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What Does the Fox Say: Domestic Violence, Personal Jurisdiction, and the State's Sovereignty in Declaring the Protected Status of its Citizens

Aaron Edward Brown

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NOTE

WHAT DOES THE FOX SAY?: DOMESTIC VIOLENCE, PERSONAL JURISDICTION, AND THE STATE’S SOVEREIGNTY IN DECLARING THE PROTECTED STATUS OF ITS CITIZENS

AARON EDWARD BROWN

I am living in hell from one day to the next. But there is nothing I can do to escape. I don’t know where I would go if I did. I feel utterly powerless, and that feeling is my prison. I entered of my own free will, I locked the door, and I threw away the key.3

I. INTRODUCTION

In 1985, Gerald Cole and Barb Hughs began a romantic relationship.4 At the time they met, Barb Hughs was pregnant and, while she and Mr. Cole lived together in New Jersey, she gave birth to a son.5 Although the child was not Mr. Cole’s biological son, when the couple separated, Mr. Cole asked the Superior Court of New Jersey to adjudicate him as the legal father of the child and grant him reasonable parenting time.6 The court granted his requested relief and allowed him parenting time every year during the summer months of June, July, and August.7


2. J.D., University of St. Thomas, School of Law; B.A., University of St. Thomas (MN). The author is very appreciative to Professors Gregory Sisk and Michael Boulette for their input and counsel with this Note. The author would also like to thank his mentors, Tonya D.F. Berzat, Dorrie B. Estebo, and Nancy Berg; his mother, Pamela Brown; his grandfather, Richard Perkins; and his girlfriend, Kjerste Gast, for their guidance and inspiration.


5. Id.

6. Id.

7. Id.
From 1989 through 1996, the child visited his father, who now lived in Pennsylvania. In 1996, Barb Hughs and the child moved to Minnesota, and a few months later, Barb Hughs filed a petition for an order for protection (“OFP”) on behalf of her son. Through her affidavit and testimony, she described numerous occasions in which Gerald Cole abused their son when he visited Mr. Cole during the previous two summers. These incidents included occasions of physical violence, such as punching and slapping the minor child. The violence became so consistent and pervasive for the then ten-year-old boy that, upon his return to his mother’s custody, he refused to go back to his father’s house, stating that he would run away if he was forced to go back. The Minnesota District Court for Wright County entered an OFP for the minor child, and the father appealed, citing a lack of personal jurisdiction.

The legal issue presented in Hughs was relatively simple: did the Minnesota District Court possess personal jurisdiction over the defendant, even though the defendant had never been to Minnesota? For a Minnesota court to have personal jurisdiction over an out-of-state defendant, two criteria must be met. First, one criterion listed in Minnesota’s long-arm statute must be met. Second, “minimum contacts” must exist between the defendant and the state to satisfy due process.

In its plain language, Minnesota’s long-arm statute was designed to go as far as due process will allow. One of the provisions of Minnesota’s long-arm statute is that a Minnesota court may exercise personal jurisdiction if the defendant commits an act outside of Minnesota that causes injury in Minnesota. In Hughs, due to the pervasive psychological effects the physical violence had on the minor child, the district court had no problem finding that continuing damage was affecting the boy and the damage was caused by acts his father committed outside the state.

By finding that Minnesota’s long-arm statute did, in fact, reach Mr. Cole, the district court was then required to find that the Due Process Clause of the United States Constitution was satisfied. In other words, Mr. Cole had sufficient minimum contacts with the State of Minnesota such that

8. Id. at 748–749.
9. Id. at 749.
10. Hughs, 572 N.W.2d at 749.
11. Id.
12. Id.
13. Id.
14. Mr. Cole also did not transact any business in Minnesota or own any property in Minnesota.
16. Id.
19. Hughs, 572 N.W.2d at 750.
the *Hughs* court’s exercise of personal jurisdiction did not offend “traditional notions of fair play and substantial justice.”\(^{20}\) Minnesota courts examine the latter criterion through a five-pronged test: (1) the quantity of contacts within the State of Minnesota; (2) the nature and quality of those contacts; (3) the connection between the contacts and the cause of action; (4) the State’s interest in providing a forum; and (5) the convenience of the parties.\(^{21}\) In summary, the dispositive question before a court analyzing fair play and substantial justice is whether the non-resident purposefully availed himself or herself of the benefits and protections of the law of the forum state.\(^{22}\)

In finding that Mr. Cole had purposefully availed himself to the State, the *Hughs* court noted that Mr. Cole called the home of the minor child repeatedly.\(^{23}\) More importantly, however, since Mr. Cole knew the minor child resided in Minnesota during the abuse, he knew or reasonably should have known that a Minnesota court would resolve custody and visitation matters.\(^{24}\) While there were not a significant number of contacts, there were enough to satisfy the first prong of the statute.\(^{25}\) Additionally, the nature and quality of the contacts satisfied the second prong of the statute.\(^{26}\)

The crux of purposeful availment, however, is the relationship between the contacts and the cause of action. The most dispositive contact Mr. Cole possessed (his son) was directly related to the cause of action; namely, a pending OFP to prevent him from continuing to abuse the minor child.\(^{27}\) There is no denying that since the son’s primary residence was in Minnesota, Mr. Cole foresaw or should have foreseen that his abuse of his son would have possible consequences, not only in Pennsylvania (where the abuse occurred), but also in Minnesota.\(^{28}\)

While the last two prongs are not as dispositive, the *Hughs* court noted that they still overwhelmingly weighed in favor of establishing personal jurisdiction. Minnesota has an interest not only in protecting the physical and emotional health of a minor resident, but also the convenience of the parties weighed in favor of the minor.\(^{29}\)

\(^{20}\) Id. (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

\(^{21}\) Kennedy, 426 N.W.2d at 868; Mahoney v. Mahoney, 433 N.W.2d 115, 118 (Minn. Ct. App. 1998) (finding that the first three factors in the analysis are given more weight in a determination than the last two factors).

\(^{22}\) See Dent-Air, Inc. v. Beech Mountain Air Serv., Inc., 332 N.W.2d 904, 907 (Minn. 1983).

\(^{23}\) *Hughs*, 572 N.W.2d at 751.

\(^{24}\) Id. Put another way, it was reasonable for Mr. Cole to see the consequences of his abusive behavior towards his son being addressed in the state where his son resided.

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) *Hughs*, 572 N.W.2d at 751. The court found that the convenience of the parties weighed in favor of the minor because the child, the mother, and the child’s psychologist all lived in Minnesota.
Given the totality of the circumstances and the road map created by the Supreme Court of the United States in *International Shoe*, the Minnesota Court of Appeals affirmed the trial court’s finding of personal jurisdiction over Mr. Cole. However, what would have happened if the facts were different? For example, what if all the parties resided together in Pennsylvania and then after the abuse occurred to Ms. Hughs, she and the minor child fled to seek safety away from Mr. Cole by moving to Minnesota?

While these are not the facts in *Hughs*, the unfortunate truth is that this scenario occurs with relative frequency. While the exact numbers are impossible to obtain, we do know that one out of four women and one out of seven men will be victims of severe physical violence by an intimate partner during their life. We also know that one in three female murder victims are killed by their intimate partner and that women are seventy times more likely to be killed in the two weeks after leaving their intimate partner than at any other time during the relationship. Because of these frightening realities, many victims of domestic violence leave their abuser to seek safety and shelter with friends, relatives, or in battered women shelters; in some instances these safe havens are located outside the state where the violence occurred.

In the past decade and a half that interstate domestic violence has been a recognizable issue, only a handful of state courts have addressed whether a trial court needs personal jurisdiction over a defendant in order to enter an OFP. Further, as of now, there is no uniform policy for handling interstate domestic violence cases. However, the majority of the states that have addressed this issue have concluded that when there is no personal jurisdiction over the alleged abuser, the state court can still enter a valid OFP based on the status of the victim as a protected person as long as no

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31. *Hughs*, 572 N.W.2d at 752.
35. Interstate domestic violence in this Note will refer to the situation when abuse transpires in State A, and the victim leaves the state to seek shelter in State B, which is a state that does not have personal jurisdiction over the alleged abuser.
37. Orders for protection are also commonly referred to as: victim protection orders, abuse prevention orders, relief-from-abuse orders, order of protection, protective order, etc. For simplicity’s sake, I will refer to all of these orders simply as “orders for protection,” or, “OFPs.”
affirmative obligations are imposed. Throughout the years, several lower state courts have disagreed with the majority. Until 2015, no state court of last resort had conclusively found personal jurisdiction was required to enter a valid OFP. In January 2015, however, the Supreme Court of the United States denied a writ of certiorari seeking review of the Vermont Supreme Court’s decision in Fox v. Fox, 106 A.3d 919 (Vt. 2014). In Fox, the Vermont Supreme Court held that entering an OFP against an out-of-state defendant violated his substantive due process rights when the trial court did not have personal jurisdiction over him. While the author agrees with the decision rendered by the Vermont Supreme Court in part and disagrees in part, the now pronounced state split exemplifies the need for uniform laws that protect interstate victims of domestic violence and protect the due process rights of the alleged abusers.

Because of the undesirability of two (or three) inconsistent legal rulings amongst sister states, this Note makes the case for two potential solutions. Both solutions represent legal remedies that provide victims with safety, while respecting the rights of defendants. Solution one consists of a statute that allows a state district court to enter an OFP without personal jurisdiction over the defendant. The relief that may be granted under this statute is an order that precludes any type of contact by the respondent that is directed toward the petitioner. In addition, the order can state that the respondent may not break any of the laws of the state in which the order is issued. Other frequently used provisions such as a restriction on the right to travel and restriction on firearm rights would be precluded under the statute for reasons discussed later in this Note.

Solution two would be for state legislatures to pass a uniform law known as the Interstate Domestic Violence Jurisdiction Act (“IDVJA”). IDVJA would allow the forum state to transfer jurisdiction to the recipient state (e.g. the state that has personal jurisdiction over the respondent). This statutory scheme would operate in a similar fashion to the Uniform Interstate Family Support Act (“UIFSA”) with additional provisions from the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) such as temporary emergency jurisdiction.

At the time this article was written, two commentators have discussed whether orders for protection (“OFPs”) may be granted in instances where the trial court does not have personal jurisdiction over the alleged abuser. The first commentary, by Bevan J. Graybill, argues that personal jurisdic-

38. See Bartsch, 636 N.W.2d at 5; Caplan, 879 N.E.2d 117 at 471; Hemenway, 992 A.2d at 582; Spencer, 191 S.W.3d at 19.
39. See In re T.L., 820 A. 2d at 515–516; Becker, 937 So. 2d at 1132.
41. See Fox, 106 A.3d at 929.
42. See discussion infra Sections III.B.1.i–ii.
44. Unif. Child Custody Jurisdiction & Enf’t Act (Unif. Law Comm’n 1997).
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 tion is needed because OFPs are tantamount to civil injunctions, and thus require personal jurisdiction over a nonresident alleged abuser. The second article, authored by Jessica Miles, argues that personal jurisdiction is not required to enter an OFP. Miles’s article suggests that the best method going forward is for state courts to enter temporary orders that can be continually renewed until a court with personal jurisdiction can enter a final OFP. Since these two articles were published, an additional court of last resort has weighed in on this issue and concluded that personal jurisdiction is required to enter an OFP against an out-of-state defendant.

