdiction over both parents.¹²²

¹¹⁵ See Wasserman, *supra* note 6, at 851.

¹¹⁶ See *id.* at 851-52.

¹¹⁷ *Id.* at 851-53.

¹¹⁸ See, e.g., *Fox*, 106 A.3d at 929 (“The due process requirement that a court have personal jurisdiction before entering a judgment against a defendant applies to those defendants with meritorious defenses, as well as those without.”); *Pounders v. Chicken Country, Inc.*, 624 S.W.2d 445, 447 (Ark. Ct. App. 1981) (“Appellants’ contention that the appellee must show a defense to the action is contrary to the constitutional requirement for the establishment of personal jurisdiction in order to adjudicate or exercise judicial power over the parties.”).

¹¹⁹ *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988) (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)).

¹²⁰ See, e.g., Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 236-37 (1979); see also Wasserman, *supra* note 6, at 888 n.381 (collecting sources making similar arguments).

¹²¹ See Bodenheimer & Neeley-Kvarm, *supra* note 120, at 236-37, 252-53.

¹²² See *id.* at 252; see also Wasserman, *supra* note 6, at 886 (“For example, if one of the parents has lived abroad for a number of years, a minimum contacts requirement could bar any state court from determining the child’s custody.”).

While the child's interests are paramount in custody cases, that fact does not decrease the parents' highly important—and constitutionally protected—interests in such proceedings. Moreover, litigating in a forum that has personal jurisdiction over both parents may in fact be in the child's best interest because each parent will be more likely to appear and present a strong and complete case to the court.¹²³ Additionally, limiting the potential fora to litigate child custody disputes may serve the beneficial purpose of decreasing the likelihood of forum shopping—a practice that is particularly troubling when the “shopping” requires moving children across state lines to gain a litigation advantage. Finally, in the rare case when there is truly no state with personal jurisdiction over both parents, the doctrine of jurisdiction by necessity may be invoked.¹²⁴

* * * * *

To be sure, the arguments both in favor of and against the continuing constitutionality of the status exception are more numerous and nuanced than those presented here. A complete evaluation of the constitutionality of the status exception is outside of the scope of this Article. However, the serious doubts about the constitutionality of the status exception in even the contexts where it has traditionally applied counsel against attempting to expand the status exception to the very different context of domestic violence.

B. *Restraining Orders Do Not Alter Status*

Even if the status exception remains constitutional, domestic violence restraining orders fit poorly into that doctrine. The reason is simple: unlike divorce and child custody cases, there is no “status” at issue for a court to determine. In the former contexts, the issues that courts are adjudicating change the plaintiff's status in the eyes of the state: divorced or not divorced; legal guardian or not. By contrast, in the context of domestic violence restraining orders there is no similar status at issue. Instead, actions seeking restraining orders are much more like actions seeking other kinds of equitable relief where the court considers whether to order the

¹²³ See Wasserman, *supra* note 6, at 888-89.

¹²⁴ See *id.* at 887-88. The doctrine of jurisdiction by necessity allows a court without personal jurisdiction over a defendant under the traditional minimum contacts analysis to nevertheless hear a case against that defendant where no forum would otherwise be available to the plaintiff and the cause of action has some connection with the forum. See Tracy Lee Troutman, Note, *Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of Our Courts*, 21 VAND. J. TRANSNAT'L L. 401, 414-15 (1988).

defendant to refrain from engaging in particular conduct. Courts and commentators have come up with a variety of justifications for treating domestic violence restraining orders as orders pertaining to status, but none are persuasive on close examination.

Many of the courts discussed in Section II.B.1, *supra*, that have adopted the status exception in domestic violence cases have argued that domestic violence restraining orders bestow a “protected” status on the victim.¹²⁵ For example, in *Bartsch*, the Iowa Supreme Court argued that it was simply “preserving the protected status accorded to the plaintiff by” Iowa’s domestic violence statute.¹²⁶ But that statute and others like it do not contain any special protected status for plaintiffs. Rather, the Iowa statute merely contains a list of restrictions that courts may place on defendants such as orders prohibiting defendants from continuing to engage in domestic abuse or going near a “plaintiff’s residence, school, or place of employment.”¹²⁷ While such orders certainly confer a *benefit* on the plaintiff by protecting him or her from further abuse, it does not change the plaintiff’s status in the eyes of the state in the same way that divorce and custody orders do.¹²⁸ Instead, restraining orders serve the same function as equitable relief does in other civil actions for which personal jurisdiction is a requirement: placing restrictions on the defendant’s conduct in order to keep him from harming the plaintiff.¹²⁹ Restraining orders cannot be shoehorned into the status exception merely by labeling them as status conferring.

Another argument that has appeared in some courts is that personal jurisdiction is not necessary to enter a domestic violence restraining order

¹²⁵ See, e.g., *Caplan*, 450 Mass. at 469; *Bartsch*, 636 N.W.2d at 6.

¹²⁶ 636 N.W.2d at 6.

¹²⁷ Iowa Code Ann. § 236.5(b).

¹²⁸ One could imagine a domestic violence statute that did confer a protected status on a plaintiff in the eyes of the state. For example, a statute could provide that a person who is found to be a victim of domestic abuse could be entitled to certain state benefits such as a special monitor to quickly notify police of danger or counseling services to deal with trauma. An order under a statute like that would indeed confer a status on the plaintiff under state law and a court would likely be able to enter such an order without personal jurisdiction over the defendant.

¹²⁹ See Bevan J. Graybill, Note, *'til Death Do Us Part: Why Personal Jurisdiction Is Required to Issue Victim Protection Orders Against Nonresident Abusers*, 63 OKLA. L. REV. 821, 858 (2011) (“A victim protection order, which demands or forbids specific behavior between the parties, alters the relationship between plaintiff and defendant to the same degree as when the court enjoins one farmer from tilling the land of a neighboring farmer. . . . Certainly, no one would argue this court order alters the status relationship between the farmers.”).

when that order merely prohibits conduct that is already illegal.¹³⁰ In *Shah*, for example, the court claimed that an order forbidding the defendant from abusing the plaintiff simply prohibited behavior that is already specifically outlawed.¹³¹ Under this view, the defendant is not being ordered to refrain from doing anything he¹³² was not already prohibited from doing and therefore there is no due process problem with forgoing traditional personal jurisdiction analysis.

It is certainly true that the conduct that constitutes domestic abuse is illegal with or without a restraining order. However, even an order that merely prohibits the defendant from abusing the plaintiff¹³³ carries with it significant consequences for the defendant. For example, such an order may have collateral consequences under federal law, including prohibiting the defendant from possessing firearms.¹³⁴ And, if the defendant violates an order prohibiting him from abusing the plaintiff, he will face not only charges for violating the statute prohibiting abuse, but also contempt charges for violating the court's order.¹³⁵ Thus, it is simply not accurate that a restraining order does nothing more than prohibit the defendant from doing something that is already illegal. Such orders place real restrictions on the defendant's conduct and should be treated accordingly.

In what is probably the most comprehensive scholarly article advocating for the extension of the status exception to at least some domestic violence cases, Professor Jessica Miles argues that a protective order works a "profound and fundamental" change in the status of the parties in relation to

¹³⁰ See, e.g., *Hemenway*, 159 N.H. at 688; *Shah*, 184 N.J. 125, 137-38.

¹³¹ *Shah*, 184 N.J. at 137-38.

¹³² Although people of both genders are victims and perpetrators of domestic violence, the overwhelming majority of domestic violence is perpetrated by men against women. The use of gender neutral terminology under such circumstances may play a role in obscuring the "gender-related causes and implications of domestic violence." See, e.g., Kristen M. Driskell, Note, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 HASTINGS WOMEN'S L.J. 129, 129 n.1 (2009). Accordingly, when this Article refers to domestic violence situations in the abstract, it will use male pronouns for the alleged abuser and female pronouns for the alleged victim.

¹³³ As discussed in Part II.B.1, *supra*, however, many of the cases making this argument were actually approving orders that did more than prohibit conduct that was already illegal.

¹³⁴ See 18 U.S.C. § 922(g)(8). The combination of the status exception and this collateral consequence raises similar constitutional concerns to those discussed in section III.A., *supra*, since the right to bear arms, like the right to marry and raise children, is constitutionally protected. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); cf. Part III.C., *infra* (discussing the importance of firearm restrictions to making restraining orders effective).

¹³⁵ See, e.g., N.J. Stat. Ann. § 2C:25-30.

each other in much the same way orders of legal separation do in divorce cases.¹³⁶ She notes that, while the “technical category of the legal relationship between the parties remains unchanged by the entry of a [protective order] (e.g., married couples remain married),” the status of the relationship is changed because a protective order enjoins contact and communication between the parties, therefore altering “the societal and legal expectations and constraints attendant to [the] relationship.”¹³⁷ Professor Miles concludes that this “change in relationship status” is analogous to orders of legal separation, which are available under the status exception.¹³⁸

There are at least two flaws in this argument. First, the existence of a “technical” legal status is an important triggering criterion for the application of the status exception. Embracing a more practical definition of “relationship status,” as Professor Miles advocates, would allow the exception to swallow the rule. Almost any kind of injunctive relief changes the relationship between the parties to a case by requiring one party to refrain from doing something that they otherwise would have done in order to confer some benefit on, or prevent some injury to, the other party. For example, an order in a trademark case barring the defendant from using a mark owned by the plaintiff gives the plaintiff control over the defendant’s use of the mark that was absent prior to the litigation. Such an order changes the legal expectations of the parties and also changes society’s perception of who is the true owner of the mark. Yet, no one would argue that trademark cases should fit into the status exception. Thus, the fact that an order alters the relationship between the parties is not sufficient to bring protective orders within the ambit of the status exception.

