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Interstate Pollution and the Quandary of Personal Jurisdiction

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INTERSTATE POLLUTION AND THE QUANDARY OF PERSONAL JURISDICTION

*Cedar H. Hobbs**

Current Supreme Court personal jurisdiction analysis does not clearly support a finding of personal jurisdiction for out of state polluters in an interstate toxic tort. Still, some courts, including the Ninth Circuit, have attempted to find personal jurisdiction in these cases, but in doing so have employed tenuous analysis that can result in inconsistent case law. This Note argues that there is a better analytical framework which reemphasizes the role played by territorial borders in personal jurisdictional analysis. Through employing this framework, courts can find personal jurisdiction in interstate toxic torts while also preserving analytically consistent case law.

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INTRODUCTION

At the outset, it is useful to consider a hypothetical. The Hobbs Industrial Company (“Hobbs”) operates a concrete production plant in Michigan. The plant is situated next to a river, which the company uses for a variety of purposes, including waste disposal. In violation of relevant environmental statutes, Hobbs knowingly dispenses of concrete discharge into the river, despite knowing that this discharge could result in downstream water contamination. Hobbs is also aware that the river runs into Ohio and provides water to several municipalities along its banks. Evidently, one of these municipalities, the City of Cedar (“Cedar”), starts to feel the effects of these discharges: the river, once teeming with fish, seems to yield fewer and fewer fish each year; the riverbanks are sullied with municipal signs warning of toxic discharge, and water treatment costs spike and increasingly contaminated drinking water leads to a spur of illness among Cedar’s residents. Frustrated by the loss of a once great resource, the City of Cedar decides to sue Hobbs in Ohio state court. Hobbs responds by filing a motion to dismiss for lack of personal jurisdiction.

Currently, Supreme Court jurisprudence does not appear to clearly support a finding of personal jurisdiction in the hypothetical outlined above. Still, some courts, including the Ninth Circuit, have found for personal jurisdiction in interstate toxic torts but have been forced to employ tenuous analysis in reaching that result.¹

Personal jurisdiction analysis has immense implications for this type of litigation. Generally speaking, if a defendant were to avoid personal jurisdiction in a state they do not reside in, they would avoid certain costs associated with out of state litigation, or even the litigation wholesale. As a matter of social policy, we generally want jurisdiction in the state where the individual or body (the City of Cedar, for instance) incurred the harm for a variety of reasons, including administrative concerns, efficiency, and fairness.² But, the law does always map onto these policy goals, as is the current case with personal jurisdiction and interstate toxic torts. This disconnect between social goals and the law is even more pronounced in cases involving interstate water pollution, which has existed since the early days of America and is still prevalent today.³

This Note contends that personal jurisdiction can be found in these types of cases through a framework that reemphasizes the role played by territorial borders in personal jurisdiction analysis. Ultimately, this framework allows for a finding of personal jurisdiction in interstate toxic torts while still producing analytically consistent case law. Section I of this Note provides a limited introduction to personal jurisdiction and outlines the legal context concerning two subsets of personal

1. See generally *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018).

2. Cf. *Pakootas*, 905 F.3d at 578.

3. See generally Jouni Paavola, *Interstate Water Pollution Problems and Elusive Federal Water Pollution Policy in the United States, 1900-1948*, 12 ENVIRONMENT AND HISTORY 435, 438 (2006); *Pakootas*, 905 F.3d 565; *Triad Hunter, LLC v. Eagle Natrium, LLC*, 132 N.E.3d 1272 (Ohio 2019); *Ex parte Aladdin Mfg. Corp.*, 305 So.3d 214 (Ala. 2019).

jurisdiction in Supreme Court case law—stream of commerce (or products liability) cases and intentional tort cases. Section II then addresses the current split in case law to illustrate inconsistencies in personal jurisdiction analysis. Finally, Section III provides a more effective framework for addressing interstate toxic torts and personal jurisdiction and will discuss what we can learn from this new framework.

I. LEGAL BACKGROUND

A. *A Primer on Personal Jurisdiction*

Personal jurisdiction is the ability of the state, through its courts, to adjudicate disputes over a particular person or property.⁴ Without jurisdiction, the presiding court cannot proceed, and if it does, the subsequent judgment will be invalid and thus carry no legal weight.⁵ The Supreme Court has determined that personal jurisdiction is an inherently constitutional question, in essence, because the Due Process Clause limits states' exercise of jurisdiction.⁶ Accordingly, Supreme Court case law is precedential.

B. *The Foundation of Personal Jurisdictional Analysis*

Historically, personal jurisdiction has been limited by territorial borders and “due process of law.”⁷ *Pennoyer v. Neff*, the bedrock case for personal jurisdiction, established the theoretical framework for what is now coined the “territorial power theory.”⁸ There, the Supreme Court outlined a foundational framework for personal jurisdiction:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can

4. WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS, & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS 20 (4th ed. 2013) [hereinafter Richman et al.].

5. *Id.* at 21.

6. *Id.* at 25.

7. *See Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

8. Richman et al., *supra* note 5, at 30.

exercise direct jurisdiction and authority over persons or property without its territory. . . . And so it is laid down by jurists, as an elementary principle, *that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.*⁹

Essential here is the court's determination that a state's jurisdiction over persons (i.e. personal jurisdiction) was limited to physical presence within the state's borders.¹⁰ Thus, an Ohio resident who had not set foot in Michigan could not be sued in Michigan. A court could only exercise jurisdiction over the defendant if the defendant resided within the forum state's borders, or if the defendant voluntarily chose to appear in the forum state.¹¹ *Pennoyer* thus stands for the proposition that personal jurisdiction can be exercised for in state defendants, or for the sake of concision, "insiders."¹²

This emphasis on physical presence within a territory led to a limited approach to jurisdiction, creating a myriad of issues for courts as advancements in modern technology led to more and more interstate litigation.¹³ This issue was particularly pronounced for out of state defendants, or "outsiders," forcing the courts to stretch the framework.¹⁴

It was against this backdrop that the Supreme Court established a new foundational test for personal jurisdiction in *International Shoe Co. v. Washington*.¹⁵ In this case, the State of Washington had an unemployment compensation scheme largely funded by employer contributions.¹⁶ The defendant, a Delaware corporation headquartered in Missouri, specialized in shoe sales.¹⁷ The business employed salesmen throughout the U.S., several of whom resided in Washington and solicited business there.¹⁸ Following the defendant's failure to contribute to the fund, the State of Washington sought to

9. *Pennoyer*, 95 U.S. at 722 (emphasis added).

10. Note though that this is fairly simplistic; jurisdiction could have been found had the defendant voluntarily appeared in the forum state's courts. *See id.* at 714, 720.

11. Richman et al., *supra* note 5, at 31.

12. *See Pennoyer*, 95 U.S. at 720.

13. Richman et al., *supra* note 5, at 32.

14. *Hess v. Pawlowski*, 274 U.S. 352, 356-57 (1927) ("[T]he state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served.").

15. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

16. *Id.* at 311.

17. *Id.* at 313.