This Note attempts to contribute to the existing scholarship in two distinct ways. First, this Note delves further into the liberty interests that are exposed by traditional OFPs and explains which of these interests could potentially still be infringed without personal jurisdiction. This analysis is important in understanding exactly what kind of relief could be granted in an OFP without personal jurisdiction while still comporting with due process. Second, based on the analysis of the first set of considerations, I propose two separate solutions. These two solutions are meant to take into consideration the interests of both victims and alleged abusers, while also crafting legislation that recognizes the need to resolve this type of issue now that state courts of last resort have officially split on whether OFPs can fall within the status exception.

To that end, Part II of this Note begins by recounting the ways states presently procure personal jurisdiction over an individual. Part II then summarizes the existing case law starting with the decisions that rely on the ‘status’ exception to fill in for traditional personal jurisdiction requirements. Part II then moves to the decisions that deny the status exception as inapplicable to interstate domestic violence cases. Part III of this Note explains the various problems with both the majority and minority view on interstate domestic violence cases. Part III also discusses the many individual rights that are implicated when an OFP is issued and which of these rights may still be infringed without personal jurisdiction. Lastly, Part IV presents two solutions in the author’s attempt to create a uniform system of laws that not only protects victims from domestic violence, but also grants the alleged abuser due process under the law and remains true to over a century of jurisprudence regarding personal jurisdiction and state sovereignty.

47. See infra Section II.A.
48. See infra Sections III.A–B.
49. See infra Part IV.
II. HISTORY OF PERSONAL JURISDICTION, THE STATUS EXCEPTION, AND RELEVANT CASE LAW

A. Recognized Ways to Establish Personal Jurisdiction

Personal jurisdiction deals with a court’s ability to enter a binding judgment over both parties subject to litigation. A state’s ability to exercise jurisdiction over an out-of-state defendant is limited by the Due Process Clause of the Fourteenth Amendment as established in *International Shoe*.50 Specifically, the Supreme Court noted that the court must have personal jurisdiction over a defendant when entering “a valid judgment imposing a personal obligation or duty in favor of the plaintiff.”51 Thus, the prevailing rule gleaned from *International Shoe* has been that, if a court wants to exercise personal jurisdiction over an out-of-state defendant, that defendant must have such minimal contacts that the exercise of personal jurisdiction does not offend “traditional notions of fair play and substantial justice.”52

There are several ways in which a petitioner in an OFP case might establish that the court has personal jurisdiction over the defendant. First, personal jurisdiction may be established if the act that gave rise to the proceeding was committed in the forum state.53 For example, jurisdiction may be established if the out-of-state defendant committed the alleged abuse within the state.54 Second, state courts may find personal jurisdiction extends in instances where the alleged abuser contacts the victim inside the forum state. This communication could include anything from phone calls, e-mails, Facebook messages, etc. In *Calder v. Jones*, the Supreme Court developed an “effects test,” which extends personal jurisdiction into communication directed into the state.55 *Calder* specifically dealt with an article that was drafted in Florida but circulated through California and eventually harmed a California resident.56 These “effects” gave California personal jurisdiction over the defendant.57 This reasoning stems from the idea that the defendant knew or should have known that his acts in California could cause damage to such a degree that it would be fair for him to be sued in California.58 Many states capture the “effects” test with a rule allowing a state court to find personal jurisdiction when a defendant commits an act

52. *Int’l Shoe*, 326 U.S. at 316.
56. *Id.* at 789–790.
57. See *id.*
58. See *id.*
outside of the state, which causes injury or damage to property within the state.\footnote{59}{See, e.g., MINN. STAT § 543.19, subd. 1(4) (2016); DEL. CODE ANN. tit. 10, § 1045 (2016). The effects test analysis has been employed in several cases involving domestic violence. See, e.g., Hughs ex rel. Praul v. Cole, 572 N.W.2d 747, 751 (Minn. Ct. App. 1997); Becker v. Johnson, 937 So. 2d 1128, 1131 (Fla. Dist. Ct. App. 2006).}

There are several other ways in which personal jurisdiction may be established. For example, a state has personal jurisdiction when service of a summons and complaint on an out-of-state defendant occurs within the jurisdictional boundaries of the state (also known as “tag jurisdiction”).\footnote{60}{Burnham v. Superior Court of Cal., 495 U.S. 604 (1990).} Also, a defendant may consent to the personal jurisdiction of a state even though the state does not have personal jurisdiction over the defendant.\footnote{61}{Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982).}

While there are many possible ways for a forum state to gain personal jurisdiction over an out-of-state defendant, there remains a large swath of cases that lack the requisite “minimum contacts” such that notions of “fair play and substantial justice” are met when a court tries to exercise personal jurisdiction.\footnote{62}{See cases cited supra note 36.}

The hypothetical mentioned at the end of the Hughs case serves as a telling reminder that questions of personal jurisdiction have real-world implications. Would a court be able to exercise jurisdiction when domestic violence occurs in Pennsylvania and the victim then flees to Minnesota to seek shelter from the violence? In this instance, if the alleged abuser has no contacts with Minnesota and does not threaten the victim in Minnesota, Minnesota generally has no personal jurisdiction over the alleged abuser. In response to this problem, two competing legal theories have developed.\footnote{63}{There are arguably three competing theories, which will later be discussed infra Section II.C.}

First, the majority of states have held that personal jurisdiction is not required for entering an OFP. These states, however, differ on precisely how this is possible with some states ruling that OFPs can be entered via the status exception, and others ruling that OFPs can be entered because they only grant prohibitory relief. On the contrary, a minority of states have found that interstate domestic violence cases do require personal jurisdiction because an OFP is a judgment that imposes an affirmative obligation in favor of the plaintiff and against the defendant. However, before conducting a more in-depth analysis of the reasoning behind the majority and minority views, it is imperative to further discuss the status exception and its application in other areas of family law.
B. The Historical Context of the Status Exception

The jurisprudence behind the status exception was first created in the Supreme Court case *Pennoyer v. Neff.* In *Pennoyer,* the Court noted, "the State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its citizens shall be created, and the cause of which it might be dissolved." Thus, the Supreme Court clarified that marriage was a state creation that the state had the sovereignty to define, control, and dissolve.

The Supreme Court further applied this theory in *Williams v. State of North Carolina,* holding that states must give full faith and credit to a divorce judgment even if the divorce decree in question was entered without personal jurisdiction over the defendant. However, the judgment may consist only of dissolving the bonds of matrimony and cannot impose affirmative relief such as property division or alimony. While the Supreme Court has not explicitly addressed the status exception for custody cases, the UCCJEA recognizes that child custody determinations are also status determinations.

The authors of the UCCJEA, along with the Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction Act ("UCCJA"), noted that the basis for the determination that child custody is not required can be found in Justice Frankfurter’s concurrence in *May v. Anderson,* in which he clarifies that the Wisconsin court did have jurisdiction to decide custody without having personal jurisdiction over one of the parents. As observed by Geoffrey C. Hazard, Jr., Frankfurter’s concurrence has generally been seen as the controlling part of the opinion because his vote was necessary for the ultimate outcome of the case and his analysis was within the issue explained by the court.

64. 95 U.S. 714 (1877).
65. *Id.* at 734–737.
67. *Id.* at 311.
68. *Id.* at 309.
69. UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 201, cmt. 1 (UNIF. LAW COMM’N 1997).
70. See *May v. Anderson,* 345 U.S. 528, 535–536 (1953) (Frankfurter, J., concurring); see also UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 201, cmt. 2 (UNIF. LAW COMM’N 1997) (explaining that the authors of the UCCJEA relied on Frankfurter’s concurrence in *May v. Anderson,* 345 U.S. 528 (1953) while establishing the requirements of the emergency-jurisdiction provision of section 201 of the UCCJEA).
C. The Majority’s View Regarding the Status Exception and Prohibitive Relief as Applied to OFPs

The majority of states who have addressed this issue have concluded that personal jurisdiction is not necessary to enter an OFP. These states, however, have two different tracks of reasoning that have led them to their respective conclusions. First, the Supreme Court of Iowa held that the status exception to personal jurisdiction also applies in OFP cases because the petitioner is seeking a new status in relation to the respondent. Second, the Supreme Court of New Jersey and the Kentucky Court of Appeals both determined that their respective courts could enter an order that granted exclusively prohibitive relief, as long as the relief did not impose an affirmative obligation. Lastly, the Massachusetts and New Hampshire Supreme Courts merge both of these lines of reasoning to create a hybrid position that finds justification for entering an order via the status exception, but clarifies that every OFP must grant only prohibitive relief to comport with due process.

The prohibitive relief that the majority refers to can be described as an order restricting the defendant from such things including having contact with the victim; abusing the victim; and coming within a certain distance of the victim’s residence, work, family members, etc. This is distinguishable from affirmative obligations which include: restrictions on future firearm purchases; the surrender of firearms the defendant may have in their possession; counseling or psychologist evaluations; abuse or anger management classes; temporary child support; and payment of costs and expense, etc. While prohibitive relief still does affect the defendant’s rights, the majority of states determined that this relief does not go any further than status determinations in marriage or custody cases.

