

# HOBBS & HANGING: PERSONAL JURISDICTION V. CHOICE OF LAW

Joseph William Singer\*

*When conduct in one state causes injury in another state, and the law at the place of injury is more favorable to the victim than the law of the place of conduct, what law applies? Where can suit be brought? The traditional answers are that the law of the place of injury applies but that it may be unconstitutional to sue the tortfeasor in the courts at the place of injury because all the tortfeasor's conduct took place outside the forum. Scholars have long criticized this contradiction, and this Article argues that they are right to do so. If we focus on choice-of-law theory and the emerging choice-of-law rules in the Third Restatement of Conflict of Laws, we see that the argument for applying the plaintiff-protecting law of the place of injury is strong. This Article explains and develops that argument, and it gives us reason to reject the idea that the place of injury courts have no personal jurisdiction over the defendant. Hobbes taught us that the first job of government is to protect us from harm at the hands of others and, as long as it is objectively foreseeable that the conduct could have caused harm in the place of injury, there is no fundamental unfairness or constitutional prohibition on applying place of injury law. If that is so, it is irrational not to allow victims to sue at home where they have been injured. Nor is personal jurisdiction unfair to the defendant. It is time to bring choice-of-law doctrine and personal jurisdiction law more in line with each other, and the right way to do so is to adopt an approach that ensures that victims have civil recourse in their home courts against those who stand across the border engaged in acts that intentionally or predictably cause harm there.*

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### INTRODUCTION

Hereby it is manifest, that during the time men live without a common Power, to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man . . . wherein men live without other security . . . In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.<sup>1</sup>

-Thomas Hobbes

To believe that a defendant’s contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.<sup>2</sup>

-Linda J. Silberman

Fireworks in Massachusetts are both illegal and ubiquitous. Although the law prohibits the sale of fireworks and use by nonprofessionals,<sup>3</sup> the quiet of twilight in my neighborhood is interrupted by the sound of fireworks throughout the summer. Almost every year Massachusetts residents suffer serious injuries from the illegal recreational use of fireworks.<sup>4</sup> Nationally in the year 2020, fireworks sent about

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1. THOMAS HOBBS, *LEVIATHAN* 88–89 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) (1651).

2. Linda J. Silberman, *Shaffer v. Heitner*; *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

3. MASS. GEN. LAWS ch. 148, § 39 (1973).

4. Catherine Cloutier, *Despite ban, Mass. still faces fireworks injuries*, BOSTON GLOBE (July 6, 2015), <https://www.bostonglobe.com/metro/2015/07/06/despite-ban-massachusetts-contentends-with-fireworks-injuries/NhGCfcZTdPM5uR3sSJCTTO/story.html>

15,600 people to emergency rooms.<sup>5</sup> It is for that reason that their sale and casual use are banned in the state. What explains their widespread use?

The answer is that neighboring states have different laws, and Massachusetts residents can easily travel to New Hampshire to purchase fireworks and bring them back to Massachusetts. A New Hampshire store that sells fireworks to Massachusetts residents knows that most of those customers will bring them back to Massachusetts and use them there, and that it is inevitable that some number of those fireworks will cause harm to Massachusetts residents. What happens if a child loses fingers or eyesight when a firecracker blows up in her face? What happens if New Hampshire law immunizes the store from liability while Massachusetts law would hold the store responsible for negligently selling an ultrahazardous product that caused foreseeable harm? Does the victim have a right to civil recourse against the store under Massachusetts law or is the store immune from liability under New Hampshire law?

The answer to that question is complicated. The first legal issue is whether the victim can sue the defendant in the Massachusetts courts. That issue is governed by personal jurisdiction law, and while the law is not perfectly clear, it is likely that courts today would hold that suit against the New Hampshire store is not available in the Massachusetts courts. That is because the store does no business within the borders of the Commonwealth of Massachusetts and has not “purposefully avail[ed] itself” of the “privileges and benefits of [Massachusetts] law.”<sup>6</sup> Suit against the

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[<https://perma.cc/H62C-FU5M>] (49 people suffered severe burn injuries in Massachusetts from illegal fireworks use between 2005 and 2014, and during that same period, there were 785 major fire and explosion incidents); Commonwealth of Mass., Off. of the State Fire Marshall, *Be Smart . . . Leave Fireworks to the Professionals*, <https://www.mass.gov/doc/leave-fireworks-to-the-professionals/download>

[<https://perma.cc/KGJ2-KABM>] (between 2007 and 2016, 49 people were treated at Massachusetts emergency rooms for severe burn injuries from fireworks, 59% of whom were children and youths under the age of 25). *See, e.g.*, *Luoni v. Berube*, 729 N.E.2d 1108 (Mass. 2000) (eye injury caused by illegal recreational use of fireworks); *Waters v. Blackshear*, 591 N.E.2d 184 (Mass. 1992) (seven-year-old injury by firecracker deliberately set off by a friend); *Fisk v. Wait*, 104 Mass. 71 (1870) (fireworks injury to neighbor). *Cf.* *Commonwealth v. Godin*, 371 N.E.2d 438 (Mass. 1977) (president of fireworks manufacturer guilty of manslaughter for willfully maintaining unsafe conditions at the plant that resulted in the death of three employees).

5. Hadley Barndollar, *Fireworks in New England: What are the laws, and how many people are injured each year?* PATRIOT LEDGER (July 2, 2021, 5:03 AM), <https://www.patriotledger.com/story/news/2021/07/02/july-4-fireworks-new-england-state-laws-injuries-deaths/7833782002/> [<https://perma.cc/4QJZ-6PHA>] (18 fireworks deaths in the US in 2020 and 12 deaths in 2019); CONSUMER PROD. SAFETY COMM’N, 2020 FIREWORKS ANN. REP.: FIREWORKS-RELATED DEATHS, EMERGENCY DEPARTMENT-TREATED INJURIES, AND ENFORCEMENT ACTIVITIES DURING 2020 (2021), [https://www.cpsc.gov/s3fs-public/2020-Fireworks-Annual-Report.pdf?ZSdvk\\_ep9au0QsqrAgL8S8\\_tA2LnAT7X](https://www.cpsc.gov/s3fs-public/2020-Fireworks-Annual-Report.pdf?ZSdvk_ep9au0QsqrAgL8S8_tA2LnAT7X) [<https://perma.cc/TSZ9-FCZ9>]; CONSUMER PROD. SAFETY COMM’N, 2019 FIREWORKS ANN. REP.: FIREWORKS-RELATED DEATHS, EMERGENCY DEPARTMENT-TREATED INJURIES, AND ENFORCEMENT ACTIVITIES DURING 2019 (2020), [https://www.cpsc.gov/s3fs-public/2019-Fireworks-Annual-Report.pdf?La\\_ZzaoEeI\\_FXhMNJSolY08BhrBbcA4B](https://www.cpsc.gov/s3fs-public/2019-Fireworks-Annual-Report.pdf?La_ZzaoEeI_FXhMNJSolY08BhrBbcA4B) [<https://perma.cc/D73U-8YK3>].

6. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 297 (1980).

defendant may have to be brought in the courts of New Hampshire even though the defendant caused, and routinely causes, harms across the border in Massachusetts.

The second legal issue is whether Massachusetts or New Hampshire law could or should apply to the claim. Paradoxically, even though it may be unconstitutional to sue the New Hampshire store owner in Massachusetts, it is almost certainly constitutional to apply Massachusetts law to the acts of a New Hampshire store that caused injury across the border in Massachusetts. The Constitution does not require application of Massachusetts law in cases like this, but it is permissible. And even though it is constitutional to apply either the law of New Hampshire or the law of Massachusetts, most courts addressing this fact pattern would apply the law of the place of injury, i.e., Massachusetts law. The emerging Third Restatement of Conflict of Laws being drafted right now agrees. Restating the results in the courts over the last forty years, the Third Restatement proposes a rule that would counsel application of the law of the place of injury when it is more favorable to the victim than is the law of the place of conduct when it is foreseeable that the injury could occur there.<sup>7</sup>

We have a paradox. If personal jurisdiction law diverges from choice-of-law doctrine in the way I have described, the Due Process Clause both prohibits suit against the defendant in a Massachusetts court and allows application of Massachusetts law. The constitutional test for choice of law prohibits application of a law when that would be “fundamentally unfair.”<sup>8</sup> But since injury in Massachusetts is easily foreseeable, there is no fundamental unfairness in applying Massachusetts law. Moreover, the place of injury rule is the traditional way to handle cross-border torts, and the Supreme Court has held that choice-of-law rules are constitutional if they are “traditional” or “longstanding and still subsisting.”<sup>9</sup> The place of injury rule is not only traditional but is consistent with current and emerging choice-of-law rules. That means that application of Massachusetts law is consistent with due process of law. Conversely, according to the Supreme Court, it is fundamentally unfair under the Due Process Clause to require the defendant to appear before Massachusetts courts to defend a claim under Massachusetts law because the defendant has conducted no activities in the forum. But how can this be? How can the very same constitutional clause—due process of law—be interpreted to find it both unfair to sue the defendant in Massachusetts court and fair to apply Massachusetts law to the defendant’s conduct?

More than forty years ago, Professor Linda Silberman recognized the incoherence of this legal structure when she remarked that a person should be more

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7. JOSEPH WILLIAM SINGER, CHOICE OF LAW: PATTERNS, ARGUMENTS, PRACTICES 179, 182 (2020) (referencing §6.08 of THE RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. L. INST. COUNCIL DRAFT NO. 3, Dec. 5, 2019)).

8. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (application of a state’s law is permissible if it has a “significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

9. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728–29 (1988) (holding that the forum can apply its own statute of limitations because that rule is traditional, longstanding, and still subsisting).

concerned about whether they will be hanged than where.<sup>10</sup> Why is it fair to apply Massachusetts law to the defendant but not fair to require the defendant to answer for the complaint in a Massachusetts court? The situation is even worse now than it was when Professor Silberman wrote her famous aphorism in 1978. Over the last forty years, the scope of personal jurisdiction doctrine has narrowed considerably

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10. Silberman, *supra* note 2, at 88 (arguing that it is irrational to adopt a constitutional standard for personal jurisdiction that is more narrow than the test for choice of law). Accord, A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 645–46 (2006) (“[R]ather than analyzing whether a defendant has established minimum contacts with a state, the question becomes whether the defendant acted in a way that implicates a state’s interests such that it may adjudicate any resultant dispute. Purposefulness recedes from the scene under this formulation, as the intentionality of the defendant in so implicating a state’s interest is not relevant to a state interest analysis. That is because sovereign power, where it properly exists to protect legitimate state interests, operates by command, not permission. It is thus the mere implication of the state’s interest, not the defendant’s intent or lack of intent to implicate that interest, which places a dispute within the authority of a state to resolve.”). See also Robert D. Brussack, *Political Legitimacy and State Court Jurisdiction: A Critique of the Public Law Paradigm*, 72 NEB. L. REV. 1083, 1101 (1993) (“If the plaintiff is not entitled to impose on the defendant a wholly alien forum for the resolution of their dispute, neither is the defendant entitled to impose such a forum on the plaintiff.”); Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 432–33 (2015) (“constitutional limits on prescriptive and adjudicative jurisdiction arguably should be similar (if not identical) in effects cases when defendants are outsiders”); Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part 1*, 65 BROOK. L. REV. 935, 937 (1999) (arguing that we “need without further delay to repudiate the doctrine derived from *Pennoyer v. Neff* that the U.S. Constitution requires a defendant-forum territorial nexus as a sine qua non for the valid exercise of such jurisdiction”); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183 (1997) (arguing that a focus on finding a forum interest in vindication of its law, rather than its territorial contacts with the defendant alone, can justify personal jurisdiction over nonresident defendants); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 570–71 (1991) (“My suggestion here is that personal jurisdiction can be treated as not merely related to choice of law, but a doctrine whose sole purpose is to keep cases out of states that would not be permitted to apply their own law.”); Winton D. Woods, *Burnham v. Superior Court: New Wine, Old Bottles*, 13 GEO. MASON U. L. REV. 199, 228 (1990) (“The courts of this state shall have authority to exercise personal jurisdiction over any defendant sued in regard to any transaction or occurrence with which this state has a contact or aggregation of contacts reflecting legitimate governmental interests in the transaction or occurrence if the defendant has some logical connection or relationship to the transaction or occurrence that forms the basis for the exercise of jurisdiction.”). But see Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751, 759–65 (1988) (defending the practice of adopting a different standard for personal jurisdiction and choice of law); Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 604 (2007) (“a fundamental liberty interest is at stake when the state seeks to employ its binding adjudicative power against a person who has not established a purposeful relationship with it”); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651, 713 (1987) (arguing that it is appropriate for personal jurisdiction analysis to focus on defendant contacts with the forum alone and for choice-of-law analysis to consider the contacts of both plaintiff and defendant to the state whose law is being applied).

while choice-of-law doctrine has developed stronger support for applying the law of the place of injury when it is more protective of victims than the law of the place of conduct.

At the same time, perhaps things are not as bad as they seem. After all, personal jurisdiction doctrine has developed in the context of fact situations where conduct took place in states far away from the place of injury. Maybe those cases do not apply to the cross-border situation. The Supreme Court has never confronted a case where harmful conduct takes place just over the border and foreseeably causes systematic harm in the neighboring jurisdiction. Because the Court has never directly addressed a cross-border tort case, we have no firm idea what it would do if it had to address the personal jurisdiction issue in that setting. It would, in my view, be a case of first impression. Some of the wording in Supreme Court precedent suggests that Massachusetts courts would have no personal jurisdiction over a New Hampshire store, but personal jurisdiction cases are based on the specific facts of the cases, and it is not clear that the rules defined in the precedents would apply in the same way to our cross-border fireworks case. Our case is distinguishable from all the prior cases decided by the Supreme Court on specific personal jurisdiction.

Nor is the fireworks case the only instance of cross-border torts where this contradiction would matter. Other examples include dram shop laws that impose liability on taverns or restaurants for serving liquor to underage or intoxicated drivers,<sup>11</sup> defamation cases,<sup>12</sup> intentional infliction of emotional distress cases,<sup>13</sup> discriminatory denial of access to public accommodations,<sup>14</sup> and consumer protection cases.<sup>15</sup> In all these cases, conduct takes place in one state and injury in another, giving the place of injury interests in protecting its residents from harm. Some involve harms right over the border; others involve harms that occur farther away from the place of conduct. However, the tendency in all these cases is to apply the law of the place of injury whether or not the case is heard there. The question is whether personal jurisdiction law is rationally consistent with that prevailing choice-of-law practice.