Second, as Professor Miles acknowledges, the relationship between the parties in domestic violence cases is not always that of a married couple such that they have a societal and legal expectation of being in frequent contact.¹³⁹ Many states allow victims of abuse suffered at the hands of dating partners or non-spouse family members to obtain restraining orders, and a few states even allow courts to grant restraining orders against persons with whom the plaintiff has no familial or intimate relationship.¹⁴⁰ Professor Miles argues that orders pertaining to these situations should also be covered under the status exception out of respect for the power of states

¹³⁶ See Miles, *supra* note 35, at 183.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *id.* at 186.

¹⁴⁰ See *id.* at 185-86 & n.267.

to define family relationships.¹⁴¹ However, statutes that allow such orders do not alter the definition of who is in a “family” merely because they are classified as “domestic violence” statutes.¹⁴² Instead, they are concerned with a much broader universe of people who are likely to be perpetrators of abuse.

Finally, Professor Miles and some courts argue that applying the status exception to domestic violence cases is good policy because it will give victims the opportunity to seek relief without returning to the state where their abuser lives and potentially endangering themselves in the process.¹⁴³ A related argument is that the interests purportedly protected by domestic violence restraining orders are at least as strong if not stronger than those protected by marriage dissolution and custody orders covered by the status exception.¹⁴⁴

This argument is simply the result of the false choice between the status exception and no relief for domestic violence victims who flee to other states. If the status exception was indeed the only option for affording victims protection, the stretching of the status exception to fit this situation would be somewhat understandable, but it is not. Instead, as discussed in Parts IV and V, *infra*, the stream of commerce doctrine and the effects test provide the basis for a new framework for assessing personal jurisdiction in domestic violence cases that will often result in the ability of courts to exercise full in personam jurisdiction over out of state defendants. Once the option of exercising in personam jurisdiction is on the table, the rationales for extending the status exception to cover these cases become much less compelling. Indeed, as discussed in the next section, the status exception’s inherent limitations render it unable to provide adequate protection to domestic violence victims through truly comprehensive protective orders.

¹⁴¹ *Id.* at 186.

¹⁴² For example, prior to *Obergefell v. Hodges*, several states allowed courts to grant domestic violence restraining orders against an intimate partner of the same sex while refusing to recognize such relationships as valid marriages. Compare Fla. Stat. Ann. § 741.212 (effective Jun. 5, 1997) (the term ‘marriage’ means only a legal union between one man and one woman as husband and wife”) with *Peterman v. Meeker*, 855 So. 2d 690, 691 (Fla. Dist. Ct. App. 2003) (“Therefore, we conclude that the statute does not exclude those persons who otherwise meet the requirements for a domestic violence injunction but seek protection from a person of the same sex.”).

¹⁴³ See, e.g., *Caplan*, 450 Mass. at 469-70; Miles, *supra* note 35, at 156-57.

¹⁴⁴ See, e.g., *Bartsch*, 636 N.W.2d at 7-9.

C. *The Status Exception's Critical Limitations*

All courts that have expanded the status exception have at least implicitly limited the protective orders available under the exception to those containing only “prohibitory” relief (i.e., orders requiring the defendant to refrain from doing something) rather than “affirmative” relief (i.e., orders requiring the defendant to do something).¹⁴⁵ The former includes orders to stay away from the victim or cease abuse while the latter includes orders requiring the defendant to relinquish firearms,¹⁴⁶ attend counseling,¹⁴⁷ or turn over important documents or other property to the plaintiff.¹⁴⁸ Assuming the validity of this distinction,¹⁴⁹ the unavailability of affirmative relief is a serious weakness of the status exception approach because these forms of relief are often some of the most effective in preventing future abuse. Similarly, the status exception does not allow domestic violence victims to secure money judgments against abusers for child support or other financial awards that may be critical to financial independence.

The link between gun violence and domestic violence is well established.¹⁵⁰ An abuser is much more likely to kill his victim if the abuser has access to a gun.¹⁵¹ Guns and domestic violence may make an even deadlier

¹⁴⁵ See, e.g., *Hemenway*, 159 N.H. at 687-88; *Caplan*, 450 Mass. at 470-72; *Spencer*, 191 S.W.3d at 19; *Shah*, 184 N.J. at 137-38; see also *Bartsch*, 636 N.W.2d at 10 (not directly addressing the affirmative/prohibitory relief distinction but noting that “[t]he order here does not attempt to impose a personal judgment against the defendant. . . . The district court merely ordered the defendant to ‘stay away from the protected party’ and not assault or communicate with her[.]”) (citations omitted). Professor Miles similarly recognizes this limitation. See Miles, *supra* note 35, at 197-200.

¹⁴⁶ See *Caplan*, 450 Mass. at 472; *Spencer*, 191 S.W.3d at 19.

¹⁴⁷ See *Spencer*, 191 S.W.3d at 19.

¹⁴⁸ See *Shah*, 184 N.J. at 140.

¹⁴⁹ A dubious assumption. See Part III.B, *supra*.

¹⁵⁰ See, e.g., *United States v. Hayes*, 555 U.S. 415, 427 (2009) (“Firearms and domestic strife are a potentially deadly combination[.]”) (citations omitted); *United States v. Staten*, 666 F.3d 154, 167-68 (4th Cir. 2011) (“[T]he use of firearms in connection with domestic violence is all too common[.]”); *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (“That firearms cause injury or death in domestic situations has been established by empirical studies.”); Benjamin Thomas Greer & Jeffrey G. Purvis, *Judges Going Rogue: Constitutional Implications When Mandatory Firearm Restrictions Are Removed from Domestic Violence Restraining Orders*, 26 WIS. J.L. GENDER & SOC’Y 275, 276 (2011) (“Domestic violence coupled with firearms is a volatile, and too often a lethal, confluence of events”).

¹⁵¹ See *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014) (“When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed[.]”) (quotations omitted) (citing Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003)); *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (en banc) (“Domestic assaults with

combination *after* the victim has sought a restraining order because “[d]omestic violence often escalates in severity over time”¹⁵² and abusers may be particularly likely to escalate their attacks in order to retaliate against the victim for seeking a restraining order.¹⁵³ Empirical studies have proven that protective orders that restrict the abuser’s use of firearms cause a statistically significant decrease in the number of homicides that occur as a result of domestic violence.¹⁵⁴

Victims of domestic violence who flee to another state and seek a restraining order under the status exception cannot obtain this critical protection. This is particularly problematic since such protection may be most needed in cases where victims of abuse flee to other states. In those cases, victims have demonstrated their autonomy and independence from their abusers by choosing not only to leave their abusers, but to leave the state entirely. This kind of assertion of autonomy heightens the risk of further abuse as the attacker is likely to attempt to reassert his dominance.¹⁵⁵ Orders of protection entered pursuant to the status exception will not be able to do anything to prevent these episodes of violence from escalating through the use of firearms.

Court ordered counseling for batterers is also a common feature of modern orders of protection that cannot be included in orders entered pursuant to

firearms are approximately twelve times more likely to end in the victim’s death than are assaults by knives or fists.”) (citation omitted).

¹⁵² See *Castleman*, 134 S. Ct. at 1408.

¹⁵³ See, e.g., Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 335 & nn.150-51 (2011); see also Njeri Mathis Rutledge, *Employers Know Best? The Application of Workplace Restraining Orders to Domestic Violence Cases*, 48 LOY. L.A. L. REV. 175, 203 (2014) (“Researchers who have looked at the phenomenon of separation assault have noted that batterers increase their aggression and lethality when their control is threatened.”) (citations omitted); Carolyn V. Williams, Note, *Not Everyone Will “Get It” Until We Do It: Advocating for an Indefinite Order of Protection in Arizona*, 40 ARIZ. ST. L.J. 371, 395 & n.182 (2008) (collecting cases “where an order of protection . . . did not prevent the batterer from killing or abusing the victim.”).

¹⁵⁴ See Greer & Purvis, *supra* note 150, at 281.

¹⁵⁵ See, e.g., Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN’S L.J. 1, 25-26 (2001) (“[W]omen who have left abusive relationships are often subject to additional violence by partners who attempt to force them to return to the relationship. These violent assaults also involve both a physical act and a verbal act that together undermine the woman’s claim to recognition, autonomy, and assistance.”); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 66 (1991) (“[W]omen describe coercive violence escalating after separation — violence clearly aimed at denying their autonomy[.]”).

the status exception.¹⁵⁶ Although the effectiveness of such counseling is not well established,¹⁵⁷ there is at least some evidence that ordering batterers to undergo treatment can decrease the likelihood that domestic violence will recur.¹⁵⁸ Moreover, this option can be particularly helpful when the parties want to continue a relationship.¹⁵⁹

Courts also sometimes order domestic violence defendants to turn over important personal property the plaintiff has left in the defendant's possession. If the victim and her attacker share a home, the victim may leave the house quickly and be unable to take important personal belongings with her such as her birth certificate, social security card, or passport. In fact, the leading case making the affirmative/negative relief distinction, *Shah*, involved just such a situation.¹⁶⁰ There, after the plaintiff—an Indian citizen—had fled the marital home in Illinois to New Jersey and sought a protective order against her husband, the trial court entered an order requiring the defendant to return the plaintiff's "work permit, social security card, all immigration related documents and . . . personal mail."¹⁶¹ The New Jersey Supreme Court reversed that portion of the trial court's order because it held the trial court had no power to grant such affirmative relief in the absence of in personam jurisdiction.¹⁶² Thus, while the plaintiff ostensibly gained an order protecting her from further attacks, she was left

¹⁵⁶ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 944 & n.912 (1993) (noting that by 1993, at least 33 states authorized courts to order domestic violence perpetrators to counseling as part of a protective order).

¹⁵⁷ See Deborah Epstein et. al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 467 n.3 (2003) ("Few experimental studies have been conducted, and those that exist do not yet provide compelling evidence for treatment effectiveness. . . . At the same time, research shows that women whose partners are mandated to batterer treatment feel safer[.]" (citation omitted)).