1. Bartsch v. Bartsch, 636 N.W.2d 3 (Iowa 2001)

In 2001, the Supreme Court of Iowa, in a four to three decision, became the first court of last resort to decide that personal jurisdiction was not required to enter an OFP in an interstate domestic violence case. In coming to their conclusion, the Iowa Supreme Court affirmed a district court ruling finding that under Iowa Code Section 236.4, personal jurisdiction

72. These states include: Iowa, Kentucky, Massachusetts, New Hampshire, and New Jersey.
73. See Bartsch v. Bartsch, 636 N.W.2d 3, 10 (Iowa 2001).
76. See, e.g., Bartsch, 636 N.W.2d at 10 (“If a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did [below]—enter an order protecting a resident Iowa family from abuse.”).
77. See id.
was not needed because the OFP “only preserved the protected status” of the plaintiff.78

In coming to this conclusion, the court noted that there have been other instances in the law where the United States Supreme Court and uniform laws have determined that personal jurisdiction is not required to satisfy due process under the law.79 These areas, including child custody and dissolutions, are reasoned to be adjudications to simply determine the parties’ relationship status, for example, husband-wife, or custodial parent-child. The court in Bartsch, by using the status exception, concluded that the status of a protected person is analogous to the aforementioned statuses.80

Bartsch also relied heavily on the public-policy implications associated with domestic violence compared to those of dissolutions and custody cases, as the risk of personal harm or death outweighed interests typically used to justify the status exception in other areas of family law.81 However, while personal jurisdiction was determined to be moot because of the status exception, the Bartsch court did find that other due-process requirements need to be met.82 These due-process requirements include giving the defendant notice and a reasonable opportunity to defend against the entering of an OFP.83

In affirming the decision of the trial court, the Iowa Supreme Court concluded that OFPs do not act to take any affirmative rights away from the alleged abuser, as the order simply specified the defendant to “ ‘stay away from the protected party’ and not assault or communicate with her.”84 Justice Carter, along with two other members of the Iowa Supreme Court, dissented and said that the petitioner, in this case, did not come to the district court for a status adjudication but rather for injunctive relief.85 In addition, the dissenting opinion points out that even if this was a status adjudication, the Fourteenth Amendment limits foreign courts from entering a judgment “affecting the rights or interests of a nonresident defendant.”86 Here, the court not only directly invaded the defendant’s “liberty interest” but imposed collateral consequences of a lasting nature, which included his ability to purchase or own firearms under federal law.87

78.  Id.
79.  See id. at 7–10.
80.  Id.
81.  “The greater and more immediate risk of harm from domestic violence, as opposed to the ‘considerable interest in preventing bigamous marriages and in protecting the offspring in marriages from being [illegitimate]’ . . . makes application of the status exception to protective orders even more compelling than in dissolution actions.” Id. at 9.
82.  636 N.W.2d at 9.
83.  “It is true that due process requires, in status determinations as well as others, reasonable attempts to notify the defendant and a reasonable opportunity to defend.” Id.
84.  Id. at 10.
85.  Id. at 11 (Carter, J., dissenting).
86.  Id.
87.  Id. at 12.

In 2005, the New Jersey Supreme Court in *Shah v. Shah* ordered that a final OFP could not be issued because there was a lack of personal jurisdiction, but that a temporary restraining order could be issued, so long as it exclusively granted prohibitory relief and imposed no affirmative obligation. Furthermore, under New Jersey Statutes Annotated 2C:25-28i, the Court held that the temporary order should remain in effect until the trial court issued a further order. Thus, ensuring that while a final order could not be entered without personal jurisdiction, the victim would at least have an indefinite temporary order until a court with personal jurisdiction could either grant or deny a final OFP.

The *Shah* court came to this conclusion by distinguishing between “prohibitory orders that serve to protect the domestic violence victim, and affirmative orders that require that a defendant undertake [some] action.” The court saw this distinction in the fact that prohibitive orders are meant to address protection for the victim and simply prohibits behavior by the defendant that is already illegal. While the court does not go as far as adopting the reasoning in *Bartsch*, it does create a carve-out to personal jurisdiction by distinguishing already illegal acts as not infringing on any substantive rights of the defendant.

The *Shah* court granted a temporary order on the basis of prohibitive relief but also concluded that due to the affirmative requirements of entering a final OFP, the court did not have authority to issue a final order. In addition, the court found that the issuance of a final order might also include several collateral consequences including registration in a central registry. However, since these affirmative obligations are placed on the defendant only when a final order is entered, the court elected to balance the plaintiff’s need for protection with the defendant’s due process rights by sustaining a temporary OFP indefinitely.

The defendant did contest the “indefinite” temporary order as also having collateral consequences. The *Shah* court responded to this concern by noting that the defendant is not prejudiced by an order that requires him to

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88. 875 A.2d 931, 942 (N.J. 2005).
89. Temporary OFPs are typically very short in duration; however, by finding that a temporary order in New Jersey could go on indefinitely, the *Shah* court found another way to protect interstate victims of domestic violence. See id. at 942.
90. Id. at 939.
91. Id.
92. Id.
93. See *Shah*, 875 A.2d at 940 (“A final restraining order must, by statutory definition, include affirmative relief. See, e.g., N.J.S.A. § 2C:25-29b (requiring the surrender of firearms and permits), -29.1 (requiring the payment of a civil penalty) and -29.4 (requiring the payment of a surcharge).”).
94. Id.
95. See id. at 942.
96. See id. at 941.
do absolutely nothing. Furthermore, the court reverted to additional language contained in the New Jersey Domestic Violence Act, which allows an ex parte order to remain in effect until a further order is issued.

In conclusion, the Shah court declined to extend the “status” reasoning in Bartsch, and in fact, did not make any citation to the Bartsch opinion. However, Shah did acknowledge the legislature’s intention to protect victims of domestic violence from continuing domestic violence where they are “sheltered,” and thus determined that relying solely on the distinction between affirmative and prohibitory relief was the correct path for interstate domestic violence cases.


In 2006, the Kentucky Court of Appeals elected to affirm a trial court’s decision to enter an OFP without personal jurisdiction over a nonresident defendant. This decision did not formally adopt the reasoning of the status determination in Bartsch, but instead found legitimacy in Kentucky’s safe harbor rule:

Any family member or member of an unmarried couple who is a resident of this state or has fled to this state to escape domestic violence and abuse may file a verified petition in the District Court of the county in which he resides. If the petitioner has left his usual place of residence within this state in order to avoid domestic violence and abuse, the petition may be filed and proceedings held in the county of his usual residence or in the District Court in the county of current residence.

In clarifying the exact parameters of the safe harbor rule in Kentucky, the Spencer court examined the published case law from other jurisdictions that examined interstate domestic violence cases. The court first analyzed In re T.L v. W.L where a Delaware court ruled against issuing an OFP in a similar factual circumstance. The Spencer court reasoned that the adverse ruling to the petitioner was because the petitioner in T.L. was not a resident for purposes of Delaware’s Domestic Abuse Act. The Spencer court also examined the reasoning in Bartsch, as well as the reasoning of Shah, and

97. Id. at 940–941 (“[H]e can either come into New Jersey and substantively defend against the domestic violence complaint, or he can request that both matters [his dissolution in Illinois and this order for protection] be heard in Illinois[,]”).
98. Id. at 942 (citing N.J. STAT. ANN. § 2C:25-28i (2017)). This is a relatively unusual provision in a state’s domestic violence act, as most expire after a relatively short period of time.
99. Shah, 875 A.2d at 942 n.5.
100. See id. at 942.
103. 820 A.2d 506 (Del. 2003) (discussed infra Section II.D.1).
104. Id. at 515–516. The facts in T.L. are very similar to the facts in Spencer.
105. Spencer, 191 S.W.3d at 17–18.
ultimately concluded that there is a recognizable distinction between a “prohibitory protective order” and an order that purports to impose affirmative obligations on the defendant.\textsuperscript{106} This distinction prompted the \textit{Spencer} court to conclude that \textit{Shah} represented the fairest balance in interstate domestic violence cases.\textsuperscript{107}

In recognizing that the Kentucky legislature clearly meant to extend protection to out-of-state victims fleeing to Kentucky for safety, the \textit{Spencer} court concluded that residency status is not required.\textsuperscript{108} In adopting \textit{Shah}’s distinction between prohibitive and affirmative relief, the \textit{Spencer} court allowed the entering of a permanent order,\textsuperscript{109} but only so far as “the order prohibits Ken from breaking the law in Kentucky by approaching Ava or Morgan.”\textsuperscript{110}


In 2008, the Massachusetts Supreme Judicial Court, in \textit{Caplan}, decided to adopt the reasoning in \textit{Bartsch} in holding that Massachusetts had the authority to enter an OFP based on the status of the petitioner.\textsuperscript{111} The \textit{Caplan} court first looked at the various ways to establish personal jurisdiction. They noted that Massachusetts has a similar statute to the Minnesota statute, examined in \textit{Hughes}, which extends personal jurisdiction to a non-resident defendant if a tortious injury is caused in the state.\textsuperscript{112} However, the \textit{Caplan} court affirmed the trial court’s decision that phone calls by the alleged abuser into Massachusetts did not amount to a tortious injury in the state of Massachusetts.\textsuperscript{113} After determining that long-arm jurisdiction was not possible, \textit{Caplan} nonetheless concluded that the status exception was applicable.\textsuperscript{114} In making this determination, the court relied heavily on the \textit{Bartsch} decision to conclude that the OFP “serves a role analogous to a custody or marital determination” except the \textit{Caplan} court noted that the order “focuses on the plaintiff’s protected status rather than her marital or parental status.”\textsuperscript{115}

The \textit{Caplan} court also addressed a public-policy argument seen in \textit{Bartsch} regarding the overall interest a state has in protecting victims from

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 18.
\item \textsuperscript{107} \textit{Id.} at 19.
\item \textsuperscript{108} \textit{Id.} at 17.
\item \textsuperscript{109} While adopting the reasoning in \textit{Shah}, the court does not indicate that a final order would violate due process but rather states that: “In all other respects [besides prohibiting the defendant from breaking the law in Kentucky], [the order] goes beyond the permissible limits of Kentucky courts’ jurisdiction.” \textit{Id.} at 19.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Caplan v. Donovan}, 879 N.E.2d 117, 124–125 (Mass. 2008).
\item \textsuperscript{112} \textit{Id.} at 125 n.5.
\item \textsuperscript{113} \textit{Id.} at 121.
\item \textsuperscript{114} \textit{See id.} at 122–123.
\item \textsuperscript{115} \textit{Id.} at 123.
\end{itemize}
additional physical and emotional abuse. However, they chose to examine this problem by illustrating an “unpalatable decision” a victim would have if the court did not issue an OFP:

The choices remaining are either to require the victim of abuse to return to the State in which the abuse occurred in order to obtain an effective abuse prevention order or, alternatively, wait for the abuser to follow the victim to the Commonwealth and, in the event of a new incident of abuse, seek an order from a Massachusetts court [at that time].

The Caplan court’s heavy reliance on this policy consideration stems from the fact that in neither of the outlined choices above is the court able to protect a resident within its own borders.

In the end, the Caplan court found that Massachusetts has long held that an order appropriately limited to prohibitions related to the protected status of a person within the Commonwealth does not violate the due-process rights of a nonresident defendant just because the court has no personal jurisdiction over that defendant. This is true, in the instance of domestic violence, as long as the defendant has notice and an opportunity to be heard, and the order does not impose affirmative obligations.


In the 2010 case of Hemenway v. Hemenway, the New Hampshire Supreme Court held that, while there was no personal jurisdiction over the defendant, the trial court could issue an OFP if it granted only prohibitory relief. The court concluded that both Williams v. North Carolina and Pennoyer v. Neff stand for the proposition that a state may adjudicate matters involving the status of relationships without personal jurisdiction over the defendants. In addition, the court resolved that prohibiting continuing abuse and ordering no contact is analogous to custody or marital determinations, and the status argument could sufficiently be extended to interstate domestic violence cases.