That leads us to the normative question: Should personal jurisdiction over a New Hampshire fireworks store be available in Massachusetts courts when the store sells its products to Massachusetts residents and those products predictably cause grievous harm across the border? I will argue that the answer is yes. Most scholars of personal jurisdiction law are civil procedure teachers where the topic is usually covered. I come to the question as a scholar of choice-of-law doctrine, and I view the issue in that light. There are strong and persuasive reasons to apply the law of the place of injury when it is more plaintiff-favoring than the law of the place of conduct when the defendant could or should have foreseen that its conduct might well cause injury there. There are good reasons why the courts have applied the law of the place of injury in cases like this. And application of the law of the place of

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11. *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *overruled on other grounds*, *West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676 (Minn. 1983).

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

13. *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828 (Ga. 2017).

14. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007).

15. *Brack v. Omni Loan Co.*, 80 Cal. Rptr. 3d 275 (Ct. App. 2008).

injury in such cases is not fundamentally unfair to the defendant and is therefore constitutional. Yet current law may not allow the plaintiff to bring the defendant to the Massachusetts courts to answer for its violation of Massachusetts law. From the standpoint of choice-of-law theory and doctrine, it is the strength of the reasons for application of the law of the place of injury that makes the denial of personal jurisdiction so anomalous and so jarring.

How can it be fundamentally unfair to require the defendant to appear in Massachusetts courts but not fundamentally unfair to impose Massachusetts standards of conduct on the New Hampshire defendant? If it is constitutional to apply Massachusetts law to a New Hampshire store that intentionally engages in acts likely to cause harm to Massachusetts residents inside Massachusetts, why should it be unconstitutional for the Massachusetts courts to hear the claim, interpret their own law, and apply that law to the foreign defendant? Why would it be fundamentally unfair to allow the Massachusetts courts to require someone to defend a claim in Massachusetts but not fundamentally unfair for a New Hampshire court to apply Massachusetts law to the defendant who acted in New Hampshire in a way that foreseeably caused (and continues to cause) harm across the border? If Massachusetts, as a sovereign, has the legitimate claim to protect its citizens from harm, why does it not have the power under the Constitution to bring the defendant before its courts to answer for its actions that caused those harms?<sup>16</sup>

This Article will focus on cross-border torts where conduct takes place in one state and causes foreseeable harm in another state, and where the laws of the two states differ with the place of conduct having a defendant-protecting rule and the place of injury having a plaintiff-protecting rule. Such cases are “true conflicts” in the sense that the states have different rules governing the parties’ relationship and in the sense that both states have strong and legitimate interests in applying their law. While application of the law of the place of conduct is not unreasonable, it is not constitutionally required, and both traditional and contemporary choice-of-law rules create a strong presumption that the law of the place of injury should apply. Moreover, it is almost certain that it is constitutional to apply the law of the place of the injury when conduct occurs in another state, as long as the defendant could have foreseen that the injury might take place there. The place of the injury has *legislative jurisdiction* or the constitutional power to apply its law to the dispute. But if the place of the injury has no personal jurisdiction over the defendant, then the place of the injury has no *adjudicative jurisdiction* over the case. If it is constitutional to apply the law of the place of injury and if that is the longstanding and emerging majority rule under the common law of choice-of-law doctrine, then I will argue that it should also be constitutional for the place of injury to assert personal jurisdiction over the defendant. A state’s adjudicative jurisdiction should not be narrower than

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16. See Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679 (2020) (developing a “protective” theory of sovereignty for both choice-of-law and personal jurisdiction); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1200 (2013) (“Just as overly broad conceptions of personal jurisdiction can interfere with the ability of states to regulate local producers, overly narrow rules can interfere with the forum state’s ability to protect its residents.”).

its legislative jurisdiction.<sup>17</sup> I will present and defend that argument after canvassing developments in both personal jurisdiction law and choice of law.

In Part I, I will recount the changes in personal jurisdiction law over the last decades, focusing on the ways it has been (generally) narrowed, especially in the last ten years. The recent case of *Ford Motor Co. v. Montana Eighth Judicial District Court*,<sup>18</sup> is a partial reversal in this narrowing trend, but dicta in the case still promote the notion that the place of injury has no personal jurisdiction over a defendant whose conduct takes place outside the forum. On the other hand, several Supreme Court cases over the years have suggested that states should have personal jurisdiction over nonresident defendants whose conduct foreseeably causes harm in the forum, especially when the forum has a strong interest in protecting its residents from harm. I will argue that this approach is the correct one, at least in the context of cross-border torts where the harm is direct and foreseeable.

Part II explains the history of choice-of-law doctrine for cross-border torts, starting with the traditional place of injury rule, the rise of interest analysis, and the emerging rules under the Third Restatement. Surprisingly, all of the various approaches that courts have adopted to adjudicate conflicts of law suggest application of the law of the place of injury in cases like this. Understanding why application of the law of the place of injury is preferred is crucial because it is the reason why denial of personal jurisdiction is so hard to comprehend.

Part III explains why this disjunction between choice-of-law doctrine and personal jurisdiction law needs to be addressed and why it means that the Due Process and Full Faith and Credit Clauses should be interpreted to allow jurisdiction over an “absent” defendant who is engaged in conduct that causes objectively foreseeable harm across the border. In defending this position, I will rely on what I have come to call the “Hobbes argument”—that is, that the first role of government is to protect us from physical harm at the hands of others. Since that is the first and primary function of government, it would be odd indeed if the state where the injury is suffered cannot apply its laws to protect its people from harm caused by conduct that is either calculated to cause harm there or that foreseeably causes harm there.

Personal jurisdiction law, unfortunately, has come to focus almost exclusively on the rights of the defendant. Well, defendants have rights *but so do plaintiffs*. Any right to act on the basis of the law of the place of conduct should give way to the right of someone not to be injured at home when that act foreseeably causes harm across the border. Anyone who fires a weapon across the border and kills someone in another state will have committed a crime in both states and can be prosecuted in both states.<sup>19</sup> There is no normative reason why tort law should be any

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17. See Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 114 (1983) (advocating a shift from a test for personal jurisdiction that focuses only on the defendant’s contacts with the forum to one that also considers the plaintiff’s contacts and the forum interest in applying its law).

18. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

19. While the common law would have found a crime only at the place of injury, most states have adopted criminal codes that extend their criminal jurisdiction to conduct within the state that causes harm in another state. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL*

different. If the place of injury has the power to apply its more plaintiff-protecting law to a defendant acting across the border in a defendant-protecting state, then there is no issue of fundamental justice or fairness that should prevent the place of injury state from requiring the tortfeasor to come before its courts to vindicate the rights of its citizens to be protected from harm. Defendants have rights but so do plaintiffs, and this is a situation where the plaintiff's rights should prevail over those of the defendant.

Hobbes may have been wrong to believe that monarchy was the best form of government, but he was not wrong about the first job of government. According to Hobbes, the first law of nature is for human beings to seek peace to avoid the disadvantages of the war that can exist in the state of nature; the second law of nature is the human propensity (and right) to “defend our selves.”<sup>20</sup> According to Hobbes, human beings band together to form governments in order to achieve two goals: peace and protection from harm. Society and government have other goals as well, according to Hobbes, such as “commodious living.”<sup>21</sup> But Hobbes teaches that the first job of government—the reason government exists—is to ensure that we are protected from harm at the hands of others.<sup>22</sup>

To disable a court from applying its own law in its own courts when a defendant knowingly engages in conduct likely to harm the residents of the forum is to disable the state from performing its first and most important public function. Personal jurisdiction law should recognize this. It should not be easier to apply a protective law than to bring a defendant before the court. The irrational contradiction between personal jurisdiction law and choice-of-law doctrine should be resolved, not by narrowing choice-of-law doctrine, but by relaxing or expanding personal jurisdiction doctrine. The state where harm is suffered has the right to the benefits of its victim-protecting law and an actor should not be able to hide behind the border of another state while intentionally causing harms across that border. The place of injury has the right to protect its people from harm and that means it should also be able to require a nonresident to come to the courts at the place of injury to answer for what they have done.

## I. THE NARROWING OF PERSONAL JURISDICTION LAW

### A. *Two Tests: Forum Conduct v. Forum Effects*

Personal jurisdiction law has traditionally focused on the connections between the defendant and the forum. Modern personal jurisdiction law subordinates plaintiff rights to defendant rights—so much so that the Supreme Court appears to view forum interests in protecting their residents from harm as relevant

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LAW §§ 4.4(a)–(b) (3d ed. Oct. 2020 Update). “Under such a statute, where A in North Carolina shoots across the border killing B in Tennessee, North Carolina has jurisdiction to punish A.” *Id.* at § 4.4(b).

20. HOBBS, *supra* note 1, at 92.

21. *Id.* at 90.

22. *Id.*

only if the defendant has some purposeful activities inside the forum.<sup>23</sup> But what happens if the defendant's only contact with the forum is the fact that the defendant's conduct foreseeably harmed someone in the forum?

Surprisingly, this question is not easy to answer. On one hand, the Court has allowed personal jurisdiction over a nonresident defendant when it has engaged in conduct it "knew" would harm a forum resident in her home state and the defendant directed its actions at the plaintiff in her home state even though all of defendant's actions took place in another state.<sup>24</sup> The Supreme Court has also allowed jurisdiction when a defendant's actions were "intentionally directed at" a forum resident.<sup>25</sup> Precedent establishes that personal jurisdiction can sometimes be based on the "effects" of defendant's out-of-state conduct on a forum resident at home at least when defendant's conduct is "directed at" the forum.<sup>26</sup> This approach is premised on the idea that the defendant cannot stand across the border lobbing stones into another state where they injure a forum resident and then hide behind the boundaries of the place of conduct. This test focuses on the *effect* of defendant's conduct rather than asking whether defendant entered the forum to conduct activities there, and it allows personal jurisdiction when those effects are the natural consequences of conduct that takes place out of state. An *effects test* like this obviously focuses on plaintiff rights under forum law and privileges those over the rights of the defendant to immunity under the law of the place of conduct.

On the other hand, the Supreme Court has narrowed both general and specific personal jurisdiction law in recent years, and its recent rhetoric suggests the forum has no personal jurisdiction over the defendant even if its actions are directed at the forum unless the defendant has *acted inside the forum* by "purposely availing itself" of "the privilege of conducting activities within the forum State"<sup>27</sup> or (ambiguously) purposefully availed itself of the "privileges and benefits of [forum] law."<sup>28</sup> Under this view, if the defendant conducts no business in the forum, sends no products there, does not physically enter the forum, and makes no contracts with anyone there, the forum cannot require the defendant to defend a suit there even if its actions out of state foreseeably or intentionally harmed a forum resident, and even if the forum has strong interests in applying its plaintiff-protecting law to protect its own residents from harm. This approach suggests that jurisdiction is based on a *quid pro quo*; a state has the right to regulate a person only if it benefits from

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23. On the "fairness defect" in personal jurisdiction law, see Linda Sandstrom Simard, Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, Ford's *Hidden Fairness Defect*, 106 CORNELL L. REV. ONLINE 45 (2020). On the forum's interests in vindicating the legal rights of plaintiffs, see Louise Weinberg, *Age of Unreason: Rationality and the Regulatory State*, 53 U. MICH. J. L. REFORM 1 (2019).

24. *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (defendants wrote and edited an article "that they knew would have a potentially devastating impact" on the plaintiff and that "that injury would be felt by [plaintiff] in the State in which she lives and works").

25. *Id.* at 790.

26. *Id.* at 789 ("the brunt of the harm...was suffered in [the forum]"); *id.* at 790 ("wrongdoing intentionally directed at a [forum] resident").

27. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

28. *Id.* at 295; *Kulko v. Superior Court*, 436 U.S. 84, 89 (1978).

that state's laws by doing business there. Limits on liberty are justified only if the affected person benefits from those limits, and that is not the case when the defendant has never been inside the forum. The current prevailing approach appears to require "purposeful availment" of the benefits of forum law by conducting activities there that are related to the claim. This test focuses not on plaintiff rights but defendant rights and, if it is determinative, immunizes the defendant from being brought into court at the place of injury to provide redress for a plaintiff injured there.

Two tests, two focuses: Should personal jurisdiction law allow defendants to hide behind state lines and wreak havoc across the border, or do plaintiffs have a right to civil recourse in their home courts when they are injured at home? The way I pose the question exposes my own views on the matter. An alternative formulation would be: Do plaintiffs have a right to force defendants to travel to a foreign jurisdiction to defend a lawsuit when they have never been in the forum or taken any actions there? While the trend is in the direction of the "purposeful availment" test, it is important to remember that the Supreme Court (usually) does not like to overrule cases,<sup>29</sup> and current formulations of the constitutional "purposeful availment" test have not overruled prior cases that established the "directed at" or "effects" test. That means we have two different tests with a trend that narrows the application of the effects test but does not eliminate it. What are we to make of this ambiguity and what it means for the cross-border tort?

#### ***B. The Triumph of Purposeful Availment & the Privileging of Defendant Rights***

It is important to understand the history of personal jurisdiction law to understand how we got here. Traditionally, states were thought to have territorial jurisdiction over persons and actions within their borders. That meant that states could not assert jurisdiction against absent defendants who were not present in the state. This idea was elevated to a constitutional principle in 1877 in the famous case of *Pennoyer v. Neff*,<sup>30</sup> which held that states have no sovereign power outside their territory (including over absent persons)<sup>31</sup> and that the Due Process Clause protects defendants from being brought before a tribunal that has no authority over them because they are not physically present in the forum state.<sup>32</sup>

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29. An exception is the recent overruling of *Nevada v. Hall* in the *Hyatt III* decision. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2018) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

30. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

31. *Id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."); *id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise jurisdiction and authority over persons or property without its territory.").

32. *Id.* at 733 ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such [court] judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."); *Cf.* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017) (arguing that court judgments can be entered against absent defendants but those judgments are not subject to full faith and credit in other states).

