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Wonky Walden: The Dizzying New Personal Jurisdiction Rule

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Wonky *Walden*: The Dizzying New Personal Jurisdiction Rule

I. INTRODUCTION

Even prior to *Walden v. Fiore*, determining if a court had authority over an out-of-state defendant was a “labyrinth with no exit.”¹ Over the years, that labyrinth has mutated. Born of federalist principles in the 1870s, personal jurisdiction analysis has long since shifted toward ensuring defendants’ due process rights.² With its evolving core purpose, it is little wonder that nailing down appropriate applications on the fringes is difficult.

Consistent with this difficulty, some commentators have criticized the United States Supreme Court as “incapable of providing a coherent vision of the law of personal jurisdiction,”³ crediting the Court for producing “an ever-widening doctrinal morass” where “fundamental principles [are] submerged beneath mechanistic formulas that are both too broad and too narrow.”⁴ As a result, due process has become “nothing more than a complex web of fact-specific outcomes.”⁵

Walden v. Fiore is the court’s most recent foray into this morass. No one claims that *Walden* clarifies the personal jurisdiction conundrum; at best, the case is seen as a dud.⁶ But *Walden* is not a dud. *Walden* injects dizzying twists and turns into the minimum contacts maze.⁷ First, *Walden* has compounded any pre-existing complexity concerning the proper roles of plaintiff residency and damage location.⁸ Second, *Walden*’s express language contradicts

1. See generally Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014).

2. Paul J. Stancil, *Walden v. Fiore - Post-Argument*, SCOTUSCAST (Dec. 13, 2013), www.fed-soc.org/multimedia/detail/walden-v-fiore-post-argument-scotuscast.

3. E.g. Grossi, *supra* note 1, at 618.

4. *Id.*

5. *Id.* at 637.

6. See *infra* Part VI.

7. See *infra* Part III.

8. *Id.*

commonsensical trends toward expanded personal jurisdiction, inviting courts to err on the side of denying personal jurisdiction.⁹

The world is shrinking. Advances in technology and transportation are dissolving interstate jurisdictional burdens.¹⁰ These advances had naturally lent to expanding state power to pull in out-of-staters to protect resident people and property.¹¹ Then *Walden* appeared.

This Note exposes *Walden*'s unappreciated mess. Part II addresses how *Walden* should have come out differently under precedent. Part III showcases the disarray that is *Walden*'s new personal jurisdiction rule. Part IV highlights the failure of lower courts to appreciate *Walden*'s departure from the previously understood role of plaintiff residency and damage location in jurisdictional analysis. Part V recommends a return to pre-*Walden* analysis—the lesser of evils—and bolsters that argument by looking to the domestic doctrines of other Western countries, specifically Canada and England. Part VI concludes.

II. PRE-*WALDEN* ANALYSIS APPLIED TO *WALDEN*

The Court in *Walden v. Fiore* did not find personal jurisdiction to exist in Nevada when Georgia officers allegedly intentionally confiscated and unlawfully delayed the return of thousands of dollars by falsifying an affidavit when they knew or should have known the money rightfully belonged to Nevada gamblers, and consequently

9. *Id.*

10. *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 765–66 (Ill. 1961) (“[T]oday’s facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.”).

11. *See id.* at 766 (“Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.”).

could not be used in Nevada or anywhere else over the course of seven months.¹²

If the Supreme Court had simply followed precedent—as it claimed it did¹³—the Court would likely have found the defendant to have sufficient minimum contacts. First, it appears that the officers who allegedly created the false affidavit knew the gamblers’ Nevada residency by the time they falsified the document. Second, the resulting delay in the return of the gamblers’ cash caused foreseeable harm in Nevada.

*A. Pre-Walden Tortious Minimum Contacts Analysis Counted
Contacts with State Residents and Damage Location*

Prior to *Walden v. Fiore*, it was well accepted, even at the Supreme Court itself, that plaintiff residency was not only a relevant but a potentially pivotal part of the minimum contacts inquiry for intentional torts. While plaintiff residency alone has not been determinative, there is little doubt that plaintiff residency had the power to push the minimum contacts pendulum toward personal jurisdiction—especially when that residency was known and the ultimate damages took place in the residency state.

Perhaps the most striking proof that plaintiff residency matters in tort minimum contacts analysis is the following line from *Calder v. Jones*, a case quoted several times in *Walden*: “[P]etitioners are primary participants in an alleged wrongdoing *intentionally directed at a California resident*, and jurisdiction over them *is proper on that basis*.”¹⁴

In *Calder*, two employees of a national magazine company who resided in Florida helped publish an allegedly libelous story about a California resident.¹⁵ The employees challenged a California court’s personal jurisdiction over them because neither was in California at

12. *Walden v. Fiore*, 134 S. Ct. 1115, 1119–26 (2014); *Fiore v. Walden*, 657 F.3d 838, 842–60 (9th Cir. 2011).

13. *See Walden*, 134 S. Ct. at 1126 (“Well-established principles of personal jurisdiction are sufficient to decide this case.”).

14. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added). However, the *Walden* court chose never to grapple directly with that particular line, instead selectively pointing to *Calder*’s language favorable to *Walden*’s change in jurisdictional direction.

15. *Id.* at 785–86.

any time for any activity related to the claims brought against them.¹⁶ However, the Supreme Court found both employees had minimum contacts with California “such that the maintenance of the suit [did] not offend traditional notions of fair play and substantial justice,”¹⁷ relying heavily on the fact that the out-of-state conduct was aimed at a California resident.¹⁸

Calder also provides evidence of the importance of the location of tortious conduct’s “effects” or injury. In addition to *Calder*’s finding that jurisdiction was proper based on plaintiff residency,¹⁹ the Court also found it proper based on the damage location: “Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”²⁰ The Court did not find that *all* of the effects of the out-of-state conduct occurred in the forum, but instead that “the *brunt* of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”²¹

The same year as *Calder*, the Court took another opportunity to establish the relevance of damage location while also reiterating the proper role of the plaintiff’s residency.

The plaintiff’s residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff’s residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff’s residence in the forum may, because of defendant’s relationship with the plaintiff, enhance defendant’s contacts with the forum. Plaintiff’s residence may be the focus of the activities of the defendant out of which the suit arises.²²

16. *Id.*

17. *Id.* at 788–89 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted).

18. *Id.* at 789–90.

19. *Id.* at 790.

20. *Id.* at 789; *see also* *Gray Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 762–63 (Ill. 1961) (“It is well established, however, that in law the place of a wrong is where the last event takes place which is necessary to render the actor liable [i.e., damage].”).

