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Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in *DaimlerChrysler v. Bauman*

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I. INTRODUCTION

Forget hard cases: *bad* cases make bad law. *DaimlerChrysler Corp. v. Bauman*, which never should have been filed in a California federal court, has the potential to make very bad law. It is a paradigmatic example of egregious forum shopping that stretches jurisdictional doctrines beyond their limits. And, like other acts of overreaching by overzealous plaintiffs' attorneys,[1] it is likely to come back to haunt not only these plaintiffs but other less manipulative plaintiffs in the future.

II. WHY CALIFORNIA?

The facts of the case cry out for justice, but it is hard to see why that justice should be meted out by any American court, much less one in California. Plaintiffs are victims of the "Dirty War" in Argentina, and allege that Mercedes-Benz Argentina ("MBA"), a wholly owned Argentine subsidiary of the German automaker DaimlerChrysler, collaborated with the Argentine state security forces in acts of torture,

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1. *See* Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1.

kidnapping, and murder.[2] Plaintiffs presumably chose to sue DaimlerChrysler rather than MBA because of deeper pockets and a broader range of possible venues in which to file suit. Most people—at least people who are not lawyers—would assume that such a suit should be filed in Argentina, of which MBA and all but one of the plaintiffs are citizens (one plaintiff is a citizen of Chile)[3] and where the horrific actions took place, or in Germany, where DaimlerChrysler is incorporated and has its primary headquarters. The United States and its courts would seem to have no interest in the case or any of the parties.

Even assuming that the United States, in addition to acting as "cops of the world,"[4] can also serve as judicial arbiter for the world, the most plausible U.S. venue for the suit is Michigan, where DaimlerChrysler has maintained a second set of headquarters since it was formed as a result of the 1998 merger between the German company Daimler-Benz and Michigan-based Chrysler.[5] Indeed, the plaintiffs served process on DaimlerChrysler at its Michigan headquarters.[6] And because the suit includes claims under two U.S. federal statutes—the Alien Tort Statute[7] and the Torture Victims Protection Act of 1991[8]—the United States has at least a presumptive interest in the suit, and bringing suit in Michigan is arguably justifiable.[9]

Given all this information, if a thousand people were asked where this suit would likely be filed, I dare say not one of them would answer "California." Why on earth does California have any connection to, or interest in, this case? And yet that is where the plaintiffs' lawyers chose to file suit, in the U.S. District Court for the Northern District of California. Why California? I can think of two reasons. First, the Ninth Circuit has a reputation as one of the most liberal and plaintiff-friendly courts in the nation—especially if you are lucky enough to draw the right judges for your panel, as these

2. Plaintiffs allege that MBA conspired with the Argentine government to brutally punish plant managers whom MBA believed were "union agitators." Bauman v. DaimlerChrysler Corp. (*Bauman III*), 644 F.3d 909, 912 (9th Cir. 2011).

3. Bauman v. DaimlerChrysler AG (*Bauman II*), 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007), *rev'd*, 644 F.3d 909 (9th Cir. 2011).

4. *See* PHIL OCHS, *Cops of the World*, *on* PHIL OCHS IN CONCERT (Elektra 1966).

5. Bauman v. DaimlerChrysler AG, 2005 WL 3157472, at *1 (N.D. Cal. Nov. 22, 2005) (*Bauman I*).

6. DaimlerChrysler briefly disputed the validity of the service but ultimately withdrew its objection to service in Michigan. *Bauman III*, 644 F.3d at 913.

7. 28 U.S.C. § 1350.

8. 106 Stat. 73, note following 28 U.S.C. § 1350.