The *Pennoyer* “physical presence” test was replaced in 1945 by the ruling in *International Shoe Co. v. Washington*<sup>33</sup> that courts have personal jurisdiction over out-of-state defendants when those defendants have “minimum contacts” with the forum “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>34</sup> *International Shoe* involved a business corporation that had a dozen sales managers living and working in the forum.<sup>35</sup> Chief Justice Stone noted that corporations are entities whose presence can only be established by the activities of those who work for the corporation.<sup>36</sup> Rather than try to establish whether a dozen employees was enough to establish “presence,” the Court focused on whether the “contacts of the corporation with the state of the forum [are such as to] make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.”<sup>37</sup> Relevant to that determination is the inconvenience in defending the suit away from its “home” and whether doing so imposes an “unreasonable burden” on the defendant.<sup>38</sup>

The two norms embraced by *International Shoe* are “reasonableness” and “our federal system of government.” The reasonableness criterion is related to the Due Process Clause and suggests that the focus should be on whether the defendant has a fair opportunity to defend itself from a claim. That reasonableness determination can be based on a variety of factors but the Court’s focus was, first, on whether jurisdiction would impose an “unreasonable burden” on the defendant,<sup>39</sup> and second, on whether the defendant’s own actions inside the forum made it “reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.”<sup>40</sup> The federalism norm enters the picture because the inquiry is about contacts with the *forum state*. For example, the defendant may live five miles from the courthouse but if the defendant has never been inside the territorial boundaries of the forum or conducted any activities there, it is possible that personal jurisdiction would be found to be unreasonable because the defendant has never

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

34. *Id.* at 316. This principle was recently reaffirmed in *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Personal jurisdiction law arguably elides three separate issues: first, whether a court has the power to require the defendant to appear before it and render a valid and enforceable judgment within the jurisdiction; second, whether a judgment rendered “without personal jurisdiction” is subject to full faith and credit in other states; and third, whether Congress can change personal jurisdiction law by statute, making judgments enforceable that would otherwise not have been so. For my purposes in these articles, these distinctions will not matter because my topic is whether a Massachusetts court can render a valid judgment against a New Hampshire store that sells goods to Massachusetts residents and which cause harm in Massachusetts—a judgment that would be enforceable against the store in the New Hampshire courts if they were asked to recognize and enforce it.

35. *Int’l Shoe*, 326 U.S. at 313 (eleven to thirteen salesmen operated in the forum).

36. *Id.* at 316.

37. *Id.* at 317.

38. *Id.*

39. *Id.*

40. *Id.* at 320.

“exercise[d] the privilege of conducting activities within [that] state” or “enjoy[ed] the benefits and protection of the laws of that state.”<sup>41</sup>

From the beginning, the “minimum contacts” test diverged into two different directions. On one hand, courts may exercise “general jurisdiction” over claims unrelated to the defendant’s activities in the forum if the defendant engages in “continuous . . . operations [that are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>42</sup> On the other hand, courts may exercise “specific jurisdiction” over the defendant when a claim “arises out of or relates to the defendant’s contacts” with the forum.<sup>43</sup> Over the last ten years, the Supreme Court has narrowed both forms of personal jurisdiction, and it is the discordance between that narrowing of personal jurisdiction and choice-of-law doctrine that commands our attention here.

On the general jurisdiction front, courts have long assumed that they have general jurisdiction over defendants—the power to render judgment against them on claims unrelated to their forum activities—when their in-state activity is “continuous and systematic.”<sup>44</sup> That idea crystallized in the 1952 case of *Perkins v. Benguet Consolidated Mining Co.*<sup>45</sup> and the 1984 case of *Helicópteros Nacionales de Colombia v. Hall*.<sup>46</sup> For example, in *Tuazon v. R.J. Reynolds Tobacco Co.*,<sup>47</sup> the Ninth Circuit applied the general jurisdiction test announced in *Perkins* and *Helicópteros* and found that general jurisdiction in Washington State could be established over a foreign tobacco company based on its substantial sales of its products inside Washington even though it was not its “home away from home.”<sup>48</sup> However, in the 2011 case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>49</sup>

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41. *Id.* at 319.

42. *Id.* at 318. Recently, general jurisdiction has been limited to states where the defendant is domiciled or “at home.” *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

43. *Ford Motor Co.*, 141 S. Ct. at 1025.

44. *Helicópteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation”); *id.* at 415 (*citing* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (noting that “sufficient contacts” exist when defendant’s activity in the forum is “continuous and systematic”)). *See, e.g.*, *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (“General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state”); *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 648 (Tenn. 2009) (“An assertion of general jurisdiction must be predicated on substantial forum-related activity on the part of the defendant. The nonresident defendant’s contacts with the forum state must be sufficiently continuous and systematic to justify asserting jurisdiction over the defendant based on activities that did not occur in the forum state”); *HealthMarkets, Inc. v. Super. Ct.*, 90 Cal.Rptr.3d 527, 533 (Ct. App. 2009) (“A defendant that has substantial, continuous, and systematic contacts with the forum state is subject to general jurisdiction in the state, meaning jurisdiction on any cause of action.”).

45. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

46. *Helicópteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

47. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006).

48. *Id.* at 1173–75.

49. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

and the 2014 case of *Daimler AG v. Bauman*,<sup>50</sup> the Supreme Court substantially narrowed general jurisdiction, holding that it only exists over corporations that are “at home” in the forum.<sup>51</sup> As a practical matter, general jurisdiction will probably be found to exist only over a corporation at its place of incorporation or its “principal place of business”—usually its headquarters or corporate offices.<sup>52</sup>

Our focus here is *specific jurisdiction* because we are concerned with the power of a plaintiff injured at home to sue a nonresident defendant whose out-of-state conduct foreseeably caused the harm at plaintiff’s home. Just as the Court has narrowed general jurisdiction, it also appears to have narrowed the test for specific jurisdiction. Originally, the cases that replaced the *Pennoyer* physical presence test with the minimum contacts test (*International Shoe* and *World-Wide Volkswagen*)<sup>53</sup> focused on considerations of fairness to defendants while giving due deference to

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50. *Daimler AG v. Bauman*, 571 U.S. 117 (2014). *See also* BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (“*Goodyear* and *Daimler* clarified that a court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.”).

51. *Daimler AG*, 571 U.S. at 122; *Goodyear*, 564 U.S. at 919.

52. One oddity resulting from this narrowing of the scope of general jurisdiction is the continued viability of so-called “tag jurisdiction.” In 1990, the Court had held, in *Burnham v. Superior Court*, 495 U.S. 604 (1990), that a court could take personal jurisdiction over a defendant based on claims unrelated to forum contacts if that defendant was “physically present” in a state and served with process there—no matter how short that presence was. “[Personal service upon a physically present defendant suffice[s] to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there.” *Id.* at 612. Justice Sotomayor pointed out, in her concurring opinion in *Daimler AG*, that preserving tag jurisdiction while limiting general jurisdiction to a corporation’s headquarters or place of incorporation “creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, . . . but a large corporation that owns property, employs workers, and does billions of dollars’ worth of business in the State will not be, simply because the corporation has similar contacts elsewhere . . .” *Daimler AG*, 571 U.S. at 158 (2014) (Sotomayor, J., concurring). A second oddity is that individuals *may* be subject to general jurisdiction in any state in which they maintain a residence even if their domicile is elsewhere while corporations are only subject to general jurisdiction at their domicile (place of incorporation or principal place of business). *See id.* at 761 n.19 (2014) (in an “exceptional case,” an individual’s contacts with a forum might be so extensive as to support general jurisdiction notwithstanding domicile elsewhere); *Compare* Repp v. Or. Health Scis. Univ., 972 F. Supp. 546, 549 n.2 (D. Or. 1997) (defendant’s current residence provides basis for general jurisdiction), and *Personal Jurisdiction: How to Determine Where a Person Can Be Sued*, FINDLAW (last updated June 20, 2016), <https://www.findlaw.com/litigation/filing-a-lawsuit/personal-jurisdiction-how-to-determine-where-a-person-can-be.html> [https://perma.cc/B64R-XXT7] (“Domicile or residence in a state is enough to give courts in that state jurisdiction over you.”), *with* Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014) (holding that general jurisdiction over an individual comports with due process in the forum where he is “at home,” meaning the place of “domicile”).

53. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

the regulatory interests of the plaintiff-protecting states. For example, in *International Shoe*, the Supreme Court focused on the “burden” on the defendant of defending a suit away from its home<sup>54</sup> and the fact that the defendant was not unfairly surprised that its activities in the forum gave rise to “obligations.”<sup>55</sup> This formulation has two sides. On one hand, the focus is on fairness to the defendant: Is it an undue burden to be brought before the court and will defendant be unfairly surprised if it had to defend a lawsuit there? On the other hand, does state law impose “obligations” on the defendant because of defendant’s conduct? State laws impose obligations to achieve public purposes and to protect the rights of victims, i.e., plaintiffs. That means that, when the minimum contacts test was first developed, sovereign regulatory interests were as much a part of the test as were considerations of fairness to defendants. In *International Shoe*, for example, defendant’s sales activity in the state of Washington should have put it on notice that it was subject to state law requiring it to pay into the state unemployment insurance fund. Conversely, the forum had sovereign interests in its “comprehensive scheme of unemployment compensation.”<sup>56</sup> Both party rights and sovereign regulatory interests were—and are, or should be—relevant to the personal jurisdiction inquiry.

This can be seen even more clearly in the dicta elaborating the minimum contacts test in the 1945 case of *World-Wide Volkswagen v. Woodson*.<sup>57</sup> That case involved a car purchased from defendant dealer in New York that erupted in fire after being struck by another car as plaintiff purchaser was driving the car in Oklahoma, resulting in severe burns to plaintiff and her children. The Court reiterated that the Due Process Clause “limits the power of a state court to render a valid personal judgment against a nonresident defendant.”<sup>58</sup> It does so both to “protect[] the defendant against the burdens of litigating in a distant or inconvenient forum [and] to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”<sup>59</sup> Again, the Court said that the focus was on “reasonableness” or “fairness.”<sup>60</sup> This inquiry focuses partly on protecting the defendant from the “burden” of defending a suit in a state with which it has no contacts and protection of the defendant from “inconvenient litigation.”<sup>61</sup> But the reasonableness inquiry *also* was supposed to include consideration of both plaintiff rights and the interests of states in furthering their public policies.<sup>62</sup>

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54. *Int’l Shoe*, 326 U.S. at 317.

55. *Id.* at 320 (“It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.”).

56. *Id.* at 311.

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

58. *Id.* at 291.

59. *Id.* at 292.

60. *Id.*

61. *Id.*

62. *Id.* (“Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be

After all, when we are talking about “coequal sovereigns,” we must be talking *both* about the interests of the state where the conduct occurred *and* the interests of the state where the injury was suffered. And the Due Process Clause protects the rights, not just of defendants, but plaintiffs as well. The Supreme Court explained:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be *considered in light of other relevant factors*, including the *forum State’s interest in adjudicating the dispute*; the *plaintiff’s interest in obtaining convenient and effective relief*, at least when that interest is not adequately protected by the *plaintiff’s power to choose the forum*; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the *shared interest of the several States in furthering fundamental substantive social policies . . .*<sup>63</sup>

The “substantive social policies” mentioned in the *World-Wide Volkswagen* opinion were not limited to the public policies of states where defendants are located or act, and the interest in “efficient resolution of controversies” included the plaintiff’s interest in obtaining “convenient and effective relief.”<sup>64</sup> Thus, the minimum contacts test required a balance between the interests of plaintiff-protecting states and defendant-protecting states and between defendant rights and plaintiff rights. Due process focused on the “burden on the defendant” but required that burden to be “considered in light of other relevant factors,” including the plaintiff’s rights to relief and the regulatory interests of the place of injury.

At the same time, the Court emphasized that territorial boundaries matter and that a court might not have personal jurisdiction over a nonresident defendant “even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation.”<sup>65</sup> With that consideration in mind, the Court held that a local car dealer in New York whose customers come from New York or neighboring states and that had no contacts with Oklahoma should not be required to defend a lawsuit in Oklahoma courts even if Oklahoma had a regulatory interest in applying its law to protect its people from harm. Given the localized nature of the defendant’s business as a dealer selling cars in New York, it might well be justifiably surprised not only by being sued in Oklahoma but by subjection to Oklahoma tort law just because it sold a car and cars are inherently mobile. That made personal jurisdiction over the New York defendant unreasonable. But this determination did not ignore the regulatory interests of Oklahoma; it balanced those interests (and the rights they created in the plaintiff)

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considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute...; the plaintiff’s interest in obtaining convenient and effective relief...”).

63. *Id.* (internal citations omitted) (italics added).

64. *Id.*

65. *Id.* at 294.

against the rights of the defendant and the regulatory interests of the place of conduct.

Three things stand out. First, when the minimum contacts test was given its full formulation in *World-Wide Volkswagen*, plaintiff interests and plaintiff-protecting sovereigns were supposed to be included in an overall reasonableness inquiry. While the original due process test does protect defendants from unfair proceedings, it never did ignore the rights of plaintiffs or the regulatory interests of plaintiff-protecting states where injuries occur. *Those considerations are part of the reasonableness inquiry.* They are not irrelevant or even external to the Due Process Clause, and they are not segregated to a second step inquiry that is undertaken only after considering the defendant's contacts with the forum.

Second, the *fact situation* in *World-Wide Volkswagen* was crucial to the Court's conclusion about the balance of state interests and party rights. The defendant was a local business, not a multinational corporation, and it neither shipped the car to Oklahoma nor interacted with the buyer there.<sup>66</sup> Would the case have come out differently if plaintiff were domiciled in New Jersey and the accident took place there? The answer is yes; maybe the case would have come out differently. What matters about that is the fact that broad language in the Supreme Court's personal jurisdiction cases should not be divorced from the facts of the cases they adjudicate. Those facts are part of the test, and they should color our understanding about both the fairness and state interest inquiries.

Third, the Court in *World-Wide Volkswagen* presented two different "reasonableness" tests for specific jurisdiction. The first version of the test suggested that defendant rights should be considered in tandem with both plaintiff rights and state regulatory interests. As noted above, the Court found that the "burden on the defendant" should be "considered in light of other relevant factors," including "the forum State's interest in adjudicating the dispute" and "the plaintiff's interest in obtaining convenient and effective relief."<sup>67</sup> Under that formulation, we need to balance considerations of fairness to defendants with considerations of fairness to plaintiffs as well as considering the forum's substantive interest in applying its laws to achieve its social policies and "shared interest of the several States in furthering fundamental substantive social policies."<sup>68</sup>

The second version of the test focused attention *on the defendant alone* without regard to the right of the plaintiff to sue in a convenient forum or the interests of the forum in applying its law to the case. In Part III of the *World-Wide Volkswagen* opinion, the Court concluded that Oklahoma courts have no specific jurisdiction over the defendant New York car dealer because there were no "affiliating circumstances" that connected the defendant to the forum.<sup>69</sup> Defendant "carr[ies] on no activity whatsoever" in the forum; it does not "avail [itself] of the privileges and benefits of Oklahoma law"; it "solicit[s] no business there either through salespersons or advertising reasonably calculated to reach" the forum; "it

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66. *Id.* at 295.

