

A Brief Response to My Colleagues on *Bauman*

Burt Neuborne

I enjoyed the excellent essays by my colleagues on the *Bauman* case. I learned from each. My thanks for being invited to join the club.

None of us believe that the Ninth Circuit opinion should be affirmed, but we follow different paths to making the *Bauman* case go away. All of us ask why a case with no discernible link to California was filed in California. Several of my colleagues seem to believe that it was the result of a sophisticated forum shopping exercise. I wish that it were so. If only international human rights law were at the point where a cadre of excellent lawyers around the world made careful strategic judgments about where to bring their cases. In fact, most human rights cases are brought in the first jurisdiction where a victim can find a lawyer who is willing to invest the time to sue, despite the overwhelming odds against generating a fee. The poor souls in *Bauman* probably found their way to California because it was the only place (outside of Argentina) where they could find a lawyer. Suzanna Sherry, with her characteristic analytic elegance, speculates that the differences between California and Michigan wrongful death law may have tipped the scales to California.¹ She's much too generous. I'd be willing to bet that nobody looked at the differences between Michigan and California wrongful death law in deciding where to bring an ATS or TVPA case. The California and Argentine claims are afterthoughts. I believe that the case was brought in California because that's where the lawyer lives.

Donald Childress seems shocked to learn that plaintiffs in international human rights cases are forum shopping for the best place to bring a case.² But what should we call the defendants' resistance to being sued in those fora? A strategic effort to avoid an unwanted forum doesn't stop being forum-shopping just because it is undertaken by a defendant. Forum shopping by plaintiffs (and defendants) undoubtedly

1. 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 (2013).

2. Donald E. Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013).

exists in human rights cases, but not between states (e.g., California or Michigan). The forum shopping is between nations. Plaintiffs gravitate to federal courts in the United States in search of a judicial forum with three procedural attributes that are essential for the effective judicial enforcement of human rights norms: (1) an independent judiciary with a track record of enforcing norms of freedom and equality; (2) discovery rules that permit a plaintiff to get inside the black box of a powerful defendant-entity to find out what really transpired; and (3) sophisticated remedial norms, like class actions, that permit effective aggregate redress. Human rights plaintiffs do not forum shop in an effort to choose favorable substantive norms. The same norms of human decency that forbid a corporation from singling out labor leaders for assassination by military thugs will apply in any civilized tribunal. Human rights plaintiffs will stop gravitating to the United States when courts in the rest of the world hold out a fair procedural chance of success. Until then, for many human rights claims against multinational corporations, United States courts are the only game in town.

As Professor Childress thoughtfully points out, ultimately the jurisdictional rules in human rights cases should be shaped by a balance between a human rights plaintiff's search for justice and defendants' legitimate concerns over where they must defend their conduct³—in short, a balance of forum shopping. But to articulate that useful truth does not tell us what the balance should be.

At least two of us—perhaps more—want to make *Bauman* go away because subject matter jurisdiction is lacking at this stage of the case. I don't see any way around the subject matter jurisdiction issue for the Court.⁴ Unlike Suzanna Sherry, I don't see a need to remand the subject matter jurisdiction issue back to the District Court. In my view, the current record demonstrates that none exists. The Court should dismiss the appeal, and invoke the *Munsingwear* doctrine to obliterate all traces of this unfortunate case.

Several of my colleagues want to make the *Bauman* case go away by narrowing general jurisdiction over corporations to their places of incorporation and principal place of business.⁵ As Howard Erichson puts it, general jurisdiction should be to corporations what domiciliary

3. *Id.*

4. Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 VAND. L. REV. EN BANC 95 (2013).

5. Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81 (2013); Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler v. Bauman: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123 (2013).

jurisdiction is to individuals.⁶ He suggests that Justice Ginsburg is slowly taking us there through her adoption of the metaphor “at home” to describe the nexus required to assert general jurisdiction over a corporation. I fear, though, that Professor Erichson’s useful effort to analogize general jurisdiction over corporations to settings where unlimited jurisdiction is available over individuals fails to account for *Burnham*, which does not require political affiliation or domicile to assert unlimited jurisdiction over individuals based on transient presence in the jurisdiction. If the analogy is to be complete, general jurisdiction must go further than domiciliary jurisdiction to settings where a corporation’s “presence” in a jurisdiction is so pervasive that it is the equivalent of transient physical presence. My long-time friend and colleague, Linda Silberman, appears to contemplate such a limited form of general jurisdiction based on corporate activities that are so substantial that they justify a sovereign in asserting general regulatory power over a corporation.⁷

Linda Silberman wants to make the *Bauman* case go away by arguing that general jurisdiction should never be based on attribution of the activities of a corporate subsidiary to a corporate parent.⁸ She posits a theory of parent/subsidiary attribution in specific jurisdiction settings based on the reasonable desire of a sovereign to assert regulatory and adjudicatory power over a foreign corporate defendant that is using a controlled corporate subsidiary to exploit the sovereign’s market, whenever the claim arises out of the subsidiary’s activities in the forum state.⁹ Thus, I think that she would recognize specific jurisdiction over Daimler in connection with litigation involving an allegedly defective Mercedes Benz that was sold by MBUSA in California. So would I.

