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Professor Lowenfeld Responds

*Andreas F. Lowenfeld**

Professor Silberman is as usual gracious in acknowledging my writings in various formats, and my efforts to restore conflict of laws to its place as a branch of international law, a place it has occupied in most of the world outside the United States, and occupied here as well in the view of Story and others who wrote before the balkanization of American law in the latter part of the nineteenth century. We have no disagreements on the value of the comparative method in teaching conflict of laws, civil procedure, or international litigation.

This brief response is addressed only to what Professor Silberman describes as the “ever-puzzling” decision in *Asahi v. Superior Court*.

There is nothing puzzling about that decision, and I do not believe Professor Silberman is really puzzled. The Court concluded that it made no sense—i.e., it was unreasonable—to subject a Japanese subcomponent maker to the jurisdiction of a California court on a claim for indemnity or contribution by a Taiwanese component maker, when no U.S. resident party—plaintiff or defendant—had an interest in the outcome of that controversy. What troubles her, it seems, is that the discretionary element in jurisdiction over non-residents, which she approves of in England, has crept into the American approach to jurisdiction through use of the word “reasonable.” Professor Silberman would like judicial jurisdiction to be like—or at least more like—her view of the Internal Revenue Code; either the court has jurisdiction or it does not.¹ I believe judicial jurisdiction can never be wholly precise, once it moves from a dependence on

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1. We know from her other writings that she would then reintroduce the element of discretion through expanded resort to *forum non conveniens*, but that is different, it is not formal, like jurisdiction, or sacred, like the Constitution, and usually leaves the last word to the court of first instance. See, e.g., Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993).

personal service in a given territory to concepts such as "domicile," "arising out of," "place of performance of the obligation," "presence," and "transaction of business." More significant, however, is the discontent of Professor Silberman, and like-minded proceduralists such as Professor Burbank, with flexible construction of the Constitution itself.

It might have been better if judicial jurisdiction in the United States had not been captured by the American passion for constitutionalization.² It is ironic that while the other teachings of *Pennoyer v. Neff*,³ about *in personam* jurisdiction and about *quasi in rem* jurisdiction, have been discarded, the doctrine that all of judicial jurisdiction in the United States—state, federal, and it appears international—is subject to scrutiny under the Due Process Clauses remains firmly established and probably unassailable. That being so, I see no way out, and no reason to seek a way out, of treating jurisdiction within the grand and flexible concepts of the Constitution.

Are we upset that the Constitution does not prescribe a dollar ceiling for bail, but says it shall not be *excessive*? Or that it does not prescribe a stated number of days before an accused must be brought to trial, but declares the right to a *speedy* trial? Or that it does not adopt a single formula to calculate what the government must pay a person whose property it takes, but states that the compensation must be *just*? Or, to come closest to the "r" word that gives Professor Silberman the willies, are we upset that the Constitution does not forbid all searches, or even all warrantless searches, but only *unreasonable* ones?

It is my turn to be puzzled, not at the result in *Asahi* or its technique, but at the reaction it provoked from reasonable persons like Professor Silberman. I don't think she is ready to join Justice Black in grumbling about Chief Justice Stone's judgment in *International Shoe v. Washington*.⁴ That judgment, as we all know, concluded that defendant's operations in the forum state "make it *reasonable* and *just*, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."⁵ Being half a generation older than Professor Silberman, I still recall encountering lawyers who could not believe that *Pennoyer*

2. Cf. Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993).

3. 95 U.S. 714 (1878).

4. 326 U.S. 310 (1945)

5. *Id.* at 320.

was no longer the basic source of the American law of judicial jurisdiction; but in more than twenty years of close acquaintance, I do not recall Professor Silberman ever taking that position, or questioning the statement in *International Shoe* that it is "evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative."⁶ What then upsets her about *Asahi*?

Is it the suggestion that the claim, not just the acts of the defendant are looked at? That can't be. Is it the suggestion that the interest of the forum state in the controversy is thought relevant? That might upset some traditionalists, possibly including Justice Scalia, who alone among the members of the Supreme Court declined to sign on to the famous Part II(B) of Justice O'Connor's opinion, but it could hardly upset a conflict of laws professional such as Professor Silberman. Is it the suggestion that there is a difference between a defendant from Japan and a defendant from Oregon? Or is it the hint that international law plays a part in defining the acceptable contours of jurisdiction of American courts over foreign defendants?

I think this is the clue for my puzzlement, but hardly a solution to the puzzle. Professor Silberman's Article demonstrates that she shares my interest in exploring the response of other systems to the problem of judicial jurisdiction. Why then should she resist the idea suggested in *Asahi* and developed in the Restatement of Foreign Relations Law (as well as in my 1994 Hague Lectures) that there is a customary international law of jurisdiction of courts, and that reasonableness is an important element of that law? I do not believe that Professor Silberman thinks it would be reasonable to try the controversy between Cheng Shin and *Asahi* in Sacramento, California. Rather, she contends that asking whether or not that would be reasonable is unsound. But why? Is she concerned that the opinion in the *Asahi* case undermines undivided fealty to that constitutionally inspiring and mathematically irrefutable concept—minimum contacts? I still don't get it.

6. *Id.* at 319. Note also that the Restatement (Second) of Conflict of Laws adopted reasonableness as the basic principle of judicial jurisdiction. RESTATEMENT (SECOND) CONFLICT OF LAWS § 24(1) (1971). It repeats that standard in various other sections. *Id.* §§ 25, 26, 27(k), 30, 31, 36-39, 42, 47, 49-52, 56-58, 65, 69, 72.