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

22. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *Calder*, 465 U.S. at 788–89; *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957). *See also* William J. Knudsen, Jr.’s interpretation of *Keeton* in his article, *Keeton, Calder, Helicopteros and Burger King—*

Though dicta, that explanation from *Keeton v. Hustler Magazine, Inc.* is perhaps the Supreme Court's clearest articulation of the role of plaintiff residency in minimum contacts analysis.²³ According to *Keeton*—another tort case concerning not only non-resident defendants but also a non-resident plaintiff—plaintiff residency in the chosen forum is not strictly required, but when present, it should be relevant and sometimes even weighty.²⁴

Regarding damage location, *Keeton* gave weight even when “the bulk of the harm done . . . occurred outside [the forum state].”²⁵ The fact that the suit was, “at least in part, for damages suffered in [the forum state],” played an important role in the Court's analysis because “it is beyond dispute that [the forum state] has a significant interest in redressing injuries that actually occur within the State.”²⁶ The fact of partial damages within the forum state did not alone justify personal jurisdiction, but when combined with the defendant's “regular circulation of magazines in the forum State,” it was sufficient.²⁷

A year after *Calder* and *Keeton*, the Court again affirmed the relevance of plaintiff residency to minimum contacts analysis, this time beyond the realm of torts. In *Burger King Corp. v. Rudzewicz*, an out-of-state franchisee allegedly wrongfully terminated a contract with its franchisor.²⁸ The Court found minimum contacts to be

International Shoe's *Most Recent Progeny*, 39 U. MIAMI L. REV. 809, 817 (1985). “[P]laintiff's residence may cause insufficient contacts to be ‘enhanced’ so that they meet constitutional standards. In other words, in a close case, plaintiff's residence could tip the scales in favor of jurisdiction.” *Id.* Knudsen also points out a clear example where plaintiff residency tipped the scales. *Id.* at 817–18 (“*McGee* . . . is a perfect example of such enhancement because the contacts of defendant insurance company in that case were as minimal as may be found in any case where the Supreme Court has upheld jurisdiction. The use of *McGee* in recognizing the significance of plaintiff's residence as a factor in the jurisdictional analysis makes good sense.”).

23. Knudsen, *supra* note 22, at 817–18. (“The Court has, of course, discussed this factor [plaintiff residency] before in *Kulko*, *World-Wide Volkswagen*, and *Rush*, but never to the extent it has in *Keeton*. Whether *Keeton*'s clearer articulation of the role of plaintiff's residence represents a step forward in jurisdictional analysis, however, is not entirely certain.”).

24. *Keeton*, 465 U.S. at 780 (“[P]laintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.”).

25. *Id.*

26. *Id.* at 776.

27. *Id.* at 773.

28. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466 (1985).

satisfied because “the defendant [had] ‘purposefully directed’ his activities at *residents of the forum* [i.e., the franchisor], and the litigation result[ed] from alleged injuries that ‘[arose] out of or relate[d] to’ those activities.”²⁹ While a contract case, the *Burger King* Court suggested via dicta that the purposeful direction standard could also apply in tort claims.³⁰ Likely, implied in purposeful direction is that the alleged victim’s residency is known, or at least has reason to be known, to the defendant at the time of the act. *Burger King* did not suggest that plaintiff residency should always receive much weight, explicitly rejecting the haling of a defendant “into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.”³¹ Thus, it makes sense for unknown plaintiff residency or residency resulting from unilateral acts after injury to play little-to-no role in minimum contacts analysis.³²

Through *Calder*, *Keeton*, and *Burger King*, the Supreme Court made clear the relevance of known plaintiff residency and foreseeable damage location to minimum contacts analysis and the ultimate sufficiency of the two when combined. In the nearly three decades since, the combined personal jurisdiction perspective of these three cases had gone utterly unchallenged.³³

B. How Walden Likely Comes Out Under the Pre-Walden Standard

Under the pre-*Walden* standard, the Court should likely have found the officers who allegedly created the false affidavit to have sufficient minimum contacts with Nevada. First, it appears that the officers knew of the gamblers’ Nevada residency at least by the time

29. *Id.* at 472 (emphasis added) (internal citations omitted).

30. Regarding product liability, “[a] forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State and those products subsequently injure forum consumers.” *Id.* at 473 (internal quotations omitted). Regarding defamation, “a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story.” *Id.* (citing *Keeton*, 465 U.S. at 774; *Calder v. Jones*, 465 U.S. 783 (1984)).

31. *Id.* at 475 (internal quotations omitted).

32. Indeed, as far back as 1958, the Court has found “unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Hanson v. Denckla*, 357 U.S. 235, 254 (1958).

33. LexisNexis Shephard’s® report run by author on December 12, 2014.

of the falsification. Second, injury flowing from the delay in the return of the gamblers' cash occurred in Nevada.

1. Walden's basic facts

Professional gamblers accused DEA agents of wrongfully seizing \$97,000 of their money while making a connecting flight at a Georgia airport.³⁴ At the time of the seizure, the pair was returning home to Nevada.³⁵ They allegedly told the officers where they were headed, though they displayed non-Nevada drivers' licenses.³⁶ The gamblers alleged "the funds were readily identifiable [as] originating and returning to Las Vegas" to their bank that ordinarily holds their gambling money.³⁷ Soon after returning home, the gamblers said they produced proof of their money's legitimacy, forwarding that proof from Las Vegas to the agents.³⁸ The gamblers also claimed that "[a]ll defendants recognized at all times that the destination of the funds at the time of the seizure was . . . Nevada, and that a substantial amount of the currency had also originated . . . [in] Nevada."³⁹ The officers also allegedly ran background checks of the gamblers, "searching data bases compiled and maintained in Nevada."⁴⁰

The gamblers further alleged that the officers falsified an affidavit which unjustly delayed the cash's rightful return until seven months after its initial seizure.⁴¹

Specifically, Fiore and Gipson allege in the complaint that this probable cause affidavit falsely stated that Gipson had been uncooperative and had refused to respond to questions; that Fiore and Gipson had given inconsistent answers during questioning; and that there was sufficient evidence for probable cause to forfeit the funds as drug proceeds.⁴²

34. *Fiore v. Walden*, 657 F.3d 838, 842–45 (9th Cir. 2011).

35. *Id.* at 846, 850.

36. *Id.*

37. *Id.* at 850.

38. *Id.*

39. *Id.* at 851.

40. *Id.*

41. *Id.* at 844.