¹⁵⁸ See, e.g., Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAMILIES, CHILD. & CTS. 23, 31 (2000) ([T]here is 'fairly consistent evidence that [batterers'] treatment 'works' on a variety of dimensions and that effects of treatment can be substantial.") (citation omitted); Karen Tracy, *Building A Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 479 (1997) ([C]ourt-involved batterers who are ordered to undergo counseling cannot easily terminate treatment on impulse, arguably increasing the chance of rehabilitation."); see also Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 946 (1993) ("[O]verall, treated batterers reduced their psychological abuse more than untreated offenders under court supervision.") (citation omitted).

¹⁵⁹ See Mahoney, *supra* note 155, at 62.

¹⁶⁰ The facts of *Shah* are described in more detail in Part II.B.2., *supra*.

¹⁶¹ *Shah*, 184 N.J. at 130.

¹⁶² *Id.* at 140-41.

without the ability to even prove she was legally in the United States without having to contact the person who allegedly abused her. This kind of extremely difficult situation is likely not uncommon¹⁶³ and represents another glaring deficiency of protective orders grounded in the status exception.

Finally, the status exception also fails to offer full protection because of the bar on money judgments against the abuser. It is well-established that the status exception does not allow a court to award alimony, child support, or any other kind of money judgment.¹⁶⁴ Whatever inconveniences this distinction may cause in the divorce context, it is a crippling limitation in the domestic violence context, where victims are often financially dependent on their abusers and abusers often use that dependence as a means to maintain control.¹⁶⁵ Obtaining a protective order under the status exception may be a hollow victory for a victim who will be unable to obtain the monetary relief necessary to free herself from dependence on her abuser.¹⁶⁶

¹⁶³ See Comment, *The Effects of Domestic Violence on Welfare Reform: An Assessment of the Personal Responsibility and Work Opportunity Reconciliation Act Applied to Battered Women*, 50 U. KAN. L. REV. 591, 600 (2002) (“Many women have been killed after attempting to leave or while planning to leave abusive relationships. For these reasons, women often leave quickly, take few belongings, and try to vanish without a trace.”); cf. Dana Harrington Conner, *To Protect or to Serve: Confidentiality, Client Protection, and Domestic Violence*, 79 TEMP. L. REV. 877, 888 (2006) (“[T]he abuser may threaten or harm what the victim cares about more than herself, such as . . . personal items.”) (citing a survey showing that many victims of domestic violence report that the abuser destroyed their personal property).

¹⁶⁴ See, e.g., *Estin*, 334 U.S. at 547-49; Part II.A.3, *supra*.

¹⁶⁵ See, e.g., Jamie Haar, Note, *Women's Work: Economic Security in the Domestic Violence Context*, 31 HOFSTRA LAB. & EMP. L.J. 471, 473 (2014) (“Researchers say that one of the main reasons women return to their abusers is out of need, specifically financial need. Due to the abuser’s exercise of power and control over her through economic abuse, she is not economically [self] sufficient and, therefore, is forced to return to her abusive environment.”); Tracy, *supra* note 158, at 492 (“Although protective orders are generally short-term in nature, long-term financial concerns may deter women from seeking necessary protection. Family courts must address the disparate economic consequences of divorce and separation on women.”); Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, N.Y. ST. B.J., February 2011, at 40, 41 (“By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship. As a result, victims of domestic violence are often forced to choose between staying in an abusive relationship and facing economic hardship, which could possibly result in extreme poverty and homelessness.”).

¹⁶⁶ Paula Pierce & Brian Quillen, *No Contest: Why Protective Orders Provide Victims Superior Protection to Bond Conditions*, 40 AM. J. CRIM. L. 227, 240 (2013).

* * * * *

Thus, the status exception fails to provide adequate relief to domestic violence victims seeking protective orders.¹⁶⁷ Nevertheless, the reliance on the status exception is understandable given the underlying assumption that in personam jurisdiction is unavailable in these cases; after all, something is better than nothing. However, as I will demonstrate in the next two sections, by reframing domestic violence jurisdiction using the stream of commerce doctrine and effects test as a guide, courts will often be able to assert in personam jurisdiction over out of state domestic violence defendants.

IV. THE STREAM OF COMMERCE DOCTRINE & THE EFFECTS TEST

In many of the cases discussed above where courts considered the applicability of the status exception to domestic violence cases, courts often gave short shrift to the possibility of asserting in personam jurisdiction. Courts usually dismissed this possibility because the defendant had never set foot in the court's jurisdiction and had a relatively small amount of traditional "contacts," if any, with the forum. However, in other contexts, courts have developed doctrinal pathways for the assertion of personal jurisdiction over defendants who have little or no contact with a forum but engage in intentional activity targeting a forum. Under the stream of commerce doctrine, courts assert jurisdiction over companies who place products into the stream of commerce with the knowledge that they will end up in a particular forum and the intention that they do so. The effects test allows courts to assert jurisdiction over intentional tortfeasors who target another forum with their conduct. Although both of these doctrines are often criticized for being muddled, they reflect a consensus that it is consistent with due process to subject a defendant to jurisdiction in a forum

¹⁶⁷ Professor Miles and some courts adopting the status exception in domestic violence cases have also suggested that the exception should be limited to temporary as opposed to permanent protective orders. See Miles, *supra* note 35, at 197-200. This limitation of the status exception, if widely adopted, would at a minimum create an increased cost and inconvenience for domestic violence victims by forcing them to continually go to court to obtain renewal orders. See Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1082 (2014) ("For a survivor seeking to end violence through a civil protection order, he or she must bear the costs of transportation to and from court, daycare for children, and time away from work. For the court case, there are often costs associated with receiving copies of 9-1-1 recordings, medical records, and police reports, and achieving personal service of the petition and court documents."); see also Williams, *supra* note 153, at 396 ("[R]enewing an order of protection . . . forces a victim to confront the abuser again and again, leaving her open to attack.").

he intentionally targets with the conduct that gives rise to a case, even if he does not otherwise have any contacts with the forum.

A. *The Stream of Commerce Doctrine*

Prior to the middle of the twentieth century, the bases for acquiring personal jurisdiction over out of state defendants were rather limited. Essentially, a defendant either had to be served while physically present in the forum or had to consent to personal jurisdiction in the forum in order for a court to assert personal jurisdiction over him.¹⁶⁸ As discussed above, these limitations were constitutionalized by the Supreme Court in *Pennoyer v. Neff* when the court held that any attempt to expand these traditional methods for acquiring personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment.¹⁶⁹

As the country's economy changed with states growing more interconnected and the role of corporations increasing, the Court felt compelled to stretch *Pennoyer* to the breaking point in order to avoid injustice in cases where defendants clearly directed their activities toward a forum, but were nevertheless unable to be physically served in that forum.¹⁷⁰ Finally, the Court went in a different direction when it decided *International Shoe Co. v. Washington*.¹⁷¹ In that case, the Court held for the first time that a defendant could be constitutionally subject to personal jurisdiction "where the defendant ha[s] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹⁷²

In the years following *International Shoe*, the Court has further refined this idea into a two part test. First, courts examine whether the defendant has a minimum level of contacts with the forum to justify the exercise of jurisdiction over the defendant.¹⁷³ Next, if such contacts are present, the court must determine whether, in light of those contacts, asserting jurisdiction over the defendant would comport with "fair play and substantial justice."¹⁷⁴

¹⁶⁸ See Jacobs, *supra* note 3, at 5.

¹⁶⁹ See *Pennoyer*, 95 U.S. at 728-29.

¹⁷⁰ See Jacobs, *supra* note 3, at 6; Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in A Twenty-First Century World*, 64 FLA. L. REV. 387, 392-94 (2012).

¹⁷¹ 326 U.S. 310 (1945).

¹⁷² *Id.* at 316 (quotations and citations omitted).

¹⁷³ See, e.g., *Burger King*, 471 U.S. at 476.

¹⁷⁴ See, e.g., *id.*

The Court has further clarified that—for a defendant’s contacts to be sufficient under this test, the defendant must engage in “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.”¹⁷⁵ Conversely, the “unilateral activity” of other parties to a case has been deemed insufficient to satisfy the minimum contacts requirement.¹⁷⁶

However, this requirement led to another seeming injustice brought on by modern commerce. Companies could sell a product to a distributor,¹⁷⁷ who could in turn sell the product to a consumer in a state where the original company had no connection. That consumer would then be unable to sue the company in the state where the product was purchased if alleged defects in the product caused injury. Courts’ discomfort with results like this led to the creation of the stream of commerce doctrine.¹⁷⁸ Under that doctrine, a forum could assert personal jurisdiction over any defendant who should have foreseen that its product would end up being sold in that forum in the regular course of commerce.¹⁷⁹

The Supreme Court first mentioned the stream of commerce theory in *World-Wide Volkswagen Corp. v. Woodson*,¹⁸⁰ where the Court sent a mixed message about the theory’s viability. In that case, the Court rejected the exercise of jurisdiction by Oklahoma courts over a car dealership in New Jersey simply because the plaintiffs drove the car to Oklahoma and it is foreseeable that a car could be driven anywhere.¹⁸¹ In doing so, the Court flatly rejected the notion that foreseeability alone is sufficient to give rise to personal jurisdiction.¹⁸² However, the Court also noted a state would not “exceed its powers under the Due Process Clause if it assert[ed] personal jurisdiction over a corporation that delivers its products into the stream of

¹⁷⁵ See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in J. McIntyre Machinery Ltd. v. Nicastro to Clarify the Stream of Commerce Doctrine*, 12 DEPAUL BUS. & COM. L.J. 171, 177-79 (2014) [hereinafter *Fork in the Stream*].

¹⁷⁶ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980); *Hanson*, 357 U.S. at 253-54.

¹⁷⁷ Or sell a part to a manufacturer of a more finished product.

¹⁷⁸ See, e.g., *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

¹⁷⁹ See Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and A Revised Approach*, 77 KY. L.J. 243, 259 & n.77 (1989).

¹⁸⁰ 444 U.S. 286 (1980).

¹⁸¹ *Id.* at 295-96.