Similar to the courts before Hemenway, the New Hampshire Supreme Court chose only to enforce the parts of the OFP, which concerned prohibitive relief, and disallowed any relief imposing affirmative obligations on the defendant. Further, since New Hampshire has a “strong interest in pro-

116. Id. at 123. (“Such an order furthers the Commonwealth’s important public policy goal of securing ‘the fundamental human right to be protected from the devastating impact of family violence.’”).
117. Caplan, 879 N.E.2d at 123.
118. Id. at 125.
119. See id. at 124–125.
120. Hemenway, 992 A.2d at 581–582.
121. Id.
122. Id.
viding protection to victims of domestic violence,” the court saw the parts of the trial court’s order dealing with prohibitive relief as consistent with due process under the United States Constitution.123

D. A Minority of States Have Concluded That Personal Jurisdiction is Required to Enter a Valid OFP


In 2003, the Family Court of Delaware, Sussex County, became the second court to hear an interstate domestic violence case.124 The court, in T.L., established its concerns regarding entering an OFP without personal jurisdiction.125 First, noting that Cohen v. Cohen allowed for the status exception to personal jurisdiction under Delaware law.126 The court, however, found that the Delaware Supreme Court precedent in Cohen placed a requirement of “bona fide residency in the state,” when using a status determination in the context of a dissolution.127 In T.L., the court noted that the plaintiff fled Ohio for Delaware and after two days in the state of Delaware applied for an OFP.128 Due to the short time frame, T.L. was not a “bona fide resident” under Cohen.129 In addition, since Delaware had no “safe harbor rule” like Kentucky, the court believed the divorce requirements of bona fide residency established in Cohen should transfer to OFPs.130

Second, the court noted that there were absolutely no contacts except for the presence of the plaintiff in Delaware.131 Under these facts, the court found that the “husband’s rights of due process vastly outweigh the state’s legitimate concerns to protect its residents from domestic violence.”132

The court did acknowledge that the Iowa Supreme Court’s reasoning in Bartsch would seem to allow adjudication without personal jurisdiction.133 However, the Court found T.L. and Bartsch distinguishable, as Tara Bartsch filed for an OFP a month after residing in Iowa.134 In addition, since the abuse in Bartsch transpired in Utah (a state in which neither of the parties then resided in) the case proceeding in Iowa seemed more reasonable.135 Lastly, the court pointed to the close four to three decision and the
chief justice’s dissent as support that the husband’s due-process rights were more significant than the need to enter an OFP. 136

The court also discussed the permissible reach of the Delaware long-arm statute juxtaposed to the interpretation of the Minnesota long-arm statute by the Minnesota Court of Appeals in *Hughes*.137 While Minnesota’s long-arm statute provides for personal jurisdiction if an act outside of Minnesota causes harm within Minnesota, Delaware is limited to situations where the act causes harm outside of the state, and is specific to “business, derivation of revenue, or use or consumption of items.”138

In conclusion, the *T.L.* court found that the OFP was improperly entered because *T.L.* was not a resident of the state and the respondent did not have sufficient minimum contacts with the State of Delaware.139 In other words, the Delaware trial court specially rejected the applicability of the status exception to interstate domestic violence cases and noted that “[a]lthough the State of Delaware clearly has an important interest in fostering the protection against domestic abuse, its power to do so should be tempered to be sure that it is serving bona fide residents and not extending protective Orders against persons lacking requisite minimum contacts with the state.”140


In 2006, the Florida District Court of Appeals decided an appeal from a Florida District Court granting the plaintiff an OFP against her alleged abuser.141 The main issue at stake was whether the defendant’s threatening phone calls made to the plaintiff while she was in the State of Florida gave the Florida court long-arm jurisdiction over the defendant.142

The Court pegged its analysis on an affidavit the defendant admitted into evidence stating that he had no knowledge that the plaintiff was residing in Florida at the time he had left threatening voicemails.143 The burden of proving that the defendant did know the plaintiff was residing in Florida then shifted to the plaintiff. While the plaintiff argued that the defendant had reason to know she was seeking refuge in Florida, no affidavit to this point was filed.144 Thus, the court of appeals reversed the grant of an OFP for want of personal jurisdiction.145

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136. *In re T.L.*, 820 A.2d at 515.
137. *Id*.
138. *Id.* at 515.
139. See *id.* at 515–516.
140. *Id.* at 516.
142. *Id.* at 1129.
143. *Id.* at 1131.
144. *Id*.
145. *Id.* at 1132.
Noticeably, the court left out any discussion about the status exception to personal jurisdiction as discussed in \textit{Bartsch} and \textit{Shah}. In addition, it declined to analyze whether personal jurisdiction might be established through the harm that was occurring in Florida based on the alleged abuse that transpired in Maryland, which is the state the victim was residing in before fleeing to Florida.\footnote{146 \textit{Id}.}


In 2014, the Vermont Supreme Court became the first court of last resort to decline to affirm a decision for a temporary or final OFP without personal jurisdiction.\footnote{147 \textit{See Fox v. Fox}, 106 A.3d 919, 921 (Vt. 2014).} In its opinion, the \textit{Fox} court, while acknowledging the distinction between the status exception argument and prohibitive/affirmative relief argument, reasoned that both theories ultimately fail.\footnote{148 \textit{Id}. at 926–927.}

Relying on the reasoning of Chief Justice Carter in his dissent in \textit{Bartsch}, the \textit{Fox} court concluded that—regardless of how you limit the OFP—it will always have significant implications for a defendant’s substantive rights.\footnote{149 \textit{Id}.} In coming to this conclusion, the court looked at the \textit{Shah} court’s conclusion that “an order that merely directs a defendant to stay away from and not contact a plaintiff does not actually impose a personal obligation,” and the OFP simply “prohibits the defendant from engaging in behavior already specifically outlawed . . . [it] does not implicate any of the defendant’s substantive rights.”\footnote{150 \textit{Id}. at 926 (quoting \textit{Shah v. Shah}, 875 A.2d 931, 939 (N.J. 2005)).} The issue for the \textit{Fox} court was whether an order prohibiting contact within a certain number of feet and disallowing travel to certain places does, in fact, prohibit more than specific behavior that is already outlawed.\footnote{151 \textit{Id}.} In addition, the court also noted that the issuance of an order opens the defendant up to many potential criminal charges for violations of the order and very well may have collateral consequences.\footnote{152 \textit{Id}.; see also, e.g., 18 U.S.C. \textsection 2262(b) (2013) (penalties for traveling interstate with the intention to violate a protection order); 18 U.S.C. \textsection 922(g)(8) (2015) (making the purchase or possession of firearms illegal for a person who is subject to a qualified OFP).}

The court noted that, after the issuance of an OFP, the defendant’s potentially illegal but also \textit{legal} conduct is restrained, and thus by extension, so is his liberty.\footnote{153 \textit{Fox}, 106 A.3d at 926.} The court added that such restraints may not only be appropriate but also necessary, however, since OFPs restrain normally permissible behavior, all OFPs go beyond strictly prohibitive relief and therefore impose relief beyond that which is already illegal.\footnote{154 \textit{Id}.}
While the Fox court recognized the “unpalatable choices” referenced in Caplan, they also recognized an unpalatable choice for the alleged abuser:

[A] Vermonter with no connection to, for example, California could be forced to choose between traveling from Vermont to California to defend against civil charges of domestic violence and accepting the consequences of a judicial finding of abuse and an abuse-prevention order in California because an alleged victim of domestic violence chose to relocate to California. Such a scenario challenges “traditional notions of fair play and substantial justice” protected by the personal jurisdiction requirement pursuant to the Due Process Clause.\(^{155}\)

In conclusion, the Fox court declined to carve out an exception based on the status exception or the grant of only prohibitive relief in interstate domestic violence cases because it reasoned that all OFPs impose affirmative relief regardless of how narrowly they are tailored.\(^{156}\) Several months after the opinion was handed down, the plaintiff petitioned the Supreme Court of the United States for review.\(^{157}\) But, in early 2015, the Supreme Court denied the petitioner’s writ of certiorari, thus settling the dispute as to Vermont’s treatment of personal jurisdiction requirements in interstate domestic violence cases.\(^{158}\)

III. AN ANALYSIS OF BOTH THE MAJORITY AND MINORITY POSITIONS

This Part details various considerations with both the majority and minority positions on interstate domestic violence cases. First, this Part explains why the majority position on the status exception’s applicability to interstate domestic violence cases is correct. Second, this Part explains the problems with the majority’s and minority’s respective positions when it comes to prohibitive relief. Mainly, this Part details the incompatibly of the Fox court’s position on the infringement of substantive rights as compared to other areas of family law that use the status exception. This Part also details the problem with the majority position on the infringement of certain rights that should not be categorized as prohibitory relief.

A. Why the Majority Position on the Status Exception is Correct

During the past decades, the status exception has allowed states across the country to address certain family law related issues that are essential to their citizenry. In fact, the status exception began with the very fundamental understanding that states have the sovereignty to declare and dissolve cer-
tain relationships within their own borders. While the status exception originally started in the area of marital dissolutions, it has since been expended into the areas of child custody and adoption because of the recognition of states’ strong interest in familial relationships and establishing the obligations and rights that flow from these relationships.

In this same vein, state courts have an arguably greater interest in protecting victims from domestic violence than they do for the interests commonly cited in support of the status exception in other areas of family law. For example, the states’ interest in protecting victims of domestic violence is presumed to be greater than its interest in preventing bigamous marriages and offspring from becoming illegitimate. In addition, the states’ interest of determining child custody through the UCCJEA is also arguably of similar—if not less—importance to protecting its citizens from domestic abuse.

The status argument in the domestic violence realm serves a similar purpose and is conceptually similar to the examples cited above. However, unlike marital or custody determinations, the status exception in interstate domestic violence cases focuses on the status of the petitioner as a protected person rather than the petitioner’s status as a custodial parent or single person. As the Iowa Supreme Court acknowledged in Bartsch, “[i]f a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to . . . enter an order protecting a resident . . . from abuse.”