42. *Id.*

Additionally, the gamblers alleged the agents failed to mention pertinent exculpatory evidence in the affidavit:

. . . that Fiore and Gipson had no history of unlawful drug use or trade; that they had documentation showing them to be advantage gamblers; that their bags had passed through an agricultural x-ray and other inspections used for contraband detection without incident; that Fiore and Gipson had provided actual receipts for most of the funds that they carried; and that the \$30,000 Gipson was carrying could be traced directly to a legal source, his winnings at El San Juan Casino.⁴³

2. *Pre-Walden law applied to Walden*

There is “some general agreement” that likely the most relevant precedential test came from *Calder v. Jones*.⁴⁴ According to *Calder*, “personal jurisdiction may be determined based on a three-part test: (1) the defendant committed an intentional act; (2) the act was aimed at the forum state; and (3) the harm caused would be experienced in the forum state.”⁴⁵

Just like in *Calder*, where magazine employees “[were] primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them [was] proper on that basis,”⁴⁶ the DEA agents were primary participants in “alleged wrongdoing intentionally directed”⁴⁷ at Nevada residents. Thus, Nevada jurisdiction over them should likely be “proper on that basis.”⁴⁸

If at the time of the initial seizure of the gamblers’ money in an Atlanta airport the officers had no knowledge of the gamblers’

43. *Id.*

44. Stephen Wermiel, *SCOTUS for law students (sponsored by Bloomberg Law): Gambling on personal jurisdiction*, SCOTUSBLOG (Nov. 1, 2013, 11:41 AM), www.scotusblog.com/2013/11/scotus-for-law-students-sponsored-by-bloomberg-law-gambling-on-personal-jurisdiction/ (“There is some general agreement that the relevant test comes from the 1984 Supreme Court decision in *Calder v. Jones*”).

45. *Id.*

46. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added). However, the *Walden* court chose never to grapple directly with that particular line, instead selectively pointing to *Calder*’s language favorable to *Walden*’s change in jurisdictional direction.

47. *Id.*

48. *Id.*

Nevada residency,⁴⁹ it is difficult to argue the officers at that time aimed their conduct at Nevada—a forum then unknown. However, by the time of the drafting of the allegedly false affidavit, the officers “definitely knew . . . that [the gamblers] had a significant connection to Nevada.”⁵⁰

First, at the time of the seizure, the pair told the officers they were heading to Nevada, and their tickets should have confirmed that fact.⁵¹ Second, the cash is described as “identifiable [as] originating and returning to Las Vegas.”⁵² Third, soon after returning to Nevada, the gamblers supposedly “forwarded” their supporting documents from Las Vegas.⁵³ Fourth, the agents themselves allegedly searched “data bases compiled and maintained in Nevada”⁵⁴ to find out more about the gamblers. Taking those allegations as true, it is quite likely the agents had a fair idea which state the gamblers belonged to at the time. Therefore, the contact the agents had with Nevada through its residents by way of the affidavit was anything other than “random, fortuitous, or attenuated.”⁵⁵

In other words, like the corporation in *Burger King* which, in part, “‘purposefully directed’ . . . activities at residents of the forum” by way of a contract,⁵⁶ the agents purposefully directed activities at residents of Nevada by way of an affidavit. By the time of the affidavit, the agents likely knew to which state the gamblers belonged. Though the affidavit did not create an ongoing relationship like the contract in *Burger King*, the affidavit should still be a relevant contact. And, just like in *Burger King*, where the alleged damages related to the purposeful direction—the contractual

49. *Fiore v. Walden*, 657 F.3d 838, 862 (9th Cir. 2011) (Ikuta, J., dissenting) (“[W]hen Walden seized the cash, he knew only that the plaintiffs had California driver’s licenses and were headed to Las Vegas. The complaint does not even hint that Walden learned of plaintiffs’ ties to Las Vegas until *after* the seizure was complete.”).

50. *Id.* at 850.

51. *Id.* at 850, 853.

52. *Id.* at 850.

53. *Id.*

54. *Id.* at 851.

55. *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

56. *Burger King*, 471 U.S. at 472, 479–80 (emphasis added) (citation omitted).

relationship—the bulk of the damages to the gamblers flows directly from the purposeful direction—the affidavit.

Moreover, just like in *Calder*, where the Court also found jurisdiction proper “based on the ‘effects’ of . . . Florida conduct in California,”⁵⁷ the Court should have found jurisdiction over the agents proper based on the effects of Georgia conduct in Nevada. Arguably, the “brunt of the harm”⁵⁸ flowing from the alleged wrongful detainment and the delayed return to the cash’s rightful owners in Nevada occurred in Nevada, where the gamblers would have most likely spent that money. But even if the “brunt of the harm” was not felt in Nevada as in *Calder*,⁵⁹ at the very least “part” of the harm occurred there as in *Keeton*.⁶⁰ While the location of “part” of the damages was not alone sufficient in *Keeton*, it did suffice in the presence of other factors.⁶¹ Here, the known residency of the Nevada gamblers could potentially be an augmenting factor.⁶²

Unsurprisingly, the Ninth Circuit found that Nevada courts had specific personal jurisdiction over the agents, hinging its decision on “key facts” which included the fact that the agents had allegedly wronged Nevada residents who were returning home.⁶³ The agents knew that the travelers were Nevada residents and that Nevada was

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

58. *Id.* (stating that one of the reasons the court had jurisdiction is because “the brunt of the harm . . . was suffered in California”).

59. *Id.*

60. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).

61. *Id.* at 773–74.

62. The following is helpful way of summarizing the most convincing arguments for Nevada jurisdiction over the agents in this case:

Jurisdiction arises from the fact that petitioner, knowing that respondents were Nevada residents and having received exculpatory evidence from them in Nevada, submitted a false affidavit that prevented the return of funds money to them in Nevada. There is no question that this conduct caused injury, which obviously was suffered somewhere. That place certainly was not Georgia; by the time petitioner wrote his affidavit, respondents had long since departed Atlanta and were, instead, back at home in Nevada. The only sensible place to locate the occurrence of the injury is where respondents were living and working during the time in which they were deprived of their funds. That rule is easy enough to administer and avoids the prospect of giving plaintiffs an unlimited choice of fora.

Brief for Respondent at 43, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574).

