THE ONLINE-CONTACTS GAMBLE AFTER *WALDEN v. FIORE*

by
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The understated recent Supreme Court decision Walden v. Fiore *settled a problem that had been perpetuated by its former decision,* Calder v. Jones*: If a defendant's minimum contacts with the forum state are limited to injury to the plaintiff, then those contacts are insufficient to form the basis for personal jurisdiction over the defendant in that forum state. This bald principle makes practical and rational sense, and seems to bring courts back to the jurisprudence that* International Shoe v. Washington *espoused. The caveat to this very simple assumption is that in the times of* International Shoe*, the internet was not available for defendants to cause mayhem in other forums. The* Walden *Court expressly declined to address whether its holding extended to online contacts. That has not prevented courts from citing it to estop the exercise of personal jurisdiction when the only contacts in a case are online, including the injury to the plaintiff. In the meantime, the* Calder *effects test remains in full effect in the Ninth Circuit as far as internet contacts are concerned through cases like* Panavision v. Toeppen *and* Schwarzenegger v. Fred Martin Motor Co. *and its progeny. This Article reviews* Calder v. Jones *and examines how the circuits treated internet contacts using it as a test. It then examines* Walden *and looks at the decisions post-*Walden *for its application. Finally, it suggests a framework that encapsulates the manner in which courts have exercised jurisdiction in virtual contact cases post-*Walden.

I. INTRODUCTION

The evolution of personal jurisdiction jurisprudence has historically been closely linked with technology. A robust non-resident personal ju-

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risdiction test was unnecessary when defendants had the ease of neither long-distance transportation nor communication. The minimum-contacts doctrine for specific in personam jurisdiction, as introduced in *International Shoe v. Washington*,[1] represented the Supreme Court's answer to jurisdictional questions created by an economy that was growing to be truly national in scale, facilitated by improving telecommunications and speedy postal options. As technology continued to improve, facilitating contacts between states, however, the Court reined in the doctrine. Each Supreme Court decision after *McGee v. International Life Insurance Co.*,[2] decided in 1957, served either to curtail jurisdiction or to further clarify and refine the test applied.[3]

It is somewhat surprising, then, that the Supreme Court has failed to address specific in personam jurisdiction in an online context head-on. Use of the internet for commercial ventures has steadily and exponentially grown since 1995, when the internet was untethered from a single National Science Foundation backbone.[4] Consequently, the ways in which a defendant could reach into a state and harm that state's residents also increased. Additionally, the defendant could cause great online harm to a plaintiff, never knowing that plaintiff's precise location. As a result, courts had to address the appropriate minimum contact a forum could have with a defendant who never had presence—the traditional hallmark of in personam jurisdiction—within the forum state. And, though they had to do it without specific guidance from the Supreme Court, courts began to appropriate the "effects test" from *Calder v. Jones*[5] to support the notion that virtual contacts could be the basis of jurisdiction in the forum state where the effects of those contacts were felt.

The Supreme Court was given the opportunity to provide clarification in 2014 in the case *Walden v. Fiore*.[6] In *Walden*, the Court considered the *Calder* effects test and rejected it insofar as the defendant's only contact with the forum state was the plaintiff herself.[7] While this did not provide a complete abrogation of the *Calder* effects test, it provided a much-needed explanation to determine which contacts are too attenuated to

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[1] 326 U.S. 310 (1945).

[2] 355 U.S. 220 (1957).

[3] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–16 (1987) (declining to extend jurisdiction to a corporation that failed to meet the reasonableness test based on a five-factor balancing test); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78 (1985) (expanding the reasonableness test of fair play and substantial justice); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); (restricting jurisdiction to defendants who could reasonably anticipate being haled into court in the forum state).

[4] *See* Susan R. Harris & Elise Gerich, *Retiring the NFSNET Backbone Service: Chronicling the End of an Era*, ConneXions, Apr. 1996, *available at* http://www.merit.edu/research/nsfnet_article.php.

[5] 465 U.S. 783 (1984).

[6] 134 S. Ct. 1115 (2014).