9. Both federal statutes, of course, buy into the "U.S. as world arbiter" mentality, but this Essay is not about congressional overreaching so we shall take the statutes as we find them.

plaintiffs did[10]—and the plaintiffs in this case needed all the help they could get because of the many potential hurdles to their claims. Second, in addition to their federal claims, the plaintiffs also brought claims for wrongful death and intentional infliction of emotional distress under the laws of Argentina and California. On several key issues, California's law on wrongful death is more plaintiff-friendly than that of Michigan.[11] In short, the plaintiffs' lawyers filed in California rather than in Michigan because they thought they had a better chance of winning there. Forum shopping, pure and simple.

Plaintiffs, however, are allowed to forum shop as long as the court they choose has personal jurisdiction over the defendant. The district court held that it did not have jurisdiction over DaimlerChrysler, but the Ninth Circuit reversed. The parties and both courts agreed that the only possible type of personal jurisdiction over DaimlerChrysler is general jurisdiction, because the suit is entirely unrelated to DaimlerChrysler's contacts with California. Thus, the question is whether DaimlerChrysler has "continuous and systematic" contacts with California.[12]

On the surface, it appears that DaimlerChrysler has *no* contacts with California. It is neither incorporated nor headquartered there. It has no sales force, no dealerships, and no manufacturing or other facilities in the state. But another wholly owned subsidiary, Mercedes-Benz USA ("MBUSA"), does have contacts with California: although it is incorporated in Delaware with its principal place of business in New Jersey, it has a regional office, a vehicle preparation center, and a "Classic Center" in California.[13] DaimlerChrysler conceded that California courts—state and federal—would have general jurisdiction over MBUSA based on these contacts. The Ninth Circuit concluded that MBUSA's contacts should be imputed to its

10. The panel consisted of Judges Reinhardt, Schroeder, and Nelson, all Carter appointees. For the Ninth Circuit's liberal and plaintiff-friendly reputation, see for example, John Schwartz, *'Liberal' Reputation Precedes Ninth Circuit Court*, N.Y. TIMES, April 24, 2010, at A33; Lee Epstein et al., *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303, 312 (2007).

11. For wrongful death actions, California confers broad standing on survivors, while Michigan limits standing to the personal representative of the decedent's estate. *See* CAL. CIV. PRO. CODE § 377.60 (West 2013); MICH. COMP. LAWS § 600.2922 (2009). California also generally imposes joint liability on multiple defendants in wrongful death actions, while Michigan holds defendants only severally liable. *See* CAL. CIV. CODE §§ 1431, 1431.2 (West 2013); MICH. COMP. LAWS § 600.2956 (2009). Michigan allows a defendant to introduce evidence of collateral sources to offset defendants' liability, while California does not. *See* MICH. COMP. LAWS § 600.6303 (2009); McKinney v. Cal. Portland Cement Co., 117 Cal. Rptr. 2d 849, 851 (Ct. App. 2002) (declining to "reconstruct the collateral source rule in a way that would reduce respondents' damages").

12. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

13. *Bauman I*, 2005 WL 3157472 at *17.

parent, DaimlerChrysler, and thus found personal jurisdiction over DaimlerChrysler based on MBUSA's contacts with California. And now the Court apparently must decide whether DaimlerChrysler is subject to jurisdiction in California on the basis of its subsidiary's facilities in that state.

III. *WHY* THE COURT SHOULD DUCK THE QUESTION

What should the Supreme Court do? What it should *not* do is answer the question that the plaintiffs foolishly teed up and the Ninth Circuit decided. There is no way to rule on whether MBUSA's contacts with California give general jurisdiction over DaimlerChrysler without doing great doctrinal damage.

Affirming the Ninth Circuit's decision has two significant problems. First, to affirm would be to abandon essentially all limits on general personal jurisdiction. Remember, DaimlerChrysler is the parent of *two* relevant subsidiaries: MBUSA, which has connections to California but no connection to the atrocities on which the plaintiffs' claims are based, and MBA, which has connections to the atrocities but no connection to California. If this combination of subsidiaries means that the parent corporation is subject to general jurisdiction in California, then effectively every global corporation will be subject to general jurisdiction in the United States for any of its activities worldwide—if not in California, then in whatever state(s) its subsidiaries do significant business. Affirming the Ninth Circuit is therefore likely to lead to an increase in exactly the kind of blatant forum-shopping that occurred in this case.