63. *Fiore v. Walden*, 657 F.3d 838, 848 (9th Cir. 2011).

their final destination.⁶⁴ Thus, “[the agents’] actions were ‘performed with the purpose of having’ its ‘consequences felt’ by someone in [Nevada].”⁶⁵ In other words, the Ninth Circuit appropriately applied Supreme Court precedent. It is true that the Supreme Court had not yet heard a case quite like the gamblers’, but there is no meaningful minimum contacts distinction between *Calder* and this case, except perhaps that the relationship and harm began in Georgia. At its core, the allegedly falsified affidavit was not a far cry from *Calder*’s defamatory article. Both concerned the communication of lies that caused damage in a predictable forum.⁶⁶

Though Justice Ikuta dissented from the Ninth Circuit’s opinion, her dissatisfaction with the plurality’s opinion was that she did not see the falsification of the affidavit and its resulting delay in the return of funds as a cognizable tort.⁶⁷ The only possible tortious conduct Justice Ikuta saw in the case was the initial seizure of the funds.⁶⁸ To that conduct—and that conduct alone—she applied the same minimum contacts standard as the majority:

In determining whether the defendant “purposefully directed” the activities which are the subject of plaintiff’s claim to the forum state, we consider whether the defendant “(1) committed 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.”⁶⁹

From the perspective of the initial seizure, she found no express aiming because “[a]s a matter of simple logic, a defendant cannot ‘expressly aim’ an intentional act at a victim’s home state if the

64. *Id.* at 843 (“When asked for identification, Fiore and Gipson showed their California drivers’ licenses and stated that they had California residences, *as well as residences in Las Vegas*. They further informed the DEA agents ‘that Las Vegas was the final destination of most if not all of the funds in their possession’ and that *they were returning to their Las Vegas residences*.”) (emphasis added).

65. *Id.* at 851 (quoting *Ibrahim v. Dep’t Homeland Sec.*, 538 F.3d 1250, 1259 (9th Cir. 2008)).

66. Though one notable difference is that with the defamatory article all that was wrongfully taken was someone’s *intangible* reputation, whereas with the affidavit, the taking of *tangible* property was perpetuated.

67. *See Fiore*, 657 F.3d at 860, 863 (Ikuta, J., dissenting).

68. *See id.*

69. *Id.* at 862 (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

defendant committing the action does not even know that the victim has any connection with that state.”⁷⁰ At the time of the seizure, the agents likely did not know the gamblers’ ties to Nevada, and, therefore, could not have aimed at Nevada at that time, according to Justice Ikuta.⁷¹ However, if Justice Ikuta had also applied her standard to the later conduct of the affidavit, thereby recognizing that act as a recoverable part of the gamblers’ grievance, she would have had little, if any, basis for her dissent.

Under established precedent,⁷² the Court should have held that the officers who allegedly created a false affidavit causing the delayed return of the gamblers’ funds constituted sufficient minimum contacts with Nevada. First, the officers likely knew the gamblers’ Nevada residency—at least by the time of the affidavit. Second, at least some of the injury caused by the affidavit-induced delay occurred in Nevada.

III. WALDEN’S INCOMPREHENSIBLE RULE

The new rule coming out of *Walden* is not as clear-cut as it initially may seem; in fact, in the greater context of the entire ruling, *Walden*’s minimum contacts rule for intentional torts is incomprehensible: “The proper focus of the ‘minimum contacts’ inquiry in intentional-tort cases is ‘the relationship among the defendant, the forum, and the litigation.’ . . . And it is the

70. *Id.*

71. *Id.*

72. Given the shakiness of the Supreme Court’s ruling, it is easy to speculate that other arguments that did not make it into the opinion itself drove the decision-making. One such possibility is that a special interest—specifically government agents—was the target of the litigation.

The Solicitor General filed a brief urging the Court to reject the Ninth Circuit standard and [took] part in the oral argument. A number of states also filed a friend-of-the-court brief warning that the Ninth Circuit’s approach would make law enforcement officers subject to lawsuits in states with which they have no real connection and in which defending against claims will be extremely inconvenient, costly, and unpredictable.

Wermiel, *supra* note 44. “The personal jurisdiction question likely has broad[] implications for litigation throughout the country, and especially for members of law enforcement (whose concerns are aired by several *amici* on Walden’s side, including the United States).” William Baude, *Argument preview: Where can a federal agent be sued?*, SCOTUSBLOG (Oct. 30, 2013, 3:49 PM), www.scotusblog.com/2013/10/argument-preview-where-can-a-federal-agent-be-sued/; *see also* Stancil, *supra* note 2.

defendant, not the plaintiff or third parties, who must create contacts with the forum State.”⁷³ Commentators have attempted their “Plain English” summary in the following way:

[Y]ou cannot force somebody to travel to a far-off place to litigate a case if they have no connection to that place. If you want to sue somebody in a particular state, you need to show that they have made contact with the state — either by committing an act in that state, or at least by intentionally reaching out to the state somehow. But you cannot sue them simply because you live in the state and you have been hurt.⁷⁴

This thousand-foot view of *Walden*'s rule makes it seem like nothing but a regurgitation of precedent; however, problems abound in the willows. First, *Walden* leaves ambiguity about the role—if any—plaintiff residency has in the minimum contacts analysis. Second, *Walden* tries in vain to draw an impenetrable line between state contacts and contacts with state residents harmed within their state.

A. *Walden's Mixed Messages About the Relevance of Plaintiff Residency*

Walden leaves us with a grab bag of contradictory statements regarding the role of plaintiff residency in minimum contacts analysis. *Walden* first pronounces that plaintiff residency has no place in the discussion, even when that residency is known. But in the same breath, *Walden* suggests plaintiff residency is in fact relevant to, even if not independently sufficient for, minimum contacts analysis.

On the one hand, *Walden* holds that plaintiff residency—even if known to defendant at the commission of a tort—is not a minimum contacts consideration. First, *Walden* states, “[M]inimum contacts analysis looks to the defendant’s contacts with the forum State itself, *not the defendant’s contacts with persons who reside there.*”⁷⁵ The Court then goes so far as to say that “when viewed through the proper

73. *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014) (citing *Calder v. Jones*, 465 U.S. 783, 788 (1984)) (citation omitted).

74. William Baude, *Opinion analysis: The boundaries of specific jurisdiction*, SCOTUSBLOG (Feb. 26, 2014, 2:37 PM), www.scotusblog.com/2014/02/opinion-analysis-the-boundaries-of-specific-jurisdiction/ [hereinafter Baude, *Boundaries*].

75. *Walden*, 134 S. Ct. at 1122 (internal quotations omitted) (emphasis added).

lens,” the agents’ alleged intentional drafting of a false affidavit about known Nevada residents that wrongfully delayed the return of money known to belong to those residents “formed no jurisdictionally relevant contacts with Nevada.”⁷⁶ In other words, the Court says that a plaintiff’s residency, even if known, is not a “jurisdictionally relevant contact[.]”.⁷⁷ As if attempting to eradicate any doubt about the absolute irrelevancy of plaintiff residency, the Court concludes, “[I]t is the defendant, not the plaintiff . . . who must create contacts with the forum State.”⁷⁸ The Court also states that the “reality” is that “none of [the agents’] challenged conduct had anything to do with Nevada itself.”⁷⁹ However clear these messages may seem in isolation, when taken in the context of the Court’s entire opinion, the overall doctrine is far from certain.