¹⁸² *Id.*

commerce with the expectation that they will be purchased by consumers in the forum State.”¹⁸³ Thus, while refusing to allow the assertion of jurisdiction based on the foreseeable *use* of a product in a forum, the Court seemed to endorse the assertion of jurisdiction based on the foreseeable *sale* of a product in a forum.¹⁸⁴

In *Asahi Metal Indus. Co. v. Superior Court*,¹⁸⁵ the Court had an opportunity to take on the stream of commerce doctrine directly. In that case, a Taiwanese company manufactured a tube used inside a tire that was allegedly the cause of an injury in California due to a defect.¹⁸⁶ After the consumer sued the Taiwanese company in California, the Taiwanese company filed a cross complaint seeking indemnification against a Japanese company that manufactured the tube’s valve assembly.¹⁸⁷ The Japanese company claimed that California’s courts could not properly exercise jurisdiction over it because it had made no direct contacts with California.¹⁸⁸

The Court unanimously agreed that California could not exercise jurisdiction over the Japanese company but the Justices were sharply divided on the reasons why. Eight justices agreed that the exercise of personal jurisdiction over the Japanese company would fail the second step of the minimum contacts analysis because forcing the Japanese company to defend itself in California courts in a dispute with a Taiwanese company only tangentially related to California would not be consistent with fair play and substantial justice.¹⁸⁹ However, when it came to the minimum contacts portion of the analysis and the stream of commerce theory, no opinion could garner the votes of five justices.

Justice O’Connor, in a portion of her opinion joined by three other justices, argued that placing a product in the stream of commerce should only be a sufficient basis for personal jurisdiction when the defendant engages in “additional conduct [indicating] an intent or purpose to serve the market in the forum State” such as designing the product for the market in that state,

¹⁸³ *Id.* at 297-98.

¹⁸⁴ *Cf. id.* at 306-07 (“It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there.”) (Brennan, J., dissenting).

¹⁸⁵ 480 U.S. 102 (1987).

¹⁸⁶ *Id.* at 105-06.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 105-07.

¹⁸⁹ *Id.* at 113-16.

advertising in that state, or marketing the product through a distributor there.¹⁹⁰ The Japanese company's mere awareness that the stream of commerce may have resulted in its product being sold in a California was, by itself, insufficient.¹⁹¹ Justice Brennan, in an opinion joined by three other justices, disagreed. He argued that if a defendant places a product in the stream of commerce and should reasonably expect that it could be sold in a particular forum, the minimum contacts requirement should be satisfied without any requirement of additional conduct.¹⁹² Accordingly, because the Japanese company was aware that the final product would ultimately be sold in California, its contacts were sufficient to satisfy the first prong of the minimum contacts test.¹⁹³ The Court's split in *Asahi*¹⁹⁴ led to a split in lower courts, with some adopting Justice O'Connor's version of the stream of commerce test, and others adopting Justice Brennan's approach.¹⁹⁵

The Court again returned to the stream of commerce doctrine over twenty years later in *J. McIntyre Machinery, Ltd. v. Nicaastro*.¹⁹⁶ In that case, the plaintiff was injured in his workplace by a metal sheering machine.¹⁹⁷ The machine was manufactured by an English company and then sold to a distributor based in Ohio, who then sold the machine to the plaintiff's employer.¹⁹⁸ In a products liability suit against the manufacturer, the employer argued that it could not be subject to personal jurisdiction in New Jersey.¹⁹⁹

Although the Court rejected the exercise of jurisdiction by a vote of six to three, the Court again produced a fractured decision with no opinion garnering a majority of the Justices. In an opinion for a plurality of four Justices, Justice Kennedy argued that the Court should endorse Justice O'Connor's *Asahi* opinion and only permit the exercise of jurisdiction

¹⁹⁰ *Id.* at 112 (opinion of O'Connor, J.).

¹⁹¹ *Id.* at 112-13.

¹⁹² *Id.* at 116-17 (opinion of Brennan, J.).

¹⁹³ *Id.* at 121.

¹⁹⁴ Justice Stevens did not join the relevant part of either principal opinion and wrote separately to note that the minimum contacts analysis was not necessary to the Court's decision and that, even if he were to decide the minimum contacts question, he did not think a clear line could be drawn between awareness that a product would end up in a particular state and the additional conduct requirement suggested by Justice O'Connor's opinion. *Id.* at 121-22 (Stevens, J., concurring).

¹⁹⁵ Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 116 nn.60-61 (2012) (collecting post-*Asahi* cases applying both approaches).

¹⁹⁶ 131 S. Ct. 2780 (2011).

¹⁹⁷ *Id.* at 2795 (Ginsburg, J., dissenting).

¹⁹⁸ *Id.* at 2795-97.

¹⁹⁹ *Id.* at 2786 (plurality opinion).

where “the defendant can be said to have targeted the forum” with some other conduct.²⁰⁰ Applying that test, Justice Kennedy concluded that New Jersey could not exercise personal jurisdiction over the defendant because the defendant’s sale of the metal sheering machine to its Ohio distributor at most showed an intent to target the United States as a whole rather than New Jersey specifically.²⁰¹ In a dissenting opinion for three Justices, Justice Ginsburg strongly disagreed. Echoing Justice Brennan’s approach, she argued that by instructing its distributor to sell its products anywhere in the United States, the defendant should have foreseen that its products would be sold in New Jersey, the state with the largest scrap metal market.²⁰²

In a concurring opinion for himself and Justice Alito, Justice Breyer agreed with the plurality that New Jersey courts could not exercise personal jurisdiction over the defendant, but felt that the case did not present a good vehicle for resolving the conflict in *Asahi*.²⁰³ Justice Breyer felt that both approaches suggested in *Asahi* would lead to the same result in this case because the machine at issue was not sold as part of a regular flow of the defendant’s products into New Jersey and therefore the defendant could not have had a reasonable expectation that one of its products would end up there.²⁰⁴

* * * * *

Thus, after *Nicastro*, courts were left with little more guidance about the stream of commerce doctrine than they had after *Asahi*.²⁰⁵ However, a few common threads relevant to domestic violence jurisdiction can be gleaned from these opinions. First, a defendant’s knowledge about the consequences of his or her intentional actions is relevant to the jurisdictional inquiry. Under Justice Brennan’s approach, the knowledge (or constructive knowledge) that the sale of a product into the stream of commerce will ultimately result in that product being sold in a forum is alone sufficient to subject a defendant to jurisdiction. Justice O’Connor’s approach requires an intentional act by the defendant that—in light of the defendant’s knowledge—reflects an intention to target the forum. Thus,

²⁰⁰ See *Nicastro*, 131 S.Ct. at 2788.

²⁰¹ *Id.* at 2790-91.

²⁰² *Id.* at 2797, 2801-02, 2804 (Ginsburg, J., dissenting).

²⁰³ *Id.* at 2791-92 (Breyer, J., concurring).

²⁰⁴ *Id.* at 2792.

²⁰⁵ See *Fork in the Stream*, *supra* note 175, at 191, 194-96 (noting that most courts after *Nicastro* have continued to adhere to the same *Asahi* opinion that they did prior to *Nicastro*).

both approaches accept that the defendant's knowledge about the geographic reach of his actions plays a role in the jurisdictional calculus.

Second, and relatedly, the stream of commerce doctrine is built upon the idea that intentional actions by the defendant that have an effect in another forum can be the basis for subjecting the defendant to jurisdiction in that forum. Although *Woodson* teaches us that a mere negligent act by a defendant that has some effect in another forum is insufficient to confer jurisdiction, such an effect can confer jurisdiction when combined with some evidence of an intention to cause such an effect. For example, Justice O'Connor's noted in *Asahi* that her conclusion may have been different had the defendant "control[ed] or employ[ed] the distribution system that brought its valves to California."²⁰⁶ In other words, if the defendant's intentional activities had been what brought the valves to California and caused the injury there, it could have been subject to jurisdiction. Similarly, the dissent in *Nicastro* argued that jurisdiction was appropriate "at the place [the defendant's] products cause[d] injury[.]" New Jersey, because the defendant controlled a distribution system that intentionally targeted the entire country.²⁰⁷

Third, the stream of commerce doctrine is concerned with not just any effects in a forum, but effects that have some impact on the forum itself, rather than merely individuals within the forum. As the *Nicastro* plurality put it, the defendant's actions must be "directed at the society or economy" of the forum.²⁰⁸ Actions with these kind of effects in a forum—like selling products into a state through a distribution system—"invoke the benefits and protections of [the state's] laws"²⁰⁹ and therefore either manifest an intent to submit to the sovereign authority of the forum²¹⁰ or make it fair and reasonable to subject the defendant to jurisdiction in that forum.²¹¹

²⁰⁶ *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.).

²⁰⁷ *Nicastro*, 131 S.Ct. at 2799-2801 (Ginsburg, J., dissenting).

²⁰⁸ *Id.* at 2789 (plurality opinion).

²⁰⁹ *Id.* at 2787-88 (quoting *Hanson*, 326 U.S. at 253).

²¹⁰ See *Nicastro*, 131 S.Ct. at 2787-88 (plurality opinion).

²¹¹ See *Asahi*, 480 U.S. at 116-17 (opinion of Brennan, J.) ("A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity."); see also *Burnham v. Superior Court of California, Cnty. of Marin*, 495 U.S. 604, 637-38 (1990) (opinion of Brennan, J.) ("By visiting the forum State, a transient defendant actually avails himself . . . of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well.") (quotations, citation, and alteration omitted).

Similarly, “in some cases . . . the defendant might well [be subject to jurisdiction] by reason of his attempt to obstruct [a forum’s] laws.”²¹² Thus, when a defendant’s actions have effects on the legal, economic, or societal ecosystem of a state, the defendant is much more likely to be subject to jurisdiction in that state.