18. *Id.*

compel the defendant to contribute to the fund through suit in Washington.¹⁹ The defendant, in response, argued that it was not amenable to suit in Washington as it was neither a Washington corporation nor did it conduct business with the state.²⁰ Historically, and prior to hearing this case, the Supreme Court had endorsed the fiction that a business was present where they did business.²¹ Recognizing that it was time to retire this fiction, in *International Shoe*, the Court held that for a non-resident, or outsider, to be subjected to personal jurisdiction, they must have had “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²² This holding became, and continues to be, the hallmark personal jurisdiction test.²³

The Supreme Court in *International Shoe* then proceeded to outline relevant factors for evaluating the “minimum contacts . . . fair play and substantial justice” test.²⁴ The Court noted that the test was not mechanical or quantitative; rather, it was important to look to the “quality and nature of the activity in relation to the fair and orderly administration of the laws.”²⁵ Accordingly, factors to be considered in the test included the “estimate of the inconveniences” in forcing the defendant to appear in a state other than their own and whether the defendant had exercised “the privilege of conducting activities within a state” such that “[they] enjoy[ed] the benefits and protections of the laws of that state.”²⁶

International Shoe remains the dominant jurisdictional paradigm and subsequent cases have sought to apply its holding to a variety of different fact patterns.²⁷ It is therefore an important foundation for interstate toxic torts as it deals explicitly with outsiders. Conversely, *Pennoyer v. Neff*, while foundational, does not support a finding of personal jurisdiction for outsiders on its own.

After *International Shoe*, there existed two distinct tests for outsiders and insiders. For outsiders, the *International Shoe* test of minimum contacts

19. *Id.* at 312.

20. *Id.* at 314 (The defendant argued that “mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state.”).

21. *See Hess v. Pawlowski*, 274 U.S. 352, 355-56 (1927).

22. *Int'l Shoe Co.*, 326 U.S. at 316.

23. *See Walden v. Fiore*, 571 U.S. 277, 283 (2013) (“[T]he nonresident generally must have ‘certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (quoting *Int'l Shoe Co.*, 326 U.S. at 316)).

24. *Int'l Shoe Co.*, 326 U.S. at 317.

25. *Id.* at 319.

26. *Id.*

27. For example, it has been applied in products liability cases. *See generally McIntyre Mach. v. Nicastro*, 564 U.S. 873 (2011). It has also been applied in intentional torts. *See generally Walden*, 571 U.S. 277 (2014).

applied. For insiders, *Pennoyer* territorialism applied. Although this dual paradigm was not clear for many years, it was later confirmed in *Burnham*.²⁸ There, Justice Scalia, writing for a plurality, held that physical presence in a state was sufficient for a finding of jurisdiction.²⁹ The Court characterized physical presence as “the touchstone of jurisdiction” and further stated that “the short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system.”³⁰ The Court further held that the minimum contacts standard was “developed by analogy to ‘physical presence.’”³¹

As our hypothetical concerns out of state defendants (Michigan defendants sued in Ohio for the effects of their actions taken in Michigan), we look to “outsider” case law. There are two general subsets of “outsider” Supreme Court case law that are relevant to interstate toxic tort litigation. The first is the “stream of commerce” cases, where the Court has grappled with products liability across state lines. The second is the “intentional tort” cases, where the Court has addressed intentional torts arising across state lines. The following sections will discuss these subsets in succession.

C. “Stream of Commerce” Analysis

Stream of commerce cases generally address the interplay between personal jurisdiction and a growing national market. For our purposes, this Note will discuss three relevant cases to illustrate the analysis. As a note, the analysis below will be confined to the “minimum contacts” prong of *International Shoe*, as the fairness prong will be discussed at length in Section IV.

1. *World-Wide Volkswagen Corporation v. Woodson*

In *World-Wide Volkswagen Corporation v. Woodson*, a family residing in New York bought a car from an auto dealer in New York.³² The following year, the family left New York to move to Arizona.³³ While driving to Arizona, they were rear ended by another car in Oklahoma, resulting in a fire that harmed the couple and their children.³⁴ The family subsequently sued a myriad of defendants in the chain of distribution, including the distributor and the retail dealer in Oklahoma state court,

28. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990).

29. *Id.* at 619.

30. *Id.*

31. *Id.*

32. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 286 (1980).

33. *Id.* at 288

34. *Id.*

alleging defects with the car.³⁵ The relevant issue was whether the Oklahoma state court could exercise personal jurisdiction over the distributor and retailer when their only connection to Oklahoma was the car sold in New York to the plaintiffs.³⁶ In a 6-3 decision, the Court held that personal jurisdiction was not warranted.³⁷ Specifically, it concluded that defendants had “no activity whatsoever in Oklahoma” and jurisdiction could not be based “on one, isolated occurrence . . . [where] a single automobile, sold in New York . . . , happened to suffer an accident while passing through Oklahoma.”³⁸ *World-Wide Volkswagen* built on the holding in *Hanson v. Denckla*, which held that the exercise of jurisdiction over an out of state defendant required that the defendant “purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”³⁹ Because the New York distributor and retailer in *World-Wide Volkswagen* had not conducted any activities within Oklahoma, personal jurisdiction was lacking there.⁴⁰ Thus, territorial borders matter for stream of commerce cases. To be forced to appear in another state, it is not enough that a defendant sold a product that foreseeably could end up in a different state, even if that product is inherently mobile.⁴¹

Under *World-Wide Volkswagen*'s analysis, the outcome under our hypothetical is unclear. *World-Wide Volkswagen*'s holding applies when a third party moves the object in question, such as a car. In our hypothetical, an actual stream, not a third-party, moves the pollutant. Thus, the holding in *World-Wide Volkswagen* does not easily map onto our hypothetical.

2. *Asahi Metal Industry Co. v. Superior Court of California*

The second of the stream of commerce cases was *Asahi Metal Industry Co. v. Superior Court of California*, which was decided in 1986.⁴² The plaintiff had a motorcycle accident in California.⁴³ He alleged that the accident was a result of a defect in the motorcycle's tire tube and subsequently sued various defendants in the

35. *Id.*

36. *Id.* at 289.

37. *Id.* at 295.

38. *Id.*

39. *Hanson v. Denckla*, 375 U.S. 235, 253. (1958).

40. *World-Wide*, 444 U.S. at 295.

41. *Id.* (Foreseeability of a product ending up in a different state “alone has never been a sufficient benchmark for personal jurisdiction,” though it could still be a relevant factor in considering personal jurisdiction.).

42. *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102 (1986).

43. *Asahi*, 480 U.S. at 102.

tire's chain of distribution.⁴⁴ The plaintiff eventually settled with all of them.⁴⁵ But, one of the defendants, Cheng Shin, a Taiwanese manufacturer of tire tubes, sued Asahi, a Japanese company that manufactured and sold valve stems to Cheng Shin.⁴⁶ Cheng Shin sued Asahi in California for indemnification and contribution.⁴⁷ The question presented was whether California courts had jurisdiction over Asahi in this secondary action.⁴⁸ In a unanimous decision, the Court found that personal jurisdiction was lacking, but split 4:4 with regard to the reasoning.⁴⁹ Although the Court unanimously agreed that the valve stem had reached California through the stream of commerce, it was split as to whether the stream of commerce alone was sufficient for a finding of personal jurisdiction.⁵⁰ Writing for the Court, Justice O'Connor concluded that the stream of commerce hook was insufficient in and of itself.⁵¹ Instead, the defendant had to have purposefully availed itself of California; or simply put, created some additional connection with California (such as advertising, marketing, etc.) to exercise personal jurisdiction.⁵² This requirement of an additional connection can be colloquially construed as "stream of commerce plus." The Court held that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."⁵³ It further clarified that "awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an action purposefully directed toward the forum State."⁵⁴ The Court concluded that personal jurisdiction was wanting, as the defendant did "not do business in California . . . or otherwise solicit business in California" and, because mere awareness is not sufficient for personal jurisdiction, there was no evidence that the defendant had directed any actions towards the State.⁵⁵

Justice O'Connor's stream of commerce plus framework does not provide for personal jurisdiction in interstate toxic torts. While the river (or stream) carried

44. *Id.*

45. *Id.* at 106.