In distinguishing the other areas of family law that allow status determinations to proceed without personal jurisdiction, one commentator has argued that OFPs do not act as true status determinations because they do not actually alter the relationship status of the victim and abuser. Bevin Graybill argues that the majority in Bartsch failed to support their holding that Tara Bartsch’s OFP was a recognized declaration on the status of the relationship between her and her former paramour. Rather, Graybill argues that the relationship is altered in the same way when a “court enjoins one farmer from tilling the land of a neighboring farmer.” Thus, she con-

160. Id. at 734–735.
161. See, e.g., UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT (UNIF. LAW COMM’N 1997).
162. Estin v. Estin, 334 U.S. 541, 546 (1948) (citing the prevention of bigamous marriages and the protection of offspring from being illegitimate as reasons for the status exception in the context of marital dissolutions).
163. This status exception, which at its core affects a parent’s fundamental right to parent their child, is recognized in part because of the state’s interest in the protection of children within its borders. See UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 201(c) (UNIF. LAW COMM’N 1997).
165. Graybill, supra note 45, at 856.
166. Id.
167. Id. at 858.
cludes that an OFP acts as a civil injunction to enjoin the defendant from abusing, contacting, or approaching the victim.\textsuperscript{168}

Graybill’s argument does not appreciate how the change in status operates because an OFP does operate to change the way the two parties are legally able to interact with each other going forward. An analogous example is in the operation of the UCCJEA. The UCCJEA, as mentioned earlier, does not require personal jurisdiction.\textsuperscript{169} Besides the lack of a personal jurisdiction requirement, custody adjudications are also interesting—as compared to OFPs—because they do not necessarily change the “legal” relationship of parties, as both parents could still be considered the parents of the minor child at issue after an adjudication under the UCCJEA. For example, a custody order under the UCCJEA’s emergency custody provision allows a court to apply its own state law and change a whole host of potential conditions on one or both of the parents, such as requiring supervised parenting time or altering parenting time.\textsuperscript{170} The state’s power to effectuate this type of change necessarily leaves the door open for a drastic modification in the parties’ rights and obligations within the parent-child relationship. But, like interstate domestic violence cases, UCCJEA adjudications only impact the way the parties are able to legally interact with their child (the subject of the custody order). To distinguish the two based on the fact that the parent-child relationship is more of a legal relationship is also incorrect if the following assertion is that victims of domestic violence often have no legal relationship with their former partner. This may be true in the technical sense, if the parties were never married and never had a child in common, yet the law in many states does recognize this distinction as they specifically allow a petitioner to bring a petition against someone they either lived with, had a sexual relationship with, or had a romantic relationship with.\textsuperscript{171}

Simply put, an OFP is an applicable form of status adjudication because it adjudicates the status of the relationship between the victim and alleged abuser. Like a determination under the UCCJEA, a properly tailored OFP does not offer judgment against the respondent, but rather adjudicates the status of the petitioner by declaring their right to be free from abusive behavior. Just like an OFP, custody orders disallow the other party from engaging in certain behaviors, such as taking custody of the minor child when the order does not allow for such custody. In both instances, the orders are not allowed to require that the respondent engage in an affirmative

\begin{flushright}
\textsuperscript{168} Id.
\textsuperscript{169} See UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 201(c), cmt. 2 (UNIF. LAW COMM’N 1997); see also, e.g., In re Paternity of Robinaugh, 616 N.E.2d 409, 411 (Ind. Ct. App. 1993) (“Custody proceedings are adjudications of status.”).
\textsuperscript{170} See MINN. STAT. § 518D.204 (2016).
\textsuperscript{171} See, e.g., MINN. STAT. § 518B.01, subds. 2(b)(4), (7); CAL. FAM. CODE § 6301 (2015); IOWA CODE ANN § 236.2 (2017).
\end{flushright}
act, such as paying child support, requiring counseling and psychological services, or surrendering firearms. However, this new status declaration does and can, in both instances, command the respondent to refrain from certain acts. In sum, the only truly distinguishing factor between a custody order under the UCCJEA entered without personal jurisdiction and an OFP entered without personal jurisdiction are the actual prohibitions that the order addresses.

It is without question that states “may exercise jurisdiction to establish or terminate a status if the status has a sufficient relationship to the state.” In the instance of an OFP ordered under the status exception, states exercise their jurisdiction to establish a status (the petitioner as a protected person), and this status determination has a sufficient relationship to the state as the petitioner is a resident of the state and is in need of the state’s protection. Graybill also asserts that the common types of relationships adjudicated under Restatement (Second) of Conflicts of Laws Sections 70–79 implicitly concludes that domestic violence is inapplicable to the status exception because OFPs are not included in the typical examples of types of family law relationships that may be adjudicated via the status exception. Even so, it is not surprising that interstate domestic violence cases are not mentioned, as OFPs themselves are a recent development.

In conclusion, the status argument in the interstate domestic violence context is backed by many of the same fundamental policy and practical reasons behind divisible divorce and interstate child custody. It allows the state to exercise its inherent authority over its citizens to declare and protect them under legal statuses established by the state. Since the advent of domestic violence laws in the 1970s and 1980s, individual states have recognized the legal status of victims of domestic violence by creating an avenue for victims to protect themselves through an adjudication declaring them a protected person. The status exception to personal jurisdiction was created specifically in the context of family law, an area long held to be in the province of the state, and it is equally applicable regardless of whether the

172. See, e.g., In re NC, 294 P.3d 866, 877 (Wyo. 2013) (striking down provisions of the district court’s order that extend beyond relief that the UCCJEA allows).

173. Whereas an OFP may say “do not contact the petitioner,” and a custody order may state, “do not violate the terms of this court-ordered parenting schedule.”


175. Graybill, supra note 45, at 857; see Restatement (Second) of Conflict of Laws §§ 70–79 (Am. Law Inst. 1971) (relationships in which the state may establish or terminate a status include: divorce, adoption, and child custody).

176. A noticeable change from Colonial America where women were viewed a property, and a man was allowed to beat his wife so long as he used “a rod no thicker than his thumb.” Jessica Carrie Clingan, Town of Castle Rock, Colo. v. Gonzales: The Value of A Restraining Order, 10 J. Gender Race & Just. 315, 332 (2007) (citing Marion Wanless, Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?, 1996 U. Ill. L. Rev. 533, 535–536 (1996)).
status declaration is that of a marital relationship, parent-child relationship, or victim-abuser relationship.

B. The Problem with the Majority Position on Prohibitive Relief/Affirmative Relief

As discussed earlier, the arguments pertaining to the status exception and prohibitive/affirmative relief are distinct but necessarily intertwined because use of the status exception requires that no affirmative obligations are imposed. While it is the author’s opinion that the OFPs do create a new legal status and are applicable under the status exception to personal jurisdiction, there remains a distinct problem. Currently, many OFPs issued in courts that have recognized the status exception likely impose affirmative obligations and overly invasive collateral consequences. These obligations and consequences must be addressed so that OFPs entered without personal jurisdiction are constitutionally sound under the Fourteenth Amendment.

In distinguishing the other areas of family law, which allow status determinations to proceed without personal jurisdiction, courts and commentators have argued that OFPs alter a respondent’s substantive rights in a way that marital and custody status determinations do not. Whether an individual state’s OFP may impose a particular affirmative obligation on a respondent can be found in either the state’s specific domestic abuse act or under federal law.

1. The Impact on Substantive Rights and Collateral Consequences from an OFP

In beginning this section, it is important first to define several terms that are used regularly by courts that have dealt with personal jurisdiction requirements for out-of-state defendants. First, prohibitive relief in the domestic violence context is relief that prohibits certain conduct by the respondent. Many courts view prohibitive relief as not directly attacking a respondent’s substantive rights because this prohibitive relief simply prohibits behavior that is already specifically outlawed, such as abusing or harassing the victim. On the other hand, an affirmative obligation is defined as requiring the respondent to undertake some action. Affirma-

177. All cases deciding this issue have either discussed both issues or merged both issues. See infra notes 77–123.
179. See id.; Fox v. Fox, 106 A.3d 919, 926–927 (Vt. 2014); Graybill, supra note 45, at 860.
181. An affirmative obligation is also referred to as affirmative relief.
182. See Shah, 875 A.2d at 939.
tive obligations, which meet the former definition, have rightly been excluded from every court’s analysis under the status exception because Kulko v. Superior Court makes clear that the state cannot award affirmative relief without personal jurisdiction over a defendant. In short,

[j]urisdiction to establish or terminate a status should be distinguishable from jurisdiction to determine the existence of a status as an incidental question in litigation whose primary objective is resolution of some other controversy . . . it should also be distinguished from jurisdiction to enforce liability arising from a status, for example child support.

Lastly, collateral consequences in the domestic violence context are defined as additional penalties, disabilities, or disadvantages, which attach to an OFP but are not explicitly ordered by the judge. The most common type of collateral consequence generally associated with OFPs, which will be discussed in Section B.III, is the prohibition of a respondent’s right to possess and purchase firearms; however, there are potentially many others which could attach depending on the state in which the OFP is entered.

In defense of prohibitory relief, courts that have employed the status exception have reasoned that prohibitory relief does not affect a respondent’s underlying substantive rights because it simply prohibits what is already illegal. Furthermore, as discussed later, a protection order that prohibits abuse “serves a role that is analogous to custody or marital determinations, except that the relief ordered focuses on the plaintiff’s protected status rather than the plaintiff’s marital or parental status.” While this proposition may be accurate for orders that simply prohibit the respondent from abusing the petitioner, there remains a problem in classifying a restraint on contact and travel. This is because typically, OFPs will also order the respondent to have no contact with the petitioner, as well as restrain the respondent from coming within a certain distance of the petitioner.

While contact and distance requirements are certainly sound provisions in OFPs, they do infringe on a respondent’s substantive rights. In fact, but for the order in question, respondents would generally be able to contact and come within any distance of the plaintiff. This point was articulated by the Vermont Supreme

184. Bartsch, 636 N.W.2d at 11 (citing Restatement (Second) of Judgments § 7 cmt. a (Am. Law Inst. 1982)).
185. See Shah, 875 A.2d at 940 (an OFP in New Jersey has such collateral consequences as registration in a central registry, etc.).
186. See, e.g., id. at 939 (prohibitory relief prohibits the defendant from engaging in behavior already specifically outlawed).
188. See Fox v. Fox, 106 A.3d 919, 926 (Vt. 2014).
Court in its finding that personal jurisdiction is required to enter a valid OFP.\textsuperscript{189}

While it is important first to recognize that almost all OFPs do impose more than a simple prohibition, this type of invasion of personal liberty is found in every single area that allows a status determination since the status exception was first established.\textsuperscript{190} Beginning with the divisible divorce doctrine, states have been allowed to declare an individual’s “status” in marriage even without personal jurisdiction over one of the individuals involved in that marriage.\textsuperscript{191} Courts after Williams made sure to include the distinction between jurisdiction to establish or terminate a status and jurisdiction to enforce liability arising from a status, such as spousal maintenance,\textsuperscript{192} property division,\textsuperscript{193} and child support.\textsuperscript{194} In all of these examples, the courts would be imposing on the individual—whom they do not have personal jurisdiction over—an obligation to act. This is in sharp contrast to precluding them from doing something such as not contacting a victim or not using a joint filing status on one’s taxes. Thus, it is not fair to categorize these provisions as an imposition of an affirmative obligation, as the Fox court does, by stating that these restrictions arise out of the enforcement of a liability as opposed to a declaration of status.\textsuperscript{195}

Simply put, all status adjudication involves the extinguishing of some rights, which in turn can affect the defendant’s substantive rights. This is true of divorce, which has enormous implications on tax deductions and tax filing statuses.\textsuperscript{196} In addition, divorce disallows the entitlement of a surviving ex-spouse to seek damages in wrongful death cases,\textsuperscript{197} precludes intestate inheritances,\textsuperscript{198} and disallows property rights such as joint tenancy in the entirety.\textsuperscript{199} All of these infringements naturally flow from a divisible divorce and have the potential to impact both spouses financially and perhaps even socially, but yet are seen as valid consequences of a state’s inherent right to declare a legal status of one of its residents.