Second, affirming the Ninth Circuit's jurisdictional ruling is especially problematic because of the interrelationship between jurisdiction and liability in this particular case. The plaintiffs are imputing the actions of subsidiaries to DaimlerChrysler, often called "piercing the corporate veil," for two different purposes. They argue (and the Ninth Circuit held) that MBUSA's actions should be attributed to DaimlerChrysler in order to confer personal jurisdiction over DaimlerChrysler in California. But they also must argue that the acts of the Argentine subsidiary, MBA, should be attributed to DaimlerChrysler for the purpose of imposing substantive liability. DaimlerChrysler did not itself commit any tortious acts in Argentina, and DaimlerChrysler thus bears no liability for the acts complained of unless the corporate veil between DaimlerChrysler and MBA is pierced.

The problem here is that the standard for piercing the corporate veil in the context of liability is quite strict, analogous to the jurisdictional test urged on the Ninth Circuit by both the defendant

and the judges dissenting from a denial of rehearing en banc.[14] In the words of one commentator, piercing the corporate veil to impose liability on a parent because of the acts of its independent subsidiary conventionally requires both "particularly intrusive exercise of control over the decision-making processes of a subsidiary" and some other evidence of non-separateness such as a lack of compliance with corporate formalities or administrative and financial interdependence.[15] The Supreme Court has agreed that "[i]t is a general principle of corporate law 'deeply ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries."[16] Indeed, many courts have explicitly held that it is more difficult to pierce the veil in the context of substantive liability than in the context of jurisdiction.[17]

In *Bauman*, then, the plaintiffs cannot win unless they satisfy the strictest standard for piercing the corporate veil. It is futile to confer jurisdiction on the basis of a more lenient standard because the stricter standard will end up applying anyway.[18] Affirming the Ninth Circuit would thus muddy—and arguably worsen—jurisdictional doctrines without providing substantive justice to the plaintiffs. It would be better to wait to settle the jurisdictional question in a case in which it mattered. For example, imagine that DaimlerChrysler itself

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14. Bauman v. DaimlerChrysler Corp. (*Bauman IV*), 676 F.3d 774 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

15. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 360 (1990). This strict test has been adopted by the Supreme Court in some statutory contexts. *See, e.g.*, U.S. v. Bestfoods, 524 U.S. 51 (1998). It has, of course, also been criticized by some commentators. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) (on limited liability generally); Note, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195 (2009) (on piercing the corporate veil for parent-subsidiary relationships). For the classic defense of limited liability (and thus of strict piercing standards), see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 41–44 (1991). In many states, the conventional multi-part requirements exist side-by-side with supplementary doctrines allowing piercing on the basis of a single factor. *See* PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS § 12.01 (2d ed. 2005) (BLUMBERG ON CORPORATE GROUPS). Even so, the standards are quite strict, requiring either a manifest lack of separate existence or the parent's use of the subsidiary for fraudulent purposes. *Id.* at §§ 12.02-03.

16. *Bestfoods*, 524 U.S. at 61.

17. BLUMBERG ON CORPORATE GROUPS, *supra* note 15, at §§ 14.02, 23.01.

18. I assume that DaimlerChrysler has the same relationship to both these wholly owned subsidiaries; there is nothing in the case to indicate otherwise. There is also the complicating factor that state law will govern whether the corporate veil is pierced for purposes of liability, and there is some evidence that California law may favor piercing more often than the law of most other states. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1052 (1991). But the difference is not statistically significant, and the "internal affairs" rule may lead to the application of Delaware or German law on piercing in any case. *Id.* at 1051–53.

had directly participated in the Dirty War rather than acting, as plaintiffs alleged, through its Argentine subsidiary. In such case, the jurisdictional test would actually matter, because if a court has jurisdiction it would be able to hold DaimlerChrysler directly liable without any further piercing of the corporate veil.