B. *The Effects Test*

The Court has, in fact, confronted personal jurisdiction issues in situations involving a defendant’s effort to “obstruct” another state’s laws through the commission of an intentional tort allegedly targeting at a plaintiff in that state. In these cases, the Court has developed a separate gloss on the purposeful availment requirement specific to intentional torts known as the “*Calder* effects test,”²¹³ a name that stems from the case that laid out that test, *Calder v. Jones*.²¹⁴

In *Calder*, an actress sued two reporters with the National Enquirer for libel in California based on allegedly defamatory statements contained in an article that was published in the Enquirer.²¹⁵ The defendants,²¹⁶ who lived in Florida and wrote the article at issue there, argued that California courts could not assert personal jurisdiction over them.²¹⁷ The defendants apparently wrote the entire article without setting foot in California, and instead conducted all of their research and interviews by phone.²¹⁸ Nevertheless, the Court found the assertion of jurisdiction over the defendants proper.²¹⁹

The Court concluded that jurisdiction in California was consistent with due process because California was “the focal point both of the [allegedly

²¹² *Nicastro*, 131 S.Ct. at 2787.

²¹³ See, e.g., Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 224 (2014).

²¹⁴ 465 U.S. 783 (1984).

²¹⁵ *Id.* at 784-85.

²¹⁶ The plaintiff also sued the Enquirer itself and one of its distributors, however, neither of these parties contested the court’s jurisdiction. *Id.* at 785. For the sake of clarity, “defendants” will refer only to the reporter defendants who challenged the court’s jurisdiction.

²¹⁷ *Id.* at 784-85.

²¹⁸ *Id.* at 785-86. There was apparent disagreement between the parties about whether one of the reporters made one trip to California for the purpose of researching the article, but the Court held that resolving that dispute was not necessary to its decision. *Id.* at 785 n.4.

²¹⁹ *Id.* at 789.

libelous] story and of the harm suffered.”²²⁰ That was because the allegedly libelous story was very focused on California since it was drawn from California based sources and concerned the activities of a California resident whose career was centered in California.²²¹ Moreover, the plaintiff’s emotional distress and injury to her professional reputation would be felt almost entirely in California.²²²

The defendants argued that, since they did not distribute the articles themselves, this case was more analogous to *Woodson* where the mere fact that the dealer could foresee that a car might travel to another state was not enough to subject it to jurisdiction in that state.²²³ In rejecting this argument, the Court established a key distinction between intentional torts and other kinds of lawsuits:

[Defendants] are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. [Defendants wrote and] edited an article that they knew would have a potentially devastating impact upon [plaintiff]. And they knew that the brunt of that injury would be felt by [plaintiff] in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, [defendants] must ‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.²²⁴

Thus, the Court established the principal that, when an intentional tort is “expressly targeted” toward a particular state, this express targeting can constitute sufficient purposeful availment to justify the exercise of

²²⁰ *Id.*

²²¹ *Id.* at 788-89.

²²² *Id.*

²²³ *Id.* at 789.

²²⁴ *Id.* at 789-90.

jurisdiction by that state even where the defendant otherwise lacks significant contacts with the forum.²²⁵

After staying silent on the subject for thirty years after *Calder*, the Court finally returned to the effects test in *Walden v. Fiore*.²²⁶ In that case, the plaintiffs were two Nevada residents who alleged that a federal Drug Enforcement Agency agent improperly seized their money and detained them while they were traveling through Atlanta's airport.²²⁷ The plaintiffs also alleged that the same DEA agent filled out an affidavit with false information in an effort to justify the seizures.²²⁸ The plaintiffs sued the DEA agent in Nevada alleging violations of their constitutional rights.²²⁹ The DEA agent argued that he could not be subject to personal jurisdiction in Nevada, despite his knowledge that the plaintiffs resided there.²³⁰

In a unanimous decision, the Supreme Court agreed with the defendant.²³¹ The Court reiterated the long established principal that the plaintiff's residency alone cannot be the only link between the defendant and a forum to establish jurisdiction.²³² Instead, the defendant must engage in conduct that forms the necessary connection with the forum state.²³³ The Court described *Calder* as being consistent with that principal because in that case

²²⁵ E.g., Andrew F. Halaby, *You Won't Be Back: Making Sense of "Express Aiming" After Schwarzenegger v. Fred Martin Motor Co.*, 37 ARIZ. ST. L.J. 625, 631-32 (2005). This somewhat vague "express targeting" requirement proved difficult for courts to apply in the years following *Calder*. See C. Douglas Floyd & Shima Baradaran-Robison, *Toward A Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 611-12 (2006) (noting that the Court's "express aiming" language caused "much difficulty in subsequent decisions"); Halaby, *supra* note 225, at 630-31 ("The express aiming element was confusing from the start."). The primary difficulty was defining the level of intent required for such targeting. See Floyd & Baradaran-Robison, *supra* note 225, at 612. Some courts required that the defendant have a specific purpose to harm the plaintiff in the forum state, while others simply required that the defendant have (or ought to have had) some awareness that his or her conduct would have some impact in the forum state. See *id.* at 618-19 & nn.88-90. In many ways, this split mirrored the one that existed after *Asahi* in the stream of commerce context, with some courts being satisfied with awareness alone and others requiring some more specific indicia of targeting. See Section III.B, *supra*.

²²⁶ 134 S.Ct. 1115 (2014).

²²⁷ *Id.* at 1118-20.

²²⁸ *Id.* at 1119-20.

²²⁹ *Id.* at 1120.

²³⁰ *Id.* at 1120. The defendant apparently became aware that the plaintiffs were Nevada residents "at some point *after* the seizure but *before* providing the allegedly false" affidavit. *Id.* at 1120 n.3 (quotations and citation omitted).

²³¹ *Id.* at 1121.

²³² *Id.* at 1122-23.

²³³ *Id.*

“the reputation-based ‘effects’ of the alleged libel connected the defendants to California, not just to the plaintiff.”²³⁴ The Court noted that because of the nature of libel, the tort in *Calder* actually occurred in California, where the article was read and distributed, not in Florida where the article was written.²³⁵ For these reasons, the defendants conduct in *Calder* was actually connected to California itself, rather than just to a California-based plaintiff.²³⁶

By contrast, in this case, the Court held the conduct that gave rise to the lawsuit—the seizure and filing of the false affidavit—took place entirely in Georgia.²³⁷ The Court rejected the idea that the defendant’s knowledge that the plaintiffs were from Nevada and would suffer injury in Nevada as a result of his conduct was sufficient to justify the exercise of jurisdiction over him.²³⁸ The fact that the plaintiffs suffered injury from not having their money in Nevada was not “tethered to Nevada” in any meaningful way; “unlike the broad publication of the forum-focused story in *Calder* the effects of the [defendant’s] conduct on [plaintiffs were] not connected to [Nevada] in a way that [made] those effects a proper basis for jurisdiction.”²³⁹

The Court’s efforts to distinguish *Walden* from *Calder* are not entirely persuasive, as several scholars have observed.²⁴⁰ After all, *Calder* seemed to turn on the defendant’s knowledge that the plaintiff would be injured in the forum, not the defendant’s intentional targeting of the forum as a whole.²⁴¹ However persuasive the Court’s description of *Calder* may be, it does offer a coherent post hoc justification of the differing results in the two cases. In both *Walden* and *Calder*, the defendants knew that the plaintiffs

²³⁴ See *id.* at 1123-24.

²³⁵ *Id.* at 1124.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 1124-25.

²³⁹ *Id.* at 1125.

²⁴⁰ See, e.g., Rhodes & Robertson, *supra* note 213, at 253; Bernadette Bollas Genetin, *The Supreme Court’s New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 152 (2015); see also William Baude, *Opinion analysis: The boundaries of specific jurisdiction*, SCOTUSBLOG, Feb. 26, 2014, <http://www.scotusblog.com/2014/02/opinion-analysis-the-boundaries-of-specific-jurisdiction/> (“*Calder* might seem to suggest that harming a person who is in California can get you sued in California. . . . The Court [in *Walden*] took a much more limited view of *Calder*.”).

²⁴¹ See *Calder*, 465 U.S. at 789-90 (“[Defendants] knew that the brunt of [the injury to the plaintiff from their conduct] would be felt by [plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, [defendants] must reasonably anticipate being haled into court there[.]”) (quotations and citations omitted).

would be injured in the forums at issue, however; only in *Calder* did the effects of the defendant's conduct extend beyond the plaintiffs to impact the state's economy, society, or political system.

* * * * *

Thus, after *Walden*, the effects test turns on (1) whether the defendant has knowledge that his conduct will have an impact in a forum, (2) whether his conduct does in fact have such an impact, and (3) whether that impact is targeted at the forum as a whole or just at individual plaintiffs who happen to reside there. These requirements bring the effects test somewhat into alignment with the stream of commerce doctrine in that both require knowledge on the part of the defendant about the likely results of his or her conduct and both require conduct that reflects an intention to target a forum as a whole. This is consistent with the *Walden* Court's statement that the same jurisdictional principals that apply to other torts apply when intentional torts are involved.²⁴²

However, *Walden*'s dicta to the contrary notwithstanding, there are still differences in the way the Court's personal jurisdiction doctrine treats intentional torts²⁴³ and non-intentional torts. To understand that difference, it is important to separate two kinds of "intentionality" the Court is concerned with in personal jurisdiction cases. One kind, is "action intentionality"—that is, whether the conduct giving rise to the claim was intentional or not. This is the distinction between intentional torts and other torts (those based on negligence or strict liability). The other kind is "forum targeting intentionality"—that is, whether the defendant did something to intentionally target the specific forum that is asserting jurisdiction over him. What the stream of commerce and effects test cases show is that where action intentionality is present, the requirements for forum targeting intentionality are somewhat relaxed.

In the stream of commerce context, where action intentionality is not present, the Court is very stringent about ensuring that forum targeting intentionality exists. Disagreements over whether such intent exists, how to prove such intent, and the level of intentionality required are precisely the problems that gave rise to the warring opinions in *Asahi* and *Nicastro*. As the doctrine has developed, it has become much harder for mere knowledge

²⁴² See *Walden*, 134 S.Ct. at 1123.