\textsuperscript{189} Id. at 926–927.
\textsuperscript{190} See infra notes 196–202.
\textsuperscript{192} Vanderbilt v. Vanderbilt, 354 U.S. 418 (1957) (holding that a court may not extinguish a spouse’s right to alimony when the court does not have personal jurisdiction over the spouse).
\textsuperscript{193} Estin v. Estin, 334 U.S. 541, 548 (1947) (concluding that a court must have personal jurisdiction over both spouses to adjudicate property interests).
\textsuperscript{194} Kulko v. Superior Court of Cal., 436 U.S. 84, 101 (1978) (holding that a court may not award child support against out-of-state defendant when there is no personal jurisdiction over the out-of-state defendant).
\textsuperscript{195} See Fox v. Fox, 106 A.3d 919, 926 (Vt. 2014).
\textsuperscript{197} Ingalls Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248, 253 (1997).
\textsuperscript{198} See generally In re Estate of Anderson, 60 Cal. App. 4th 436, 70 Cal Rptr. 2d 266 (1997).
\textsuperscript{199} See, e.g., 765 ILCS 1005/1c (2016).
The significant effect on substantive rights does not only stop at marriage, but is also seen in custody, adoption, and child welfare proceedings. For example, under the UCCJEA, a court without personal jurisdiction over one of the parties may decide custodial rights.\textsuperscript{200} In the child welfare and adoption context, the court may even go to the extreme lengths of completely terminating the full ambit of a parent’s rights vis-à-vis their child.\textsuperscript{201} This equivalency stays true even in light of \textit{Troxel v. Granville}, which held that, “[t]he Fourteenth Amendment’s Due Process Clause has a substantive component that . . . including parents’ fundamental right to make decisions concerning the care, custody, and control of their children.”\textsuperscript{202} OFPs have also been attacked in the past on the basis that they restrain the defendant’s free speech rights and their right to free movement.\textsuperscript{203}

\textit{i. Alleged Abusers Do Not Have a Right to Contact Their Victims}

While it is true that there is a deprivation of a liberty when an alleged abuser is ordered to not contact a petitioner, an interstate OFP commanding such is valid for several reasons. First, the restriction does not require the defendant to affirmatively do anything, which is a hallmark of the status exception. Second, it has long been the case that a person’s ability to speak in certain instances can be reasonably constrained without almost any due process. This idea has been articulated in cases such as \textit{Rowen v. United States Post Office Department}, where the United States Supreme Court upheld the validity of a law that allowed a recipient of unwanted mail to obtain a prohibitory order from the Postmaster General directing the sender to stop sending mail to the recipient.\textsuperscript{204} This prohibitory order was sent without a hearing or notice, but rather simply activated by the request of the recipient.\textsuperscript{205} As the Supreme Court stated in \textit{Hill v. Colorado}, the “privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when ‘strolling through Central Park’ than

\begin{itemize}
\item \textsuperscript{200} \textit{Unif. Child Custody Jurisdiction & Enf’t Act} § 109 (Unif. Law Comm’n 1997); Consford v. Consford, 271 A.D.2d 106, 110 (N.Y. 2000) (“[C]ustody determinations are status adjudications not dependent upon personal jurisdiction over the parents.”).
\item \textsuperscript{202} 530 U.S. 57, 57 (2000).
\item \textsuperscript{203} \textit{See}, e.g., State v. Byzewski, 778 N.W.2d 551, 554 (N.D. 2010) (holding OFP did not violate respondent’s right to travel, as he forfeited his right to travel to the petitioner’s home and place of work by engaging in acts that led to the order); State v. Mott, 692 A.2d 360, 365 (Vt. 1997) (holding OFP did not violate defendant’s right to free speech because the Defendant has no right to inflict unwanted and harassing conduct on another person).
\item \textsuperscript{204} \textit{Rowan v. U.S. Post Office Dep’t}, 397 U.S. 728, 738 (1970).
\item \textsuperscript{205} \textit{Id.}
\end{itemize}
when ‘in the confines of one’s own home,’ or when persons are ‘powerless to avoid’ it.”

Most victims of domestic violence, like the mail recipients in *Rowen*, wish to be left alone from harassment and abuse. While advertisers and alleged abusers have a liberty to communicate, this communication is not absolute as articulated by the captive audience doctrine. Dissenters may distinguish the captive audience doctrine to apply in instances exclusively seen in *Rowen* and its progeny, but this would be problematic for cases involving domestic violence. Simply put, the type of relationship the victim and alleged abuser had prior to the OFP provides justification for disregarding the abuser’s right to communicate with the victim because the victim is powerless to avoid unwanted communication by their abuser. As the Court in *Rowen* articulated, “[i]f this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient.” In conclusion, any provision in any OFP restricting the abuser’s right to contact the victim is valid regardless of whether the court issuing the order has personal jurisdiction over the defendant. This is not only true because the restraint may be warranted and appropriate based on past behavior, but because the abuser does not have a substantive right in further violating the sanctity of a victim who is powerless to avoid unwanted communication from their abuser.

### ii. Restrictions on a Respondent’s Movement Does Restrain a Substantive Right

With regard to an OFP’s restriction on movement, OFPs commonly contain a provision that forbids the defendant from coming within a certain area of the petitioner for the duration of the order. Generally, every person has the right to interstate travel and the freedom of movement. The right to interstate travel has been construed to contain at least three main components; however, the main component at issue in this context is the right of a citizen of one state to enter and to leave another state. Yet, the right to travel and the right to freedom of movement are not absolute and may be validly restricted in many instances, including by a court that orders


207. See id. at 752.


209. 397 U.S. at 738.


211. Spence v. Kaminski, 12 P.3d 1036, 1036 (Wash. Ct. App. 2000) (the freedom of movement under the first amendment is also a protected liberty interest).

such a provision in an OFP.\textsuperscript{213} Compared to the ability to communicate with a victim, the restrictions placed on travel and movement are recognizable infringements of substantive rights in the context of interstate OFPs. While restricting the ability of a respondent to go places they normally would be entitled to go is not an affirmative obligation, it still restrains a defendant’s otherwise permissible conduct and a liberty interest they would otherwise have.\textsuperscript{214} Because of this, restricting a defendant’s ability to travel and go to certain places constitutes a direct invasion of a liberty interest. Including such a provision in an interstate OFP would likely force some courts to strike down this provision because it would have the effect of restraining liberty by restricting some conduct that the defendant would otherwise be able to engage in.\textsuperscript{215}

\textit{iii. Conclusion}

It is difficult to argue that the status exception as a whole does not, in every instance, impact the underlying rights of the individuals involved. Rather, almost a century of status-exception jurisprudence recognizes that effects on substantive rights that do not qualify as affirmative conduct can be both permissible and unavoidable. The status exception is, and always was, meant to allow the states to define the critical familial relationships within its borders out of a concern for the health and safety of its citizenry.\textsuperscript{216} Its explicit call to not impose affirmative obligations on an out-of-state defendant is a policy designed to respect other foreign citizens’ due process rights, but this call was never meant to block all actions that could have an effect on an out-of-state defendant’s underlying rights. For this reason, states may validly include a no-contact provision in an interstate OFP. However, a restriction on movement that encompasses public property does affect a defendant’s underlying liberty interest in a more pronounced way, which presents problems when including such a provision in an interstate OFP. While there is no dispute that both may infringe to a minor degree on an out-of-state defendant’s total and complete liberty, they do so no more (and arguably much less) than the many other areas in family law we currently look to as valid exceptions to the personal jurisdiction requirement under the Fourteenth Amendment.\textsuperscript{217}

\textsuperscript{213} See, e.g., State v. Byzewski, 778 N.W.2d 551, 554 (N.D. 2010); see also Spence, 12 P.3d at 1036.
\textsuperscript{214} Spence, 12 P.3d at 1036.
\textsuperscript{215} Assuming the restriction is not only a restriction on entering private property but also a restriction on entering places of public accommodation.
\textsuperscript{216} See Hazard, supra note 71.
\textsuperscript{217} See, e.g., UNIF. CHILD CUSTODY JURISDICTION & ENF’T ACT § 201(c) (UNIF. LAW COMM’N 1997) (allowing for custody adjudication without personal jurisdiction).
2. Collateral Consequences of Criminal Prosecution

In addition, to the effect on underlying rights as discussed in Sections B.1.i–ii, proponents of the minority position have also discussed the problem of collateral consequences that directly flow from an OFP.218 In Fox, the Vermont Supreme Court alludes to this as the “prospect of criminal prosecution” in the forum state and beyond.219 The Fox court is right to point out the fact that there is a potential collateral consequence of criminal prosecution, as every state in the country criminally punishes violations of OFPs.220 However, this collateral consequence is literally no different than the collateral consequences, which again, stem from other areas of family law involving the status exception. For example, it is possible that a violation of a custody and/or parenting time order may result in the violator being subject to criminal prosecution.221 While many states have varying punishments and penalties, depending on the degree and severity of the deprivation, many courts can punish these violations as felonies under state law.222 Thus, while an OFP may prohibit otherwise legitimate conduct that could consequently serve as the basis for criminal prosecution, so too could an interstate custody order serve to prohibit otherwise legal conduct, which could then serve as the basis for criminal prosecution.

Courts have also cited the fact that criminal prosecution may take place under federal law, particularly the Violence Against Women Act (“VAWA”).223 Under VAWA, criminal prosecution may also occur without an OFP; for example, if the abuser travels interstate to abuse a victim.224 Additionally, VAWA allows for felony punishment of alleged abusers who travel interstate to commit a crime against a victim when there is a temporary restraining order.225

In conclusion, the collateral consequences of enhanced criminal prosecution under either state or federal law does not change the outcome of whether or not an OFP without personal jurisdiction is valid. While it is true that the potential for criminal prosecution is pronounced for violations of OFPs, these same types of collateral consequences can flow from custody orders under the UCCJEA. Furthermore, they are not affirmative obliga-

219. Id. at 926.
220. See, e.g., N.C. GEN. STAT. § 50B-4.1 (2015); OKLA. STAT. tit. 22, § 60.6 (2009).
221. See, e.g., MINN. STAT. § 609.25 (2014); N.J. STAT. ANN. § 2C:13-4 (2012); IOWA CODE § 710.6 (1986).
223. See, e.g., 18 U.S.C. § 2262(b) (2012) (listing federal penalties for persons who travel in interstate commerce with intent to violate protection order); Fox, 106 A.3d at 927.
225. Id. § 2261(b)(6). This is noteworthy because temporary OFPs don’t provide a defendant with any form of procedural due process as they do not have an opportunity to be heard before the order is entered against them.
tions in any sense because they do not require the defendant to act, and they do not impose an enforcement of liability. They simply clarify that further violations of an order will result in criminal punishment. While they may make the enforcement of liability more pronounced in the event that an intervening act occurs, this is also true of other areas of family law. As long as the order does not impose an enhanced chance of criminal prosecution for things that are not already illegal or not a protected interest, then it cannot fairly be asserted that it infringes a defendant’s underlying substantive rights.