46. *Id.*

47. *Id.*

48. *Id.* at 105.

49. *See id.*

50. *Id.* at 104.

51. *Id.* at 112.

52. *Id.* ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct . . . may indicate an intent to purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State . . . or marketing the product through a distributor.").

53. *Id.*

54. *Id.*

55. *Id.*

the pollutants into the forum state, the defendant did not do anything additional to create a connection with Ohio and thus could not be said to have purposefully availed itself of the privileges of conducting activities in Ohio.

3. *McIntyre Machinery v. Nicastro*

The third and final of the relevant stream of commerce cases was *J. McIntyre Machinery, Ltd. v. Nicastro*, a 2011 case which further clarified the stream of commerce plus test.⁵⁶ The plaintiff, a man from New Jersey, was injured in New Jersey while using a metal-shearing machine manufactured in England.⁵⁷ The plaintiff subsequently sued the English manufacturer of the metal-shearing machine, J. McIntyre, in New Jersey state court.⁵⁸ J. McIntyre had little if any connections to New Jersey.⁵⁹ It had not marketed goods in New Jersey nor shipped them there; in fact J. McIntyre did not sell any machines to the United States save for sales to one distributor, who had sold one of the machines in New Jersey.⁶⁰ The question presented was whether the New Jersey courts had jurisdiction over J. McIntyre.⁶¹

In a plurality opinion written by Justice Kennedy, the Court found personal jurisdiction was lacking.⁶² The defendant had not “engaged in conduct purposefully directed at New Jersey,” as the defendant did “not have a single contact with New Jersey short of the machine in question ending up in this state.”⁶³ Thus, even though the product had arrived via the stream of commerce, J. McIntyre had not “purposefully availed” itself of New Jersey.⁶⁴ In essence, the opinion in *McIntyre v. Nicastro* served to confirm the stream of commerce plus analysis proffered by the plurality in *Asahi*.⁶⁵

Taking these cases together, the product, or pollutant, cannot be the only tie between the defendant and the forum state for a finding of personal jurisdiction. It is not enough to send a product or pollutant into the stream of commerce; the defendant must purposefully avail itself of the forum state, whether it be through marketing or designing a product specifically for that state. In interstate toxic torts, purposeful availment will generally be lacking and thus stream of commerce analysis will not support a finding of personal jurisdiction.

56. *McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011).

57. *Id.* at 894.

58. *Id.*

59. *Id.* at 895-98.

60. *Id.*

61. *Id.*

62. *Id.* at 876-77.

63. *Id.* at 886.

64. *Id.*

65. *Id.* at 886-87.

D. The “Intentional Tort” Cases

An additional subset of Supreme Court jurisprudence applicable to interstate toxic torts can generally be deemed the “intentional tort” cases. These cases address interstate intentional torts. They do not rely on stream of commerce connections, but instead apply when the defendant does something to the forum state or someone in the forum state.

1. *Keeton v. Hustler Magazine*

The first of these cases is *Keeton v. Hustler Magazine*.⁶⁶ Hustler Magazine, an Ohio corporation headquartered in California, sold its magazines throughout the United States.⁶⁷ Five issues included allegedly libelous articles about Kathy Keeton, a New York resident.⁶⁸ Keeton then sued Hustler Magazine in federal court in New Hampshire for libel.⁶⁹ Hustler Magazine’s connections with New Hampshire consisted of the monthly sale of “some 10 to 15,000 copies.”⁷⁰ Given these facts, the Court unanimously found for personal jurisdiction, reasoning that “Hustler Magazine [had] continuously and deliberately exploited the New Hampshire market [and thus] must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.”⁷¹ Hustler Magazine’s “regular monthly sales of thousands of magazines [could not] . . . be characterized as random, isolated, or fortuitous” and thus a finding of minimum contacts was warranted.⁷² Implicit in this language was a recognition of the Court’s willingness to be less stringent in its personal jurisdiction analysis with intentional torts as compared with negligent actions. For instance, the Court recognized that the bulk of the harm had occurred outside of New Hampshire, “but that [would] be true in almost every libel action.”⁷³ *Keeton* thus suggests that if a defendant creates a connection with a forum State and commits an intentional tort within that state, they will likely be subject to personal jurisdiction there.⁷⁴

66. *Keeton v. Hustler Mag.*, 465 U.S. 770 (1984).

67. *Id.* at 772.

68. *Id.*

69. *Id.*

70. *Id.* Note that the New Hampshire market only accounted for a small portion of Hustler Magazine’s sales. *See id.* at 780 (“It is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire”).

71. *Id.* at 781.

72. *Id.* at 774.

73. *Id.* at 780.

74. *Id.*

Keeton also held that the location of the plaintiff was somewhat irrelevant to the personal jurisdiction analysis.⁷⁵ The Court determined that personal jurisdiction existed in New Hampshire notwithstanding the fact that Keeton did not reside in New Hampshire.⁷⁶ This analysis represents the fact that the Court is generally more concerned with the defendant's connections to the forum state rather than its connections with the plaintiff.⁷⁷ For instance, even though the plaintiff did not live in New Hampshire, she still experienced an injury there created by the defendant, as New Hampshire residents read the alleged libel.⁷⁸ The crux of the analysis is therefore where the effect of the tort was, not the location of the plaintiff.

The *Keeton* test does not provide a conclusive answer to interstate toxic tort personal jurisdiction. It seems unlikely that the business connection envisioned by *Keeton* could be equated to intentional pollution that happens to pollute an adjacent state and thus personal jurisdiction may be wanting.

2. *Calder v. Jones*

Released alongside *Keeton*, *Calder v. Jones* sought to further clarify intentional tort analysis.⁷⁹ The plaintiff, Shirley Jones, lived and worked in California.⁸⁰ The relevant defendants were reporters for the National Enquirer, a Florida corporation headquartered in Florida.⁸¹ The National Enquirer published a national weekly newspaper with a circulation of over 5 million issues; 600,000 of those were sold in California.⁸² The reporters were Florida residents with minimal contacts to California, though their story relied on sources in California.⁸³ In a 1979 issue, the National Enquirer allegedly libeled Shirley Jones.⁸⁴ She sued, among others, the reporters of the particular article in California state court.⁸⁵ The question presented to the Supreme Court was whether the reporters were subject to personal jurisdiction in California for their actions in Florida.⁸⁶ In a unanimous decision written by Justice Rehnquist, the Court held that the reporters had sufficient minimum contacts with California so as to give California jurisdiction.⁸⁷ Specifically,

75. *Id.* at 779-80.

76. *Id.* at 774-75.

77. *See id.* at 775.

78. *Id.* at 775-76.

79. *Calder v. Jones*, 465 U.S. 783 (1984).

80. *Id.* at 785.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 787-88.