²⁴³ I use the phrase "intentional torts" here broadly to refer to any cause of action premised on intentional wrongful conduct, including constitutional claims like the one at issue in *Walden*. The Court used the phrase similarly in *Walden*. See *id.*

that a product could end up in a particular forum to satisfy due process requirements. In contrast, when it comes to intentional torts, which, by definition, include action intentionality, knowledge is a much more palatable basis for satisfying the forum targeting intentionality requirement. This is reflected in both *Calder* and *Walden* where the focus of the Court's analysis was on how the claimed conduct of the defendants in those cases had an impact on the forums at issue, not on the state of mind of the defendants with respect to the forums. In both cases the only evidence of forum targeting intentionality was the defendants' knowledge that their conduct could have effects in California and Nevada respectively. The difference was that in *Calder*, the researching and publication of the article had a large impact in California, whereas in *Walden*, the seizure of the cash and drafting of the affidavit had a minimal impact in Nevada. By contrast, under the stream of commerce doctrine—at least in its more stringent formulations—knowledge alone is insufficient to give rise to jurisdiction even where the effects of the defendant's conduct are widely felt in the forum.

Therefore, another important guiding principal that can be gleaned from the effects test is that where action intentionality is present, the requirement of forum targeting intentionality is relaxed to the point that mere knowledge is largely sufficient provided that the conduct at issue has far reaching effects in the forum.²⁴⁴ This makes sense within the larger context of personal jurisdiction doctrine because it reflects the overriding focus on the defendant's agency that has been present since the purposeful avilment requirement was added. A defendant should be able to make a choice that determines whether or not he or she will be subject to jurisdiction in the forum, and not have that choice made for him by third parties.²⁴⁵ In the context of negligence or strict liability, the forum targeting intentionality requirement exists to ensure that a real choice is involved since the underlying conduct does not involve one. In the context of intentional conduct, since the offending conduct itself is the result of a conscious choice, courts can take a relaxed view of the forum targeting intentionality requirement, and still protect the defendant's agency.

²⁴⁴ See Halaby, *supra* note 225, at 631-32.

²⁴⁵ See *Woodson*, 444 U.S. at 297 (“The Due Process Clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”) (quotations and citation omitted).

V. REFRAMING DOMESTIC VIOLENCE JURISDICTION: THE KNOWLEDGE TEST

The stream of commerce doctrine and the effects test have been often (rightly) criticized for being muddled and unclear. However, the broad principals embedded in these two lines of cases provide a framework for formulating a new test for domestic violence jurisdiction. A defendant's mere knowledge that his conduct could have an effect in a forum is generally insufficient to justify the assertion of personal jurisdiction over him in that forum.²⁴⁶ However, the stream of commerce doctrine teaches us that where the defendant knows that his or her conduct is likely to cause an effect in another forum *and* takes specific action to target that forum, the assertion of jurisdiction may be proper. In turn, the effects test posits that where an intentional tort is committed and the effects of the intentional tort are felt not just by the victim, but by the forum as a whole, the defendant's knowledge alone may be sufficient to give rise to jurisdiction.

In the following subsections, I will demonstrate that in domestic violence cases, the alleged misconduct by the defendant is: (1) intentionally designed to target forums where the plaintiff might flee, and (2) likely to have effects in those forums that go well beyond the individual plaintiff involved. Therefore, it is proper to subject domestic violence defendants to jurisdiction in any forum where the defendant knows or should know his victim may flee. I will refer to this test as the Knowledge Test.

A. *Intentionality*

Although actions seeking domestic violence restraining orders are equitable, they are similar to intentional tort actions in that both require the plaintiff to prove the defendant engaged in intentional conduct.²⁴⁷ A restraining order is never granted on the ground that the defendant threatened or injured the plaintiff accidentally—instead, the defendant must commit an *intentional* act—usually one that is violent or threatening such that the plaintiff is placed in reasonable fear that the defendant may attack her (or attack her again).²⁴⁸ Thus, actions seeking domestic violence restraining orders carry the same inherent action intentionality that triggers the effects test in intentional tort cases.

²⁴⁶ See Section IV.A, *supra*.

²⁴⁷ See Jennifer Wiggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 122-24 & n.7 (2001).

²⁴⁸ See 25 AM. JUR. 2D *Domestic Abuse and Violence* § 6.

Although the presence of action intentionality relaxes the forum targeting intentionality requirement, it does not eliminate it. *Walden* makes clear that even if an intentional tort defendant knows the plaintiff he is intentionally harming may travel to another state, that is not sufficient to give rise to jurisdiction in that state without some additional indication that the defendant intended to target that state. However, domestic violence is different from other intentional torts in at least two critical ways that help satisfy this requirement. First, domestic violence is almost always part of a larger pattern of coercive control by the batterer rather than an isolated incident. Second, domestic violence by definition takes place between people with a pre-existing relationship—often a close one—that gives the perpetrator more knowledge about the potential effects of his conduct in other forums.

Unlike an ordinary intentional tort like the ones at issue in *Calder* and *Walden*, domestic violence is not a discrete harm that one person does to another in a single instance. Rather, it is well established that domestic violence is a pattern of behavior by the batterer designed to establish control over the victim.²⁴⁹ That control is not limited to the times when physical attacks are occurring or even when the batterer is physically present.²⁵⁰ Rather, the batterer places the victim in an ongoing state of terror designed

²⁴⁹ See, e.g., Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1058 (2011) (Psychologists, scholars, and social scientists agree that domestic violence is defined as 'a pattern of behavior in a relationship by which the batterer attempts to control his victim through a variety of tactics.' . . . Domestic violence is about coercive control of another and deprivation of their liberty.") (citation omitted); National Coalition Against Domestic Violence, *What is Domestic Violence?*, <http://www.ncadv.org/need-support/what-is-domestic-violence> (last visited Jul. 22, 2015) ("Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another."); see also Donald G. Dutton, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 112 (1995) (finding that over 60% of men who batter their wives do so repeatedly).

²⁵⁰ See, e.g., Michael P. Johnson, *A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE* 6, 9, 26 (2008) ("Although each particular act of intimate violence may appear to have any number of short-term, specific goals, it is embedded in a larger pattern of power and control that permeates the relationship."); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 966 (2004) ("Episodic physical violence, while often a devastating manifestation of the abuser's control, does not fully define its contours or map its reaches."); see also Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1318 (1993) ("[U]nderstanding the pattern of control makes it easier to understand how she 'didn't leave' during the time when he 'wasn't violent.'").

to ensure her continued subjugation.²⁵¹ Moreover, domestic violence does not end when the victim leaves the batterer, and in fact, in many cases is likely to escalate.²⁵² Batterers are well aware of the fact their relentless abuse may cause the victim to rationally choose to escape by fleeing elsewhere. In fact, research shows that batterers' efforts to control their victims are at least partially motivated by a desire to keep the victim from leaving permanently.²⁵³

When a person engages in domestic violence with the knowledge that the victim may seek refuge in another state, the batterer is also aware—and perhaps hoping—that his pattern of violence will continue to affect the victim even if she chooses to flee to that state and perhaps ultimately compel her to return to him. This is very different from the usual intentional tortfeasor who is simply seeking to impose a one-time injury on the plaintiff without any aim to exert ongoing control. The DEA agent in *Walden* may have known that the plaintiffs lived in Nevada, but by seizing their cash, he did not intend to visit any *ongoing* harm to the plaintiffs in Nevada beyond the loss of the money. By contrast, domestic violence is an ongoing harm that is designed to subject the victim to the batterer's control in any state where she travels.²⁵⁴

Indeed, obtaining a domestic violence restraining order usually requires the plaintiff to demonstrate a *current* fear or likelihood of further violence.²⁵⁵ Where a plaintiff flees to another state and seeks a restraining order, this element of her claim cannot be completed until she arrives in the destination state and actually files her claim while being in a continuing state of fear or

²⁵¹ See, e.g., Johnson, *supra* note 250, at 37-38.

²⁵² See, e.g., Przekop, *supra* note 249, at 1055 (“[A] woman escaping an abusive relationship has a 75 percent greater risk of severe injury or death than a woman who remains with her abuser.”); see also *supra* note 155 (collecting sources discussing separation assault).

²⁵³ See Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 291-92 & n.104 (1987); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 286-89 & n.101 (1985).

²⁵⁴ Of course, if a specific case truly does raise an isolated incident that is not connected to a larger pattern of domestic violence and intimidation, then the Knowledge Test may not be appropriate. However, such cases are likely to be rare, both because of the nature of domestic violence, and because restraining orders are generally unavailable when only a single incident is alleged. See, e.g., *L.M.F. v. J.A.F., Jr.*, 24 A.3d 849, 858 (N.J. App. Div. 2011) (refusing to grant a restraining order over an “isolated incident” of harassment where it was not accompanied by other threatening or violent behaviors and noting the requirement that the victim demonstrate an order is “necessary to prevent future abuse”).

²⁵⁵ See, e.g., 28 C.J.S. *Domestic Abuse and Violence* § 5

danger. Thus, just like the defamation in *Calder*, the cause of action for a domestic violence restraining order is actually completed in the forum where the plaintiff files her claim.

Even so, the victim's decision to flee to a another state is—on its own—not sufficient to give rise to jurisdiction in whatever state she travels to, rather, the defendant must know the *specific* state to which the plaintiff will flee.²⁵⁶ Domestic violence perpetrators are uniquely positioned to know the locations where their victims are likely to flee because of the close relationship between the batterer and the victim. Domestic violence is, by definition, limited to violence between people who have a close relationship with each other.²⁵⁷ Accordingly, a batterer is very likely to know the victim well enough to have some idea of where the victim might go to seek refuge from his attacks. This is particularly true where the victim seeks refuge with close friends or family, as victims of domestic violence often do.²⁵⁸

The typical domestic violence defendant's knowledge of the plaintiff's likely avenues of escape is nicely illustrated by many of the cases discussed in Part II.B, *supra*, where the applicability of the status exception was litigated. For example, in *Burnett v. Burnett*, the case described in the Introduction, it is highly likely that the defendant was well aware that the plaintiff—who he had been married to for seven years—might flee to Ohio where her family lived.²⁵⁹ In fact, the defendant had previously attended family gatherings in Ohio at the plaintiff's family home.²⁶⁰ And in *Bartsch*, the Iowa Supreme Court case that led the way in applying the status exception to domestic violence, the parties had met in Iowa while both were attending school there and the plaintiff's parents—who she went to live

²⁵⁶ See *Nicastro*, 131 S.Ct. at 2789 (plurality opinion) (“[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.”).