On the other hand, the Court should not reverse the Ninth Circuit by holding that the Court of Appeals too easily pierced the corporate veil and imputed MBUSA's contacts with California to DaimlerChrysler. Such a ruling would also have deleterious consequences, both doctrinal and practical. As a doctrinal matter, setting a high bar for piercing the corporate veil across the board—including in all jurisdictional contexts—continues and entrenches a formalist approach to corporate separateness that does not reflect either the reality or the diversity of corporate forms and that allows corporations to externalize costs.[19] As a practical matter, it would allow a corporation to avoid jurisdiction in most (or all) states by the simple expedient of turning its various divisions into separate corporate subsidiaries. Consider the ways corporations structure their subsidiaries to avoid state and federal taxes:[20] Do we really want to expand those opportunities to the jurisdictional context?

The imputation question must be answered eventually, but it should be addressed in a more appropriate case: one in which the plaintiffs have a real connection to the forum state and the parent company can plausibly be held liable for the acts of its subsidiary. That is not this case. Deciding a broad, recurring question in the context of a unique case is too likely to lead to an answer that is right for this case but wrong for the run-of-the mill case. But, if the Court answers the question presented to it, the rule announced in this case will apply to all cases.

IV. *HOW* THE COURT SHOULD DUCK THE QUESTION

The Court, therefore, is apparently damned if it does and damned if it doesn't. (Although I suspect that some individual Justices might find one or the other of the two results appealing.) But there is a way out. Indeed, there are several ways to decide the case that

19. For cases illustrative of this trend, see, for example, *Bestfoods*, 524 U.S. at 61; Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011). I am indebted to Bob Thompson for suggesting both the trend and the problems with it.

20. *See, e.g.,* Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES, April 28, 2012, *available at* http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html?pagewanted=all&_r=0 (describing Apple's efforts to minimize its tax liability).

would do less damage and might even do some good by clarifying existing doctrine.

The best option would be to revisit the question of MBUSA's contacts with California, which DaimlerChrysler unwisely conceded were sufficient to satisfy the "continuous and systematic" test for general jurisdiction. Under current doctrine, it is highly questionable that a federal court in California has general personal jurisdiction over MBUSA, and the Court could reverse the Ninth Circuit on that ground.[21]

When the suit was filed—and, indeed, until a month after the Ninth Circuit issued its opinion—the law on general jurisdiction was at least unclear and possibly in flux. The Supreme Court had decided only two cases focusing on general jurisdiction, finding in one that a corporation that essentially camped out in Ohio while its headquarters in the Philippines were occupied by the Japanese during World War II *did* have sufficient contacts with Ohio to confer general jurisdiction in that state,[22] and in the other that a corporation that purchased helicopters from a Texas supplier, deposited its payments into a Texas bank, and occasionally sent personnel to Texas for training on the helicopters *did not* have sufficient contacts with Texas for general jurisdiction.[23] Neither case gave much guidance as to the bulk of situations falling between the two extremes. Faced with a lack of guidance from the Supreme Court, lower courts were in disarray.[24] Some, including notably the Ninth Circuit, had loosened the definition of continuous and systematic contacts so far that any company with substantial sales in a state was subject to general jurisdiction in that state.[25] It is thus unsurprising that DaimlerChrysler did not contest jurisdiction over MBUSA, especially given the strength of its

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21. DaimlerChrysler's concession should not stand in the way of this holding. First, DaimlerChrysler probably conceded personal jurisdiction over MBUSA based on then-extant Ninth Circuit precedent, which a more recent Supreme Court case has found to be incorrect. *See* text accompanying notes 26–31. Moreover, as long as DaimlerChrysler objected to the exercise of general jurisdiction—which it did—nothing should prevent the Supreme Court from agreeing with that objection even on reasoning not suggested by DaimlerChrysler.

22. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

23. Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408 (1984).

24. *See* Eugene F. Scoles et al., Conflict of Laws 357–58 (4th ed. 2004) (documenting lower court division).

25. *See* Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), *vacated as moot*, 398 F.3d 1125 (9th Cir. 2005) (en banc) (holding that despite absence of any offices or agents in California, L.L. Bean was subject to general jurisdiction there because California sales constituted 6% of its business); *accord* Gorman v. Ameritrade, 293 F.3d 506 (D.C. Cir. 2001); Metro. Life Ins. Co. v. Robertson-CeCo Corp., 84 F.3d 560 (2d Cir. 1996); Michigan Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462 (6th Cir. 1989); Bearry v. Beech Aircraft Corp. 818 F.2d 370 (5th Cir. 1987).

argument that MBUSA's contacts with California should not suffice to confer general jurisdiction over DaimlerChrysler itself.

But just over a month after the Ninth Circuit's decision in *Bauman*, the Supreme Court issued its third opinion on general jurisdiction in seventy years. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[26] a unanimous Court clarified the requirements for general jurisdiction, interpreting the earlier cases as setting a high bar. A corporation has "continuous and systematic" contacts with a state, the Court said, only in a state in which "the corporation is fairly regarded as at home," equivalent to an individual's domicile.[27] It cited approvingly an article that it described as "identifying domicile, place of incorporation, and principal place of business as 'paradig[m]' bases for the exercise of general jurisdiction."[28] A year before *Goodyear*, *Hertz Corp. v. Friend*[29] had defined "principal place of business" for purposes of diversity jurisdiction as the corporation's "nerve center [], typically . . . [its] headquarters."[30] Putting the two cases together suggests that MBUSA's maintenance of three facilities in California, none of them headquarters or a nerve center, was not sufficient to constitute continuous and systematic contacts.

A Supreme Court holding that MBUSA's contacts with California did not give rise to general jurisdiction under *Goodyear* would provide two benefits. First, it would obviate the need to decide the difficult question of whether MBUSA's activities in California should be imputed to DaimlerChrysler. If California cannot exercise general jurisdiction over MBUSA, then it cannot derivatively exercise general jurisdiction over DaimlerChrysler regardless of whether MBUSA's contacts can be imputed to DaimlerChrysler. Second, it would serve to clarify the meaning of "continuous and systematic," limiting general jurisdiction to the states in which a corporation is incorporated or has enough headquarters-like operations to count as a principal place of business.[31] Lower courts are already pushing the envelope after *Goodyear*, distinguishing *Goodyear* and finding general personal jurisdiction on the basis of sales (or salespeople) alone

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

27. *Id.* at 2853–54.

28. *Id.* at 2854 (citing Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

29. 130 S. Ct. 1181 (2010).

30. *Id.* at 1186.

31. As I suggest *infra*, text accompanying notes 38–39, although the Court has reasonably interpreted § 1332 as dictating that a corporation has only a single principal place of business for purposes of diversity jurisdiction, there is no reason why a corporation cannot have more than one principal place of business in which it feels "at home" for purposes of personal jurisdiction.

without any other physical presence, let alone headquarters.[32] If *Goodyear* was meant to rein in the lower courts, it isn't working; *Bauman* offers an opportunity for the Court to reiterate the narrowness of general jurisdiction. Unlike a determination of whether to impute MBUSA's contacts to DaimlerChrysler, therefore, holding that the district court lacked general jurisdiction over MBUSA would serve to improve rather than worsen personal jurisdiction doctrines.

