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# Some Reactions to the *DaimlerChrysler v. Bauman* Roundtable

*Linda J. Silberman*

It is striking that all five of the contributors to the Roundtable conclude that California should not be able to obtain jurisdiction over the German corporation, DaimlerChrysler, for human rights claims based in Argentina, on the basis of the activities of its U.S. subsidiary, Mercedes-Benz USA (MBUSA) in California. If the Supreme Court agrees, it will be interesting to see on what grounds it bases its decision.

Both my colleague Burt Neuborne and I, though approaching the issue from different perspectives, focus on the lack of any regulatory interest by California with respect to the human rights claims asserted against DaimlerChrysler. Professor Neuborne embraces a broad theory of corporate integration and then limits the application of that theory in this case on grounds of reasonableness.<sup>1</sup> I am more inclined to offer a bright-line test that would constrain imputation of an “agency” theory to cases of specific jurisdiction, and I see that the actual merits brief filed by Daimler in the Supreme Court takes precisely that position.<sup>2</sup> I do agree with Professor Neuborne that formal agency doctrine is less useful than a more functional approach in the context of the modern corporation, and I too would embrace the concept of the “multinational enterprise” but only as applied to *specific* jurisdiction.

Professor Neuborne suggests that in *World-Wide Volkswagen v. Woodson*<sup>3</sup> the distribution activity of the New Jersey importer (Volkswagen USA) could have been the basis for *general* jurisdiction over

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1. See Burt Neuborne, *General Jurisdiction, “Corporate Separateness,” and the Rule of Law*, 66 VAND. L. REV. EN BANC 95, 105 (2013) (“California does not appear to have a conventional interest in exercising general jurisdiction over Daimler AG as a means of influencing the behavior of Daimler’s wholly-owned subsidiary toward Argentine citizens residing in Argentina. Without such a foundational regulatory interest, it would be constitutionally unreasonable under *Asahi* to force Daimler AG to defend the acts of its Argentine subsidiary in California.”).

2. See Brief for Petitioner at 24–27, *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (2013) (No. 11-965). Note that the initial essays for the Roundtable were submitted prior to the filing of the merits briefs in the case.

3. 444 U.S. 286 (1980).

the German parent (Audi NSU).<sup>4</sup> However, jurisdiction over Audi and Volkswagen in the *Volkswagen* case is more appropriately understood as an exercise of specific jurisdiction. Professor Neuborne seems to think that, to meet the definition of specific jurisdiction over the manufacturer Audi in *Volkswagen*, the claim must arise from Audi's sale of cars in Oklahoma. But specific-act statutes, like those of New York and indeed the actual statute in Oklahoma, authorize jurisdiction over defendants who cause in-state injuries but limit jurisdiction to those defendants who do additional business in the state or can expect their out-of-state acts to have in-state consequences because they earn substantial revenue from interstate commerce.<sup>5</sup> Thus, even if a defendant does not carry on the type of extensive business activities in a state to qualify as "presence" for general jurisdiction, the fact that a defendant's product has caused an in-state injury gives the state both a regulatory and litigational convenience interest in providing a forum. It is true that the Supreme Court has found exercises of specific jurisdiction with respect to in-state injuries unconstitutional when a defendant lacks sufficient purposeful conduct with the forum state, as was the case of the New York regional distributor and local dealer in *Volkswagen*.<sup>6</sup> But the plaintiffs' claims for personal injury asserted against the manufacturer, the importer, the distributor, and the dealer are nonetheless examples of "specific jurisdiction" because the claims arose in Oklahoma and implicate the regulatory interests of Oklahoma. This type of case can be contrasted with *Frummer v. Hilton Hotels International*,<sup>7</sup> where the plaintiff's injury took place in London, England and not in the forum state, New York. That is not to say that the Supreme Court today would necessarily find jurisdiction by Oklahoma over the manufacturer and importer constitutional in that the particular car that caused the injury was not sold in Oklahoma. Nonetheless, the argument for specific jurisdiction over the manufacturer in a case like *Volkswagen* is much narrower than an attempt to ground general jurisdiction. If the distribution of a manufacturer's cars in Oklahoma were sufficient to support general jurisdiction over the manufacturer, a plaintiff injured in Florida—or

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4. Neuborne, *supra* note 1, at 103. Professor Neuborne points out that neither Volkswagen USA nor Audi NSU actually challenged jurisdiction in Oklahoma, but writes that "all parties appeared to recognize that general jurisdiction existed over the German manufacturing parent (Audi NSU) and the American sales-and-distribution subsidiary (Volkswagen USA). Daimler AG is in the same jurisdictional posture as Audi NSU."