²⁵⁷ See, e.g., 18 U.S.C.A. § 921(a)(33)(A)(ii) (limiting the definition of domestic violence for purposes of federal firearm prohibitions to violent acts “committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”); 25 AM. JUR. 2D *Domestic Abuse and Violence* §§ 8-10 (describing various state definition of domestic or family violence which include violence between household members, parents of children, dating partners, and other people in personal relationships).

²⁵⁸ See Graybill, *supra* note 120, at 823 (“When victims of domestic violence flee the homes they share with their abusers, they often seek refuge with friends, family, or in shelters, and many move to another city or state to hide from their abuser.”).

²⁵⁹ See *Burnett*, 2012-Ohio-2673, 2012 WL 2196336, at *1-3. Indeed, the plaintiff alleged that the defendant “knew all the places she would go” to flee from him. *Id.* at *1.

²⁶⁰ See *id.* at *3.

with when she sought the protective order—continued to live in Iowa throughout the parties’ five year marriage.²⁶¹ Even in *Fox*, where the parties were an uncle and his nephew instead of a couple in an intimate relationship, the contentious court battle over estate issues the parties were involved in that precipitated the nephew’s alleged attack likely would have revealed to the nephew his uncle’s address in Vermont if he was not already aware of it from their familial relationship.²⁶² Moreover, right as the attack was occurring in the courthouse parking lot, the nephew told the uncle he was memorizing his Vermont license plate in case he “need[ed] it again.”²⁶³ These examples illustrate what is likely true in many domestic violence cases—that the attacker has a very good idea of the states where the victim may choose to flee.²⁶⁴

As the Knowledge Test recognizes, the defendant may not be aware of the plaintiffs’ likely destination in every case. In cases where the defendant does not know where the plaintiff has fled, a restraining order may be unnecessary or even harmful since it could alert the defendant to the plaintiff’s location.²⁶⁵ However, in cases where the defendant engages in domestic violence knowing the plaintiff might flee to a particular state, he is engaging in intentional conduct targeting that forum since he intends his campaign of terror to extend into that forum. This is sufficient to satisfy the

²⁶¹ See Appellee’s Final Brief at 4-5, *Bartsch*, 636 N.W.2d 3 (No. 00-0068). In fact, the defendant’s parents also lived in Iowa throughout the marriage not far from where the plaintiff’s parents lived. *Id.*

²⁶² See Brief of Plaintiff-Appellee at 5, *Fox*, 106 A.3d 919 (No. 13-147), 2013 WL 3874104 (Vt.).

²⁶³ *Id.*

²⁶⁴ This is true in at least two other major cases discussing applicability of the status exception. See *Hemenway*, 159 N.H. at 683 (noting that the defendant sent a threatening letter to the plaintiff’s New Hampshire address); *Caplan*, 450 Mass. at 464 (noting that the parties met in Massachusetts approximately six years before the action was filed, that the plaintiff took periodic trips to Massachusetts during the parties’ marriage and that “the defendant had telephoned the plaintiff’s father’s house in Massachusetts [and] had telephoned his own friends in Massachusetts apparently trying to locate the plaintiff” after she fled to Massachusetts). Other cases did not include enough information to know for sure whether the defendant would have had some idea about where the plaintiff might flee. See *Spencer*, 191 S.W.3d at 16 (noting that the plaintiff fled to Kentucky to stay with “a close friend” after suffering abuse at the hands of her husband who she knew for at least seven years); *Shah*, 184 N.J. at 129 (noting that the plaintiff sought refuge with “family friends” in New Jersey after about two years of marriage). It is likely that at least part of the reason the record was not as well developed on that issue in those cases is because of the plaintiffs’ reliance on the status exception.

²⁶⁵ See Annie Pelletier Kerrick, *Protections Available to Victims of Domestic Violence: No Contact Orders, Civil Protection Orders, and Other Options*, 54 *ADVOCATE* 32 (2011).

forum targeting intentionality requirement since the defendant's underlying conduct giving rise to the cause of action is intentional.

B. *Effects*

As cases like *Walden* and *Nicastro* demonstrate, causing injury in a forum—even on purpose—is insufficient to give rise to jurisdiction. Instead, the key question is what *kind* of injury batterers cause in these fora? If the injury is confined just to the plaintiff herself, then it may be insufficient to give rise to personal jurisdiction. But, if the injury spreads to the society and economy of the forum, then the assertion of personal jurisdiction is justified. There is no doubt that the latter type of harm is visited on forums where domestic violence victims flee to escape abuse.

The enormous costs to society of domestic violence are well documented²⁶⁶ and are likely to be even higher for states receiving fleeing domestic violence survivors. Because batterers are more likely to attack their victims right after they leave²⁶⁷ and recidivism rates in domestic violence cases are high,²⁶⁸ the receiving state is likely to be a site of further abuse that may require police and/or court intervention. Victims of domestic violence are also often financially reliant on their abusers.²⁶⁹ When victims leave their abusers by moving away, victims often find themselves with no job, no reliable transportation, and little or no assets.²⁷⁰ In turn, this forces many

²⁶⁶ See, e.g., Stoeber, *supra* note 167, at 1081-82 (“Costs related to experiencing domestic violence and to ending violence are substantial. In the United States, the annual cost of medical care, mental health services, and time away from work due to intimate partner violence is estimated to be \$8.3 billion (in 2003 dollars). Every year, survivors of intimate partner violence lose nearly 8 million days of paid work, which amounts to more than 32,000 full-time jobs. They also lose approximately 5.6 million days of household productivity due to domestic violence, and there are significant costs for services to children exposed to domestic violence.”) (citations omitted).

²⁶⁷ See *supra* note 252; Mahoney, *supra* note 155, at 64 (“At least half of women who leave their abusers are followed and harassed or further attacked by them.”).

²⁶⁸ See, e.g., Skoien, 614 F.3d at 644 (“[T]he recidivism rate [in domestic violence cases] is high[.] . . . Estimates of this rate come from survey research and range from 40% to 80%[.] . . . No matter how you slice these numbers, people convicted of domestic violence remain dangerous to their spouses and partners.”) (citations omitted).

²⁶⁹ See, e.g., Ralph Henry, *Domestic Violence and the Failures of Welfare Reform: The Role for Work Leave Legislation*, 20 WIS. WOMEN’S L.J. 67, 68 (2005)

²⁷⁰ See, e.g., Eliza Hirst, Note, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL’Y 131, 133-34 (2003) (“Abusers often control the finances or prohibit their victims from working, which leaves many victims of domestic violence without any money when fleeing abusers.”); Comment, *supra* note 163, at 598 (“[W]hen a woman finally gets up the courage to leave her batterer, she often has no job,

victims to rely on welfare and other forms of public assistance.²⁷¹ And domestic violence survivors are more likely than most to struggle to obtain employment and get off of welfare.²⁷² Even survivors who do find employment struggle to maintain such employment and often make their employer a target for harassment from the batterer.²⁷³ Survivors of domestic violence also often struggle to find suitable permanent housing after leaving their abusers, with many relying on public housing and many others becoming homeless.²⁷⁴

Thus, when a batterer abuses someone with the knowledge that she will likely flee to another state, and she does flee there, his conduct imposes substantial effects and costs on that state's economy and society. The effects of battering reach well beyond the victim and are analogous to (and perhaps greater than) those imposed by companies who utilize a distribution system that targets a particular state's economy or intentional tortfeasors whose conduct targets a forum as a whole. Just as we hold these defendants accountable for their actions, so too should batterers be responsible for their

no car, no house, and no bank account.”); *see also* Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 148 (2015) (“[M]any women who experience domestic violence find themselves homeless and jobless when the dust settles.”).

²⁷¹ *See, e.g.*, Henry, *supra* note 269, at 73; Comment, *supra* note 163, at 598.

²⁷² *See* Henry, *supra* note 269, at 73 (“Further studies have provided empirical evidence that domestic violence can make it very difficult for a woman to successfully leave the welfare rolls or even to maintain part-time employment if forced off of welfare.”); *see also* Comment, *supra* note 163, at 601 (“Long-term abuse can produce depression, anxiety, post-traumatic stress disorder, inability to concentrate, substance abuse problems, and difficulty in making decisions.”).

²⁷³ *See* Rutledge, *supra* note 153, at 182-87 (describing the impact of domestic violence on the victim's employer).

²⁷⁴ *See* Shirley Darby Howell, *Making Women Homeless and Keeping Them Homeless Domestic Violence, Flawed Interpretations of 42 U.S.C. § 1437d(1)(6), Sexual Harassment in Public Housing, and Municipal Violations of the Eighth Amendment*, 65 GUILD PRAC. 77, 78 (2008) (“At least fifty percent of homeless women became homeless as a direct result of domestic abuse[.]”); Elizabeth J. Thomas, *Building A Statutory Shelter for Victims of Domestic Violence: The United States Housing Act and Violence Against Women Act in Collaboration*, 16 WASH. U. J.L. & POL'Y 289, 305 (2004) (“Victims of domestic violence often do not possess the financial resources necessary to obtain suitable housing; however, [public housing] provides these victims with a potential source of housing in their quest to escape a violent relationship.”); Hirst, *supra* note 270, at 134 (“When friends, relatives, and private housing do not offer viable options, federally subsidized housing may be the last resort for victims, short of homelessness.”); *cf.* 42 U.S.C.A. § 14043e(7) (“Victims of domestic violence often return to abusive partners because they cannot find long-term housing.”).

own choices and subject to jurisdiction in states where they knowingly force their victims to flee.²⁷⁵

VI. OBJECTIONS TO THE KNOWLEDGE TEST

Professor Miles makes several arguments against relying on the effects test in domestic violence cases which could also be raised against utilizing the Knowledge Test.²⁷⁶ First, Professor Miles points out that courts have been reluctant to embrace the effects test in interstate domestic violence cases in part because jurisdiction cannot be premised “solely on emotional injury in the forum based on a wrongful act in another state.”²⁷⁷ However, as discussed above, when a domestic violence victim is forced to flee to another state, she suffers far more than a mere emotional injury in the destination state. Instead, the effects are like those in *Calder*: comprehensive, ongoing, and targeted to the forum itself rather than just the victim.