There are multiple times when *Walden* contradicts itself and suggests plaintiff residency is actually relevant to minimum contacts analysis. When the Court says “the mere fact that [defendants’] conduct affect[s] plaintiffs with connections to the forum State does not suffice to authorize jurisdiction,”⁸⁰ the Court is implying that plaintiff residency is relevant. When the Court relies on *Calder* and says that “mere injury to a forum resident is not a sufficient connection to the forum,”⁸¹ the Court is implying that plaintiff residency is relevant. Thus, while some of *Walden*’s plain language makes no room for plaintiff residency, other language suggests its relevance.

The only statement in *Walden* which attempts to reconcile this apparent friction is too vague to clarify anything meaningful—it only points out the obvious. The Court says the following: “To be sure, a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.”⁸² First, for there to be a lawsuit there must be some kind of interaction or transaction that

76. *Id.* at 1124.

77. *Id.*

78. *Id.* at 1126.

79. *Id.* at 1125.

80. *Id.* at 1126.

81. *Id.* at 1125.

82. *Id.* at 1123.

went sour with a party and it goes without saying that the negative interaction must be tied to a forum state. The question is whether a part of that tie to a forum state is a plaintiff's known residency, and the Court does nothing to repair its contradictory answers to that question. Pointing out that "*a defendant's relationship with a plaintiff* or third party, standing alone, is an insufficient basis for jurisdiction,"⁸³ is not helpful either. First, that observation is vague. More importantly, that observation addresses *sufficiency*, not *relevancy*.

Walden leaves a mess for lower courts and litigators to grapple with: Are plaintiff residency and the location of damages relevant to personal jurisdiction analysis, or not? Some language in *Walden* implies, "Yes." This is in harmony with well-vetted precedent that, as shown below, seems to make sense. However, *Walden's* strongest language apparently rebuffs reason by saying, "No, neither plaintiff residency nor the location of damages is relevant."

B. Walden Attempts to Divorce Contacts with the State from Contacts with Known State Residents

To the extent *Walden* is meant to preclude consideration of plaintiff residency, it attempts to draw an impossible line—unsupported by precedent—between "contacts with the forum State itself" and "contacts with persons who reside there."⁸⁴

Walden tries to justify its unproductive exercise of detaching a forum from its residents by pointing to language in both *International Shoe* and *Burger King*, which hardly lend the sought-after support. First, *Walden* quotes from *International Shoe* language that actually says nothing about plaintiff residency: "Due process 'does not contemplate that a state may make binding a judgment *in personam* against an individual . . . with which the state has no contacts, ties, or relations."⁸⁵ The insufficiency of zero contacts says nothing about relevancy of any particular type of contact, including contact with a plaintiff.

83. *Id.* (emphasis added).

84. *Id.* at 1122 ("[O]ur 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.").

85. *Id.* (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945)).

Second, the Court looks to *Burger King*, which similarly fails to support a bar to consideration of plaintiff residency and instead focuses on the insufficiency of “random, fortuitous, or attenuated” contacts.⁸⁶ Though there may be times when plaintiff residency is “random, fortuitous, or attenuated” and *Burger King* could be used to support excluding such a contact from the minimum contacts arithmetic, *Burger King* says nothing about un-random, un-fortuitous, or un-attenuated plaintiff residency. As shown, neither *Burger King*, nor *International Shoe* support a wholesale divorce between contacts with a forum from contacts with a forum’s residents.

Even if creating such a partition were justified by precedent, it still would not make sense to draw a distinction between a forum and a forum’s residents. What is a forum? Is it not, at least in part, logical to conclude that a forum includes the sum of its residents? Can a defendant affect a resident without, by extension to some degree, affecting the state in which that resident resides? It makes little sense to allow a state to claim responsibility for its residents but deny consideration of those relationships in minimum contacts analysis. It is not “unconstitutional alchemy”⁸⁷ to accept residents as logical extensions of their states—if not residents, then with whom does a party interact at all? *Walden* outruns reason by holding that a false affidavit regarding known Nevada residents did not have “anything to do with Nevada itself.”⁸⁸

IV. WALDEN’S MESS UNAPPRECIATED

It appears lower courts have swallowed *Walden*’s pitch that its holding did not change anything. As shown above, regardless of what the Court tries to say about it, there is no way “[w]ell-established principles of personal jurisdiction [were] sufficient to

86. *Id.* at 1123 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

87. Brief for Petitioner, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 LEXIS 2472, at *12–13 (“That respondents have connections with Nevada and felt harm there is purely incidental to petitioner’s alleged conduct. Transforming respondents’ connections with Nevada into connections between *petitioner* and Nevada is unconstitutional alchemy.”).

88. *Walden*, 134 S. Ct. at 1125 (“[N]one of petitioner’s challenged conduct had anything to do with Nevada itself.”).

decide this case” based on the Court’s reasoning.⁸⁹ Of the 195 cases mentioning *Walden*, none have criticized the ruling.⁹⁰ The closest any court has come to rebellion is distinguishing its facts.⁹¹ In fact, at least one federal district court has expressly denied *Walden* changed anything: “*Walden* . . . left undisturbed established Supreme Court precedent.”⁹² That case is worth dissecting briefly because if the district court had actually appreciated *Walden*’s chaotic doctrinal narrowing of personal jurisdiction, that case likely would have flipped a u-ey.⁹³

A. Jenkins v. Miller

Jenkins v. Miller is a federal district court case about whether a Vermont court should have personal jurisdiction over four out-of-state defendants who allegedly assisted in a parental kidnapping from Virginia to Nicaragua.⁹⁴ The four defendants’ motions to dismiss for lack of personal jurisdiction were previously denied, but post-*Walden*, they “renewed their motions to dismiss in light of . . . *Walden*.”⁹⁵ Notwithstanding *Walden*, the court again found personal jurisdiction over the four defendants under the assumption that *Walden* “left undisturbed established Supreme Court precedent, and [did] not dictate an alteration.”⁹⁶

1. Jenkins’s basic facts

In *Jenkins*, a daughter was born into a same-sex civil union.⁹⁷ The couple soon dissolved their union and the biological mother

89. *Id.* at 1126.

90. LexisNexis Shephard’s® report run by author on January 2, 2015.

91. Seventeen of the 195 cases have distinguished their facts from *Walden*. *See id.*

92. *Jenkins v. Miller*, No. 2:12-cv-184, 2014 WL 3530365, at *5 (D. Vt. July 15, 2014).

93. Another case worth exploring is one which came out pre-*Walden* and would likely have come out much differently post-*Walden*. In 2011, an Idaho district court found sufficient contacts over an out-of-state defendant for merely inducing independent contractors to abandon their contracts with an Idaho-based company. *Melaleuca, Inc. v. Organo Gold Int’l*, No. 4:10-CV-420-LMB, 2011 WL 3490244, at *5–6 (D. Idaho Aug. 9, 2011).