67. *Id.* at 292.

68. *Id.*

69. *Id.* at 295.

sells no cars there.”<sup>70</sup> The mere fact that it was foreseeable that a buyer might drive the car to Oklahoma is insufficient to make it fair to require the defendant to defend a lawsuit there. Under this second formulation, the plaintiff must establish minimum contacts between the defendant and the forum *first*. Only *after* doing that do plaintiff rights and forum regulatory interests become relevant to the reasonableness inquiry.

This second version of the test is the one that has won out in later cases. The “reasonableness” test has been converted into a “minimum contacts test” and the only contacts that matter are those between the defendant and the forum. Justice Kagan’s 2021 opinion in *Ford Motor Co.*, for example, states that specific personal jurisdiction can exist when the defendant has taken “some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.”<sup>71</sup> It may do so by entering a contractual relationship with someone in the forum or “exploiting [the] market” there perhaps by selling goods to forum residents.<sup>72</sup> Under this “purposeful availment” test, the forum has no personal jurisdiction over a defendant that conducts no activity in the forum, no matter what the forum sovereign interests are and no matter whether the plaintiff has rights under forum law. Those plaintiff-favoring considerations apparently only come into play *after* minimum contacts are present. But even then, those factors appear to play no role. After all, if the defendant has minimum contacts with the forum, there is no need to consider additional reasons to allow suit at the forum, such as the forum’s interest in applying its law or plaintiff rights under forum law. The second part of the specific jurisdiction test—the so-called “reasonableness” factors—seem to work only to *defeat* personal jurisdiction, not to *establish* it. They may result in a denial of personal jurisdiction when minimum contacts are present because jurisdiction at the forum is an unreasonable burden on the defendant.<sup>73</sup>

If the due process clause requires “purposeful availment” to bring a defendant before a forum, and if that means that personal jurisdiction exists only if defendant has acted within the borders of the forum, then in our cross-border case, there would be no personal jurisdiction at the place of injury. It is an interesting question whether a New Hampshire fireworks store “exploits the Massachusetts market” by selling its goods to Massachusetts residents who come to New Hampshire because that is the only place they can lawfully buy those goods. Perhaps that constitutes “purposeful availment” of the benefits of Massachusetts law or the Massachusetts market. If it does not, then current law would seemingly find no specific personal jurisdiction over a New Hampshire store that sells goods to Massachusetts residents even if those goods cause foreseeable harm in Massachusetts.

Here are some considerations that may go the other way. First, personal jurisdiction cases are factually specific, and the results are strongly dependent on the

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70. *Id.*

71. *See, e.g., Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

72. *Id.* at 1025.

73. *See, e.g., Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987) (Justices cannot agree whether minimum contacts are present but agree that assertion of personal jurisdiction is unreasonable).

fact situations before the Court. None of the Supreme Court precedents in this field involve cross-border torts where the conduct takes place near the border and causes harm across the border. None of the cases involve sellers who routinely sell their goods to residents of the neighboring state. None of them involve a regional market where an urban area or a state is part of a larger geographic market with routine advertisements and sales to people from neighboring jurisdictions. And none of the cases involve proof that the substantive law of the forum is different from the substantive law of the place of conduct such that the forum's interest in applying its law is both evident and potentially outcome-determinative.

The "purposeful availment" test was developed in the context of cases where defendant's conduct takes place far away from the forum. Consider that *World-Wide Volkswagen* involved a local New York dealer who sold a car involved in an accident in Oklahoma;<sup>74</sup> *Asahi* involved a Japanese manufacturer that sold a product to a buyer in Taiwan and was later sued in California;<sup>75</sup> *Walden v. Fiore* involved the actions of a government official in Georgia affecting the personal property rights of Nevada residents;<sup>76</sup> *Nicastro* involved a company in the United Kingdom whose product caused harm in New Jersey.<sup>77</sup> Its most recent incarnation in *Ford Motor Co.* found "purposeful availment" when defendant car manufacturer both advertised and sold its cars in the forum, making it unnecessary to consider the cross-border case.<sup>78</sup>

Our cross-border case has never been addressed by the Supreme Court. When the Court chooses to decide such a case, it will be a case of first impression. The Supreme Court has never considered whether a defendant can escape the jurisdiction of a state's regulatory ambit simply by locating across the border. If that is true, then we have no precedent at all that directly addresses this issue. It is possible that the Supreme Court would distinguish all its prior cases and find them inapposite to the cross-border tort that concerns us here. That would especially be true if forum tort law differs from the law in the jurisdiction where the defendant is located and engages in business. It is also possible that the Court might fit this distinguishable case within the "exploiting the forum market" criterion and find it covered by current law. Either way, there remains an argument under current law for finding personal jurisdiction in the courts at the place of injury.

Second, the current post-*Pennoyer* personal jurisdiction test had an original formulation that included consideration of plaintiff rights and forum regulatory interests as part of the overall reasonableness determination. That formula recognized that *both* states may have regulatory interests that are implicated in multistate cases that have contacts with more than one jurisdiction, and that defendants are not the only ones with rights, including constitutional rights. The defendant's right to be free from unfair or burdensome litigation coexists with the plaintiff's right to fair and effective litigation to vindicate the plaintiff's rights under

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74. *World-Wide Volkswagen Corp.*, 444 U.S. at 288.

75. *Asahi Metal Indus. Co.*, 480 U.S. at 105–06.

76. *Walden v. Fiore*, 571 U.S. 277, 280–81 (2014).

77. *J. McIntyre, Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011).

78. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022, 1028 (2021).

forum law. The two-step dance that turns our eyes away from plaintiff rights to focus solely on the defendant misinterprets the way that rights arguments work. Rights are always relational and the fact that defendants have rights does not mean that plaintiffs do not have them as well. A right not to be sued in Massachusetts is not a free-floating defendant entitlement; it limits the rights of plaintiffs. Such a right can only be defended if it does not result in fundamental injustice to someone else, like the plaintiff. It is a logical error to define the defendant's rights without consideration of the plaintiff's rights.

Third, there is an independent doctrinal path that has now been suppressed by the triumph of the "purposeful availment" test. The alternative test is the "directed at" test evident in the contracts context in *Burger King* and the torts context in *Calder v. Jones*.<sup>79</sup> That is the subject of the next section.

### ***C. The Marginalized "Directed at" or "Effects" Test: Plaintiff Rights and Sovereign Regulatory Interests***

In a 2011 case narrowing the scope of general jurisdiction (the *Goodyear* decision), the Supreme Court said, "When a defendant's act outside the forum causes injury in the forum . . . , a plaintiff's residence in the forum may strengthen the case for the exercise of *specific jurisdiction*."<sup>80</sup> To support that observation, the Court cited favorably to the case of *Calder v. Jones*,<sup>81</sup> a 1984 decision that found specific personal jurisdiction in California courts over Florida defendants who had written a newspaper story at their place of employment and domicile in Florida that allegedly defamed California resident Shirley Jones. While the newspaper they worked for (the *National Enquirer*) had a large circulation in California, the newspaper was not the defendant. Rather, the defendants were the writer and editor of the article. Because there was no allegation that California courts had general jurisdiction over defendants, the claim was that the actions of defendants in Florida were sufficient to constitute contacts with California relevant to the plaintiff's claim and to allow personal jurisdiction over them in the California courts.<sup>82</sup>

Reporter John South wrote the article in Florida and did most of his research there. His only contact with California related to this case was that "[s]hortly before publication, South called [Jones's] home and read to her husband a draft of the article so as to elicit his comments upon it. Aside from his frequent trips and phone calls [to California], South [had] no other relevant contacts with California."<sup>83</sup> Iain Calder lived in Florida and was the president and editor of the newspaper. He had only been to California twice, once on a pleasure trip and once to testify in an unrelated trial. He had "no other relevant contacts with California."<sup>84</sup>

Justice Rehnquist began by reasserting the minimum contacts test and emphasizing that "[i]n judging minimum contacts, a court properly focuses on the

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79. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder v. Jones*, 465 U.S. 783 (1984).

80. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 n.5 (2011) (*citing* *Calder v. Jones*, 465 U.S. 783, 788 (1984)).

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

82. *Id.* at 784–86.

83. *Id.* at 785–86.

84. *Id.* at 786.

relationship among the defendant, the forum, and the litigation.”<sup>85</sup> While trying to keep the emphasis on the defendants’ contacts with the forum, he explained how the *plaintiff’s* contacts with the forum might be relevant to finding personal jurisdiction *over a defendant*. He noted that the plaintiff’s contacts with the forum “may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises.”<sup>86</sup> The libelous story here “concerned the California activities of a California resident,” and “impugned the professionalism of an entertainer whose television career was centered in California.”<sup>87</sup> Justice Rehnquist further explained:

[T]he brunt of the harm, in terms both of [her] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and the harm suffered. Jurisdiction over [defendants] is therefore proper in California based on the “effects” of their Florida conduct in California.<sup>88</sup>

The Supreme Court held that the California courts had personal jurisdiction over the Florida defendants when their only contact with the forum was that they had committed an intentional tort *knowing* it would cause harm to a California resident inside California. It was as if they had fired a gun across the border aiming at a victim and hitting their target.<sup>89</sup> For choice-of-law purposes, the court designated the domicile of the victim as the place where injury to reputation from libelous statements occurs.<sup>90</sup> And specific personal jurisdiction existed over nonresident defendants, *not* based on their conduct inside the forum but on their conduct *outside* the forum that directly harmed a forum resident where that harm was objectively foreseeable as a result of defendants’ conduct outside the state. There is no hint of “purposeful availment” of the opportunity to conduct activities inside the forum or to take the benefits of forum law—only out-of-state conduct that foreseeably harms a forum resident. The “effects” test is presented in *Calder v. Jones* as an *alternative* to the “purposeful availment” test.

Justice Rehnquist explained that defendants engaged in “intentional and allegedly tortious acts, expressly aimed at California”<sup>91</sup> and also “intentionally directed at a California resident.”<sup>92</sup> The article they wrote was about Jones, in that sense it was directed at harming her. It was also intended to cause harm, and because the courts adopt the fiction that the harm of libel and slander occur at one’s domicile,

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85. *Id.* at 788.

86. *Id.*

87. *Id.* at 788.

88. *Id.* at 789.

89. *See, e.g., Kulko v. Superior Court*, 436 U.S. 84, 96 (1978) (discussing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (AM. L. INST. 1971), which grants personal jurisdiction by acts causing effects in the forum such as “shooting [a] bullet from one State into another”).

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

91. *Id.*

92. *Id.* at 790.

the actions were intended to cause injury in California. Rehnquist emphasized that this was not “mere untargeted negligence.”<sup>93</sup>

Petitioner South wrote and petitioner Calder edited an article that *they knew* would have a potentially devastating impact upon respondent. And *they knew the brunt of that injury would be felt by respondent [Jones] in the State in which she lives and works* and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must reasonably anticipate being haled into court there to answer for the truth of the statements made in their article. . . . An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, *knowingly cause the injury in California.*<sup>94</sup>

The Supreme Court found it to be irrelevant that the defendants were “not responsible for the circulation of the article in California.”<sup>95</sup> The Court reasoned that their conduct was “expressly aimed at California” and they knew it would cause harm there.<sup>96</sup> While their contacts with California “are not to be judged according to their employer’s activities” in California, “their status as employees does not somehow insulate them from jurisdiction” either.<sup>97</sup>

Would the case have come out differently if the *National Enquirer* were not sold in California? Perhaps it would, on the theory that the libelous information would not be circulated there. But the reasoning of the case strongly suggests the opposite. The focus of the argument for specific jurisdiction is out-of-state conduct likely to cause harm to a California resident at her home in California. The newspaper is merely the vehicle for the intentional tort. The same harm with the same certainty that it would occur in California would have happened even if the paper were not sold in California.

A different instance of specific personal jurisdiction over a defendant who had never been in the forum was *Burger King Corp. v. Rudzewicz*,<sup>98</sup> where the Supreme Court found personal jurisdiction over a Michigan defendant in Florida courts. Plaintiff Florida-based franchisor Burger King sued Michigan defendant franchisee to enforce a franchise agreement that had a choice-of-law clause for Florida law. The Court found defendant to have established minimum contacts with Florida by entering an ongoing contractual relationship with a Florida resident.<sup>99</sup> When “parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state,’”<sup>100</sup> a forum may exercise personal

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93. *Id.* at 789.

94. *Id.* at 789–90 (italics added).

95. *Id.* at 789.

96. *Id.*

97. *Id.* at 790. *Cf.* Janus v. Freeman, 840 F. App’x. 928 (9th Cir. 2020) (posting on social media of allegedly defamatory comments about California employer not sufficient to confer personal jurisdiction over defendant in California).

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

99. *Id.* at 485–87.

100. *Id.* at 473 (quoting *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 647 (1950)).

jurisdiction over a nonresident who “purposefully directs”<sup>101</sup> his activities toward forum residents. In such a case, a “State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”<sup>102</sup> While this “purposefully directed at” test would seem to encompass the result in *Calder*, the *Burger King* Court pushed the other way by reaffirming the “purposeful availment” test. The Court noted that it had previously held that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>103</sup>

This set up a potential clash between the “effects” or “directed at” test and the “purposeful availment” test. Which of those tests would prevail in a tort suit? The purposeful availment test won in the 2014 case of *Walden v. Fiore*,<sup>104</sup> potentially cutting back on the broader *Calder v. Jones* holding. *Walden* rewrote the holding in *Calder* by focusing not on the effects of the conduct in California, but on the indirect contacts the defendants had in California, including the fact that the defamatory article was circulated there.

*Walden* involved two professional gamblers returning to their Nevada home from Puerto Rico with a stopover in Atlanta. Their bags were searched at the airport in Puerto Rico and a police officer found \$97,000 in cash in their carry-on bags. They explained that they had been gambling at the El San Juan casino, and that the money was the “gambling bank,” which included their earnings. They were allowed to board the plane to Atlanta where they had a stopover before flying on to their home in Nevada. When they landed in Atlanta, two officers of the Drug Enforcement Agency (“DEA”), one of which was Anthony Walden, approached them at their departure gate for Las Vegas and seized the cash, explaining that it would be returned to them once they had proved a legitimate source for the cash. Subsequently, the cash was returned to them in Nevada by the DEA. Plaintiffs sued Walden in federal court in Nevada seeking money damages under *Bivens*<sup>105</sup> for violating their constitutional rights to be free from unreasonable search and seizure.