3. Collateral Consequences — Restriction of a Respondent’s Right to Bear Arms

Under an amendment to the 1968 Gun Control Act, a defendant that is subject to a qualified OFP is restricted from possessing any firearms. Many states, including Minnesota, have also bolstered statewide firearm bans against defendants subject to OFPs by requiring a court to seek the surrender of the defendant’s firearms after certain criteria are met. However, some of these states allow for judicial discretion, while others require an automatic suspension when a qualified domestic violence order is issued. States that require courts to order the defendant to surrender his or her firearms would obviously be placing an affirmative obligation upon the defendant, which would be unconstitutional unless that court had personal jurisdiction over the defendant. However, all courts, regardless of whether state law mentions or deals with firearms, must place notice language on OFPs that federal law may ban the possession, sale, etc. of firearms.

The distinction between affirmative and prohibitory relief is at the outset made very difficult because of this section of the Gun Control Act. While a court that enters an OFP may not affirmatively command you to relinquish your firearms, the practical effect of 18 U.S.C. § 922(g)(8) is an all-out ban on the ability to purchase or own firearms. This ban would have the impact of unconstitutionally infringing on a protected liberty interest via a collateral consequence without personal jurisdiction. Therefore, an OFP must be drafted in an incredibly narrow way to block the triggering of criminal penalties for the possession of firearms. The prohibition of firearms under federal law will trigger after a hearing at which the defendant had

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226. However, this would have to exclude firearm restrictions under 18 U.S.C. § 922(g)(8) (2012).
227. See, e.g., Raguse, supra note 222.
229. See, e.g., MINN. STAT. § 518B.01, subd. 6(g) (2016); MASS. GEN. LAWS ch. 209A, § 3B (1998); 750 ILL. COMP. STAT. 60/214 (2016).
230. Compare COLO. REV. STAT. § 13-14-105.5 (2013), with MINN. STAT. § 518B.01, subd. 6(g)-(i) (2016).
notice and an opportunity to be heard if the court order either: 1) finds the defendant represents a credible threat to the physical safety of the petitioner, or 2) prohibits the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.\textsuperscript{233} However, some states allow for ex parte orders to transform into regular OFPs without the need for a hearing, which means the firearm prohibition under federal law would not be imposed.\textsuperscript{234}

In states where an evidentiary hearing is required by law, there is another way to avoid triggering the firearms ban. The Ninth Circuit has held that language that does not at least somewhat track \textit{18 U.S.C. § 922(g)(8)} is not sufficient to trigger the firearm prohibition under federal law.\textsuperscript{235} This might mean that an interstate order could prohibit the defendant from “breaking the laws of X state,” instead of explicitly saying the defendant is not allowed “to physically abuse the petitioner” to avoid triggering the federal ban. This may be a solution in certain interstate domestic violence cases because physically abusing anyone is already illegal, and thus the order does not need to specifically prohibit physical abuse.\textsuperscript{236} It is clear that the collateral consequence imposed by an interstate OFP under federal law would restrain a defendant’s right to possess firearms, which would be unconstitutional if the order was entered without personal jurisdiction over the defendant.

In the time since the 1994 amendment to the Gun Control Act was enacted, one federal district court in Texas did find that the statute was unconstitutional when it criminalized conduct based upon a state civil OFP without any individualized findings.\textsuperscript{237} But, the Fifth Circuit subsequently overruled that opinion by reasoning that the firearms ban is a “narrowly tailored specific exception or restriction to the Second Amendment.”\textsuperscript{238} Due to the fact that federal law bans firearms when a defendant has a qualified order for protection, coupled with the fact that the Supreme Court has interpreted the Second Amendment to confer individuals with a personal right to

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Compare, e.g., \textit{Minn. Stat. § 518B.01}, subds. 5(a), (b)(1)–(2) (2016) (stating that a hearing is not required unless the court declines relief, or one of the parties request a hearing), with \textit{Ky. Rev. Stat. Ann. § 403.730} (2017) (mandating that the court shall summon the parties to an evidentiary hearing if the judge concludes that domestic violence and abuse exists).
\item \textsuperscript{235} Compare \textit{United States v. Sanchez}, 639 F.3d 1201, 1205 (9th Cir. 2011) (finding that an order prohibiting no contact was not sufficient to trigger \textit{18 U.S.C. § 922(g)(8)}), with \textit{United States v. DuBose}, 598 F.3d 726, 730–731 (11th Cir. 2010) (finding that an order prohibiting defendant from “hurting” the plaintiff was sufficient to activate \textit{18 U.S.C. § 922(g)(8)(c)(ii)})
\item \textsuperscript{236} If the order is entered ex parte and no evidentiary hearing occurs, then \textit{18 U.S.C. § 922(g)(8)} will not trigger per the statute’s language.
\item \textsuperscript{237} See \textit{United States v. Emerson}, 46 F. Supp. 2d 598 (N.D. Tex. 1999), rev’d and remanded, 270 F.3d 203 (5th Cir. 2001).
\item \textsuperscript{238} \textit{United States v. Emerson}, 270 F.3d 203, 260–264 (5th Cir. 2001).
\end{itemize}
bear arms, an OFP that triggers the firearms ban would need personal jurisdiction over the alleged abuser in order to be constitutional.

In addition to the barriers presented by federal law, many states also have their own specific firearm laws, which ban the possession and purchase of firearms, while the defendant is subject to a qualified domestic violence order. In Minnesota, for example, a court must order a defendant to surrender his firearms for the length of the OFP if it: 1) restrains the abusing party from harassing, stalking, or threatening the petitioner or restrains the abusing party from engaging in other conduct that would place the petitioner in reasonable fear of bodily injury, and 2) includes a finding that the abusing party represents a credible threat to the physical safety of the petitioner or prohibits the abusing party from using, attempting to use, or threatening to use physical force against the petitioner. However, as discussed in Section IV.A, some states may be able to get around this type of restriction by issuing a “no-finding order” when personal jurisdiction is lacking. A no-finding order would allow the respondent to continue to possess his firearms, as the order would not contain a finding that the abusing party represents a credible threat to the safety of the petitioner. This would also be true of the states that either allow judges the discretion to decide whether to require the defendant to surrender their firearms and states that do not have any laws that require a defendant to surrender their firearms.

In conclusion, as discussed in Part IV, there may be a narrowly tailored type of OFP, which does not trigger the firearm ban and could conceivably be valid under the status exception even after an evidentiary hearing. For the states like Minnesota, which allow “no-finding” orders to be entered, the firearm ban will not be triggered and will allow the order to preclude the respondent from committing acts of violence against the petitioner. But, if the firearm ban is triggered, then it will be a violation of a defendant’s due process rights since the defendant effectively loses his or her right to own firearms. A restriction such as this, even though it is not technically an affirmative obligation, has the effect of infringing a constitu-

241. Minn. Stat. § 518B.01, subd. 6(g) (2016).
242. See, e.g., 14 Michael Boulette, Minnesota Practice § 13:8 (3d ed. 2016). Before an OFP evidentiary hearing, the judge will ask the respondent if he would either: 1) agree to the order issuing without contesting the order; 2) agree to a “no-finding” order issuing, which has the same effect as a regular OFP but does not contain a finding of actual violence; or 3) request that the order be contested.
243. See discussion supra Section III.B.3. A qualified domestic violence order which directs the defendant to “violate no laws” and have “no contact with” the petitioner and her family, does not activate 18 U.S.C. § 922(g)(8).
tionally protected right without due process. Thus, in order to pass muster going forward, any court that enters an interstate OFP against a person over whom it lacks personal jurisdiction, must do so without activating a collateral firearm restriction.

C. The Practical Problem with Allowing Interstate Victims of Domestic Violence to Have No Ability to Petition for Protection

Domestic violence continues to be a very big problem not just for victims and their families but also for society as a whole. The actual act of violence is usually just one of the many injustices that are typically dealt to a victim of domestic violence. Other injustices that stem from domestic violence include homelessness, hospital visits, psychological problems, financial instability, joblessness, etc. These circumstances are potentially exacerbated if the victim lives in a different state than family members or friends who may be willing to help by providing financial support or shelter.

Over the past few decades, our world has come a long way in recognizing—not only the impact of domestic violence—but also that individuals have a right, as human beings, to be free from domestic violence. This became explicit on the international scale with the Convention to End All Discrimination Toward Women, which noted that gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law and human rights conventions, is discrimination within the meaning of Article 1 of the Convention.

In the United States, courts have also recognized that victims of domestic violence have “the fundamental human right to be protected from the devastating impact of family violence.” In many instances, we have done well to further this fight through innovative methods, which include the creation of the OFP as a civil form of relief. However, we have also, at


times, disregarded the seriousness of domestic violence. No such case is a better representation of this tragic reality than Town of Castle Rock v. Gonzalez,249 in which the Supreme Court found that the petitioner did not have a protected property interest in the enforcement of an OFP after her ex-husband kidnapped their three children and then murdered them.250 This was the case even though hours before the children’s deaths, the petitioner sought police help numerous times for enforcement of her protection order that was against the ex-husband and in favor of her and her three daughters.251 In 2011, the Inter-American Commission on Human Rights found that “the state failed to act with due diligence to protect Jessica Lenahan-Gonzalez and [her daughters] Leslie, Kathryn and Rebecca Gonzales from domestic violence, which violated the state’s obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration.”252 Furthermore, the Commission noted, “the failure of the United States to adequately organize its state structure to protect [the Gonzales girls] from domestic violence was discriminatory and constituted a violation of their right to life.”253

As the Inter-American Commission on Human Rights articulated in its report, we must be cognizant of the structure of states and the fact that this has barred some victims from being able to protect themselves. This is true even though we agree that victims of domestic violence have a human right to be free from abuse, and acknowledge that the onus is on the states and the country as a whole to help facilitate this protection through—not only enforcement of OFPs—but also by allowing victims that flee from their abuser in search of shelter to have the ability to petition a court for protection without either having to return to the state in which they were abused or wait until their abuser follows them into their new state. To hold that a state does not have the power to issue a protective order for residents within its borders not only contravenes state sovereignty, but it also ignores the long-held power of a state to declare a status on its residents. As our society continues to become more mobile and interconnected, it is imperative that we recognize that states not only have the ability to protect victims of domestic violence through a status adjudication, but an obligation that compels such a mandate if the victim wishes to petition a court for protection.