[7] *Id.* at 1122–23.

establish jurisdiction. The *Walden* plaintiff–respondents argued that an unfavorable decision of the Court would "bring about unfairness in cases where intentional torts are committed via the internet or other electronic means. . . ."[8] Justice Thomas declined to consider the question, noting: "[*Walden*] does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State. . . . We leave questions about virtual contacts for another day."[9]

In the meantime, American courts are still virtually without guidance, left to determine for themselves the extent of *Walden*'s application to contacts that remain primarily online. This Article explains the *Calder* effects test and the various circuits' application of *Calder* to contacts that were primarily online. It then reviews *Walden*, its effect on the *Calder* test, and its application by courts in situations where the contacts are almost entirely on the internet.

II. PERSONAL JURISDICTION

Since *International Shoe v. Washington*, courts have recognized the constitutional permissibility of exercising jurisdiction over a non-resident defendant.[10] *International Shoe* dealt with in personam jurisdiction, which asks the trial court to consider the rights and liabilities of an individual defendant, as opposed to in rem jurisdiction, which asks the court to consider the rights and liabilities of the world with respect to a property defendant, and as opposed to quasi in rem jurisdiction, where the court considers the rights and liabilities of an individual defendant using property as a jurisdictional hook to bring that individual defendant in before the court.[11] The *International Shoe* Court also identified two sub-types of in personam jurisdiction: what we now know as general, based on the defendant's systematic and continuous contacts with the forum state; and specific, where the defendant's actions give rise to the plaintiff's cause of action in the forum state.[12] Courts have further refined specific in personam jurisdiction to a three-part test:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
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> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

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[8] *Id.* at 1125 n.9.

[9] *Id.*

[10] 326 U.S. 310 (1945).

[11] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 724 (1878) (detailing the difference between in personam and in rem proceedings).

[12] *Int'l Shoe*, 326 U.S. at 316–18.

> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.[13]

The inquiry in *Calder* and *Walden* addressed the purposeful direction or availment prong of the specific in personam jurisdiction test. The Supreme Court in *Calder v. Jones* set out a three-part "effects test" to determine whether a defendant in a tort case had purposefully directed its activities at the forum state.[14] As articulated by the Ninth Circuit, the effects test allows personal jurisdiction based on the defendant's "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state."[15]

In *Calder*, celebrity Shirley Jones sued the *National Enquirer*, a tabloid magazine based in Florida; Calder, its president; and South, its reporter, for South's allegedly libelous article that Calder refused to retract.[16] Jones sued in California, and the individual defendants moved to dismiss based on a lack of personal jurisdiction. Calder had been to California only twice, though never in relation to the article about Jones.[17] South traveled there frequently for business, and in writing the article had made phone calls to sources in California.[18]

The Supreme Court found jurisdiction to be proper.[19] The allegedly libelous story concerned the California activities of a California resident, tarnishing the professionalism of an entertainer whose television career was centered in California.[20] The article was drawn from California sources, and the brunt of the harm, in terms both of Jones's emotional distress and the injury to her professional reputation, was suffered in California.[21] In sum, California was "the focal point both of the story and of the harm suffered," and the defendants' intended effects were aimed at the forum state.[22] The Court thus affirmed the lower court's finding that the fact that the actions causing the effects in California were performed outside the state did not prevent California from asserting jurisdiction over a defendant in a cause of action arising out of those effects.[23]

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[13] *E.g.*, Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)).

[14] Calder v. Jones, 465 U.S. 783, 788–90 (1984).

[15] Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (quoting Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993)).

[16] *Calder*, 465 U.S. at 785–86.

[17] *Id.* at 786.

[18] *Id.* at 785–86.

[19] *Id.* at 791.

[20] *Id.* at 788–90.

[21] *Id.*

[22] *Id.* at 789.

[23] *Id.* at 786–87, 791.

A. *Applying* Calder *to Online Contacts*

The *Calder* effects test was an appealing option for courts to apply to defendants whose contacts with the forum state were primarily or entirely online. Because the purposeful availment prong could be satisfied by a defendant whose actions had effects in the forum state, it was not necessary for the defendant ever to have been personally to the forum state. As a result, a defendant's protests that he had never been to a forum state could be rendered meaningless, especially in intentional tort cases where the defendant was aware that the plaintiff resided in the forum state.