In a unanimous opinion, the Court found no personal jurisdiction over defendant Walden in Nevada. Justice Thomas explained that Walden had no “substantial connection” with Nevada just because the owners of the money he confiscated lived there and he was aware of their domicile.<sup>106</sup> “[T]he relationship [with the forum] must arise out of contacts that the defendant *himself* creates with the forum State.”<sup>107</sup> Moreover, “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,”<sup>108</sup> and “the plaintiff cannot be the only link between the

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101. *Id.* (personal jurisdiction over a nonresident when a “nonresident who purposefully directs his activities toward forum residents”).

102. *Id.*

103. *Id.* at 474–75.

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

105. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

106. *Walden*, 571 U.S. at 284.

107. *Id.*

108. *Id.* at 285.

defendant and the forum.”<sup>109</sup> “These same principles apply when intentional torts are involved.”<sup>110</sup>

The Court distinguished *Calder v. Jones* by arguing that “we examined the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story.”<sup>111</sup>

The defendants relied on phone calls to “California sources” for the information in their article; they wrote the story about the plaintiff’s activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the “brunt” of that injury was suffered by the plaintiff in that State. “In sum, California [wa]s the focal point both of the story and of the harm suffered.” Jurisdiction over the defendants was “therefore proper in California based on the effects of their Florida conduct in California.”<sup>112</sup>

Here, in contrast, defendant Walden had no connection with Nevada at all. The Court found irrelevant the fact that the conduct (the allegedly unconstitutional seizure of the money) directly caused harm in Nevada by delaying the victims’ access to their own money without just cause. “Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.”<sup>113</sup> While not explicit on the matter, the Court’s reasoning suggested that personal jurisdiction existed in California only because the defendants contacted the plaintiff in her home state, the article concerned a California resident, and the defamatory article was circulated there. The fact that the Georgia conduct would necessarily harm the plaintiffs in their home state was not sufficient to make it reasonable for the defendant to be sued there.

The Supreme Court further narrowed the “effects” test in the 2011 case of *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>114</sup> where the Supreme Court found that New Jersey courts had no jurisdiction over an English machine manufacturer that sold its goods in the United States through a distributor. Robert and Roseann Nicastro brought the lawsuit against J. McIntyre because Robert was severely injured while using the machine. His hand was caught in the machine while he was operating it, and the machine severed four of his fingers.<sup>115</sup>

The Supreme Court of New Jersey held that J. McIntyre had minimum contacts with New Jersey because it not only “place[d] a defective product in the stream of commerce” but used a “distribution scheme that target[ed] a national market, which includes New Jersey . . . .”<sup>116</sup> The forum had a significant interest in

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109. *Id.*

110. *Id.* at 286.

111. *Id.* at 287.

112. *Id.* (alteration in original).

113. *Id.* at 290.

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

115. *Id.* at 894 (Ginsburg, J., dissenting).

116. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 589 (N.J. 2010), *rev’d sub nom. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

hearing the case, and if no personal jurisdiction were available, this would “render[] a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey customer.”<sup>117</sup> “It would be strange indeed,” the court continued, “if a New Jersey manufacturer that makes a defective and dangerous product . . . would be able to move its plant to a foreign land and peddle its wares through an independent distributor across the nation, with some purchased by New Jersey customers, and suddenly become beyond the reach of one of our injured citizens through this State’s legal system.”<sup>118</sup>

The U. S. Supreme Court reversed, finding that result not “strange” at all. Mechanically applying the purposeful availment test without consideration for the fact that it might leave the plaintiff with no remedy at all, Justice Kennedy explained, “[a]s a general rule, the sovereign’s exercise of power requires some act by which the defendant ‘purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws . . . .’”<sup>119</sup> That, in turn, requires finding that the “defendant’s activities manifest an intention to submit to the power of a sovereign.”<sup>120</sup> “[S]ubmission through contact with and activity directed at a sovereign may justify specific jurisdiction ‘in a suit arising out of or related to the defendant’s contacts with the forum.’”<sup>121</sup> This may occur “where manufacturers or distributors ‘seek to serve’ a given State’s market.”<sup>122</sup>

Jurisdiction is proper, the Court noted, when a defendant engages in an “intentional tort”; in such a case, a court may hear the case because of the defendant’s “attempt to obstruct its laws.”<sup>123</sup> Absent that, a defendant that sends its goods to the United States can only be subject to personal jurisdiction under the “stream of commerce” theory when it “can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”<sup>124</sup> What is needed is a finding that the defendant “can be said to have targeted the forum.”<sup>125</sup> In this case, because the manufacturer operated through a distributor that was empowered to decide how and where to market the goods in the United States, there was no evidence to show that the manufacturer defendant directed its conduct toward New Jersey specifically. No intentional targeting (as in *Calder*), no personal jurisdiction.

Justice Ginsburg dissented, along with Justices Kagan and Sotomayor:

On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its

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117. *Id.* at 590.  
118. *Id.* at 591.  
119. 564 U.S. at 880.  
120. *Id.* at 882.  
121. *Id.* at 881.  
122. *Id.* at 882.  
123. *Id.* at 880.  
124. *Id.* at 882.  
125. *Id.*

efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicaastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?<sup>126</sup>

Finding no personal jurisdiction in New Jersey because the defendant did not target its sales to any particular state but to the United States as a whole might well mean that "a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury."<sup>127</sup> And note that Justice Ginsburg's dissenting opinion emphasizes the rights of plaintiffs to have access to a forum for convenient relief—a factor that was specifically mentioned in *World-Wide Volkswagen*.<sup>128</sup>

The upshot is that the Supreme Court adopted an "effects" test in *Calder v. Jones* but grew tired of it and sought to cut it back in *Walden* and *Nicaastro* without overruling it directly. The result, as Justice Ginsburg noted, is to leave victims of tortious conduct without power to redress injuries they suffered at home at the hands of nonresident defendants whose actions foreseeably caused their harms. What does this mean for our cross-border fireworks case?

#### ***D. The Uneasy Cross-Border Case***

On one hand, recent developments in personal jurisdiction law would appear to shut the courthouse door to a victim in Massachusetts injured by fireworks sold by a defendant in New Hampshire. The law currently requires "purposeful availment" of the privilege of conducting activities in the forum, and that would seem to require the victim to sue the store in New Hampshire. On the other hand, the Supreme Court has not overruled *Calder v. Jones*. Nor has it held that states have no criminal jurisdiction over nonresident defendants who commit crimes that cause harm in the forum. Moreover, none of the recent cases involve actors who cause harm just over the border or repeated conduct that repeatedly causes harm in another state. *Walden* involved one act by a police officer acting on the job in Georgia harming the personal property rights of Nevada residents. *Nicaastro* involved a European manufacturer whose goods caused injury in New Jersey but were sent to the United States through a distributor that did have direct contacts with the forum.

When we read the cases with attention not only to the legal standard but the facts, it becomes clear that the Court has never considered—much less addressed—the case of a tavern that sells beer to a minor who then drives across the border and injures someone in the neighboring state. Nor has it addressed a case like our fireworks hypo. Importantly, it has also never addressed a case *that involved a conflict of laws* where the place of injury had a law that was more plaintiff-favoring and the place of conduct had a more defendant-protecting law. Given the possibility that courts at the place of conduct might immunize the defendant from liability even

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126. *Id.* at 904 (Ginsburg, J., dissenting).

127. *Id.* at 906 (Ginsburg, J., dissenting).

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

though the place of injury would find a cause of action, the personal jurisdiction inquiry might result in a change of applicable law. That, in turn, might limit the sovereign power of the place of injury to protect its people or to provide them the benefits of the law of their home state. To understand fully why this is so problematic, we need to consider choice-of-law doctrine and the reasons why most courts would apply the law of the place of injury in our cross-border tort case.

## II. CROSS-BORDER TORTS & THE CONFLICT OF LAWS

### A. *The Place of Injury Rule*

When conduct takes place in one state and the injury is suffered in another state, and the tort laws of the two states differ, which law governs? The state courts consistently embraced a “place of injury” rule since they were first asked to address the question in the mid-nineteenth century.<sup>129</sup> That rule is reflected in many decided cases<sup>130</sup> and was embraced by both the First and Second Restatements of Conflict of Laws.<sup>131</sup> The rule is based on state common law and has never been challenged as unconstitutional.<sup>132</sup> The only issue that has come up in regard to the rule is the personal jurisdiction issue that concerns us here, i.e., when defendant causes injury in the forum to a forum resident but the defendant has never set foot in the forum, do forum courts have personal jurisdiction over the defendant?<sup>133</sup>

Tort cases based on accidents or negligence are a relatively recent phenomenon. Book III of William Blackstone’s *Commentaries on English Law*, published in 1768, concerns “private wrongs.”<sup>134</sup> Most of those “wrongs” involve harms to property. While Blackstone recognizes “personal actions” for harms to the

129. See, e.g., *Needham v. Grand Trunk R. Co.*, 38 Vt. 294 (1865) (wrongful death claim available at the plaintiff’s domicile only if a domicile statute recognizes such a claim even if the conduct took place in a state that would allow the claim); *Thayer v. Brooks*, 17 Ohio 489 (1848) (case can be heard in Ohio for injury to property in Ohio based on an act of diversion of water that occurred in Pennsylvania).

130. See, e.g., *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (AM. L. INST. 1971); RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934). The First Restatement contained three exceptions to this rule in § 380(2) (where defendant acted in reliance on a law creating a particular standard of care); § 382(2) (where defendant acted in a state that immunizes them from liability); § 387 cmt. a (employers not liable for the actions of the employees if the employees are not authorized to enter a state). The Second Restatement embraces the “most significant relationship” test and allows deviations from the place of injury rule when another state has a “more significant relationship” with the parties and the occurrence taking into account the factors listed in § 6 and the contacts listed in § 145. RESTATEMENT (SECOND), at §§ 145–146.

132. Indeed, one famous nineteenth century case would have found it unconscionable to apply any law other than the law of the place of injury. See *Ala. Great S. R.R. Co.*, 11 So. at 807.

133. Compare *Blamey v. Brown*, 270 N.W.2d 884, 887–888 (Minn. 1978) (forum has personal jurisdiction over defendant) with *West American Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 680–81 (Minn. 1983) (forum has no personal jurisdiction over defendant). Cf. *Bernhard v. Harrah’s Club*, 546 P.2d 719, 725 (Cal. 1976) (jurisdiction over foreign defendant that advertises in the forum).

134. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 73–78 (1768).

person (without using the term “tort”), he mentions only intentional torts like “trespasses, nuisances, assaults, defamatory words, and the like.”<sup>135</sup> Chancellor James Kent’s 1827 *Commentaries on American Law* does not deal with torts at all, simply mentioning “the right of personal security” as one of the “absolute rights of persons.”<sup>136</sup> The first torts treatise was published in 1859 by Francis Hilliard.<sup>137</sup> In the field of conflict of laws, the great treatise by Joseph Story, *Commentaries on the Conflict of Law, Foreign and Domestic, in regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments*, published in 1834, does not deal with torts at all; instead, Story focuses on contracts, property, and family law.<sup>138</sup> Caselaw involving conflict of laws before the Civil War involves contracts and trusts,<sup>139</sup> real property,<sup>140</sup> personal property,<sup>141</sup> inheritance,<sup>142</sup> insurance,<sup>143</sup> marriage,<sup>144</sup> and the legal status of enslaved persons.<sup>145</sup>

Both because torts was an undeveloped field in the early nineteenth century and because most torts that were legally regulated as “private wrongs” were local in nature (the conduct and injury took place in the same state), there was no reason to examine the question of what to do when the conduct and injury were in different states. The first cases to address the issue involved sparks emitted by railroad cars in one state that caused fires across the border in another state<sup>146</sup> and nuisance cases arising from diversion of water in a stream.<sup>147</sup> Those cases unabashedly adopted the

135. *Id.* at 73.

136. CHANCELLOR JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 2–17 (1827); *see id.* at 11 (“the personal security of every citizen is protected from lawless violence, by the arm of government”).

137. FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS (1859).

138. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAW, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834).

139. *Bank of Augusta v. Earle*, 38 U.S. 519 (1839); *Cox v. Adams*, 2 Ga. 158 (1847); *President, etc. of Worcester Bank v. Wells*, 49 Mass. 107 (1844); *Hinds v. Brazealle*, 3 Miss. 837 (1838); *Chapman v. Robertson*, 3 N.Y. Ch. Ann. 1128 (1837); *Means v. Hapgood*, 36 Mass. 105 (1837).

140. *Urquhart v. Sargent*, 2 La. Ann. 196 (1847); *Offutt v. Flagg*, 10 N.H. 46 (1838); *Woodward v. Gates*, 9 Vt. 358 (1837).

141. *French v. Hall*, 9 N.H. 137 (1838); *Appeal of Heydock*, 7 N.H. 496 (1835).

142. *State v. Judges of Probs. for City of New Orleans*, 17 La. 486 (1841); *McCullum v. Smith*, 19 Tenn. 342 (1839); *Hicks v. Pope*, 8 La. 554 (1835); *President, etc., of Harvard Coll. v. Gore*, 22 Mass. 370 (1827).

143. *Walters v. Washington Ins. Co.*, 1 Iowa 404 (1855).

144. *Sutton v. Warren*, 51 Mass. 451 (1845).

145. *Arsene v. Pigneguy*, 2 La. Ann. 620 (1847); *Fishburne v. Kunhardt*, 29 S.C.L. 556 (Ct. App. Law 1844); *Willard v. People*, 5 Ill. 461 (1843); *Commonwealth v. Aves*, 35 Mass. 193 (1836). *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

146. *See Otey v. Midland Valley R.R. Co.*, 197 P. 203 (Kan. 1921).