94. *Jenkins*, 2014 WL 3530365, at *1–5.

95. *Id.* at *1.

96. *Id.* at *5.

97. *Id.* at *1.

moved with her daughter from Vermont to Virginia.⁹⁸ A Vermont court determined the parental rights of the mother and ex-partner, granting full custody to the mother and visitation rights to the ex-partner.⁹⁹ After a time of partial compliance with the visitation schedule, the biological mother allegedly fled the country with her daughter.¹⁰⁰ Soon after the mother left the country with her daughter, the court changed the child's custody, transferring the mother's rights to her ex-partner.¹⁰¹

The ex-partner subsequently sued those she believed assisted in the biological mother's removal of the child from Virginia to New York, then to Canada, and ultimately to Nicaragua.¹⁰² Four defendants renewed a previously-denied motion to dismiss for lack of personal jurisdiction after *Walden's* ruling.¹⁰³ The four consisted of a company, the company's president, the president's daughter, and a founder of the Protect Isabella Coalition.¹⁰⁴ A cell phone owned by the company and another owned by the president made the trip from Virginia to New York the same day the mother traveled from Virginia to New York.¹⁰⁵ The president and his daughter allegedly called the mother's father to set up "a rendezvous at a parking lot where [the mother] abandoned her car" in New York.¹⁰⁶ The president also purportedly helped send money and supplies—solicited from donors by the president's daughter—to the mother in Nicaragua.¹⁰⁷ The Coalition's founder allegedly encouraged her to flee with the child and helped create a fund and a Facebook page devoted to supporting the idea.¹⁰⁸ The founder also "advised anyone with knowledge of [the mother's] whereabouts not to reveal it."¹⁰⁹

98. *Id.*

99. *Id.*

100. *Id.* at *1–2.

101. *Id.* at *1.

102. *Id.* at *2.

103. *Id.* at *3.

104. *See id.* at *2–3.

105. *Id.* at *2.

106. *See id.* at *3.

107. *Id.*

108. *Id.* at *2.

109. *Id.*

2. Jenkins's *analysis*

According to the Vermont district court, it had jurisdiction over the four defendants because they had “allegedly interfered with [the ex-partner’s] parental rights.”¹¹⁰ These rights “arose out of a Vermont civil union and subsequent Vermont Family Court rulings”¹¹¹ and “were to be exercised in Vermont.”¹¹² Relying on *Calder*, the court held that such “intentional and tortious out-of-state activity” aimed at a resident and causing in-state damages satisfied personal jurisdiction.¹¹³ According to the court, *Walden* “presented a very different set of facts” and did not change the law from how it was understood under *Calder*.¹¹⁴

3. How Jenkins *actually comes out under* Walden

The *Jenkins* court is correct that *Walden* “presented a very different set of facts”¹¹⁵ but is wrong in thinking those differences should tip the scale toward jurisdiction under *Walden*. If anything, the differences of contacts in *Jenkins* would seem to justify personal jurisdiction even less than the insufficient contacts in *Walden*. In *Walden*, DEA agents’ out-of-state activities causing in-state damages against known state residents were insufficient to support personal jurisdiction.¹¹⁶ Unlike *Walden*, it is completely unestablished in *Jenkins* whether the defendants knew or had reason to know the plaintiff was a Vermont resident. If anything, that fact would seem to make the contacts more “random, fortuitous, or attenuated”¹¹⁷ than those in *Walden*.

Regardless, as with the DEA agents, there do not appear to be any jurisdictionally relevant contacts between the alleged kidnapping conspirators and the forum state. According to the most straightforward reading of *Walden*, plaintiff residency is no longer

110. *Id.* at *5.

111. *Id.*

112. *Id.* at *4.

113. *See id.*

114. *Id.* at *5.

115. *Id.*

116. *See supra* Sections II.B.1, II.B.2.

117. *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

relevant.¹¹⁸ The fact that the ex-partner was a Vermont resident should no longer have place in the post-*Walden* analysis. While personal jurisdiction over the alleged conspirators may have been justified pre-*Walden* (though still doubtful), it is reasonably clear that personal jurisdiction should not be possible post-*Walden*. It is not established that any of the alleged conspirators ever set foot in Vermont, ever sent anything to Vermont, or had any *Walden*-like contact with Vermont. All they ever did was make decisions that that happened to hurt someone who coincidentally was a Vermont resident with Vermont rights. The fact that Vermont courts determined the plaintiff's rights should make no material difference after *Walden* (although it is unclear if it ever did) because the focus is now on what the defendants did to aim at the forum, not where the plaintiff happened to be or which state happened to be interested in protecting that plaintiff's rights.

If intentionally keeping money out of the custody of its known rightful owners in Nevada is insufficient, then helping keep a child from an occasional visit to a part-time parent—who may not even be known to live in Vermont—should likewise be insufficient.

Jenkins v. Miller exemplifies how dozens of courts have failed to appreciate *Walden*'s potential impact on personal jurisdiction analysis. While other courts have implied by their absence of criticism that they agree *Walden* did not change anything, *Jenkins*—which should have looked on *Walden* with a critical eye—has *expressly* argued that *Walden* left precedent unaltered.

V. PLEA TO RETURN TO PRE-*WALDEN* ANALYSIS

Walden should be overruled. Pre-*Walden* personal jurisdiction analysis, while far from perfect, was more helpful. Not only does *Walden* set the stage for discriminatory and unpredictable enforcement through its contradictions, but the opinion tends to minimize—perhaps even erase—the weight once rightfully given to damage location and contacts with people and property tied to a state. Giving weight to damage location and contacts with people and property tied to a state is in harmony with the territorial legacy laid down by the Court as far back as *Pennoyer*. Further, *Walden* lays

118. See *supra* Section III.A.

the foundation for absurd results, especially in light of increased interstate mobility. Lastly, the protocol in other countries regarding jurisdiction is more in line with the pre-*Walden* tradition. While other countries should not dictate United States law, American courts can learn from other countries and can find persuasive their perspectives on fairness.

A. Walden's Foundation for Unpredictable and Arbitrary Results

Walden leaves a grab bag of contradictions for lower courts and litigators to wrestle with, especially regarding the relevance of plaintiff residency and damage location.¹¹⁹ Some language implies predictable plaintiff residency and damage location are relevant, but explicit language states they are not.¹²⁰ Law should not be self-contradictory.¹²¹ Self-contradictory law creates ambiguity. If courts and attorneys do not—in fact, cannot—comprehend the law because it is incomprehensible, there is little doubt that the law will lead to unpredictable and arbitrary outcomes.