B. *Representative Cases Finding Jurisdiction.*

One of the first cases to decide the tricky question of online contacts was *Panavision International, L.P. v. Toeppen*,[24] a case often cited as precedent in the Ninth Circuit and beyond.[25] In a now-classic cybersquatting case, defendant Toeppen registered Panavision.com and then attempted to sell Panavision the domain name.[26] Toeppen argued that the Central District of California had no personal jurisdiction over him because he did not direct any activity towards Panavision in California, nor did he enter the state: "[I]f this activity injured Panavision, the injury occurred in cyberspace."[27]

Affirming the district court, the Ninth Circuit held that Toeppen purposefully registered Panavision's trademarks as domain names on the internet to extort money from Panavision, and the brunt of Panavision's harm was felt in California.[28] Further, the court found, Toeppen knew Panavision would likely suffer harm there because California was its principal place of business, "the heart of the theatrical motion picture and television industry."[29]

In *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, the plaintiffs sold fabrics on eBay from their home in Colorado.[30] Two of their prints played on famous images by the artist Erté, an artist known for willowy women sometimes set against stylized settings and patterns.[31] Chalk & Vermilion is an American art publisher of contemporary fine art prints[32] that owns the rights to the Erté images.[33] After seeing the plaintiffs' auction page,

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[24] 141 F.3d 1316 (9th Cir. 1998).

[25] *See, e.g.*, Budget Blinds, Inc. v. White, 536 F.3d 244, 260 (3d Cir. 2008); Cummings v. W. Trial Lawyers Ass'n, 133 F. Supp. 2d 1144, 1152–53 (D. Ariz. 2001).

[26] *Panavision Int'l*, 141 F.3d at 1319.

[27] *Id.* at 1322.

[28] *Id.* at 1321.

[29] *Id.*

[30] 514 F.3d 1063, 1067 (10th Cir. 2008).

[31] *Id.*

[32] *See About Chalk*, Chalk & Vermilion Fine Arts Inc., http://chalk-vermilion.com/about-chalk.html.

[33] *Dudnikov*, 514 F.3d at 1067.

which disclosed they were located in Colorado, Chalk & Vermilion contacted eBay in California and suspended the plaintiffs' auction based on copyright infringement.[34] Plaintiffs brought suit in the U.S. District Court for the District of Colorado seeking a declaratory judgment that they did not infringe on the defendant's copyrights.[35]

While the District of Colorado dismissed the claim for lack of personal jurisdiction, the Tenth Circuit reversed, holding that Chalk & Vermilion's act of sending the Notice of Claimed Infringement was an intentional act.[36] Even though it formally traveled only to California, it was intended to cancel plaintiffs' auctions in Colorado, making their "express aim" valid under the *Calder* test.[37] The court further reasoned that the defendants had a "purposeful direction" under the *Calder* test because they knew the plaintiffs' business and auction were based in Colorado, and therefore knew the brunt of the harm would be felt there.[38]

In *Tamburo v. Dworkin*, plaintiff Tamburo opened a dog-breeding software business in Illinois.[39] Tamburo alleged that the defendants—a Canadian, an Australian software company, and three Americans located outside of Illinois—violated state and federal antitrust laws with their communications, which included email blasts and website postings that accused Tamburo of stealing their data and urged dog enthusiasts to boycott his products.[40] The Northern District of Illinois dismissed the case for lack of personal jurisdiction.[41]

The Seventh Circuit reversed in part, holding specific personal jurisdiction applied to the individual Canadian and American defendants.[42] The court reasoned that the defendants satisfied *Calder*'s "express-aiming" test because they acted from outside the state to generate a consumer boycott targeting Tamburo, knowing that he would be injured in Illinois, where he lived and operated the software business.[43]

C. Representative Cases Finding No Jurisdiction.

Later in the same year it decided *Tamburo*, the Seventh Circuit declined to extend *Calder*. In *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, Chicago-based plaintiff Mobile Anesthesiologists contracted with medical offices to provide on-site anes-

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1082, *rev'g* Order on Recommendation of Magistrate Judge, No. 05-cv-02505-WDM-OES, (D. Colo. Sept. 14, 2006), ECF No. 28.