249. 545 U.S. 748 (2005).
251. Id. For a more detailed discussion of the Castle Rock decision see Clingan, supra note 176.
253. Id. ¶ 164.
IV. SOLUTIONS

“The first duty of the Government is to afford protection to its citizens.”254

As discussed earlier in this Note, a previously written article by Jessica Miles255 also concluded that the status exception was applicable in interstate domestic violence cases. Miles suggested that the optimal solution in dealing with interstate domestic violence cases is to allow for temporary renewable orders.256 To be sure, this solution has many noticeable benefits including its elimination of affirmative obligations that are imposed by operation of law in certain states such as fines, penalties, and costs. However, I believe that Miles’s solution has potential disadvantages including continually needing to renew a temporary OFP. In addition, depending on the ability and number of times one may be able to renew, the process may become a disguised way of infringing an out-of-state defendant’s substantive rights indefinitely.257

Below, I have proposed two solutions that could both individually address the problems that are now present regarding interstate domestic violence cases. Solution one is a statute, which issues a prohibitory OFP under the status exception. Solution two is a set of uniform laws, which combines certain provisions of both the UCCJEA and the UIFSA and applies these provisions in the interstate domestic violence context. While no solution will afford the ultimate solution to either victims or alleged abusers, both solutions recognize the importance of domestic violence victims’ ability to protect themselves, alleged abusers due process rights, and state sovereignty.

A. Solution One: States Pass a Narrowly-Tailored Status Exception Statute for Interstate Domestic Violence Cases

The first solution represents a codification of the majority rule of law; however, it is slightly narrower to avoid the due process issues articulated in Part III. This codification of the majority rule has been passed in one state already.258 North Dakota’s domestic violence statute contains the following:

Upon the application of an individual residing within the state, a court may issue a domestic violence protection order or an ex parte temporary protection order under this chapter even though the actions constituting domestic violence occurred exclu-

255. Miles, supra note 46, at 141.
256. Id. at 197–200. Essentially a Shah order that is renewable instead of indefinite.
257. This infringement may be most noticeable in its restriction of a defendant’s right to movement.
sively outside the state. In these cases, a respondent is subject to the personal jurisdiction of this state upon entry into this state. If the domestic violence justifying the issuance of a protection order under this chapter occurred exclusively outside the state, the relief that may be granted is limited to an order restraining the party from having contact with or committing acts of domestic violence on another person in this state.259

North Dakota’s law is certainly a good start; however, as described in Section III.B, there are several issues that make the order potentially unconstitutional as a violation of the defendant’s due process rights.

The North Dakota statute could be amended to ensure that victims are able to petition and receive OFPs, while defendants do not lose any liberty interests or have any affirmative obligations imposed upon them that would offend due process. The model statute would appear as follows:

Upon the application of an individual residing within the state, a court may issue a domestic violence protection order or an ex parte temporary protection order under this chapter even though the actions constituting domestic violence occurred exclusively outside the state. In these cases, a respondent is subject to the personal jurisdiction of this state upon entry into this state, or by violating an order entered into under this chapter. If the domestic violence justifying the issuance of a protection order under this chapter occurred exclusively outside the state and no personal jurisdiction over the respondent can be established, then the relief that may be granted is limited to an order restraining the party from having contact with the protected person(s), and restraining the respondent from breaking any of the laws of X state. To comport with procedural due process, the Court must ensure that before the issuance of the final order, the respondent has both actual notice of the pending order for protection, and an opportunity to be heard on the merits of that order for protection.

In the above provision, the restriction on the ability to contact the petitioner still validly remains in place; as restricting the respondent’s ability to contact the petitioner is not a violation of the respondent’s liberty as explained in Section III.B. Such a provision is also one of the most beneficial parts of an order because many victims note that contact after an issue of an OFP is their most frequent problem.260 Some of the other provisions of the North Dakota law are potentially problematic because if an evidentiary hearing is required and an order commands the respondent not to commit acts of domestic violence on another person in the state, then it would acti-

259. Id.

260. See SUSAN L. KEILITZ ET AL., NAT’L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 38 (1997) (indicating that the most frequent problem amongst survey participants who had an OFP was the respondent contacting them via phone).
vate the firearm prohibition contained under federal law. However, if the order simply commands the respondent not to break any laws within the state, then it precludes the respondent from engaging in activities like abuse, assault, stalking, and trespassing on the protected person’s property. In addition, the statute will not allow the OFP to restrict the defendant from going to public areas.

This solution, while not necessarily the most ideal for either the petitioner or respondent, adequately puts in place protections for the petitioner while in the forum state. Several studies have indicated that the OFP process can benefit the petitioner in several ways including by acting as an influential deterrent for further abuse, allowing the petitioner to take greater control of their environment, and actively improving the quality of a petitioner’s life. It also has the added benefit of a heightened response from police when the subject of an OFP reports a violation. The forum state’s interest in protecting citizens within its borders is also met as it will be able to issue an OFP without having to wait for one of the two possibilities described in Caplan. Lastly, the respondent’s interests are also adequately met as they will have no personal affirmative obligations against them and their substantive rights will not be implicated, as the order will only ban future communication and acts which are already illegal.

It is true that in the past many have criticized the OFP process as an attempt by some to gain a leg up on their opponent in some ancillary family court proceeding. While there have been some documented instances of this type of behavior, there are generally many reasons a petitioner is unable to substantiate their accusations of domestic violence. This issue notwith-
standing, the type of order imagined in this solution should dispel all concerns for defendants who are completely innocent of everything alleged in the petitioner’s complaint. This is not only because the order is incredibly narrowly-tailored and does not provide any restriction on otherwise permissible behavior, but also because an order which does not contain a finding of domestic abuse will not help a petitioner in any future family court action.271

In conclusion, this solution represents a way of balancing the state’s right as a sovereign to protect its citizens, the victim’s right to be free from abusive behavior, and the defendant’s right to due process regarding his or her substantive rights.

B. Solution Two: The Interstate Domestic Violence Jurisdiction Act (IDVJA)

The second solution is the creation of a uniform set of laws known as the Interstate Domestic Violence Jurisdiction Act (“IDVJA”). The IDVJA would consist of a combination of similar provisions from both the UIFSA and the UCCJEA and would allow for states to transfer OFPs to a jurisdiction that has personal jurisdiction over the defendant. The IDVJA would also have a “temporary emergency jurisdiction” provision, which would allow the forum state to enter a temporary order that would protect the victim in the interim until a hearing on the merits can occur in the state that has personal jurisdiction over the defendant. The IDVJA would allow for one controlling order that could be registered in any jurisdiction that the parties are in or move to in the future. The IDVJA would also be ideal for cases in which the victim would like more relief than what could be potentially provided under the first solution. This relief would allow for any type of affirmative obligation, such as child support, restriction of firearms, etc. The IDVJA would also ensure that orders could be transferred from state to state should the petitioner want to transfer the order to a new state because they would meet the requirements for Full Faith and Credit under VAWA and the United States Constitution.272 This is true because VAWA requires full faith and credit for all valid orders entered with jurisdiction over the par-

be substantiated in domestic violence proceedings involving children; however, several explanations are likely at play including: 1) sometimes real abuse can be hard to substantiate; 2) sometimes one parent has a good faith belief that abuse has occurred but they are incorrect; and 3) sometimes individuals do maliciously fabricate stories of abuse to gain an advantage in a pending dissolution or custody hearing).

271. See 14 MICHAEL BOULETTE, MINNESOTA PRACTICE § 13:18 (3d ed. 2016) (explaining that in instances of easily proven domestic violence allegations, practitioners will, on occasion, counsel clients to deny the allegations but allow a no-finding order to issue).

ties. Thus, under the IDVJA, victims would be entitled to the normal full faith and credit provisions of federal law because the orders would be entered with personal jurisdiction.

Perhaps the biggest hurdle in implementation of the IVDJA is the fact that it would require every state to enact a uniform law, similar to the enactment of UIFSA in the 1990s. In order to pass the IVDJA, the federal government could attach additional VAWA funds on the basis that each state enacts the IVDJA. Another potential problem that would face this uniform set of laws is attorney initiation. Typically, the public authority will handle most UIFSA cases by initiating a petition in the county in which IV-D services are requested by the petitioner or the county in which some type of welfare benefit is being expended on behalf of the minor child. The initiating county attorney’s office then forwards the petition to the county attorney’s office where the defendant resides, so that the receiving county attorney’s office can bring the action there. This may prove problematic when private attorneys are the only individuals bringing these actions. Thus, in order for the plan to work appropriately, domestic violence agencies and programs would have to coordinate and help each other so that a petitioner initiating their petition would be able to have representation in the county in which the defendant resides. As a part of the IVDJA, considerations to the ability of the petitioner to appear via videoconference should also be explored as suggested by Jessica Miles.

The IDVJA would have multiple, almost identical sections to the UIFSA. For starters, the IVDJA would prescribe the valid basis for a petitioner to exercise jurisdiction over a non-resident defendant. The other provisions in this section would include the applicable duration of personal jurisdiction, the initiating and responding parties in the particular state, a determination of controlling orders, how to begin proceeding under this act, application of the law of the state, duties of initiating tribunal, duties and powers of responding tribunal, etc.

The IDVJA would also include a provision allowing for temporary, emergency jurisdiction, similar to the UCCJEA. This provision would essentially operate as normal ex parte orders operate. The order would be in effect until an evidentiary hearing could be held in the IVDJA case.

273. Id. It should be noted that it is likely that Massachusetts, New Hampshire, Iowa, and Kentucky would likely accept an interstate OFP from another state; however, this probably would not be the same approach taken by Vermont and other states.

274. All states were required to enact UIFSA in 1998 as a condition to receive federal funds for family support enforcement.

275. See Minn. Stat. § 518A.26, subd. 10 (2016) (defining IV-D cases as a case where a party has assigned to the state rights to child support because of the receipt of public assistance as defined in section 256.741 or has applied for child support services under title IV-D of the Soc. Sec. Act, 42 U.S.C. § 654(4) (2014)).

276. Miles, supra note 46, at 201.

restrictions for the temporary order would be the same as in a regular ex parte order.

In conclusion, the IDVJA allows victims of domestic violence to get a full OFP with all of the normal remedies that would generally attach without the petitioner being forced to go back to the state where the domestic violence occurred. It would also provide for an interstate ex parte OFP, which would attach a huge benefit to the process, and would allow the victim and the victim’s attorney to stay in the state in which the victim currently resides. For these reasons, it helps cure the different untenable scenarios noted by both the Massachusetts Supreme Court in *Caplan*, and the Vermont Supreme Court in *Fox*.

**V. Conclusion**

In terms of practicality, states should immediately move to enact legislation in accordance with the first solution. This move will provide a quick state-to-state level response for dealing with the issue of interstate domestic violence. The second solution should be seen as an aspirational level solution that the federal government should aim to enact in the future to allow for greater continuity amongst all states in regard to the procedure for obtaining and enforcing an interstate OFP.

This Note represents an attempt to provide context to a discussion that is immensely important to the future of many. The end goal of these solutions should be to promote protection for petitioners and fairness to respondents. During parts of the last century, when violence occurred between two intimate partners, the justice system was generally hesitant to become involved and labeled such acts as private matters. Through the subsequent years, victims and advocates built a movement to end domestic violence, which began with civil OFPs, no-fault divorce, women’s shelters, etc. and eventually succeeded in beginning to change a culture. It is time to continue that progress by creating a process that allows survivors of domestic violence, who are fleeing violence by going across state lines, the ability to seek shelter and protection in their new state.