147. *Thayer v. Brooks*, 17 Ohio 489 (1848) (case can be heard in Ohio for injury to property in Ohio based on an act of diversion of water that occurred in Pennsylvania).

rule that the law that should apply is the law of the place of injury.<sup>148</sup> That rule was firmly entrenched by the end of the nineteenth century in the courts,<sup>149</sup> and it was embraced by Joseph H. Beale, the first Conflict of Laws professor at Harvard Law School who taught the subject for fifty years and authored both a casebook and a treatise.<sup>150</sup> Beale's view was enshrined by the American Law Institute in the First Restatement of Conflict of Laws in 1934<sup>151</sup> and retained as the presumptive rule in the Second Restatement in 1971.<sup>152</sup>

At first glance, the place of injury rule seems to violate the “territoriality principle” which limits state power to persons and conduct within its borders. After all, the place of injury rule involves a regulation by one state of conduct that takes place outside that state's territorial borders. Why did the U.S. courts adopt a place of injury rule for harms caused by tortious conduct once they were aware that conduct in one state could cause harm in another? To answer that question, it helps to know a little bit about the history of conflict of laws.

The field began in medieval Italy, where jurists distinguished between “real” statutes that apply within a sovereign's borders to anyone present there and “personal” statutes that affect a person's status and which follow them wherever they go.<sup>153</sup> That meant that “personal” laws had effect outside the territory that adopted them. Ulrich Huber, the hugely influential Dutch scholar, rejected the idea of classifying laws as real or personal and, instead, adopted a robust presumption that states have full sovereignty within their borders and none outside of those borders.<sup>154</sup> However, Huber proposed an exception to the territoriality principle. Sovereigns “act by way of comity [so] that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.”<sup>155</sup> Huber's approach was adopted in England<sup>156</sup> and was fully accepted by Joseph Story when he helped create an American approach to conflict of laws.<sup>157</sup>

Although Story accepted the territorial approach, he modified it by placing the “comity principle” at the core of the field. According to Story, the only law that

148. Cf. *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294 (1865) (wrongful death claim available at the plaintiff's domicile only if a domicile statute recognizes such a claim even if the conduct took place in a state that would allow the claim); *Cameron v. Vandergriff*, 13 S.W. 1092 (Ark. 1890) (place of injury law applies when plaintiff was injured in Arkansas by a rock blasted over the state line from a quarry in another state).

149. *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

150. JOSEPH HENRY BEALE, *A SELECTION OF CASES ON THE CONFLICT OF LAWS* (3 vol. 1900–02); JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

151. RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. L. INST. 1934).

152. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (AM. L. INST. 1971).

153. STORY, *supra* note 138, §§ 12–13, at 14–18; Ernest Lorenzen, *Huber's De Conflictu Legum*, [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5566&context=fss\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5566&context=fss_papers) [https://perma.cc/2BJP-FFT5]. See also SINGER, *supra* note 7, at 5.

154. Lorenzen, *supra* note 153, at 376.

155. *Id.* at 376, 403.

156. *Id.* at 393–94.

157. *Id.* at 394; STORY, *supra* note 138, at § 7, at 7.

a court can apply is its own law<sup>158</sup>. That is a derivation of the territorial principle, but it means that other states' laws can never operate of their own effect at the forum. Whenever the forum applies foreign law, it is choosing to do so. It is extending comity to the law of the other jurisdiction. Why do so? The answer, Story says, is "public convenience."<sup>159</sup>

What does this mean for the cross-border tort? The 1848 case of *Thayer v. Brooks*<sup>160</sup> applied the law of the place of injury when water diverted by a mill owner in Pennsylvania harmed a landowner in Ohio. The court forthrightly asserted that the appropriate forum was the state where the land harmed was situated, not the state of the land where the conduct occurred, and it applied forum law to deny the claim.<sup>161</sup> What is striking about the case is that it involved property *in both states* so that if one tries to explain the result by reference to the law of "the situs of the property," we have no guidance on what to do because the case involved two parcels of land situated in two different states. Nor does the territoriality principle give us any guidance. The place of conduct has interests in either regulating conduct there to prevent harm or to promote freedom of action by immunizing actors there from liability. Conversely, the place of injury either has a regulatory interest in limiting conduct that causes harm in the forum or it is content to leave its residents without a claim when it believes the out-of-state actor did nothing wrong. Neither territory nor land status answers the question of what law to apply in cross-border cases. Nor did Joseph Story give us any guidance; his treatise only addressed contracts, property, and marriage.<sup>162</sup>

Late nineteenth century cases are consistent in choosing the law of the place of injury for cross-border torts. The textbook case of *Alabama Great Southern Railroad Co. v. Carroll*<sup>163</sup> involved an Alabama-based railroad company whose employee negligently failed to notice a cracked link between two cars, resulting in an injury to a brakeman as the train was moving on the tracks in Mississippi. When Alabama law, but not Mississippi law, provided the injured employee with a remedy against his employer, the Alabama Supreme Court unhesitatingly refused to apply Alabama law even though all parties were domiciled there and the negligent conduct took place there. When the plaintiff asked for application of the Alabama employers' liability act, the Alabama Supreme Court as much as scoffed at the claim, calling it "unsound and untenable."<sup>164</sup> The court explained that "there can be no recovery in

158. STORY, *supra* note 138, at § 7, at 7 ("It is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country.").

159. *Id.* at § 23, at 31, § 25, at 33, § 38, at 44. Huber gave the same reason. States grant comity to foreign laws out of "convenience and the tacit consent of nations." Lorenzen, *supra* note 153, at 378.

160. *Thayer v. Brooks*, 17 Ohio 489, 492 (1848) ("The actions of trespass and trespass on the case for injuries to land, are local, and in all cases where the act done and the injury sustained are wholly in a foreign jurisdiction, the place of the injury is the place of the trial. This doctrine is universally recognized as a rule of the common law.").

161. *Id.*

162. STORY, *supra* note 138.

163. Ala. Great S. R.R. Co., 97 Ala. 126 (1892).

164. *Id.* at 131.

one state for injuries to the person sustained in another, unless the infliction of the injuries would support an action under the law of the state in which they were received.”<sup>165</sup> This position might be comprehensible if the plaintiff were a resident of the place of injury and lived there and had never been in the state where the conduct occurred. Such a case is often classified as a “no interest” case, and dismissal of the claim in such cases is not uncommon.<sup>166</sup> But here we have conduct occurring in a state that regulates the conduct and a victim domiciled in the state where the conduct occurred. In a case like that, it is hard to see the reason for applying any law other than forum law.

The most plausible argument for applying the law of the place of injury here is that the defendant railroad has a right to operate in Mississippi under Mississippi rules, and if Mississippi law immunizes it from liability for injuries suffered in Mississippi, then the railroad has a right not to be discriminated against by being denied the benefits of the immunizing Mississippi law just because its principal place of business is in another state or because the conduct causing the injury occurred in another state. Nor is this necessarily unfair to the plaintiff who was injured on the job in Mississippi and might have anticipated that his work in Mississippi might be governed by Mississippi law.

But none of these nuances were in the realm of judicial contemplation in the late nineteenth century. As the Alabama Supreme Court saw it, the case involved a tort, and the conflict of laws rule for torts was to apply the law of the place of injury. What both made that rule appealing and a place of conduct rule “unsound and untenable”? The answer can be found in the *Lochnerian* worldview of late nineteenth century lawyers, a world that revolved around “vested rights.”<sup>167</sup> Arguably the first Supreme Court case to protect “vested rights” under the Due Process Clause was a conflict of laws case, *Allgeyer v. Louisiana*.<sup>168</sup> *Allgeyer* involved a contract insuring Louisiana property owned by a Louisiana resident. In that case, the Supreme Court found that the insurance contract was “made” in New York, vesting contract rights in the promisee, and the state of Louisiana had no constitutional power to ignore those vested rights even though the insurance company had violated the laws of Louisiana by selling insurance in Louisiana without a license.<sup>169</sup> How does the vested right theory apply to torts?

Joseph Beale answered that question by arguing that “[t]he place where any tort is committed depends upon the place where the incidental right of protection is injured. . . . [and t]he place of wrong is the place where the person or thing harmed is situated at the time of the wrong.”<sup>170</sup> The rule applies easily, he says, when the harm is “direct.”<sup>171</sup> An “indirect” case may “present more difficulties, but the difficulties disappear if one keep [sic] in mind the fact that *the right injured is that*

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165. *Id.*

166. *See* SINGER, *supra* note 7, at 76–89.

167. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905); BEALE, *supra* note 150.

168. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

169. *Id.* at 585.

170. BEALE, *supra* note 150, at vol. 2, § 377.2, at 1287.

171. *Id.*

created by the law to protect the person or thing from the injury, and that that law is the law of the place where the person or thing is situated at the time of the injury.”<sup>172</sup> To support the place of injury rule, Beale cites *Otey v. Midland Valley Railroad Co.*,<sup>173</sup> a typical railroad sparks case where sparks emitted in one state caused harm in another state.<sup>174</sup> *Otey* itself cites a case in which a patient was killed in Maryland by a poisonous drug negligently substituted for a healthful one by a druggist in the District of Columbia,<sup>175</sup> and a case where a victim was hit by a rock blasted across state lines into Indian Territory (now Oklahoma).<sup>176</sup>

Beale imagines the case where the conduct and injury take place in different states and the injury occurs in a state that is interested in protecting its people from harm. That is why he mentions the “right . . . created by the law to protect the person or thing from the injury.”<sup>177</sup> That type of case is the same pattern as our fireworks hypo. It involves a true conflict between the defendant-protecting (or immunizing) law of the place of conduct and the plaintiff-protecting law of the place of injury. When the place of injury has laws designed to protect people within its borders from harm, their rights to recover from injurious conduct vest at the moment they are injured. All the elements of the claim are present: (i) a duty, (ii) that is breached, and (iii) causes (iv) harm to a legally protected interest. The moment—and place—of injury completes the claim, and a right to compensation vests in the victim. The foregrounding of the protective interests of the place of injury are reminiscent of the Hobbes argument adverted to at the beginning of this Article. The first purpose of government is to protect people from harm, and when someone causes harm to a person within a plaintiff-protecting sovereign, they have an obligation to compensate the victim, who has the right to civil recourse under the law of the place of injury.

Does this same theory apply to the so-called “no interest” case where the conduct is in a plaintiff-protecting state that provides a remedy for the harm and the injury is in a defendant-protecting state that denies the plaintiff a remedy? Yes and no. Obviously, the protective theory does not cover this case, but at the same time, it offers a helpful clue. The place of injury does not view the harm as one for which the law should provide a remedy; the injury is a case of *damnum absque injuria* or harm without a right to legal redress. In such a case, a right to recover for injury never vested since negligent conduct does not give rise to tort liability unless or until it results in harm—harm that is recognized by law. And if the place of injury does not view the injury as a “legal” injury, i.e., one that gives the victim a right to civil

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172. *Id.*, vol. 2, §377.2, at 1288.

173. *Otey v. Midland Valley R.R. Co.*, 197 P. 203 (Kan. 1921) (Okla. law applies when railroad sparks emitted in Kansas set fire to a barn across the border in Oklahoma).

174. For similar cases, see *Kansas City, Ft. Scott & Memphis R.R. Co. v. Becker*, 53 S.W. 406 (Ark. 1899); *Belt v. Gulf, Colorado & Santa Fe Ry. Co.*, 22 S.W. 1062 (Tex. Civ. App. 1893); *Chi., St. Louis & New Orleans R.R. Co. v. Doyle*, 60 Miss. 977 (1883).

175. *Moore v. Pywell*, 29 App. D.C. 312 (Cir. 1907) (Md. law applies to patient killed in Md. by poisonous drug negligently substituted for a healthful one by a druggist in D.C.).

176. *Cameron v. Vandergriff*, 13 S.W. 1092 (Ark. 1890) (Ark. law applies to victim hit by rock blasted across the state line in Indian Territory).

177. BEALE, TREATISE, *supra* note 150, at vol. 2, §377.2, at 1287.

recourse against the actor who caused the harm, then no harm was done, and no claim is available. Conversely, however, it is likely an accident that the harm occurred in a defendant-protecting state. Because the state where the conduct occurs has interests in deterring the tortious conduct, it has a strong interest in applying its plaintiff-protecting law and no interest in discriminating against a nonresident plaintiff by denying them a right to recover.

We will return to the place of injury rule in the next section. For now, it is important to note that the cross-border tort did not enter American legal consciousness until the second half of the nineteenth century and, once it was recognized, the U.S. courts never deviated from a place of injury rule. The gravitational force of that rule was so profound that the Second Restatement of Conflict of Laws retained it when it was published in 1971.<sup>178</sup> The commentary to § 146 of the Second Restatement repeats the “protective argument” adopted by Joseph Beale. Comment e to § 146 of the Second Restatement explains:

One reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury. Moreover, the place of injury is readily ascertainable. Hence, the rule is easy to apply and leads to certainty of result.<sup>179</sup>

The victim has a right under the law of the place of injury, and the defendant should not be able to “escape liability” by hiding behind the immunizing law of another state.<sup>180</sup> Again, we see the Hobbes argument at work.

### ***B. The Emerging Third Restatement Rule***

The Third Restatement of Conflict of Laws is still being written, but available drafts give us a clear sense of what the tort rules are going to be. In general, they strongly support a place of injury rule when the law of the place of injury is more plaintiff-favoring than the law of the place of conduct.<sup>181</sup> The only exception is for cases when application of the law of the place of injury is unfair because it was not “objectively foreseeable” that the harm might occur there.<sup>182</sup> To understand the current and emerging choice-of-law rule for cross-border torts, some history is warranted—specifically, the ways that interest analysis affected both the Second Restatement and the development of choice-of-law doctrine for torts cases.

As we have seen, there were no established choice-of-law rules for torts until the middle of the nineteenth century in the United States. At that point, the courts adopted a place of injury rule on the ground that that state has the right to

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178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (AM. L. INST. 1971).

179. *Id.* §146 cmt. e.

180. The Restatement does explain that the law of the place of conduct may apply if that law is intended to “punish the tortfeasor” while the law of the place of injury is more suitable if the goal of the law is “compensation.” *Id.* The commentary does not give a clear analysis of the so-called “no interest” case where the conduct occurs in a defendant-immunizing state and the injury is suffered in a plaintiff-protecting state.

181. RESTATEMENT (THIRD) OF CONFLICT OF LAWS COUNCIL DRAFT NO. 4, §6.08 (AM. L. INST. Sept. 4, 2020).

182. *Id.*

regulate events that occur within its borders and a sovereign interest in protecting its people from harm. In Justice Story's comity paradigm, there was a legitimate reason to depart from forum law if the injury occurred in another state. States adopt laws to protect people from harm within their borders, and the place where the harm is suffered has the best claim to determine the legal consequences of tortious conduct.