[37] *Id.* at 1075.

[38] *Id.* at 1077.

[39] 601 F.3d 693, 697 (7th Cir. 2010).

[40] *Id.*

[41] *See* Tamburo v. Dworkin, No. 04 C 3317, 2007 WL 3046216 (N.D. Ill. Oct. 9, 2007).

[42] *Tamburo*, 601 F.3d at 697.

[43] *Id.* at 707.

thesia services.[44] Defendant Anesthesia Associates consisted of one doctor providing similar services in Houston.[45] Plaintiff brought suit against the defendant, claiming violation of the anti-cybersquatting statute by registering a domain name confusingly similar to the plaintiff's registered trademark.[46] Defendant had never visited Illinois for business, had never conducted business in Illinois, had no agent or offices in Illinois, and was unaware that the plaintiff, its website, or its trademark existed.[47]

The district court dismissed the suit for lack of personal jurisdiction.[48] The Seventh Circuit affirmed, holding that the defendant's two sole contacts with Illinois—the creation of a website accessible in Illinois (but aimed only at the Houston market) and receipt of plaintiff's cease-and-desist letter—were insufficient to establish that the defendant's activities in Texas were calculated to cause harm in Illinois.[49]

In *Fielding v. Hubert Burda Media, Inc.*—a case from the Fifth Circuit—plaintiffs, a former Swiss ambassador to Germany and his wife, filed claims in Texas for libel, intentional infliction of emotional distress, tortious interference with prospective business relations, and civil conspiracy claims.[50] The defendants owned a German-language news magazine with 94% of its issues sold in Germany.[51] Out of a total printing of one million issues per week, the magazine's circulation was limited to 60 issues per week in Texas.[52] Defendants' magazine was published by a German corporation, and one of its subsidiaries was a Delaware corporation with its principal place of business in New York.[53] The Fieldings sued the owners of the magazine, the publishing company, and its subsidiary after a story was published alleging an extramarital affair between the former Swiss ambassador and a European model.[54]

The United States District Court for the Northern District of Texas dismissed the case for lack of personal jurisdiction, and the Fifth Circuit affirmed.[55] The court ruled that the allegedly libelous articles concerned German activities of individuals in Germany and knowledge that sufficient harm would be suffered in Texas was lacking.[56] Additionally, because the articles were published in the German language and the overwhelming percentage of sales was in Germany, the court concluded that

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[44] 623 F.3d 440, 441 (7th Cir. 2010).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 442.

[48] *Id.* at 441.

[49] *Id.* at 446–47.

[50] 415 F.3d 419, 422 (5th Cir. 2005).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 423.

[54] *Id.*

[55] *Id.* at 429, *aff'g* No. Civ. A. 3:03-CV-0872-, 2004 WL 532714 (N.D. Tex. Feb. 11, 2004).

[56] *Id.* at 426–27.

the reporting was directed at a German, not Texan, audience.[57] While the plaintiffs argued that their reputations were destroyed in Texas, neither had lived in nor had careers in Texas during a time relevant to the lawsuit, making the connection tenuous at best.[58]

In *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, plaintiff ALS Scan, a Maryland corporation, brought a claim for copyright infringement.[59] Plaintiff created and marketed adult photographs of female models for distribution over the internet and accused defendant Alternative Products of appropriating copies of copyrighted photos and placing them on its own website.[60] ALS Scan further alleged Digital Service Consultants, as the Internet Service Provider, enabled Alternative Products to publish the infringing photos by providing Alternative Products with the bandwidth service needed to maintain its websites.[61] Digital Service Consultants argued that the Maryland district court lacked personal jurisdiction because Digital Service Consultants was a Georgia corporation, provided Alternative Products the bandwidth service as a customer, and was not affiliated in any way with Alternative Products.[62] Digital Service Consultants further argued that it did not select the infringing photographs for publication, did not have knowledge that they were posted on Alternative Products' website, and received no income from Alternative Products' subscribers.[63]