87. *Id.* at 791.

jurisdiction was warranted over the reporters “based on the ‘effects’ of their Florida conduct in California.”⁸⁸ Furthermore, the writers’ contacts with California were ample: “the article was drawn from California sources, and the brunt of the harm, in terms both of [plaintiff’s] emotional distress and the injury to her professional reputation, was suffered in California.”⁸⁹ Effectively, “California [was] the focal point both of the story and of the harm suffered.”⁹⁰ Critical to this conclusion was the fact that this was not “mere untargeted negligence.”⁹¹ Instead, the Court noted that the reporters’ intentional and tortious actions “were expressly aimed at California” as they both knew that the article “would have a potentially devastating impact” on the plaintiff.⁹² Note that the meaning of “intentional” in this context is not necessarily that the defendants intended to injure the plaintiff; instead, “intention” should be interpreted as an intentional action that defendants were aware may lead to certain effects in another state.⁹³ In short, the *action* must be intentional, not the *outcome*.

Calder stands for the proposition that with respect to intentional torts, knowingly causing an injury to a resident in another state may be sufficient for a finding of personal jurisdiction.⁹⁴ Even if a defendant never sets foot in, say, California, they may nevertheless be subject to suit in California solely based on the effects of their actions in another state. *Calder* therefore appears to support a finding of personal jurisdiction in an interstate toxic tort. Applied to our hypothetical, if Hobbs intentionally discharges pollutants into a river in Michigan and is aware of the potential for adverse effects in the City of Cedar, Hobbs will likely be subject to suit in Ohio based on *Calder*’s framework.

3. *Walden v. Fiore*

The third relevant intentional tort case is *Walden v. Fiore*. Released in 2014, *Walden* significantly limited the *Calder* framework.⁹⁵ The defendant, a police officer and deputized agent of the DEA, was working at the Atlanta Hartsfield-Jackson Airport.⁹⁶ His work consisted of routine stops and other functions to support the

88. *Id.* at 783.

89. *Id.* at 788-89.

90. *Id.* at 789.

91. *Id.*

92. *Id.*

93. *Id.* (“[T]heir intentional, and allegedly tortious, actions were expressly aimed at California. [They] wrote and . . . edited an article that they knew would have a potentially devastating impact upon respondent.”).

94. *Id.* at 790 (“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.”).

95. *Walden v. Fiore*, 571 U.S. 277 (2014).

96. *Id.* at 279.

DEA's "airport drug interdiction program."⁹⁷ Plaintiffs, residents of both California and Nevada, were a couple flying to Nevada from Puerto Rico with a layover in Atlanta.⁹⁸ Upon arriving at the airport in Puerto Rico, they were stopped by DEA agents.⁹⁹ During the stop, agents discovered nearly \$100,000 in cash in their luggage.¹⁰⁰ Plaintiffs then boarded their plane to Atlanta while DEA agents notified personnel in Atlanta about the cash.¹⁰¹ Upon arriving at the Atlanta airport, plaintiffs were again stopped and their cash was seized by the defendant.¹⁰² Although the funds were eventually returned, the defendant had falsified reports to justify the seizure of funds.¹⁰³ The plaintiffs subsequently sued the defendant in Nevada court seeking monetary damages for the alleged unlawful seizure.¹⁰⁴

In a unanimous decision, the Court held that Nevada did not have personal jurisdiction over the defendant.¹⁰⁵ Writing for the Court, Justice Thomas opened with two broad maxims. First, the analysis must look to the "relationship among the defendant, the forum, and the litigation."¹⁰⁶ Second, the defendant's conduct "must create a substantial connection with the forum State."¹⁰⁷ In light of these maxims, the Court concluded that the defendant did not have the necessary relationship with Nevada for an exercise of personal jurisdiction.¹⁰⁸ His only relevant contact with Nevada was his interaction with the plaintiffs, who happened to be from Nevada.¹⁰⁹ But, minimum contacts analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."¹¹⁰ "The plaintiff cannot be the only link between the defendant and the forum;" therefore the officer lacked the necessary links with Nevada.¹¹¹

In essence, *Walden* served to clarify the intentional tort framework. Prior to *Walden*, a court could exercise jurisdiction over a defendant who had intentional and tortious actions if it was foreseeable that those actions would cause a particular effect in another state.¹¹² After *Walden*, the effects caused by an intentional action

97. *Id.*

98. *Id.* at 280.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 281.

104. *Id.*

105. *Id.* at 282.

106. *Id.* at 284

107. *Id.*

108. *Id.* at 288.

109. *Id.*

110. *Id.* at 285.

111. *Id.*

112. See generally *Calder*, 465 U.S. 783.

had to connect “the defendant’s conduct to [a particular State], not just to a plaintiff who lived there” for a finding of personal jurisdiction.¹¹³ Thus, *Walden* distinguished *Calder* by clarifying that a connection to the plaintiff alone was not a sufficient basis to exercise personal jurisdiction. In *Calder*, the defendant created the necessary contacts with California because the intentional tort occurred in California, as “publication to third persons is a necessary element of libel.”¹¹⁴ The effect of the tort connected the defendants in *Calder* to California, not the fact that the plaintiff resided there. In contrast, in *Walden*, the defendant’s only connection with Nevada was the fact that he had harmed persons who happened to be from Nevada, but a connection stemming from the defendant’s relationship with the plaintiff was not sufficient for a finding of personal jurisdiction.¹¹⁵

Walden narrowed intentional tort personal jurisdiction, thus making it more difficult to justify a finding of personal jurisdiction in our interstate toxic tort problem. The courts have struggled with the analysis as applied to interstate toxic torts, resulting in opinions employing differing types of analysis.¹¹⁶

II. INCONSISTENT ANALYSIS ILLUSTRATED

Lower courts have struggled to apply the above framework to contemporary toxic tort cases. The following cases illustrate why the current personal jurisdiction analysis can lead to inconsistent results, particularly in the context of toxic torts. First, this section will outline relevant cases that have found for personal jurisdiction in interstate toxic torts post *Walden*. Second, this section will outline relevant cases that have used similar analysis in factually analogous cases to find a lack of personal jurisdiction. Third, this section will compare the analysis as applied to our running hypothetical.

A. Cases That Support a Finding of Personal Jurisdiction

1. *Pakootas v. Teck Cominco Metals, Ltd.*

In *Pakootas v. Teck Cominco Metals, Ltd.*, the Ninth Circuit addressed interstate toxic torts and personal jurisdiction post *Walden*.¹¹⁷ Teck Cominco Metals, Ltd. (“Teck”), a Canadian corporation, operated a lead-zinc smelter in British Columbia.¹¹⁸ The smelter generated hazardous materials, which Teck disposed of into

113. *Walden*, 571 U.S. at 289.

114. *Id.* (“Indeed, because publication to third persons is a necessary element of libel. . . .” (citing RESTATEMENT (SECOND) OF TORTS § 558 (1976))).

115. *Id.* at 288-89.

116. *See, e.g.*, *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018); *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016).

117. *Pakootas*, 905 F.3d 565.