Another good option would be to hold that regardless of whether DaimlerChrysler has sufficient contacts with California, it would be unreasonable for a California court to exercise jurisdiction over it. It is black-letter law that a court has personal jurisdiction only if the defendant has the requisite contacts with the forum state *and* the exercise of jurisdiction is reasonable.[33] The Court has identified five factors relevant to the determination of reasonableness: the burden on the defendant, the plaintiff's interest, the forum state's interest, the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies."[34] Neither California nor the plaintiffs have any legitimate interest in litigating this dispute in California rather than in Michigan, even assuming that the plaintiffs have a legitimate interest in litigating in the United States rather than in Argentina or Germany. Nor is litigating in California likely to be efficient. Indeed, eight Justices have previously found the exercise of *specific* jurisdiction unreasonable in a dispute between two foreign parties that arose out of an event in the forum state.[35] The exercise of *general* jurisdiction in *Bauman* has to be even less reasonable, as it involves a

32. *See, e.g.*, J.B. ex rel. Benjamin v. Abbott Labs. Inc., 2013 WL 452807 (N.D. Ill., Feb. 6, 2013); Ashbury Int'l Group v. Cadex Defence, Inc., 2012 WL 4325183 (W.D. Va., Sept. 20, 2012); McFadden v. Fuyao N. America Inc., 2012 WL 1230046 (E.D. Mich., Apr. 12, 2012).

33. More accurately, it is black-letter law that reasonableness is required for specific jurisdiction, and it is assumed by courts and scholars that it is also required for general jurisdiction. *See, e.g.*, Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 113–116 (1987) (in specific jurisdiction context, eight Justices agreed on dismissal because exercise of jurisdiction was unreasonable, despite disagreement about whether minimum contacts existed); Amoco Egypt Oil Co. v. Leonis Nav. Co., 1 F.3d 848, 851 n.2 (9th Cir. 1993) ("Although neither the Supreme Court nor this circuit has explicitly engaged in a separate reasonableness inquiry in a general jurisdiction case, *Asahi*'s interpretation of *International Shoe* as entailing separate contacts and reasonableness inquiries is not limited to the specific jurisdiction context but applies to all determinations of personal jurisdiction."); Johnston v. Multidata Systems Int'l Corp., 523 F.3d 602, 615 (5th Cir. 2008) ("[E]ven if [defendant] had continuous and systematic contacts with Texas . . ., traditional notions of fair play and substantial justice would be violated if we exercised jurisdiction over it in this case.").

34. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *Asahi*, 480 U.S. at 113.

35. *Asahi*, 480 U.S. at 113–16.

suit by foreign plaintiffs challenging the actions on foreign soil of a foreign defendant (with much stronger ties to a *different* U.S. state). Like the first option, holding that the exercise of jurisdiction over DaimlerChrysler is unreasonable would both avoid the difficult question of imputation and clarify the contours of the doctrinal reasonableness requirement.

There is also a third option, which, while not as good as the first two, would be better than directly confronting the Ninth Circuit's holding. Recall that the plaintiffs' claims arise under two federal statutes and two non-federal sources of law. Because the federal statutes plainly confer federal-question jurisdiction and the other claims are sufficiently related to the federal claims to fall within supplemental jurisdiction, at the time this case was filed—and at the time it was decided by the Ninth Circuit—the district court undoubtedly had subject matter jurisdiction. But things have changed dramatically since the Ninth Circuit's ruling. In *Mohamad v. Palestinian Authority*,[36] the Court held that only a natural person can be held liable under the Torture Victims Protection Act. And in *Kiobel v. Royal Dutch Petroleum Company*,[37] the Court held that the Alien Tort Statute does not reach most acts outside the territory of the United States. Both federal claims should therefore be dismissed, leaving only the state claims.