In fact, if *Walden* were treated as a criminal statutory law, such ambiguity would make it unconstitutional under the void-for-vagueness doctrine. According to that doctrine, “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.”¹²² Just like the void-for-vagueness doctrine,¹²³ personal jurisdiction finds its roots in the Due Process Clause of the Constitution. There is no reason the United States Supreme Court should not strive for the same level of clarity it requires of legislatures. Just as when a legislature lays down incomprehensible law, the Court’s contradictory rulings “may permit

119. See *supra* Part IV.

120. See *supra* Section III.A.

121. See John Finnis, *Foundations of Practical Reason Revisited*, 50 AM. J. JURIS. 109, 110 (2005) (explaining that “purportedly valid propositions of law must not contradict or be practically inconsistent with each other”); Marvin Zalman, et al., *Michigan's Assisted Suicide Three Ring Circus—An Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863, 900 n.174 (1997) (stating that rules should be “understandable, must not be contradicted by overlapping law, [and] must not require the impossible”).

122. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotations omitted).

123. *Id.* at 353 (“We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment . . .”).

a standardless sweep” that allows lower courts and attorneys to “pursue their personal predilections.”¹²⁴

B. Minimum Contacts Should Consider Predictable Damage to Plaintiff Residents and Property

Though *Walden* leaves ambiguity regarding the relevance of plaintiff residency, property tied to a state, or the presence of damages in a state, *Walden*'s strongest language seems to indicate their irrelevance.¹²⁵ This not only contradicts precedent,¹²⁶ but specifically seems to run counter to the territoriality principles in *Pennoyer v. Neff*, which provided the backbone of personal jurisdiction analysis for nearly seventy years.¹²⁷ Moreover, ignoring contacts with people, property, and damages tied to a state could lead to absurd results. Lastly, looking to other countries indicates no widespread belief that considering such contacts would be unfair.

1. The territoriality principle of personal jurisdiction supports considering such factors

Personal jurisdiction over an out-of-state defendant once strictly required the defendant's “presence within the court's territorial jurisdiction.”¹²⁸ Presence could be satisfied by service of process on the defendant while within the state or could be indicated by the defendant's ownership of property in the state, though such presence would only justify jurisdiction up to the value of that property.¹²⁹ This was the law from at least *Pennoyer v. Neff*¹³⁰ in 1878 until *International Shoe Co. v. Washington*¹³¹ in 1945—spanning nearly seven decades.

International Shoe did not eliminate the relevance of defendant presence within a state territory, but no longer considered presence a

124. *Id.* at 358 (internal quotations omitted).

125. *See supra* Section III.A.

126. *See supra* Part II, Section III.B.

127. *See infra* Section V.B.1.

128. *Shaffer v. Heitner*, 433 U.S. 186, 186 (1977) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

129. *Pennoyer*, 95 U.S. at 725, 733–34.

130. *Id.*

131. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

strict requirement, instead allowing jurisdiction in its absence if the defendant had “minimum contacts with [a state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”¹³² *International Shoe* became the basic framework upon which much personal jurisdiction analysis over out-of-state defendants has since been built.¹³³ One way of looking at it is that *International Shoe* simply expanded *Pennoyer*’s meaning of “presence” under the territoriality principle to include other ways a defendant can touch a state without physically being or owning property there.

Based on the territoriality principle of jurisdiction, and as recently as 1990, the Court found minimum contacts satisfied when a defendant merely stepped foot into a state for something entirely unrelated to a lawsuit because the plaintiff managed to track down the defendant and serve him process while he was there.¹³⁴ Given the increased interstate mobility of people and things owing to advances in technology and infrastructure, this type of transient or ambush jurisdiction seems more “random, fortuitous, or attenuated”¹³⁵ than reasonable. A single layover in a state could satisfy minimum contacts so long as the plaintiff is opportunist enough to serve a defendant walking from gate to gate. It is true that if a defendant could travel to the state once, the defendant could likely travel there again without too much inconvenience, but given modern circumstances the same could be true for *any* state. Most of the time, there is little difference in the time and expense required of a defendant to fly to one state versus another.¹³⁶

Compared with ambush jurisdiction, it is far more reasonable to subject a defendant to the jurisdiction of a state which that

132. *Id.* (internal quotations omitted).

133. See Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1243 (2001); Brian L. Hazen, Comment, *Rethinking the Dormant Commerce Clause: The Supreme Court as Catalyst for Spurring Legislative Gridlock in State Income Tax Reform*, 2013 BYU L. REV. 1021, 1028 (2013).

134. *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 607–28 (1990).

135. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

136. See *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (1961) (“[T]oday’s facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.”).

defendant has knowingly touched in a way related to the lawsuit. Interacting with a person who resides in a state or property belonging to a person who resides in a state, or causing injury to people or property within a state, should all be considered relevant contacts that may add up to “presence” under *International Shoe*. They should not be minimized or rejected as in *Walden*. This should be especially true when the defendant knows or has reason to know of the state ties. After all, people and property are basically appendages to a state and a state has interest in protecting and governing them.

Of course, plaintiff residency and damage location should not always carry equal weight. Like *Burger King* says, “‘random,’ ‘fortuitous,’ or ‘attenuated’” contacts should carry little, if any, weight and that doctrine should not carve an exception for plaintiff residency.¹³⁷ For example, plaintiff residency unlikely to be known to the defendant at the time of the acts giving rise to injury should not matter much. Also, if residency merely results from a plaintiff’s post-injury unilateral move, that contact should not matter.¹³⁸ However, where residency exists and the defendant knows or has reason to know of it at the time of the alleged wrongful acts, plaintiff residency should not be shrugged off as irrelevant to the minimum contacts inquiry. Also, just because a defendant does not personally care where he is inflicting injury does not make the predictable location of that injury incidental.

2. Ignoring plaintiff residency and damage location could lead to absurd results

While there is nothing fundamentally unfair about considering such factors, if courts turn a blind eye to contacts based on where plaintiffs or their property belong, or where damages occur, absurdities will likely result. The following three fact patterns are illustrative.

137. *Burger King*, 471 U.S. at 475.

138. *See, e.g.*, *Rush v. Savchuk*, 444 U.S. 320, 322–23, 329 (1980) (illustrating that plaintiff’s unilateral post-incident move cannot tie a defendant to that new state).