118. *Id.* at 572.

the Columbia River.¹¹⁹ The discharge was carried downstream into the United States, leading to significant pollution in the Upper Columbia River.¹²⁰ After some years, the EPA initiated discussions with Teck and subsequently issued an order directing Teck to start surveying the Upper Columbia River for cleanup projects.¹²¹ Teck failed to comply, prompting Joseph Pakootas to file a citizen suit in Washington federal court seeking to compel Teck's compliance with the EPA Order.¹²² Notwithstanding the litigation's procedural complexity, a key issue throughout the litigation was the basis for personal jurisdiction over Teck, given its status as a Canadian corporation with no presence in the U.S.¹²³ The district court determined that personal jurisdiction was warranted, which Teck ultimately appealed to the Ninth Circuit.¹²⁴

The Ninth Circuit affirmed the finding of personal jurisdiction.¹²⁵ In its decision, the court employed a *Calder* type analysis, stating that with respect to intentional torts, there were three requirements for personal jurisdiction: (1) "an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."¹²⁶ The court concluded that Teck had committed an intentional act as it had "expressly aimed its waste at the State of Washington."¹²⁷ The court reasoned that Teck had "expressly aimed its waste" because Teck knew that the Columbia River carried the waste into Washington but still continued to discharge its waste into the river.¹²⁸ Thus, Teck must have known "that its waste was aimed at the State of Washington."¹²⁹ Teck argued that it had aimed its waste only at the Columbia River, but the court dismissed this line of reasoning because the Columbia was aimed at Washington and "rivers are nature's conveyor belts."¹³⁰ Thus, even though Teck had not targeted Washington in the traditional sense, through its continued targeting of the Columbia and its knowledge that the Columbia was "aimed" at Washington, the court considered those actions to be "expressly aimed at the forum State."¹³¹

119. *Id.*

120. *Id.*

121. *Id.* at 573.

122. *Id.*

123. *Id.* (Teck argued that personal jurisdiction was not warranted because its "smelter's discharges into the Columbia River were not expressly aimed at Washington.>").

124. *Id.* at 574.

125. *Id.* at 578.

126. *Id.* at 577.

127. *Id.* at 577-578.

128. *Id.*

129. *Id.* at 578.

130. *Id.*

131. *Id.*

2. *Triad Hunter, LLC v. Eagle Natrium, LLC*

In a different case, the Seventh District Court of Appeals of Ohio ruled on interstate toxic torts and personal jurisdiction in *Triad Hunter v. Eagle Natrium*.¹³² Triad Hunter (“Triad”), a Delaware corporation with an office in Ohio, was engaged in the exploration of oil and gas in Ohio.¹³³ In 2014, Triad Hunter purchased mineral rights along a certain portion of the Ohio River.¹³⁴ At this time, Triad had drilled three wells but did not discover damage in one of them until years later.¹³⁵ Upon this discovery, Triad subsequently drilled a new well but discovered salt water, toxic gas, and pressure in the underground formation.¹³⁶ These abnormalities were allegedly a result of mining activities on the other side of the river (in West Virginia) by a manufacturing plant owned by Eagle Natrium (“Eagle”), a Delaware company headquartered in Texas.¹³⁷ Triad sued Eagle in Ohio state court, alleging that Eagle had improperly mined under their site.¹³⁸ Eagle responded by challenging Ohio’s jurisdiction.¹³⁹ The Ohio trial court found a lack of personal jurisdiction, concluding that Eagle, the defendant, did not have “purposeful minimum contacts within the State of Ohio.”¹⁴⁰ Triad then appealed the decision to the Ohio Court of Appeals.¹⁴¹

Upon appeal, the question presented was whether the defendant’s “subsurface injection of fluids originating in West Virginia that trespass[ed] upon and cause[d] injury to property Ohio” subjected them to personal jurisdiction in Ohio.¹⁴² Under Ohio law, an exercise of personal jurisdiction is warranted if: “(1) the defendant purposefully availed [themselves] of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action arose from the defendant’s activities in the forum state; and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum state to make the exercise of jurisdiction . . . reasonable.”¹⁴³ The court concluded that these elements were met and thus a finding of personal jurisdiction was sufficient.¹⁴⁴ First, citing *Pakootas*, the court concluded that the purposeful availment prong was satisfied as “continuing to release a substance while knowing it

132. *Triad Hunter v. Eagle Natrium*, 132 N.E.3d 1272 (Ohio Ct. App., 2019).

133. *Id.* at 1276.

134. *Id.*

135. *Id.*

136. *Id.* at 1277.

137. *Id.*

138. *Id.*

139. *Id.* at 1278.

140. *Id.* at 1280.

141. *Id.*

142. *Id.*

143. *Id.* at 1282.

144. *Id.* at 1285.

travels to a jurisdiction is considered purposeful direction of efforts toward that jurisdiction.”¹⁴⁵ Prongs two and three were met as well; the cause of action arose from the mining and the defendant’s acts had a substantial enough connection to make personal jurisdiction reasonable.¹⁴⁶

3. *Ex parte Aladdin Manufacturing Corporation et al.*

The Alabama Supreme Court similarly addressed toxic torts and personal jurisdiction in *Aladdin Manufacturing et al* in 2020.¹⁴⁷ In rather complicated litigation, Alabama municipal water boards sought to sue several defendants who were carpet and chemical manufacturers in Georgia.¹⁴⁸ The municipal water boards alleged that the Georgia manufacturer’s actions led to contamination of the municipalities’ water-intake sites.¹⁴⁹ Unlike *Pakootas* and *Triad Hunter*, here, the defendants did not directly release the contaminants.¹⁵⁰ Instead, defendants discharged the toxic chemicals into industrial wastewater, which was then treated at a wastewater-treatment plant in Georgia, where it was then sprayed over a 9,800 acre area.¹⁵¹ Runoff from that area then entered a tributary of a river that transported the discharge into Alabama, contaminating the water at the two municipalities.¹⁵² It was unclear from the record if the defendants were aware of this chain of events, but as this was an interlocutory appeal the court assumed that the “defendants knew or should have known from publicly available reports of the EPA and from published studies that the PFC-containing chemicals . . . were polluting the . . . River, which flow[ed] . . . into Alabama.”¹⁵³ Defendants challenged the finding of personal jurisdiction in Alabama, appealing the case to the Alabama Supreme Court.¹⁵⁴

The question presented was whether out-of-state defendants allegedly causing environmental pollution in Alabama could be subjected to personal jurisdiction in Alabama.¹⁵⁵ The Alabama Supreme Court upheld the finding of personal jurisdiction in Alabama.¹⁵⁶ The defendants argued that personal jurisdiction was not warranted because none of their conduct had occurred in Alabama and their use of a third-party for waste water treatment in Georgia meant that they had not

145. *Id.*

146. *Id.*

147. *Ex parte Aladdin Mfg. Corp.*, 305 So.3d 214 (Ala. 2019).

148. *Id.* at 221-224.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 232.

154. *Id.*

155. *Id.* at 221.

156. *Id.* at 239.

undertaken any conduct aimed at Alabama.¹⁵⁷ The court dismissed this argument, concluding that through “knowingly discharging . . . chemicals in their industrial wastewater, knowing they were ineffectively treated . . . and knowing that the [chemicals] would end up in the Coosa River, which flows into Alabama, the . . . defendants . . . purposefully directed their actions at Alabama.”¹⁵⁸ Thus, the defendants had sufficient contacts with Alabama to support a finding of personal jurisdiction in Alabama.¹⁵⁹

4. Considering the Cases Together

Pakootas, *Teck*, and *Aladdin* all stand for the proposition that with intentional torts, knowingly discharging a pollutant into, say, a river, with the knowledge that those would end up in a particular state, constitutes *targeting* a particular state, thus warranting a finding of personal jurisdiction.

The resulting analysis equates foreseeability to express targeting. Considering our hypothetical, the analysis under this framework is fairly straightforward. As Hobbs discharged pollutants into a river that it knew would end up in Ohio, it thus targeted Ohio and a personal jurisdiction finding was warranted. But this analysis can lead to inconsistencies. The case below will illustrate why this sort of analysis does not always guarantee a finding of personal jurisdiction in analogous fact patterns.

B. *A Case that does not Support a Finding of Personal Jurisdiction*

Despite analogous fact patterns, the case below employs a different analysis, producing a different outcome. While this is not a toxic tort case, it presents similar factual patterns that in theory should warrant the same analysis.