Once the Court concludes that the federal claims are no longer viable, it should remand to allow the district court to determine whether to exercise subject matter jurisdiction over the remaining state claims. There is, of course, no federal-question jurisdiction over the state claims. There is almost certainly no diversity jurisdiction. All of the plaintiffs are citizens of foreign nations. DaimlerChrysler's citizenship is, under § 1332(c), its place of incorporation (Germany) and its principal place of business.[38] Although a corporation might conceivably have more than one "nerve center" where it can be considered "at home" for purposes of general personal jurisdiction, it can only have one principal place of business for purposes of diversity jurisdiction.[39] Whether or not it is at home in Michigan, then, its principal place of business under § 1332 is almost surely in Germany where it has its primary headquarters. Thus, none of the parties are citizens of any state. Section 1332 does not confer jurisdiction over

36. 132 S. Ct. 1702 (2012).

37. 133 S. Ct. 1659 (2013).

38. 28 U.S.C. § 1332(c) (2013).

39. *Hertz, supra* note 26, at 1192 –94.

suits entirely among foreign parties—at least one party must be a citizen of one of the United States.[40]

That leaves only the possibility of supplemental jurisdiction under § 1367.[41] The district court had supplemental jurisdiction over the state claims at the time the suit was filed, because they arose out of the same set of events as did the federal claims.[42] But if all the federal claims are dismissed, § 1367(c)(3) explicitly permits the district court to decline to exercise that jurisdiction. That discretionary decision must be left to the district court; neither the Supreme Court nor the Court of Appeals should make the initial determination of whether to decline the exercise of jurisdiction under § 1367(c)(3).[43]

Like the first two options, a remand for determination of subject matter jurisdiction avoids unnecessary damage to personal-jurisdiction doctrines. It also allows the district court to exercise its discretion rather than mechanically applying mandatory jurisdictional rules, which seems especially appropriate in a case that has broad implications not only for constitutional doctrine but also for U.S. foreign relations. Unlike the first two options, however, it does not necessarily avoid the need to confront the imputation question in this case eventually. That is why it is the third-best choice, but still better

40. 28 U.S.C. § 1332(a) (2013).

41. 28 U.S.C. § 1367 (2013).

42. 28 U.S.C. § 1367(a) (2013).

43. 28 U.S.C. § 1367(c) (2013) ("the *district court* may decline to exercise supplemental jurisdiction . . . ") (emphasis added); *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (pendent or supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right"). Although a remand for a determination of subject matter jurisdiction will not necessarily obviate the need to decide personal jurisdiction at some point—if the court decides *not* to decline jurisdiction, DaimlerChrysler's objection to personal jurisdiction will still stand—remanding nevertheless makes good sense under the circumstances. A court needs both subject matter jurisdiction and jurisdiction over the parties in order to act, but subject matter jurisdiction is the more fundamental of the two. It cannot be waived, and a case must be dismissed at any point in the proceedings, up to and including at the Supreme Court, if it is discovered that subject matter jurisdiction is lacking. *See* FED. R. CIV. P. 12(h)(3); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("Neither party has questioned [subject matter] jurisdiction, but it is the duty of this court to see to it that the jurisdiction . . . is not exceeded."); *see also* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.' "). The only exception to the rule is that a court may—but need not—dismiss for lack of personal jurisdiction without examining its subject matter jurisdiction first. Ruhrgas v. Marathon Oil Co., 526 U.S. 574 (1999). That exception does not apply here, because it is limited to circumstances in which "a district court has before it a straightforward personal jurisdiction issue . . . and the alleged defect in subject matter jurisdiction raises a difficult and novel question." *Id.* at 588. In *Bauman*, the situation is exactly the reverse: the subject matter jurisdiction issue is straightforward and the personal jurisdiction issues are difficult and novel. Thus, the district court should decide whether to exercise subject matter jurisdiction before deciding whether it has personal jurisdiction.

than answering the question in circumstances that almost guarantee a wrong answer.

V. CONCLUSION

The lawyers and lower-court judges in this case had the best of intentions. But their overzealous pursuit of justice blinded them to doctrinal realities and put this bad case before the Supreme Court. One can only hope that enough Justices recognize the dangers and exercise their discretion by deciding the case without answering the Ninth Circuit's provocative question.