5. See, e.g., N.Y. CPLR § 302(a)(3); Okla. Stat., Tit. 12 §1701.03 (a)(4).

6. The lack of purposeful conduct by a manufacturer in the forum state was the basis for the Supreme Court's split decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), holding that jurisdiction over the foreign manufacturer violated Due Process. However, in *J. McIntyre* the record showed perhaps only a single product distributed in the forum state.

7. 227 N.E.2d 851 (N.Y. 1967).

even Germany—could bring suit in Oklahoma based on such activity. But the argument for jurisdiction in Oklahoma over the manufacturer Audi in the actual *Volkswagen* case is different: jurisdiction over the defendant Audi rested on the fact that one of its cars had caused an in-state injury and that Audi—unlike the New York distributor and dealer—had exploited the Oklahoma market and derived substantial revenue from that market.<sup>8</sup>

Turning to Professor Childress's concern with the transnational legal market<sup>9</sup>—or more simply the basic problem of forum-shopping on a transnational scale—human rights cases provide a current example. Plaintiffs forum shop (and defendants resist) for multiple reasons: to find a convenient forum, to exploit certain local values and biases, to take advantage of certain procedural attractions, and to seek favorable law.<sup>10</sup> In cases like *Bauman* and *Kiobel v. Royal Dutch Petroleum Co.*,<sup>11</sup> the Alien Tort Statute appeared to offer foreign plaintiffs a liberal U.S. statute that provided a remedy of compensation for human rights abuses wherever and by whomever they occurred. The Supreme Court in *Kiobel* restricted the extraterritorial reach of that statute, leaving plaintiffs who complain of human rights abuses by foreign defendants that take place outside the United States to find another remedy in another forum. But I doubt that other countries without a nexus to the parties or the events are vying to fill the gap.

Whether a *U.S. defendant* who commits human rights abuses abroad is outside the scope of the ATS is not yet clear, although the Second Circuit in *Balintulo v. Daimler AG*<sup>12</sup> opined that the ATS would still not apply as long as the conduct occurred outside the United States. In *Bauman*, where the defendant is a German corporation and the conduct occurred in Argentina, the ATS claim would likely be dismissed under the *Kiobel* precedent due to the lack of U.S. interest in such a case.<sup>13</sup> To the extent there are remaining claims asserted under California or Argentine law, the federal court has no independent federal jurisdiction over such claims. Professor Sherry explains the

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8. See, e.g., *Vermeulen v. Renault, U.S.A., Inc.*, 965 F.2d 1014 (11th Cir. 1992); see also *Conference on Jurisdiction, Justice and Choice of Law for the Twenty-First Century—Case Three: Personal Jurisdiction*, 29 NEW ENG. L. REV. 627 (1995).

9. Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 74–76 (2013).

10. See Silberman, Stein & Wolff, *Why Litigants Care About Choice of Forum: Choice of Law and Other Matters*, in *CIVIL PROCEDURE: THEORY AND PRACTICE*, (4th ed. 2013).

11. 133 S.Ct. 1659 (2013).

12. 727 F.3d 174 (2d Cir. 2013). That issue is also before the Eleventh Circuit in *In Re Chiquita Brands International, Inc. Alien Tort Statute Litigation*, Case 12:14898-B (2013).