1. *TV Azteca v. Ruiz*

In *TV Azteca v. Ruiz*, the Supreme Court of Texas was presented with a defamation case.¹⁶⁰ The plaintiff, Trevino, was a famous Mexican recording artist.¹⁶¹ In a major scandal in the 1990s, she was charged with sexual assault and kidnapping in Brazil, but was ultimately acquitted.¹⁶² Following her acquittal, she moved to Texas.¹⁶³ In the late 2000s, on the ten-year anniversary of the scandal, various

157. *Id.* at 232.

158. *Id.* at 238.

159. *Id.*

160. *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016).

161. *Id.* at 35.

162. *Id.*

163. *Id.*

Mexican television broadcasting companies ran stories rehashing the scandal.¹⁶⁴ Trevino proceeded to sue two of the broadcasting companies, TV Azteca and Publimax, and a news anchor, a Mexican citizen, in Texas state court, alleging defamation.¹⁶⁵ The defendants challenged the jurisdiction of the Texas court.¹⁶⁶ The dispute was appealed to the Texas Supreme Court.¹⁶⁷

The question presented was whether “a television broadcast that originates outside Texas but travels into the state can support personal jurisdiction over the broadcaster in Texas.”¹⁶⁸ Though the court ultimately found that personal jurisdiction was warranted, the court held that mere knowledge of effects in another state could not alone support a finding of personal jurisdiction.¹⁶⁹ For instance, the court concluded that the fact that the defendants knew “that the brunt of the injury [would] be felt by a particular resident in the forum state” was insufficient to support a finding of personal jurisdiction.¹⁷⁰ Crucial to this analysis was the distinction between “directing a tort at an individual who happens to live in a particular state and directing a tort at the state.”¹⁷¹ Thus, “the mere fact that [defendants] directed defamatory statements at a plaintiff who live[d] in and allegedly suffered injuries in Texas, without more, d[id] not establish” personal jurisdiction.¹⁷²

Under this framework, personal jurisdiction would likely not be warranted in our hypothetical. Hobbs’ knowledge that the pollutants would end up in the City of Cedar and potentially have adverse effects would not be sufficient for targeting and thus personal jurisdiction would be lacking.

C. *A Summary: How Toxic Torts Can Create Inconsistent Outcomes*

Under the Ninth Circuit, Ohio case law, and Alabama case law, jurisdiction would be proper in our hypothetical (Hobbs knowingly discharging pollutants into a river that carried them into Ohio).¹⁷³ Specifically, the Ninth Circuit’s holding in *Pakootas* would warrant a finding of personal jurisdiction, as Hobbs was aware that their discharge was being carried into Cedar, Ohio and thus had aimed at Ohio

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 36.

168. *Id.*

169. *Id.* at 43, 47 (Jurisdiction was based on the defendants’ targeting of Texas through their broadcasting. The court concluded that personal jurisdiction was warranted because defendants had “continuously and deliberately exploited’ the Texas market.”).

170. *Id.* at 40.

171. *Id.* at 43.

172. *Id.*

173. See generally *Pakootas*, 905 F.3d 565; *Triad Hunter*, 132 N.E.3d 1272; See *Aladdin Manufacturing*, 305 So.3d 214.

through “nature’s conveyor belts.”¹⁷⁴ The Ohio Court of Appeals would hold similarly, as “continuing to release a substance while knowing it travels to a jurisdiction is considered purposeful direction of efforts toward that jurisdiction.”¹⁷⁵ Jurisdiction would be proper in Alabama as well, even if there was an intervening third party between Hobbs and the city of Cedar.¹⁷⁶ The Alabama Supreme Court would hold that jurisdiction is proper because by continuing to send discharge despite knowing where it would end up, Hobbs had “knowingly and directly aimed tortious actions” at Cedar.¹⁷⁷

However, under the framework articulated by the Texas Supreme Court, personal jurisdiction would likely be wanting.¹⁷⁸ Even though Hobbs was aware of the effect on the city of Cedar, foreseeability would not be enough to create purposeful availment.

Our hypothetical therefore reflects the inadequacies of the current case law on interstate toxic torts. Understandably, courts are sympathetic to plaintiffs wanting to sue out of state polluters in their home states, but by equating foreseeability to targeting they have laid the groundwork for inconsistent judicial opinions. Courts can exercise jurisdiction on out of state polluters, but they need to acknowledge that toxic torts do not easily map onto the *Calder* effects test.

III. A BETTER FITTING FRAMEWORK

Indeed, it is understandable that the courts have felt obligated to find personal jurisdiction for out of state polluters. Otherwise, polluters could escape suit simply by hiding behind territorial borders. However, the problem is that these courts have attempted to fit interstate toxic torts into analytical frameworks that are simply not conducive to fair (if you take for granted that assumption that out of state polluters should not be able to escape suit in bordering states) and consistent resolutions. Instead, courts should apply a different analytical test that emphasizes the fact that interstate toxic torts inherently affect the state, thus creating the necessary contacts, rather than focusing on the intent of the defendant. This approach will provide for a cleaner minimum contacts analysis while ensuring consistent case law. The following section will outline the proposed analysis by applying it to the traditional *International Shoe* test of minimum contacts and traditional notions of fair play and substantive justice.

174. *Pakootas*, 905 F.3d at 579.

175. *Triad Hunter*, 132 N.E.3d at 1285.

176. *Cf. Aladdin Mfg.*, 305 So.3d at 239-40.

177. *Id.* at 239.

178. *See TV Azteca*, 490 S.W.3d at 34-35.

A. *Focusing on the State is a Better Way to Analyze the Minimum Contacts Requirement*

Under *International Shoe* and subsequent case law, the overarching test for personal jurisdiction is that the defendant must have “certain minimum contacts with . . . [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁷⁹ The first step of this test is “minimum contacts.” Through recognizing that toxic torts occur to a territory rather than a specific person, courts can satisfy the minimum contacts analysis in interstate toxic torts without having to stretch the meaning of “targeting.”

Interstate toxic torts are inherently territorial matters. That is, the harm does not occur to *persons who happen to be in a state*; it occurs to a *state where persons happen to be*. The Ninth Circuit, Alabama Supreme Court, and Ohio Supreme Court found minimum contacts because the defendants in those cases had been aware that their pollutants were reaching the forum state, thus they had “targeted” the forum state. However, this analysis fails to acknowledge the pivotal role that territorial borders hold in personal jurisdictional analysis.¹⁸⁰

Various Supreme Court opinions have recognized state borders as an essential part of personal jurisdiction analysis. *Pennoyer*, the basis for personal jurisdiction jurisprudence, stands for the proposition that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”¹⁸¹ Similarly, *Walden*, in limiting the “effects” analysis of *Calder*, also relied heavily on the importance of state borders, reemphasizing the need for a connection between the defendant’s conduct and the forum State.¹⁸²

In *Calder*, the Supreme Court grounded its finding of personal jurisdiction “based on the ‘effects’ of their Florida conduct in California.”¹⁸³ In *Walden*, the Supreme Court limited the so-called *Calder* effects test.¹⁸⁴ Specifically, the Court articulated two prongs to consider when evaluating a defendant’s relationship: (1) the relationship had to arise out of contacts that the “defendant himself” created and (2) the analysis should look to “contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”¹⁸⁵ Furthermore, due process required that personal jurisdiction be based on the defendant’s “affiliation with the State [and not

179. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

180. Instead, these decisions have predicated jurisdiction on continued awareness. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 579 (9th Cir. 2018) (“It is inconceivable that Teck did not know that its waste was aimed at the State of Washington when Teck deposited it into the powerful Columbia River.”).

181. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

182. *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014).

183. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

184. *Walden*, 571 U.S. at 286-87.

185. *Id.* at 285.

on] the ‘random, fortuitous, or attenuated’ contacts” they made with persons affiliated with the State.”¹⁸⁶

The distinguishing factor between *Calder* and *Walden* is the connection (or lack thereof) with the forum State. In *Calder*, personal jurisdiction was warranted because the nature of the tort created the contacts with the state:¹⁸⁷ “[b]ecause publication to third persons is a necessary element of libel, the defendants’ intentional tort actually occurred in California” and thus the defendant had a connection with the state itself, not just the plaintiff.¹⁸⁸ In contrast, personal jurisdiction was not warranted in *Walden* because the intentional tort happened to occur to a person who happened to be from Nevada, and thus the “effects” occurring in Nevada stemmed only from the plaintiff’s residency there.¹⁸⁹ In short, in *Calder*, the reputational damage stemming from the libel could have only occurred in California, but in *Walden*, the tort could have occurred to a plaintiff from Nevada or New York or Michigan.¹⁹⁰ This distinction is critical: the crux of personal jurisdiction analysis is “whether the defendant’s actions connect him to the *forum*,” not whether the defendant’s actions affected a *person* who happened to be from a particular state.¹⁹¹

Because the connection to the forum is the crux of the analysis, it is crucial to understand that toxic torts inherently occur where the injury is felt.¹⁹² For instance, in *Ex parte Aladdin Manufacturing*, another interstate toxic tort case, the plaintiffs asserted claims including nuisance and trespass.¹⁹³ These torts occur in the place where the injury occurs. Nuisance is defined as “a condition, activity, or situation . . . that interferes with the use or enjoyment of property.”¹⁹⁴ Trespass is “an unlawful act committed against the person or property of another; esp., wrongful entry on another’s real property.”¹⁹⁵ These torts both can occur where the pollutant is felt and where the pollutant originates from. To further clarify, in the instance that a neighbor released toxic chemicals into your home, trespass would not occur the instant those chemicals were released but rather at the point when they entered your home. This fact is key to the analysis --*Calder’s* holding was largely predicated on the fact that the tort of libel generally occurs where the offending material was circulated, thus creating the necessary connections with the forum. Analogously, through the

186. *Id.* at 286.

187. *Id.* at 287 (“The crux of *Calder* was that the reputation-based “effects” of the alleged libel connected the defendants to California, not just to the plaintiff.”).

188. *Walden*, 571 U.S. at 288.

189. *Id.* at 289-90.

190. Though note that the actual plaintiffs were from Nevada, this statement stands for the proposition that the tort could have happened to a person from any state. *Id.*

191. *Id.* at 289 (emphasis added).

192. See generally RESTATEMENT (SECOND) OF TORTS § 158 (1965).

193. *Ex parte Aladdin Mfg. Corp.*, 305 So.3d 214, 221 (Ala. 2019).

194. *Nuisance*, BLACK’S LAW DICTIONARY (11th ed. 2019).

195. *Trespass*, BLACK’S LAW DICTIONARY (11th ed. 2019).

release of pollutants, the defendant creates a connection with the state itself, not with persons who happen to be from the forum.

After establishing that toxic torts generally occur where the injury occurs, it becomes apparent that two prongs articulated in *Walden* to establish minimum contacts are satisfied. First, the relationship necessarily arises out of contacts that the defendant himself created with the forum State.¹⁹⁶ It is not the case that a plaintiff encountered a pollutant in state A and then moved to state B; rather, the defendant released pollutants that spilled over into state B. The contacts are not created through the “unilateral activity of another party.”¹⁹⁷ Furthermore, under the second prong, the defendant’s contacts are with the forum state itself, not with persons who happen to reside there.¹⁹⁸ To clarify, in *Calder*, the Supreme Court held that personal jurisdiction was warranted in California because “California [was] the focal point both of the story and of the harm suffered.”¹⁹⁹ In contrast, the Court in *Walden* found no personal jurisdiction as the defendant had no connection to Nevada outside of his connection to the plaintiffs.²⁰⁰ The plaintiffs “would have experience[d] this same [injury] in California, Mississippi, or wherever else they might have traveled.”²⁰¹ Applied to an interstate toxic tort, the forum state is a necessary element of the harm; the injury could only occur in the place the pollutants reached, thus connecting the defendant to the forum in a meaningful way.

B. Fair Play and Substantial Justice is Easily Satisfied

The second step of the test articulated in *International Shoe* is that the exercise of jurisdiction does not offend “traditional notions of fair play and substantial justice.” Generally, this part of the analysis acts as a backstop for exceptional cases, but it is still useful to briefly go through the analysis.²⁰²

World-Wide Volkswagen Corp v. Woodson outlined the general factors that courts tend to employ: (1) the burden to the defendant; (2) the forum State’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the “interstate judicial system’s interest in obtaining the most efficient resolution;” and (5) the interest of several states in furthering social policies.²⁰³

196. *Walden*, 571 U.S. at 284 (“First, the relationship must arise out of contacts that the ‘defendant himself’ creates with the forum State.”).

197. *Id.*

198. *Id.* at 285 (“Second, our ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”).

199. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

200. *Walden*, 571 U.S. 277, 288-89 (2014).

201. *Id.* at 289.

202. Note that in *Calder*, the Court failed to even employ the “traditional notions of fair play and substantial justice” test. See *Calder*, 465 U.S. at 783.

203. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

Beginning with the first factor, the burden to the “outsider” defendant in an interstate toxic tort will be minor as compared to similar instances of being forced to litigate out of state. Case law shows that courts are generally only worried about particularly unique burdens, such as making a foreign defendant appear. For instance, in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, the Court found that forcing a Japanese defendant to appear in California was a severe burden.²⁰⁴ The Court further clarified that courts should generally be hesitant about forcing a foreign defendant to appear because of “the unique burdens placed upon one who must defend oneself in a foreign legal system.”²⁰⁵ Given the physical limitations of toxic torts, there will rarely be an instance of a foreign defendant being required to appear in the United States. A far more likely defendant will be one residing just across state lines.²⁰⁶ This is not the type of “unique burden” the Court envisioned in *World-Wide Volkswagen* so as to warrant against a finding of personal jurisdiction.

Next, the forum State will have several legitimate interests in overseeing the dispute. First and foremost, they will want to ensure compensation for their residents. For instance, in *McGee v. International Life Insurance*, the Supreme Court held that California had a “manifest interest in providing effective means for its residents.”²⁰⁷ Crucial to this conclusion was the recognition that some plaintiffs would “be at a severe disadvantage if they were forced to follow [the defendant] to a distant State in order to hold it legally accountable.”²⁰⁸ This is particularly salient if plaintiffs tend to be low income and thus “[cannot] afford the cost of bringing an action in a foreign forum.”²⁰⁹ The forum state will also have a genuine interest in discouraging pollution within their borders.

Next, courts have generally interpreted the plaintiff’s genuine interest in convenient and effective relief to hinge on the availability of additional avenues of remedy.²¹⁰ Interstate toxic torts will not present similar concerns, as there generally will not be alternative methods of restitution that allow the defendant to defend the suit “at home” and accordingly this factor will support a fairness finding.