The district court granted Digital's motion to dismiss for lack of personal jurisdiction, and the Fourth Circuit affirmed.[64] The court reasoned that based on *Calder*, specific jurisdiction in the internet context may be based only on an out-of-state person's internet activity directed at Maryland and causing injury that gives rise to a potential claim cognizable in Maryland.[65] Digital's only direct contact with Maryland was through the general publication of its website on the internet, but the website itself was unrelated to the plaintiff's claim because Digital was not involved in the publication of the photos.[66] Further, Digital did not direct its electronic activity specifically to any target in Maryland, did not manifest an intent to engage in business or other interaction in Maryland, and none of its conduct in enabling a website created a cause of action in Mary-

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[57] *Id.* at 427.

[58] *Id.*

[59] 293 F.3d 707, 709 (4th Cir. 2002).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 716, *aff'g* ALS Scan, Inc. v. Wilkins, 142 F. Supp. 2d 703, 710 (D. Md. 2001).

[65] *Id.* at 714–15.

[66] *Id.* at 715.

land.[67] The court did not address whether Digital continued to enable the website after receiving notice.

This sampling of cases by no means represents all court applications of *Calder* to online cases pre-*Walden*, but it demonstrates a problem with consistency that courts have had when determining whether online contacts are purposefully directed or expressly aimed at a jurisdiction. In certain instances, such as the Seventh Circuit's *Mobile Anesthesiologists* decision, a defendant's impacting the plaintiff's activities in a forum was not enough under *Calder*.[68] In others, knowledge that the plaintiff would be harmed in a forum, such as in the Seventh Circuit's *Tamburo* decision, was sufficient for the court to exercise personal jurisdiction.[69]

III. *WALDEN v. FIORE*

The Supreme Court has seemed "unable to find a transcendent, theoretical principle to meaningfully guide the [personal jurisdiction] analysis."[70] In just the past five years, the Supreme Court has issued four personal jurisdiction decisions, each providing little more than a course correction for guiding courts' reasoning. Following this trend, *Walden v. Fiore*,[71] with little pre-decision commentary, addressed what the Court perceived to be a misapplication of the *Calder* effects test.

Petitioner Anthony Walden worked as a deputized agent of the Drug Enforcement Administration at Atlanta's Hartsfield-Jackson Airport.[72] Walden was working when his task force was notified by the airport in San Juan, Puerto Rico that respondents Gina Fiore and Keith Gipson had boarded an Atlanta-bound plane with almost $97,000 in cash.[73] After a sniff-test by a drug-sniffing dog, Walden seized the cash, advising Fiore and Gipson that if they later proved "a legitimate source for the cash," it would be returned to them.[74] Fiore and Gipson were then permitted to board their connecting flight to Las Vegas, Nevada.[75] Following an inves-

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[67] *Id.*

[68] Mobile Anesths. Chi., LLC, v. Anesth. Assocs. of Hous. Metroplex, P.A., 623 F.3d 440, 444–47 (7th Cir. 2010).

[69] Tamburo v. Dworkin, 601 F.3d 693, 702–08 (7th Cir. 2010).

[70] Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961, 1020 & n.354 (2013) (noting personal jurisdiction as an example of an area requiring "continuous interventions by the Court to revisit its earlier pronouncements that have proven themselves inadequate and theoretically ungrounded").

[71] 134 S. Ct. 1115 (2014).

[72] *Id.* at 1119.

[73] *Id.*

[74] *Id.* Respondents maintained throughout the incident that they were professional gamblers and the cash represented their bank and winnings. *Id.*

[75] *Id.*

tigation for which Walden provided assistance, the funds were returned to the respondents, seven months after the airport incident occurred.[76]

Respondents filed suit in the United States District Court for the District of Nevada, alleging violation of their Fourth Amendment rights and alleging Walden had filed a false affidavit in connection with the investigation.[77] Walden filed a motion to dismiss for lack of personal jurisdiction. While the district court granted the motion, the Court of Appeals for the Ninth Circuit reversed.[78] The Ninth Circuit found that Walden had knowledge that his conduct would affect persons with a "significant connection" to Nevada, causing them "foreseeable harm."[79]

The Supreme Court reversed, noting that:

> The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation.'" For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a *substantial connection* with the forum State.[80]

This connection, and the analysis of that relationship, must arise out of contacts that the defendant himself creates with the forum state, "not the defendant's contacts with persons who reside there."[81] In other words, "the plaintiff cannot be the only link between the defendant and the forum. . . . [A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."[82]

According to the *Walden* Court, this holding merely clarified *Calder*, but was not inapposite to its effects test.[83] "The crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[84] The *Calder* defendants "expressly aimed" their conduct at the state of California.[85] The Court reasoned that because publication to third persons was a necessary element of libel, the tort actually occurred in California, and therefore the "effects" caused by the defendants connected their conduct to the state, not just to the plaintiff.[86] Using this rationale, the Court quickly concluded that Walden was

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[76] *Id.* at 1119–20.

[77] *Id.* at 1120.

[78] *Id.*

[79] *Id.*

[80] *Id.* (emphasis added) (citation omitted) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984)).

[81] *Id.* at 1122.

[82] *Id.* at 1122–23.

[83] *Id.* at 1123–24.

[84] *Id.*

[85] *Id.* at 1124 n.7.

[86] *Id.* at 1124.

not subject to personal jurisdiction in Nevada, because the connection was with the plaintiff, not the state.[87]

A. Application of Walden

The *Walden* facts were squarely "old-school," in that they involved no virtual contacts with the forum state whatsoever. However, in argument, Fiore did note that it could bring about unfairness in intentional tort cases where the only contacts the defendant had with the forum state were with the internet.[88] Writing for an undivided Court, Justice Thomas summarily disregarded the internet contacts, noting the physical nature of the contacts that *Walden* presented: "[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State. . . . We leave questions about virtual contacts for another day."[89]

Since *Walden*, Fiore's fears have not played out, largely because of the perceived limited addition *Walden* contributed to the personal jurisdiction dialogue in general. In several instances, instead of modifying the *Calder* effects test, *Walden* serves as a citation for situations that are distinguishable from those implicating *Calder*, providing a factual counterweight that has become familiar in the Supreme Court's recent treatment of civil procedure issues.[90] For example, the Eastern District of Virginia recently posited *Calder* against *Walden*, not because they stood for different principles, but because they represented entirely different factual scenarios.[91]

In post-*Walden* cases involving contacts that are primarily online, most courts have maintained the *Calder* effects test as the authority for determining purposeful availment in intentional tort cases, acknowledging *Walden* for a contribution, albeit a small one.[92] Although *Walden* added an express requirement that the defendant's "suit-related conduct"

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[87] *Id.* at 1124–25.

[88] *Id.* at 1125 n.9.

[89] *Id.*

[90] *Compare* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–85 (1985) (applying a five-factor reasonableness test to confirm jurisdiction over nonresident defendants), *with* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–16 (1987) (applying the five-factor reasonableness test to deny jurisdiction over a nonresident defendant). *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (finding plaintiff's complaint insufficiently plausible under FED. R. CIV. P. 12(b)(6)), *with* Erickson v. Pardus, 551 U.S. 89, 93 (2007) (finding plaintiff's complaint satisfied the "no set of facts" standard for motions to dismiss set forth by *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

[91] *See* Cent. Va. Aviation, Inc. v. N. Am. Flight Servs., Inc., 23 F. Supp. 3d 625, 630–31 (E.D. Va. 2014) (citing *Walden* over *Calder* because of the factual similarity to *Walden*).

[92] *See, e.g.*, Levin v. Posen Found., No. 13 C 8102, 2014 WL 3749189, at *4 (N.D. Ill. July 29, 2014) (finding jurisdiction appropriate based on emails that would "most likely" be read in the forum state).

create a "substantial connection" with the forum state,[93] courts have not extensively cited *Walden* for that proposition.[94] Instead, *Walden* is popular for the point that it makes: that this substantial connection must arise from contacts that the defendant himself creates and the contacts must be between the defendant and the forum, not just between the defendant and plaintiffs who reside there.[95]