Joseph Beale accepted the protective function idea but based his place of injury rule on his theory that rights vest at particular moments when the facts establish the elements of a claim. For contracts, that moment occurs when a contract is *made* because acceptance of an offer imposes obligations on the contracting parties. For torts, that is the moment the injury is suffered. Injuries that are not caused by tortious conduct do not give rise to legal claims, but when injuries are the result of tortious conduct, the injury is the last element necessary to create a claim for legal redress.

Beale's theory garnered criticism almost from the very beginning by legal realist Walter Wheeler Cook because there was no reason to believe the place of acceptance was any more significant than the place where the offer was made.<sup>183</sup> If both offer and acceptance are necessary for a valid and enforceable contract, then it is arbitrary to choose to apply the law of the place of acceptance merely because it occurred last in time. An acceptance without a valid offer does not create an enforceable contract. Similarly in the tort area: an injury gives rise to a tort claim only if the harm was caused by conduct and only if that conduct was tortious in nature. Why privilege the state where the injury occurred over the place where the conduct happened? We need a reason to choose one state's law over the other, and the fact that a contact was "last in time" is not a good reason to choose that state's law when both states are interested in achieving their regulatory goals. The vested rights approach focused on one contact alone for each class of cases and then chose that contact in an arbitrary (indefensible) manner.

This led Brainerd Currie to invent interest analysis.<sup>184</sup> Rather than arbitrarily pick one of several state contacts to adjudicate choice-of-law cases, Currie argued that we should determine whether states have legitimate or real interests in applying their laws to particular facts, occurrences, or transactions. He assumed that protective laws are generally designed to protect a state's residents. He privileged the domicile of the parties over the place where events happened. In a sense, he was arguing for a partial return to the distinction between "real statutes" and "personal statutes." Effectively, Currie argued that the domicile of the parties should be relevant to torts conflicts of law and perhaps even outcome-determinative. That means that the place of injury was of lesser significance than the domicile of the parties, at least in certain classes of cases.

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183. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924). Other early legal realist critics of Beale were Ernest Lorenzen and Hessel Yntema. Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Hessel Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

184. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). Currie's essays are collected in *BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

Currie's approach reached fruition in the famous case of *Babcock v. Jackson*.<sup>185</sup> That case involved parties domiciled in New York that were involved in an auto accident in Ontario, Canada. While New York law allowed the claim by the passenger against the host driver, Ontario law immunized the driver from such a claim. The place of injury rule would require application of Ontario law, but the New York Court of Appeals applied New York law on the ground that the Ontario rule was not a "rule of the road" designed to deter dangerous conduct in Ontario but a "loss-allocating" rule designed to regulate the relationship between the parties. While Ontario law should govern things like speed limits or standards of care (conduct-regulating rules), the court found that the place where the relationship was centered had the best (actually, the only) claim to regulate the parties to the relationship (a "loss-allocating" rule). Indeed, the court held that Ontario had no interest at all in determining the legal consequences of a guest-host relationship when neither the guest nor the host was domiciled in Ontario. Conversely, New York had several interests in giving a New York domiciliary a right of civil recourse against a New York resident for tortious conduct that harmed another New Yorker.<sup>186</sup>

The distinction between conduct-regulating and loss-allocating rules had an explosive effect on the development of conflicts of law in the United States. The *Babcock* decision was seen by both scholars and judges as persuasive, and it led many courts to begin looking for "false conflicts" under the theory that, if only one of the two states had an interest in applying its law, then it was irrational to apply the law of the disinterested state. The main vehicle for finding false conflicts was the *Babcock* pattern: a relationship centered in a plaintiff-protecting state (where both parties are domiciled), and both conduct and injury occur in a defendant-protecting state where the defendant-protecting law is not intended to promote business investment or tourism or any other conduct. When the rule at the place of conduct and injury is a loss-allocating rule rather than a conduct-regulating one, the courts should apply the law of the common domicile because that is (arguably) the only state with a legitimate interest in regulating the parties' relationship. In cases like that, the courts decided that it was irrational to apply the law of the place of injury.

Two other cases are likely to be viewed as false conflicts by courts and scholars alike. In "fortuitous injury" cases, like *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*,<sup>187</sup> both parties live in a plaintiff-protecting state, and the conduct takes place there as well. In *Rong Yao Zhou*, a Washington, D.C. restaurant served liquor to an intoxicated customer who was later in a car accident in Maryland that injured another D.C. resident. When the injury takes place in a defendant-protecting state, but the defendant is not domiciled there and never acted there, it is irrational to apply the law of the place of injury to immunize the defendant from liability. The place of conduct (here, D.C.) has regulatory interests in preventing tortious conduct, and it has compensatory and fairness interests in providing one D.C. resident a right

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185. *Babcock v. Jackson*, 191 N.E.2d 279, 280 (N.Y. 1963).

186. For a similar case that was decided by recategorizing the issue as one of status rather than torts, see *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814 (Wis. 1959).

187. *Rong Yao Zhou v. Jennifer Mall Rest., Inc.*, 534 A.2d 1268 (D.C. 1987).

to civil recourse against another D.C. resident for harm resulting from conduct that took place at their shared domicile. The defendant-protecting policy of the place of injury extends only to actors who live and act in that state; for that reason, the place of injury state has no interest in granting immunity to actors who live and work in other states where the law does impose liability on them. Fortuitous injury cases are distinguishable from cross-border torts because the parties are both domiciled in the same state, and that is also the state where the conduct occurred.

The last typical “false conflicts” case involves “lonely domicile” cases. If all contacts are in one state, and the only contact with the other state is the domicile of one of the parties, most courts will apply the law of the place where both the conduct and injury occurred, whether that law favors the plaintiff or the defendant.<sup>188</sup> While such cases involve split domiciles, they differ from cross-border torts because the conduct and injury both occur in the same state.

Cross-border torts are of two kinds. One kind is variously treated as either a “false conflict” or a “no interest” case. Such cases occur when the conduct occurs in a plaintiff-protecting state and the injury occurs in a defendant-protecting state. As with fortuitous injury cases, the place of the injury has no interest in immunizing a defendant from liability when the defendant acts in a state that regulates its conduct and imposes liability on it. Nor does it have an interest in denying plaintiff a remedy when the defendant is a resident of another state and acted there in violation of that other state’s law. Conversely, the place of conduct may well have an interest in regulating the conduct of a defendant who lives and acts there. After all, it is an accident when conduct causes injury in another state to a nonresident. The place of conduct has a regulatory interest in deterring negligent conduct that takes place there no matter where the harm materializes and no matter where the plaintiff lives.<sup>189</sup> Deterring conduct that is illegal protects everyone at the place of conduct even if the victim in this instance happened to be a resident of another state.

On the other hand, some courts think it amounts to irrational altruism to impose liability on a forum resident to benefit a victim harmed in a state that denies the plaintiff a claim. If the plaintiff’s domicile does not seek compensation for them, why should the defendant’s state impose an obligation on its own resident that the other state is happy to live without? If that is the case, then we have a “no interest” case; the place of injury’s defendant-immunizing rule only extends to defendants who act there, and the place of conduct’s plaintiff-protecting rule only applies to persons who live or are injured there. If neither state is interested in applying its law, the court can either dismiss the case because plaintiff has not shown a claim upon which relief can be granted, or the court can apply forum law as the residual law for cases not covered by interest analysis.

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188. *Pelican Point Operations, L.L.C. v. Carroll Childers Co.*, 807 So. 2d 1171 (La. Ct. App. 2002) (defendant from defendant-protecting state harms plaintiff in plaintiff-protecting state); *Hurtado v. Superior Ct.*, 522 P.2d 666 (Cal. 1974) (plaintiff from defendant-protecting state harmed in plaintiff-protecting state by a resident of that plaintiff-protecting state).

189. *See, e.g., Deemer v. Silk City Textile Mach. Co.*, 475 A.2d 648 (N.J. Super. Ct. App. Div. 1984).

In contrast, the cross-border tort case that concerns us here is a clear example of a “true conflict.” The plaintiff lives and is injured in a plaintiff-protecting state while defendant lives and acts in a defendant-protecting state. Both states have interests in applying their law, and there is no obvious reason why either state should give way. The case is simply hard, and whatever result is chosen may be unfair (to a large or small extent) to one of the parties.

So what is the state of play? Although the Second Restatement has a presumptive rule for application of the law of the place of injury, it also requires attention to the *justified expectations* of the parties and the *relative strength of state interests* given the *policies* promoted by their conflicting laws.<sup>190</sup> As the caselaw developed, courts deviated from the place of injury rule in cases deemed to be false conflicts where the only state interested in applying its law was either (a) the place where the conduct occurred,<sup>191</sup> (b) the common domicile of the parties,<sup>192</sup> or (c) the place where the parties’ relationship was centered.<sup>193</sup> What about cross-border torts?

Dean Symeon Symeonides provided a monumental service to the legal profession by reading every single conflict of laws case over many decades, cataloging them, and developing patterns that could be translated into presumptive rules.<sup>194</sup> His research clearly demonstrates that practical application of interest analysis in the courts over decades resulted in a rule that governs cross-border torts. The rule that emerged from decades of practice and adjudication for cross-border torts is that courts should apply the law that favors the plaintiff unless it was not objectively foreseeable that the injury would occur in the plaintiff-protecting state.<sup>195</sup> While the formal rule suggests application of the law of the place of conduct, it has an exception for cases where the plaintiff chooses the law of the place of injury. In practice, that means that the plaintiff-protecting rule should presumptively apply absent reasons to believe that doing so would be unfair to the defendant.

When conduct takes place in a regulatory state that is plaintiff-protecting, that state is likely to have an interest in regulating the conduct of the defendant to protect people from harm, while the place of injury has no interest in immunizing a defendant who acted in a plaintiff-protecting state. When conduct takes place in a defendant-protecting state and the injury occurs in a plaintiff-protecting state, the courts tend to apply the plaintiff-protecting law of the place of injury on the ground that that state has strong interests in protecting people from harm and that the defendant has no right to engage in actions likely to cause harm across the border without being held responsible for those harms. In such cases, the plaintiff’s right to recover under the law of their home state where they were injured outweighs the defendant’s right to immunity under the law of the place the defendant acted, unless

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190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 (AM. L. INST. 1971).

191. *Deemer*, 475 A.2d at 649.

192. *Babcock v. Jackson*, 191 N.E.2d 279, 282 (N.Y. 1963).

193. *Saharceski v. Marcure*, 366 N.E.2d 1245, 1248 (Mass. 1977).

194. SYMEON C. SYMEONIDES, CHOICE OF LAW IN PRACTICE: A TWENTY-YEAR REPORT FROM THE TRENCHES (3 vol., Brill-Nijhoff 2020).

195. RESTATEMENT (THIRD) COUNCIL DRAFT NO. 4, §6.08 (AM. L. INST. 2020); Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337 (2009).

it would be unfair to subject defendant to the law of the plaintiff-protecting state because the defendant could not have foreseen that its conduct would cause injury there.

You take the plaintiff as you find them. If the person you injure lives and is injured in a plaintiff-protecting state, then you have caused greater harm (legally-speaking) than if you injured a plaintiff in a state that denies them a tort claim. The plaintiff in the cross-border case has the right to be protected by their home state's law, and if it was foreseeable that the conduct would cause harm across the border, then it is not unfair to require the defendant to avoid causing harm in a plaintiff-protecting state unless they are willing to pay for what they have done.

The upshot is that the place of injury rule has been displaced for cross-border torts with a more nuanced rule derived from interest analysis and Second Restatement jurisprudence. But the result is *exactly the same* in our cross-border tort case. When the injury occurs to a resident of a plaintiff-protecting state at home, then the law of the place of injury applies under the Third Restatement (and under the majority rule in the United States over the last 40 years), just as it did under the First and Second Restatements. If that is true, then caselaw has been consistent from the very beginning. The law of the place of injury applies to cross-border torts, at least when that law favors the plaintiff. Our fireworks hypo thus requires application of Massachusetts law. There is a very long and strong tradition of applying the law of the place of injury when the conduct occurs in another state. Moreover, the new rules being crafted right now by the American Law Institute for the future *also* require application of the law of the place of injury when the defendant should have foreseen the injury taking place there.

What does this mean for personal jurisdiction law? Is it really the case that the courts at the place of injury have no personal jurisdiction over the defendant even though the rules in force require application of the law of the place of injury?

### III. RECONCILING PERSONAL JURISDICTION & CHOICE-OF-LAW DOCTRINE

#### A. *The Hobbes Argument: Escaping "Continuall Feare"*

Commonly, people associate John Locke with the idea that we have natural rights that preexist government and that "to secure these rights, Governments are instituted" among people.<sup>196</sup> Thomas Hobbes, in contrast, is generally credited with the idea that human beings agree to create government to protect from the "warre . . . of every man, against every man" that we suffer when there is no government.<sup>197</sup> The usual view is that Hobbes thought that governments were not limited by natural rights; whatever rights we have must be recognized by positive law (i.e., by government) to be enforceable.<sup>198</sup> I do not mean to weigh into the debate between natural rights theorists and positivists. I do mean to credit Hobbes with the idea (picked up by Locke) that the first job of government is to protect our lives and

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196. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

197. HOBBS, *supra* note 1.

198. *But see id.* at 93 ("And therefore there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred.").

persons from harm at the hands of others. Locke's formulation in 1689 was "life, liberty, and property," while the Declaration of Independence in 1776 phrased it as "life, liberty, and the pursuit of happiness." In both these formulations, the first reason for government is "life," and that idea comes from Hobbes's *Leviathan* published in 1651. While Hobbes also thought government promotes "commodious living," his real focus was on the lack of physical security that human beings suffer when there is no working government.

Hobbes knew what he was talking about. He lived through the civil war in the 1640s that led to the beheading of King Charles I and the establishment of the government of Oliver Cromwell.<sup>199</sup> Hobbes wrote *Leviathan* in the aftermath of those events.<sup>200</sup> Alan Ryan explains:

Hobbes concluded that the royalist game was up and that sensible people must make their peace with the government of Oliver Cromwell. It was then that Hobbes wrote *Leviathan*, which many readers today read as a defense of absolute monarchy, but which was a defense not of *monarchy* but of absolute *authority* in whatever person or persons it was vested. Hobbes certainly thought that monarchy was the best form of government, but he did not think that it was possible to demonstrate it. What he thought he had demonstrated was that political authority must be absolute. The moral of *Leviathan* was that subjects had a duty to obey and assist any regime that would guarantee peace and would allow them to prosper by their own efforts.<sup>201</sup>

The so-called "war of all against all" associated with Hobbes's thinking about the "state of nature" was not an abstraction; *he lived through it*. He knew what it meant to be in fear of one's life. Biographical events often affect sensibilities, and the events of Hobbes's life led him to value personal security and wellbeing above all else.