Further, the interstate judicial system has a legitimate interest in having toxic torts adjudicated in the forum state. Putting aside the normative assumption

204. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 102 (1987).

205. *Id.*

206. Pollutants are necessarily restricted by geography, thus limiting their ability to travel far distances.

207. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

208. *Id.*

209. *Id.*

210. For instance, in *Kulko v. Superior Court of California*, the Court implied that the plaintiff, a mother, did not have a genuine interest in convenient and effective relief in seeking to force her ex-husband to appear in California for suit when there were other statutory mechanisms that provided for restitution and would not require the ex-husband to travel. *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 98-99 (1978).

that toxic tort adjudications should occur where the pollution occurred, judicial administrability will generally be served by having toxic torts adjudicated in the forum state. For instance, while this is a fact dependent inquiry, generally in toxic torts the majority of the facts will have occurred in the forum state: witnesses will be generally present in the forum and the harm will have occurred in the forum.

Finally, states also have a genuine interest in having the dispute settled in the state of the injury. If plaintiffs were required to litigate at the origin of the pollutant rather than the place of injury, it would have the perverse effect of discouraging toxic tort litigation, thus promoting continued pollution. Given the length of many rivers in the U.S., it is easy to envision the dispersal of pollutants through several states. Occasionally, substantive policy interests will be served through a denial of personal jurisdiction, especially when foreign defendants or parallel statutory schemes are involved,²¹¹ but those concerns are not present in toxic tort litigation. Of course, it is important to note that some states also have an interest in promoting business and thus may consider toxic tort litigation harmful to their business climate.²¹²

Once minimum contacts have been established, fairness concerns will often operate as a backstop. For instance, minimum contacts, coupled with the interests of the plaintiff and the forum, “will justify even the serious burdens placed on the . . . defendant.”²¹³ The burden on the defendant will generally be slight and the plaintiffs, forum state, and interstate judicial system all have sufficient interest in adjudicating toxic torts in the forum state so as to warrant a finding that fair play and substantial justice are not offended.

C. Purposeful Availment Is Not Required for a Finding of Personal Jurisdiction if We Have a Territorial Touchstone

A broader lesson can be gleaned from the analysis discussed above: in intentional torts, targeting is not necessarily required for a finding of personal jurisdiction if there exists a territorial touchstone.²¹⁴ Put another way, we can use intentional tort analysis without imputing a targeting requirement if there is a sufficient effect connecting the defendant to the forum state.

Supreme Court jurisprudence suggests that purposeful availment or targeting, while not a necessary element, is a useful tool for the jurisdictional analysis.

211. *See Kulko*, 436 U.S. at 98.

212. This Note does not address the policy implications inherent in this decision as they are not relevant to the analysis, but it is still important to remember that the interests of several states can cut both ways.

213. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987).

214. Though note that in stream of commerce cases, without an intentional tort purposeful availment (or direction) is necessary. *See generally id.* at 112 (Jurisdiction in stream of commerce cases requires that the connection between the defendant and forum State “necessary for a finding of minimum must come about by *an action of the defendant purposefully directed toward the forum State.*”).

In *Burnham*, a plurality held that mere presence in a forum State was sufficient for a finding of personal jurisdiction, regardless of targeting or minimum contacts.²¹⁵ It is clear that the plurality did not consider “minimum contacts” so as not to offend “traditional notions of fair play and substantial justice” necessary in cases with physical presence, as Justice Brennan argued in concurrence that all jurisdictional analyses should be considered in light of “minimum contacts” and “fair play and substantial justice.”²¹⁶ In response, Justice Scalia, writing for the plurality, noted that the minimum contacts standard was “developed by *analogy* to ‘physical presence’ and it would be perverse to say it could now be turned against that touchstone of jurisdiction.”²¹⁷ Therefore, it was clear that purposeful availment and targeting were not necessary for personal jurisdiction, as mere physical presence in the state could be sufficient.²¹⁸ In *Calder*, the Court conflated targeting to require that the defendant “reasonably anticipate being haled into court there.”²¹⁹ The Court concluded that the defendant’s “intentional [tortious] actions were expressly aimed at California,” as defendants wrote and edited an article “that they knew would have a potentially devastating impact upon [the plaintiff] . . . and they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works.”²²⁰ While the Court called this targeting, it is clear that it was a different type of targeting than that envisioned in *World-Wide Volkswagen*. There, the Court required concrete actions by a corporation that indicated purposeful availment towards a particular state, such as marketing to that particular state.²²¹ In contrast, *Calder* considered tortious libel against a plaintiff in a particular state sufficient for targeting as the defendants were aware of the injury that would occur to the plaintiff in the forum state.²²² Later cases in fact clarified that “the crux of *Calder* was the reputation-based ‘effects’ of the alleged libel connected the defendants to California . . . [and] the strength of that connection was largely a function of the nature of the libel tort” because the “intentional tort actually occurred in California” given that reputation injury requires others to read the libel.²²³ Thus, the defendant had ample contacts with California, given that it was “the focal point both of the story and of the harm suffered.”²²⁴ The Supreme Court in *Calder* did not uphold a finding of personal jurisdiction based on “targeting” but rather on the connections between the

215. *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 619 (1990). Though note that this holding only applies to “insiders” and thus would not support a finding of personal jurisdiction in our hypothetical.

216. *Id.* at 622-23.

217. *Id.* at 619.

218. *Id.*

219. *Calder*, 465 U.S. at 790.

220. *Id.* at 784.

221. *World-Wide Volkswagen*, 444 U.S. at 297.

222. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

223. *Walden v. Fiore*, 571 U.S. 277, 287-88 (2014).

224. *Calder*, 465 U.S. at 789.

defendant and the forum State stemming from the nature of libel. We now can see that the crux of the finding of personal jurisdiction was not the targeting of Shirley Jones but rather the commission of the effect in California. This distinction is crucial to the analysis.

The differing views of “targeting” or “purposeful availment” taken up by the Court in *World-Wide Volkswagen* and *Calder* illustrate that they are plausibly nothing more than a useful factor for intentional torts analysis. For instance, in *Calder*, contacts with California were ample, but a reasonable person would likely conclude that the defendants had not literally “targeted” California by writing a libelous article about a Californian resident. If that were the case, then “targeting” could be equated to targeting a particular person in a particular state, which *Walden* explicitly rejects.²²⁵

The above cases illustrate that “targeting” is not always a necessary requirement for a finding of personal jurisdiction. In certain circumstances, the effects, whether intentional or not, of a defendant’s action in another state may warrant personal jurisdiction where the action creates a connection with the state itself, not persons within the state. While Supreme Court jurisprudence continues to insist on a “targeting” prong,²²⁶ the analysis above illustrates that the tests proffered by *Calder* and *Walden* can be satisfied without the defendant intentionally targeting the forum State. By acknowledging this fact, courts can avoid a tenuous and inauthentic targeting analysis while still grounding their findings of personal jurisdiction on concrete analysis.

CONCLUSION

Courts can exercise personal jurisdiction in interstate toxic torts, but they need to ground their analysis on the role that territorial borders play. This Note proposes that this framework teaches us that targeting or purposeful availment is not necessarily a necessary element for personal jurisdiction. If we have a territorial touchstone, we may be able to exercise personal jurisdiction without targeting. By using this analytical framework, courts can exercise personal jurisdiction without employing tenuous analysis that may result in inconsistent case law.

225. *Walden*, 571 U.S. at 286 (“Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.”).

226. *See Calder*, 465 U.S. at 789-90.

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