This is not to say that the standard has elevated defendants beyond jurisdictional reach. A defendant can successfully combat jurisdiction under *Walden* only when the plaintiff is the defendant's sole link with the forum state; the defendant's "random, fortuitous, or attenuated" contact with the plaintiff (while outside of the forum state) alone is insufficient to establish personal jurisdiction.[96] So, for example, the Northern District of Illinois found jurisdiction to be appropriate when it found that emails were directed to the plaintiff in the forum state and were "most likely" to be read there.[97]

The place into which many courts have fit *Walden* has been the "expressly aimed" prong of *Calder*. While citing *Calder* as the main test for purposeful direction, courts cite to *Walden* to illuminate that second part of the test, often to opposite ends.[98]

At least one court reversed itself based on the *Walden* ruling. In *Burdick v. Superior Court*, the Superior Court of Orange County, California, denied a defendant's motion to quash summons based on *Calder*'s effects test.[99] Jurisdiction was appropriate, reasoned the superior court, because the plaintiffs' claims of defamation all arose from the defendant's postings to Facebook, causing harm in California.[100] The California Court of Appeals summarily dismissed the defendant's petition for a writ of man-

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[93] *Walden*, 134 S. Ct. at 1121.

[94] *See* Streamline Bus. Servs., LLC v. Vidible, Inc., No. 14-1433, 2014 WL 4209550, at *12, *14 (E.D. Pa. Aug. 26, 2014) (concluding that there was no jurisdiction over defendants whose only link to Pennsylvania was the plaintiff and who had no knowledge that plaintiff resided in Pennsylvania). *But see* Jenkins v. Miller, No. 2:12-CV-184, 2014 WL 3530365, at *4–5 (D. Vt. July 15, 2014) (finding a substantial connection to the forum state where the plaintiff's parental rights would be exercised in Vermont, even though defendant was unconnected to the forum).

[95] *Walden*, 134 S. Ct. at 1122.

[96] *See* Dillon v. Murphy & Hourihane, LLP, No. 14-cv-01908-BLF, 2014 WL 5409040, at *8 (N.D. Cal. Oct. 22, 2014) (citing *Walden*, 134 S. Ct. at 1123).

[97] *Levin*, 2014 WL 3749189, at *4.

[98] *See, e.g.*, Timberstone Mgmt. LLC v. Idaho Golf Partners, Inc., No. 2014-CV-5502, 2014 WL 5821720, at *4–5 (N.D. Ill. Nov. 6, 2014) (refusing to exercise jurisdiction over a defendant with online contacts in the state even though the trademark infringement affected an Illinois corporation); Reimer v. Corporacion De Viajes Mundiales S.A., No. 14-cv-00147-EDL, 2014 WL 5492774, at *6–7 (N.D. Cal. Oct. 30, 2014) (finding no personal jurisdiction based on *Calder* effects test).

[99] 183 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2015).

[100] *Id.*

damus.[101] After *Walden*, the California Supreme Court directed the Court of Appeals to show cause why mandamus should not issue.[102]

Upon review, the Court of Appeals entered the mandate ordering the trial court to vacate its order denying the defendant's motion to quash.[103] The defendant had had no contacts with the State of California; plaintiffs' defamation claims all arose from the single Facebook posting, defendant's sole California contact.[104] The court found that *Calder* and *Walden* dictate a finding that "merely posting on the internet negative comments about the plaintiff and knowing the plaintiff is in the forum state are insufficient to create minimum contacts."[105] Based on the Facebook post alone, which defendant created and deleted from his home state of Illinois, California courts could not exercise personal jurisdiction.[106]

This is not to say that every court considering personal jurisdiction based on internet contacts in light of *Walden* has come to the same conclusion. In *Exobox Technologies Corp. v. Tsambis*, the District of Nevada cited the *Calder* effects test to retain specific jurisdiction over the defendant, Tsambis.[107] Tsambis urged the district court to apply *Walden*, but to no avail. The district court distinguished *Walden*, finding that "Tsambis chose to direct his activities to an entity known to be in Nevada," as opposed to a person who "incidentally happened to be going to Nevada."[108] Further, argued the court, the *Walden* Court stopped short of overruling a line of cases supporting the notion that targeting a corporation in the forum constituted expressly aimed activity to the forum state, concluding that *Walden* had at most limited applicability to contacts that were primarily online.[109]

Moreover, at least one court cited extensively to *Walden* as the new authority for in personam jurisdiction. The Seventh Circuit, in *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, ordered the dismissal of an action that was based solely on online contacts with the

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[101] *Id.*

[102] *Id.* at 5–6.