Hobbes was not an enemy of liberty; indeed, he thought that banding together in a social contract to create government was the best way of promoting liberty.<sup>202</sup> But the social contract promoted liberty by agreeing to be bound by the laws of a government that would, by its very nature, limit natural liberty. After all, laws regulate conduct and therefore limit freedom of action. They promote liberty in doing so, however, by making it possible to live without fear.<sup>203</sup> "Feare of oppression," Hobbes wrote, "disposeth a man to anticipate, or to seek ayd by society; for there is no other way by which a man can secure his life, and liberty."<sup>204</sup> Governments are created, according to Hobbes, to escape the state of nature where

199. ALAN RYAN, 2 ON POLITICS: A HISTORY OF POLITICAL THOUGHT FROM HERODOTUS TO THE PRESENT 414–16 (2012).

200. *Id.*

201. *Id.* at 415.

202. Perhaps surprisingly, John Locke agreed: "where there is no law there is no freedom." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305 (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690).

203. RYAN, *supra* note 199 at 434 ("The strongest man is vulnerable to the weakest when asleep. Since we all know this, we all have a reason to fear everyone else.").

204. HOBBS, *supra* note 1, at 73–74.

there is a war of all against all and “which is worst of all, continuall feare.”<sup>205</sup> He explains: “The Passions that encline men to Peace are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them.”<sup>206</sup> There it is again, first and foremost. The reason for law, for government, is “Feare of Death.” And the right to defend oneself from others is so fundamental that it is inalienable. “For . . . no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment, (the avoyding whereof is the onely End of laying down any Right,) and therefore the promise of not resisting force, in no Covenant transferreth any right; nor is obliging.”<sup>207</sup>

I do not want to rest my entire argument on whether or not you like Hobbes or appreciate his brilliance or his significance. I do want to argue that we should learn something from his suggestion that *the first job of government is to protect us from being harmed at the hands of others*. When one state passes laws designed to protect its people from harm by the dangerous acts of others, that state’s interest in protecting its people from harm outweighs the interests of a neighboring state that authorizes its people to sell harmful objects to people from the first state, knowing that their use is illegal there and that it is inevitable that the majority of those buyers will bring them back home where they will cause harm across the border.

The right of a child in Massachusetts to civil recourse against the seller of what Massachusetts sees as an ultrahazardous product outweighs the rights of the New Hampshire store to make profits by lawfully selling goods to residents likely to bring them back to Massachusetts. Recall that the argument is not whether Massachusetts can directly prohibit sales in New Hampshire to Massachusetts residents. Rather, the claim is that a New Hampshire store that voluntarily sells goods banned in Massachusetts to Massachusetts residents cannot expect to be immune from tort liability that its products foreseeably caused when the place of injury gives victims a right to recover from the store for those harms.

You do not need to agree with this choice-of-law rule. Perhaps you think it better for New Hampshire law to apply on the ground that we should be able to look to the law of the place where we act to determine what our liabilities are. No matter: the argument is that application of the law of the place of injury is at least defensible from a normative standpoint. Moreover, as I have shown, it is not only the expected result but both the majority rule in the United States and the rule being adopted by the American Law Institute as the strongly recommended rule of law for the future. The question then becomes this: If application of the law of the place of injury is legitimate (or even persuasive), what is the argument for preventing the Massachusetts plaintiff from suing the nonresident defendant in the courts at the place of injury?

### ***B. Fairness & Sovereignty in Cross-Border Torts***

The Supreme Court has said that its personal jurisdiction jurisprudence is based on a combination of concern for fairness and state sovereignty. The fairness concerns come in because it is arguably both procedurally and substantively unfair

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205. *Id.* at 89.

206. *Id.* at 90.

207. *Id.* at 98.

to require a person to defend a lawsuit in a distant forum in a state with which the defendant has no connection. This not only creates unfair surprise but prevents people from “structuring their primary conduct” so they can know where they are liable to suit.<sup>208</sup> The Supreme Court also has repeatedly said that these fairness concerns must be interpreted in light of state sovereignty considerations. After all, it has said that there may be no jurisdiction over a person even if that person suffers no unreasonable burden at all (the courthouse is several miles away) if that person has no contacts *with the state* in which the court sits.

Let’s focus on the sovereignty issue first. On one hand, it is odd to think that sovereignty is at stake when the rights guaranteed under the Due Process Clause applicable to personal jurisdiction are waivable. If a state has no sovereign power over a case or controversy, how can that sovereign power be magically created just because a private, nongovernmental actor agrees to it? Subject matter jurisdiction, for example, cannot be waived. If personal jurisdiction objections can be waived by the defendant, then how does personal jurisdiction law protect state sovereignty?

The answer to that question lies in the fairness considerations on which the Supreme Court relies. On one hand, the Supreme Court does *not* want personal jurisdiction to devolve into an inquiry about how great a burden it is for the defendant to be called into the forum courts. While burden analysis is relevant to the doctrine, the Court wants to retain a requirement that there be some contact *with the forum state*. On the other hand, the Court’s view seems to be based squarely on a fairness calculus. Vulnerability to court process is thought to rest on a *quid pro quo*: If you enjoy the “privileges and benefits”<sup>209</sup> of a state’s laws, then you can be asked to suffer its burdens as well, but if you do not benefit from a state’s laws, why is it fair to ask you to bear burdens imposed by that state?

That *quid pro quo* reasoning is what has led the Court to divide its analysis into two stages. First, we look for minimum contacts between the defendant and the forum, and then, second, we consider other reasonableness factors, including the plaintiff’s right to relief and the forum state’s interest in regulating the conduct to protect its governmental interests. But, as we have seen, this means that *we never get to the second part of the test*. The Supreme Court has made forum interests and plaintiff rights *irrelevant* to personal jurisdiction law. But that is troublesome. If the Due Process Clause concerns both liberty and sovereignty, then why is it concerned only with the liberty interests of defendants and the sovereign interests of the place of conduct? What about the liberty interests of the plaintiff and the protective interests of the place of injury?

It is here that choice-of-law doctrine gives us a different lens on the problem. Conflicts of law are governed by the Constitution just as much as is personal jurisdiction. But in this case, the Supreme Court has explicitly based its constitutional analysis on a combination of the Due Process Clause and the Full Faith and Credit Clause. Although the Supreme Court constitutionalized the vested right approach of the First Restatement during the *Lochner* era, it abandoned that

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208. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (“allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit”).

209. *Id.* at 295.

analysis in the New Deal era, ruling that it is often constitutional to apply more than one law to a particular event or case.<sup>210</sup> That makes the field of conflict of laws the field of “choice of law,” meaning that courts often have the constitutional power to apply the law of two or more states to an event, and any result they reach will be consistent with constitutional standards. All that is required is to meet the test created in 1981 in *Allstate Insurance Co. v. Hague*.<sup>211</sup>

Under the *Allstate* test, it is constitutional for a state’s law to apply to a case (a) if it has a contact, or aggregation of contracts, with the parties and the occurrence or transaction; (b) that contact or those contacts “creat[e] state interests” in applying the state’s law; and (c) application of that law is not “fundamentally unfair” to any party.<sup>212</sup> Under the *Allstate* test, it is constitutional to apply the law of the place of injury in cross-border torts, as long as the defendant is not unfairly surprised that its conduct resulted in harm in that state. And application of the law of the place of injury is both the longstanding traditional rule that has existed in the United States since the issue was first addressed, and the current law as it has developed since interest analysis became the reigning approach to the common law of conflicts. And it is the rule that is being “codified” by the American Law Institute in the emerging Third Restatement of Conflict of Laws.

Recall why the place of injury rule is the law when it favors the plaintiff: the Hobbes argument. The place of harm has a protective interest over anyone within its territory, whether a resident or a nonresident visitor. The place of injury has *sovereign interests* in preventing harm within its borders, and when its laws provide a remedy for that harm, it is because it views the conduct as wrongful (tortious) and it views the plaintiff as having a *right of civil recourse* against the defendant. In the constitutional analysis of choice of law, the sovereign interests of the place of harm matter as much as the sovereign interests of the place of conduct. Similarly, plaintiff rights not only matter as much as defendant rights, but they take precedence, and they do so because Hobbes was correct that the first function of government is to protect us from harm at the hands of others. If you cannot confine your conduct, or the consequences of your conduct, to the state that immunizes you, then you place yourself in the heart of the regulatory state where your actions cause harm, and you are liable to be taken to account under that state’s laws.

That means that it is both constitutional *and standard practice* to vindicate the sovereign interests of the place of harm and the rights of the victim plaintiff in the choice-of-law field, while those interests have, in recent Supreme Court cases, been deemed *irrelevant* to personal jurisdiction law. This is a contradiction, and Professor Linda Silberman recognized the incongruity many years ago. Defendants are not more concerned with where they will be sued than whether they are liable.<sup>213</sup>

It is true that application of the place of injury law may sometimes be unconstitutional. The constitutional test for applying a state’s law requires us to take

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210. *Pac. Emps. Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502–04 (1939) (holding that more than one state’s law may constitutionally be applied to the same set of events).

211. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980).

212. *Id.* at 308, 312–13.

213. Silberman, *supra* note 2, at 88.

the plaintiff's rights as seriously as the defendant's rights. But that does not mean that it may not sometimes be unconstitutional to apply the law of the place of injury when defendant acts elsewhere just because it was conceivable the injury would occur in another state. *World-Wide Volkswagen* is a potential example. Recall that the local dealer in New York sold a car that was in an accident in Oklahoma. It is not unreasonable to believe that the dealer should neither be sued in Oklahoma nor subject to Oklahoma law. That does not change the fact that choice-of-law doctrine requires us to consider the justified expectations of the defendant while *also* considering the rights of the plaintiff. The emerging Third Restatement agrees.<sup>214</sup>

But our fireworks case is not the same as *World-Wide Volkswagen*. In a neighboring state scenario, it is almost certainly constitutional to apply the law of the place of injury, and application of that law is the expected result under both traditional, current, and emerging approaches to conflicts of law. Moreover, the Supreme Court has repeatedly held that "traditional" rules of conflict of laws and personal jurisdiction should be retained whether or not they comply with currently applicable reasonableness tests. Thus, "tag" jurisdiction remains even if the defendant's contacts with the forum would not otherwise meet the "purposeful availment" standard,<sup>215</sup> and courts are free to apply the forum statute of limitations by classifying it as a procedural issue whether or not they have a substantive state interest in doing so.<sup>216</sup>

So we have a striking contradiction: while it is legitimate and constitutional to apply the law of the place of injury in cross-border torts, it may be unconstitutional for the plaintiff to bring a claim there. What on earth justifies this contradiction? The answer is that it is not justified. Nor is it logical. Indeed, the original formulation of the minimum contacts test made plaintiff rights and forum sovereign interests relevant to the analysis, rather than banished to a second step that we never reach after looking for minimum contacts between the defendant and the forum. It was only later law that banished these considerations and insisted on a myopic focus on the defendant. Defendant interests matter, but they are not the only thing that matters. It is irrational and unfair to define party rights by reference to only one party. Rights that concern relations between persons are necessarily relational. An argument that the defendant has rights is incomplete without an argument that plaintiffs have a duty to respect those rights. And the reverse is also true. Defendants may have rights to be protected from being forced to litigate in a distant forum with which they have no connection, but plaintiffs have a Hobbesian right to the protection of their home state laws.

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214. RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 (AM. L. INST. Preliminary Draft No. 7, Oct. 2021) ("Choice of law is largely decisional and, to that extent, are as open to reexamination as other common-law rules. Formulating and reexamining these rules requires a court to consider the specific policies of the relevant internal-law rules, general policies relating to multistate occurrences, and policies relating to the predictable and efficient conduct of litigation and the protection of the rights and justified expectations of the parties. The evolution of choice of law reflects the ongoing balance between these different policies.").

215. *Burnham v. Superior Court*, 495 U.S. 604, 610–11 (1990).

216. *Sun Oil v. Wortman*, 486 U.S. 717, 722 (1988).

When the defendant's conduct foreseeably causes harm to the plaintiff in a plaintiff-protecting state, the defendant's rights to the immunity offered by the place of conduct should give way to the plaintiff's right to civil recourse. And if that is so, then the state whose law is being applied has the sovereign interest and legitimate power to say what its law is and to make the tortfeasor appear before it to vindicate the rights of a forum resident harmed at home. In such a case, by definition, the defendant could foresee its actions having an effect in the forum, and if the defendant went ahead regardless of that danger, then defendant waived the immunity provided by the law of the place of conduct.

Unlike personal jurisdiction law, choice-of-law doctrine is *balanced*. It considers the legitimate regulatory interests of *both* states and the rights of *both* parties. Current personal jurisdiction doctrine is one-sided and unbalanced; it is structurally unfair because it focuses on the defendant alone and treats both the plaintiff and the state that has regulatory interests as irrelevant. The choice-of-law approach is superior, both because it considers the territorial powers of both states and because it attends to the rights and expectations of both plaintiffs and defendants. If we want to know how to resolve the contradiction between the two doctrines, we will do well to accept the one that attends to *all* the relevant state sovereign interests and *all* the party rights implicated in the case rather than the doctrine that blots out one of the parties and one of the states.

### CONCLUSION

“Feare of oppression disposeth a man to anticipate, or to seek ayd by society; for there is no other way by which a man can secure his life, and liberty.”<sup>217</sup> Hobbes taught us that the first job of government is to protect us from harm. When someone acts in one state in a manner that foreseeably harms someone in another state, the victim should not have to travel away from home to vindicate their rights under their own law. Application of the law of the place of injury is both the usual result and comports with constitutional standards. If that is so, it is not unfair to require the tortfeasor to appear before courts at the place of injury. It is time for personal jurisdiction law to absorb the insights of choice-of-law doctrine and to end the contradiction between the two fields. It is time for the rights of victims to receive as much constitutional protection as the rights of tortfeasors. States have the legitimate authority to apply their own law in their own courts when they have a legitimate interest in doing so and when that is not fundamentally unfair to the defendant. There is no other way for a person to “secure his life, and liberty.”

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217. HOBBS, *supra* note 1, at 73–74.