First, consider a recent Tenth Circuit decision that relied on *Walden*¹³⁹ and came to an absurd conclusion. A Utah financial company relied on an opinion letter from a New Hampshire law firm.¹⁴⁰ The letter allegedly “contained falsehoods” and caused economic damage in Utah.¹⁴¹ The New Hampshire firm knew that the financial company requesting the opinion letter was based in Utah.¹⁴² The firm had been informed that the company was organized under Utah law.¹⁴³ The firm recognized the company as being “a Utah company” and having a Utah address.¹⁴⁴ The firm had discussed the letter over the phone with the Utah company and ultimately sent the opinion letter to the corresponding Utah address.¹⁴⁵

The Tenth Circuit held that the New Hampshire firm’s ties to Utah “[did] not suffice under *Walden v. Fiore . . .*”¹⁴⁶ The Tenth Circuit justified its ruling by explaining, “Walden teaches that personal jurisdiction cannot be based on interaction with a plaintiff known to bear a strong connection to the forum state.”¹⁴⁷ In other words, a firm’s setting up a transaction with a known Utah resident, sending the agreed-upon product into Utah, and causing injury through that product is insufficient to justify haling the firm into a Utah court. That means if the Utah company wants relief, it must now likely travel across the country and litigate in New Hampshire.

Second, consider a hypothetical car stolen from its owner in Nevada and driven to Georgia, where it is illegally sold. The buyer, who has never been to Nevada, is told that the car was stolen. Before buying the car, the buyer noticed the Nevada plates. Even though the buyer had reason to believe he was perpetuating injury in Nevada by taking property that belonged in Nevada, the original owner

139. *Rockwood Select Asset Fund XI (6)–1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1179 (10th Cir. 2014) (“We conclude that Devine’s contacts with Utah were insufficient under . . . *Walden v. Fiore . . .*”). Though the court relied on *Walden*, it did not seem to indicate that it thought *Walden* was teaching anything new.

140. *Id.*

141. *Id.* at 1179–80.

142. *Id.* at 1180.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

could not hale the buyer into a Nevada court. If the owner were to find his car and the illegal buyer in Georgia, the only likely avenue for relief would be for him to bring suit in a forum over 2000 miles from his home. To make this hypothetical more absurd (and more analogous to what happened in *Walden*), imagine that instead of the buyer simply noticing the plates, the seller actually told the buyer where the owner of the vehicle resided. Would it not be more reasonable and fair for the defendant to be haled to court in Nevada—where the owner is known to live and where the car is known to belong—than to require the plaintiff to bring suit in Georgia?

Third, consider a hypothetical similar to *Jenkins v. Miller*, but with additional facts to make the point clearer. Let's say the ex-partner living in Vermont received custody of the daughter prior to her alleged kidnapping from Virginia. Additionally, imagine that those accused of aiding and abetting the kidnapping, while never having been in Vermont, knew the daughter belonged in Vermont in the custody of the ex-partner. The abettors knew they were causing injury in Vermont and that was their intention. Would it not be more reasonable and fair for the abettors to be haled into court in Vermont than to require the mother to bring suit in whatever state the abettors happened to reside in or whatever state the daughter happened to have been abducted in?

There is nothing absurd about weighing where plaintiffs live or where harm occurs in minimum contacts analysis, but ignoring such factors may be a recipe for injustice, as illustrated by the above fact patterns.

3. Domestic law in other Western countries supports such considerations

Western peers, like Canada and England, give weight to plaintiff residency and the location of damages when determining personal jurisdiction under domestic law. International peer pressure alone should not be dispositive in pushing United States courts one way or the other, but it should be persuasive. "As commerce, and therefore litigation, becomes more international in character, American

personal jurisdiction . . . rules must be reassessed and perhaps harmonized with corresponding rules in other countries.”¹⁴⁸

a. Plaintiff residency and the location of damages weigh heavily in the Canadian personal jurisdiction analysis. Canada does not find it fundamentally unfair to hale defendants to a forum, even if the defendant “has little or no connection to the forum” beyond the plaintiff’s own ties.¹⁴⁹ Also, “as long as damages were suffered in the . . . jurisdiction,” the court is permitted to hale a defendant, “even if the defendant ha[s] no other contacts with that jurisdiction.”¹⁵⁰ “[B]ecause damage is an essential element of any tort, if the damages complained of occurred in the forum, the tort is deemed to have been committed in the forum, regardless of whether the actual tortious conduct occurred somewhere else.”¹⁵¹

While Canada does not label defendants’ rights as stemming from due process, Canada does require that lawsuits proceed “in accordance with the principles of fundamental justice for the determination of [defendants’] rights and obligations.”¹⁵² Since “[t]he United States and Canada enjoy perhaps the closest economic, cultural, and political ties of any other neighboring countries in the world,”¹⁵³ United States courts should not ignore Canada’s administration of “principles of fundamental justice” in their own “due process” determinations.

b. The location of damages suffices in England. As in the United States, British law explicitly includes “due process” in its vocabulary.¹⁵⁴ In England’s protection of the right that “[n]one shall be put to answer without due Process of Law,”¹⁵⁵ it has no problem

148. Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 9 (1996).

149. Stephen J. Maddex, *The Law of Personal Jurisdiction in Canada: How U.S. Defendants Can Be Haled Into Court in Canada . . . And Never See It Coming*, TERRALEX.ORG (Jun. 5, 2009), www.terrallex.org/publication/4bc381f127.

150. *Id.*

151. *Id.* (citing *Furlan v. Shell Oil Co.*, 2000 BCCA 404 (Can.)).

152. Canadian Bill of Rights, S.C. 1960, c 44, § I(2)(e), <http://laws-lois.justice.gc.ca/eng/acts/C-12.3/FullText.html>.

153. Maddex, *supra* note 149.

154. Observance of Due Process of Law 1368, 42 Edw. 3 c. 3 (U.K.), www.legislation.gov.uk/aep/Edw3/42/3/section/III.

155. *Id.*

with calling non-resident defendants to task in tort actions, so long as “damage was suffered” in the forum.¹⁵⁶ Though the exact meaning of “due process” in England may not align completely with the meaning attached to those words in the United States, England’s personal jurisdiction analysis is still persuasive evidence that there is nothing inherently unfair about haling a defendant to a forum where he has intentionally caused injury.

VI. CONCLUSION

Instead of offering welcome clarity to personal jurisdiction obscurity, or even leaving the status quo, *Walden v. Fiore* created new twists and turns in the minimum contacts maze. After *Walden*, the proper role of plaintiff residency and the location of damages is an enigma. To the extent *Walden*’s language seems clear, it appears to contradict commonsensical precedent at home and abroad, attempting to divorce people and property from the state they call home. To date, both courts and commentators have failed to appreciate *Walden*’s impact. *Walden* should not be ignored, nor should *Walden* be merely mentioned in passing as if benign: *Walden* should be overruled.

*Adam Balinski**

156. Chris Woodruff & Karen Reed, *Comparative Study of “Residual Jurisdiction” in Civil and Commercial Disputes*, NAT’L REP. ON RESIDUAL JURISDICTION 6 (http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_england_en.pdf (last visited Jan. 2, 2014)).

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