[103] *Id.* at 17.

[104] *Id.* at 11–12.

[105] *Id.* at 12.

[106] *Id.* at 12–13. The Court of Appeals directed the Superior Court to rule on plaintiffs' request to conduct jurisdictional discovery. If it denied the request, the action must be dismissed for lack of personal jurisdiction. If it allowed discovery, then the ruling on the motion to quash must be based on the entire factual record. *Id.* at 17.

[107] No. 2:14-cv-00501-RFB-VCF, 2015 WL 82886, at *4 (D. Nev. Jan. 6, 2015).

[108] *Id.* at *5.

[109] *Id.* at *5–6 ("[I]n [*Bancroft*], the Ninth Circuit held that a letter sent from Georgia to a Virginia domain registration company targeting a California corporation constituted express aiming at California." (citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1088 (9th Cir. 2000))).

forum state.[110] The court considered contacts that in other instances were considered appropriate for jurisdiction, including misleading emails directed at the forum state and the plaintiff in the forum state.[111] While the court did not disregard *Calder* altogether, the court found that although *Calder* and *Walden* "may be in some tension with one another, after *Walden* there can be no doubt that 'the plaintiff cannot be the only link between the defendant and the forum.' Any decision that implies otherwise can no longer be considered authoritative."[112]

IV. CONCLUSION

> Nearly 70 years ago, the Supreme Court held that due process is satisfied for [specific jurisdiction] so long as the defendant had "certain minimum contacts" with the forum state such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Walden* serves as a reminder that the inquiry has not changed over the years . . . .[113]

While the Seventh Circuit may be correct in saying that, the test for specific in personam jurisdiction is hardly clearer than it was immediately following the Court's pronouncement of "minimum contacts" in *International Shoe*. Yes, with each opinion, the Court has offered more guidance in terms of an example of what contacts are sufficient enough to exercise specific jurisdiction over a defendant; however, each catchphrase added to the personal jurisdiction test has provided little by way of a concrete benchmark of when personal jurisdiction is appropriate. And perhaps this is appropriate. In cases where personal jurisdiction is questionable, it stands to reason that no two factual scenarios would be exactly alike.

In jurisdiction for intentional torts, especially an intentional tort conducted entirely online, it is difficult for conduct aimed at the forum to be distinguishable from conduct aimed at the plaintiff. After all, the plaintiff has alleged that the defendant intended an injury to occur. But because *Walden* suggests that connections with the plaintiff are insufficient to establish jurisdiction over a defendant, mere allegations of online conduct injurious to the plaintiff, targeted at the plaintiff regardless of location, would be considered irrelevant to the jurisdictional inquiry under the *Walden* extension. As a result, courts have had to create fictitious intent to cause harm to a particular state, a thin distinction that invites the Supreme Court to clarify yet again.

In practice, it seems that the distinction is not one of defendant's intent to injure the plaintiff in a particular state, but whether defendant's

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[110] 751 F.3d 796 (7th Cir. 2014).

[111] *Id.* at 801.

[112] *Id.* at 802 (citation omitted) (quoting Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014)).

[113] *Id.* at 800–01 (citation omitted) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

knowledge of the location of the plaintiff is prospective or retrospective. For example, should a cyberstalking victim sue her pursuers for assault, the fact that the stalkers post maps of her current address could demonstrate defendants' prospective awareness of the impact in her home state. If, on the other hand, a copyright owner sues for infringement based on the defendant's use of a photo available online, the lack of awareness of plaintiff's ties to the forum state would lead to a finding of no personal jurisdiction. This result is clearly not ideal, potentially rewarding a defendant who knows that his conduct is illegal with a forum inherently inconvenient to the plaintiff. But until the Supreme Court decides to review online contacts in their own right, jurisdiction based on those contacts will continue to be as ephemeral as the contacts themselves.