I think, though, that she would also recognize general jurisdiction by attribution in cases where the forum state demonstrates a strong regulatory interest in influencing the parent’s behavior. If, as in *WWVW*, Audi used a U.S. sales subsidiary to sell numerous cars in Oklahoma, I believe that jurisdiction over Audi would exist in Oklahoma in connection with a claim involving an allegedly defective car sold in New York. So, I think, does Professor Silberman—but she would apparently characterize such an assertion of adjudicatory power

6. *Id.* See also *Milliken v. Meyer*, 311 U.S. 457, 462-64 (1940) (recognizing state domiciliary jurisdiction); *Blackmer v. United States*, 284 U.S. 421, 441-43 (1932) (recognizing national domiciliary jurisdiction).

7. Linda J. Silberman, *Jurisdictional Imputation in DaimlerChrysler v. Bauman AG: A Bridge Too Far*, 66 VAND L. REV. EN BANC 123 (2013).

8. *Id.*

9. *Id.*

as specific jurisdiction.¹⁰ Maybe the difference between us is semantic. I believe that to be called specific, the jurisdiction would have to be based on cars actually sold in Oklahoma. Professor Silberman seems to label it specific jurisdiction if the car is similar to cars sold in Oklahoma, even if it was actually sold somewhere else.

Finally, if subject matter jurisdiction doesn't work, I would make the *Bauman* case go away, not because general jurisdiction cannot exist by attribution, but because, even when it does, California must demonstrate some interest in using its adjudicatory power over Daimler to influence the behavior of Daimler's Argentine affiliate.¹¹ In short, the *Asahi* reasonableness test. In order to make the analogy with jurisdiction over individuals complete, though, I would drop a footnote as I was going out the door clarifying *Burnham* by requiring transient physical presence jurisdiction to meet the minimum contacts test.

A final word. My colleagues' excellent essays (as well as my effort) reflect our law's confusion over the values that due process restraints on the exercise of adjudicatory power are designed to protect. Once upon a time, a principal value was physical convenience. The Internet, the rise of huge multi-national corporations, and the jet plane have all but erased physical hardship to the defendant as a serious concern in most cases. Most cases these days involve large commercial enterprises designed to operate globally, rendering it difficult to articulate constitutionally cognizable costs when such a defendant is asked to defend in a faraway forum. If anything, as in *Nicastro* or *WWVW*, the balance of convenience often rests with the plaintiff.

Justice White's opinion in *WWVW* introduced the defendant's concern over being forced to defend in an unanticipated forum, both because it may be physically inconvenient, and because the forum might apply law to the case that would frustrate the legitimate expectations of a defendant.¹² *Nicastro* tells us that we're still fighting over how to define those legitimate expectations. Implicit in the concern over frustration of legitimate expectations is the broad latitude that a sovereign has under existing due process law to choose the governing law, once a case is within its adjudicatory power.¹³

I think we may have it backwards. Why use rigorous *in personam* rules to police a potential unfair choice of law? And, when the substantive law will be the same in two or more fora, why do we have a

10. *Id.*

11. Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 VAND. L. REV. EN BANC 95 (2013).

12. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

13. *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

due process concern over which one hears the case? I believe that our *in personam* cases have conflated three distinct, but related sovereign interests: (1) an interest in taxing activities within a sovereign's borders; (2) an interest in regulating the conduct of individuals or entities; and (3) an interest in providing a fair adjudicatory forum for the resolution of disputes. *International Shoe* was a case about the power to levy and enforce a tax, but we treat the case as if it were about the power to provide an adjudicatory forum. We assumed, moreover, that once power to provide an adjudicatory forum exists, power to choose the governing law almost inevitably follows. Thus, our *in personam* cases since *International Shoe* have assumed a forum state with wide, almost unlimited power to select the governing law. Once we had backed ourselves into that box, we had no choice but to require a showing of a strong regulatory interest as a precondition to providing an adjudicatory forum.

Why not reverse the flow—encourage the provision of fair adjudicatory fora, especially to plaintiffs who would suffer physical inconvenience if forced to sue in a distant forum, but insist that a forum demonstrate legitimate interest in regulating the defendants' conduct as a precondition to choosing to apply its own law. In short, use the Due Process Clause to assure that choice of law respects the legitimate expectations of the defendant. That's a due process doctrine worth developing. After more than 40 years of teaching this stuff, I'm tired of redoubling my efforts after I've lost sight of my goals.