Second, Professor Miles argues that some long arm statutes take a narrower view of the effects test than might be allowed by the Due Process Clause, which would limit the availability of the effects test—and presumably by extension, the Knowledge Test—to domestic violence victims fleeing to those states.²⁷⁸ This critique is a valid one but it highlights a problem with those states’ limited long arm statutes rather than with the Knowledge Test. Even if states are reluctant to expand their jurisdictional statutes with respect to the effects test in general, nothing would stop them from enacting statutes that specifically provide for jurisdiction over out of state domestic violence perpetrators as most states have done for other specific acts committed by non-residents.²⁷⁹

Third, Professor Miles argues that whether the victim’s flight to a particular state was foreseeable to the defendant may be “strongly contested” and “murky” in many cases.²⁸⁰ However, the issue of the defendant’s

²⁷⁵ Cf. Stoeber, *supra* note 167, at 1053-58 (describing the the “minimal length of protection afforded to domestic violence survivors [by domestic violence restraining orders], in comparison to business and property interests” being afforded permanent protection through injunctive relief).

²⁷⁶ See Miles, *supra* note 35, at 164-67.

²⁷⁷ *Id.* at 164-66 (citing *Caplan*, 879 N.E. at 121 n.5).

²⁷⁸ Miles, *supra* note 35, at 165-66.

²⁷⁹ See, e.g., Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496 (2004) (noting that “forty-three states . . . have long-arm statutes [that] enumerate[e] the acts that subject a nonresident to jurisdiction in the state.”).

²⁸⁰ Miles, *supra* note 35, at 166.

knowledge with respect to the forum would likely be easier for courts to determine in domestic violence cases than in stream of commerce cases where courts already routinely assess the defendant's knowledge of and intent to target the forum. In those cases, the defendant is usually a large corporation whose actions represent the sum of decisions made by dozens if not hundreds of different people, making concepts like "intent" and "knowledge" difficult to determine and highly contestable in individual cases.²⁸¹ Moreover, the evidence necessary to prove intent and knowledge—if it exists at all—is usually entirely under the control of the corporate defendant and must be unearthed via extensive (and expensive) jurisdictional discovery.²⁸² In a typical domestic violence case applying the Knowledge Test by contrast, the court only needs to look at the knowledge of one individual natural person—the defendant. Moreover, proof of the defendant's knowledge is likely to be found in the history of the parties' relationship (i.e., things the plaintiff told the defendant, places they visited together, etc.)—evidence of which is equally available to both parties. Thus, although assessing the knowledge of a party is a difficult enterprise in any case, there is every reason to believe it would be less difficult in the domestic violence context than in other contexts where parties' knowledge is already routinely assessed by courts.

Finally, Professor Miles argues that defendants are less likely to comply with protective orders if they perceive those orders as being entered in the "absence of procedural justice."²⁸³ It is almost certainly true that defendants are more likely to comply with orders they perceive as the result of a

²⁸¹ See Erik T. Moe, Case Comment, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive but Still Kicking Asahi Metal Industry Co. v. Superior Court*, 107 S. Ct. 1026 (1987), 76 GEO. L.J. 203, 208 (1987) (noting that "a corporation's intentions are difficult to measure" when determining purposeful availment); see also *Doug-Long, Inc. v. Comm'r of Internal Revenue*, 72 T.C. 158, 181 (1979) ("Corporate purpose or intent is a subjective question, difficult of proof."); *JJJ Corp. v. United States*, 576 F.2d 327, 338 (Ct. Cl. 1978) (noting "the inherent difficulty of proving a corporation's intent or state of mind"); cf. Ann Foerschler, Comment, *Corporate Criminal Intent: Toward A Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1296-97 (1990) ("The idea of 'intent,' a troublesome concept at best, is even more formidable when applied to corporate criminal prosecutions. . . . [C]ourts have had a [difficult] time deciding if there was a 'mind' in a corporation, and if so, who could possibly represent this mind in the context of forming criminal intent.").

²⁸² See RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 190 (1976) ("It is extraordinarily difficult to ascertain the intent of a large corporation by the methods of litigation. What juries (and many judges) do not understand is that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not the underlying reality.").

²⁸³ Miles, *supra* note 35, at 166-67.

procedurally just process.²⁸⁴ However, this argument cuts in *favor* of the Knowledge Test and against using the status exception for domestic violence cases. A defendant is more likely to perceive a court’s exercise of jurisdiction as fair when its assertion of power turns on an examination of the defendant’s own knowledge and conduct rather than an arcane legal doctrine that simply reclassifies the matter as a status determination that does not involve the defendant at all. And because the Knowledge Test is merely an extension of existing personal jurisdiction doctrine, the defendant would be getting similar treatment to defendants in other cases instead of being subject to a special “exception” to generally applicable due process protections. Therefore, applying the Knowledge Test rather than the status exception in domestic violence cases will increase the likelihood that defendants will perceive the jurisdictional aspect of the process as fair.

Another potential argument against the Knowledge Test that Professor Miles does not raise but others have is the “self-serving” problem that is inherent in the effects test. The purported problem is essentially that a plaintiff can subject a defendant to the more relaxed personal jurisdiction standard of the effects test by simply asserting that the defendant has committed an intentional tort even if he has not in fact done so.²⁸⁵

Whatever the merits of this objection to the effects test in general, it is a weak objection to the Knowledge Test because false allegations of domestic violence are extremely rare.²⁸⁶ Moreover, it is unlikely that a person would

²⁸⁴ See, e.g., Elizabeth Chamblee Burch, *Calibrating Participation: Reflections On Procedure Versus Procedural Justice*, DEPAUL L. REV. (forthcoming 2016) (manuscript at 1 & n.2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617355 (“[E]mpirical studies demonstrate that whether people are satisfied with process and perceive it as being procedurally fair significantly impact their opinion of whether courts are legitimate sources of power and authority, often even more so than whether they win or lose.”) (collecting sources).

²⁸⁵ See, e.g., Halaby, *supra* note 225, at 632 (arguing that the effects test “invite[s] personal jurisdiction determinations based on plaintiffs’ self-serving allegations of nefarious conduct by [the] defendant rather than through liability-neutral analyses.”); David Post, *The “Effects Test” rises up – temporarily, one hopes – from its sickbed*, VOLOKH CONSPIRACY (Apr. 14, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/14/the-effects-test-rises-up-temporarily-one-hopes-from-its-sickbed/> (“Simply allege an unauthorized use of your trademark – that it was not used by accident, but via an ‘intentional’ act – and presto! you can subject the defendant to the personal jurisdiction of your home court[.] . . . It can’t be that easy, and it shouldn’t be that easy.”).

²⁸⁶ See, e.g., Nicholas Bala, *Bringing Canada’s Divorce Act into the New Millennium: Enacting A Child-Focused Parenting Law*, 40 QUEEN’S L.J. 425, 450 & n.65 (2015) (“[S]tudies that have been undertaken clearly indicate that there are substantially more false denials and minimizations of spousal abuse by genuine abusers (generally men) than exaggerations or false allegations by victims (generally women).”) (collecting sources);

uproot her entire life to move to another state just to make a false accusation of domestic violence, when she could just as easily make the same false accusation without moving. Instead, someone who goes to all the trouble of moving to another state is far more likely to have a real fear for her safety.

Finally, it may be argued that the provision of the federal Violence Against Women Act requiring inter-state recognition of domestic violence judgments offers adequate protection to domestic violence victims fleeing to other states.²⁸⁷ However, as even the *Fox* court admitted, seeking a restraining order in the original state where the violence took place “may in some cases be logistically challenging, psychologically difficult, or even personally dangerous.”²⁸⁸ When a person is subject to domestic violence to such a severe degree that she is forced to leave her home and flee to another state, her personal safety will likely be her top priority, rather than ensuring that she files the paperwork to obtain a restraining order prior to leaving. Thus, while the inter-state judgment recognition provision of VAWA is a valuable tool in some circumstances,²⁸⁹ it is not a substitute for the assertion of personal jurisdiction where the defendant knows his violent acts may cause the plaintiff to flee to a particular state.

VII. CONCLUSION

A victim of domestic violence should not be barred access to legal protection simply because she was forced to seek physical protection by moving away from her abuser. However, attempting to fit domestic violence into the status exception is not a coherent or particularly effective way to help solve the problem of jurisdiction in inter-state flight domestic

Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's principles of the Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 663 n.93 (1999) (“[W]omen seldom make false allegations of either domestic violence or child physical or sexual abuse.”) (quotations and citations omitted); see also Peter G. Jaffe et. al., *Custody Disputes Involving Allegations of Domestic Violence: Toward A Differentiated Approach to Parenting Plans*, 46 Fam. Ct. Rev. 500, 508 (2008) (“[I]t is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators.”) (citation omitted).

²⁸⁷ See *Fox*, 106 A.3d at 927 (“A victim of domestic abuse can secure an abuse-prevention order that is enforceable in Vermont by petitioning in a state that does have personal jurisdiction over the alleged abuser.”) (citing 18 U.S.C. § 2265).

²⁸⁸ *Fox*, 106 A.3d at 927.

²⁸⁹ But see Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 840-48 (2004) (describing substantial difficulty that has been encountered in implementing this provision).

violence cases. Instead, courts should exercise jurisdiction over batterers who force their victims to flee to another state where the batterer knew or should have known that the victim was likely to flee. This approach logically follows from the principles embodied in the stream of commerce doctrine and the effects test and will hold batterers accountable for the consequences of their actions in a way that is consistent with due process of law.