13. At the oral argument, Plaintiffs' counsel suggested that because at the time of suit, Daimler was a dual American/German company with dual headquarters in the United States, the U.S. interest was different than it was with respect to Shell in *Kiobel*.

point in detail, noting that although a court might be able to exercise supplemental jurisdiction over such claims, neither the Supreme Court nor the Court of Appeals should make that determination.<sup>14</sup> She recommends, as one option, that the court remand for that determination to avoid addressing the personal jurisdiction issue for the moment.<sup>15</sup> However, as Professor Sherry concedes, this option might still require the imputation issue to be decided eventually, and it is that issue she prefers the Supreme Court avoid.<sup>16</sup>

Even if the court were to exercise supplemental jurisdiction over these other claims, from a choice of law perspective it is hard to fathom a basis under which California law could even be applied on these facts. An attempt to ground an action under *California* law for a violation of human rights wherever it occurs—i.e. a claim under state law duplicating an ATS claim but without the presumption against extraterritoriality—could well be met with a preemption or due process defense.<sup>17</sup> The claims most likely to be sustained would be those based on Argentine law, but such claims would be strong candidates for dismissal on *forum non conveniens* grounds.<sup>18</sup>

Professor Sherry would prefer that the Supreme Court “duck” the imputation issue and decide the case on the basis that MBUSA’s contacts with California were insufficient for general jurisdiction, and therefore could not be used to confer general jurisdiction over DaimlerChrysler itself.<sup>19</sup> Although Daimler conceded that MBUSA was subject to general jurisdiction, it nonetheless objected to general jurisdiction over Daimler itself. Therefore, Professor Sherry contends that the Supreme Court could still decide the case on that ground.<sup>20</sup> Professor Erichson also urges the Supreme Court to more clearly adopt a “home state” test for general jurisdiction and to jettison the “continuous and systematic” language that continues to create confusion and uncertainty with respect to general jurisdiction.<sup>21</sup> His analogy to *Milliken v. Meyer*<sup>22</sup> is persuasive, although the notion of corporate “presence” developed as the analogue to “tag” jurisdiction,

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14. See Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Question in DaimlerChrysler v. Bauman*, 66 VAND. L. REV. EN BANC 111, 120–121 (2013).

15. See *id.*

16. *Id.*

17. See generally Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 749–752 (2012); see also *Zschernig v. Miller*, 389 U.S. 429 (1968).

18. See Childress, *supra* note 16, at 740.

19. Sherry, *supra* note 14, at 118–119.

20. *Id.*

21. Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 87–89 (2013).

22. 311 U.S. 457 (1940).

and it is *Burnham v. Superior Court of California*<sup>23</sup> that presents the greater difficulty. But perhaps the future of tag jurisdiction should be in jeopardy as well.

Unlike Professor Sherry, Professor Erichson does not urge the Supreme Court to avoid the imputation issue before the Court.<sup>24</sup> The point he does emphasize, and with which I agree, is that an agency theory cannot withstand the home-state logic of general jurisdiction<sup>25</sup> as expressed in *Goodyear Dunlop Tires, S.A. v. Brown*.<sup>26</sup> “Home state” was not further defined by the Court in *Goodyear* and is susceptible to various definitions. The European Regulation uses the concept of domicile for general jurisdiction, and defines the domicile of a corporation as the place where it has its statutory seat, central administration, or principal place of business.<sup>27</sup> Other countries will permit general jurisdiction over a corporate defendant that has a fixed place of business in the forum.<sup>28</sup> Since neither the concept of “home state” nor a redefined scope for general corporate jurisdiction was briefed in *Bauman*, the Court may not be ready to decide the case on that basis. But the attribution issue has been fully vented, and the Supreme Court should be prepared to confine the attribution of a subsidiary’s activities in cases of *general jurisdiction* to situations where the subsidiary can be considered the alter-ego of the parent. That course of action would call for the Supreme Court to reverse the Ninth Circuit in *Bauman* and bring some clarity to this muddled issue.

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23. 495 U.S. 604 (1990).

24. See Erichson, *supra* note 21 at 83–84.

25. Erichson, *supra* note 21, at 91–92.

26. 131 S.Ct. 2846 (2011).

27. See Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L.REV. 591, 611–614 (2012)

28. *Id.* at 613.