CORPORATE LAW AND THE REACH OF COURTS

by
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Large businesses are often organized into a complicated web of interrelated corporations. Yet in many areas of U.S. law, jurisdictional and substantive rules focus only on the single entity, creating a mismatch between legal doctrine and the organization of business into corporate groups or conglomerates. Drawing on the U.S. Supreme Court's 2014 decision in Daimler AG v. Bauman*, this Article considers one aspect of this problem: the extent to which a subsidiary's contacts "count" as those of the corporate parent for court jurisdiction. Courts, litigants, and commentators often look to corporate law for part of the answer. During oral argument in* Daimler AG v. Bauman*, Justice Breyer went so far as to say that he saw the relevant contacts "through the lens of corporate law." This Article makes the case for a very limited role for corporate law in determining the reach of courts.*

INTRODUCTION

Large businesses are often organized into a web of interrelated corporations and other business entities: parents, tiers of subsidiaries, broth-

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ers and sisters, holding companies. At one point, Citigroup had almost 2500 majority-owned subsidiaries.[1] A snapshot of the Daimler-Benz corporate structure in the 1990s showed 357 subsidiaries, including subsidiaries for North America, "for every western European country," and "for Brazil, Argentina, Nigeria, South Africa, Turkey, Iran, India, Japan, Indonesia, and Australia."[2] Yet in many areas, the legal doctrines that govern corporations focus only on the single corporation, creating a mismatch between the organization of business into corporate groups or conglomerates and the jurisdictional and substantive rules that focus on the entity level.[3]

This Article examines one aspect of the treatment of corporate groups in U.S. law: whether courts can reach members of a corporate group based on the actions of another member. When members of a corporate group are sued in U.S. court, the court must have personal (adjudicatory) jurisdiction over all of the defendants. The requirement derives from the Due Process Clause of the U.S. Constitution. The classic statement of the constitutional requirement is that defendant must have "minimum contacts" with the territory of the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[4]

This Article views jurisdiction over corporate groups through the lens of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*.[5] One often-overlooked aspect of the opinion is how it addressed the attribution of contacts within a corporate group. A question before the Court was whether the contacts of a Daimler subsidiary with the state of California "counted" as the contacts of its parent corporation. The Court's brief response rejected an expansive view of jurisdiction in corporate groups that would have brought most corporate parents into court, but left many open questions.

One issue underlying the Court's response was whether corporate law should be the source of jurisdictional limits. During oral argument in *Daimler AG v. Bauman*, Justice Breyer went so far as to say to the attorney

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[1] *See* Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643, 682 (2012).

[2] *See* Daimler-Benz Aktiengesellschaft v. Olson, 21 S.W.3d 707, 713 (Tex. App. 2000).

[3] Phillip Blumberg has written extensively about corporate groups. *See, e.g.*, PHILLIP BLUMBERG ET AL., 1 BLUMBERG ON CORPORATE GROUPS § 23.03 (2d ed. Supp. 2015); PHILLIP BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (1983) [*hereinafter* BLUMBERG, THE LAW OF CORPORATE GROUPS]; Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573, 624 (1986); *see also* Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 880 (2012).

[4] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

[5] Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

for Bauman that "You're seeing it"—the question of whether the U.S. subsidiary's contacts counted for the parent—"through the lens of jurisdiction. I'm not. I'm seeing it through the lens of corporate law."[6] Defendants in *Bauman* also framed the question of jurisdiction in corporate law terms. Daimler AG advocated counting the subsidiary's contacts as the parent's for the purposes of general jurisdiction *only* where substantive veil piercing standards were met.[7]

The court and litigants in *Daimler AG v. Bauman* were not the first to borrow corporate law to answer the jurisdictional question. Other courts have used state corporate law, developed in the context of substantive liability, to determine whether the court had jurisdiction because a parent and subsidiary are alter egos or form a single enterprise.[8] This Article considers the connection between corporate law and the reach of courts because many courts and litigants do so.[9]

Why does it matter whether corporate law is imported into questions about a court's reach? A corporate approach would have consequences for uniformity and predictability, as detailed below. The main reason to care, though, is that treating this as a corporate law question may impede the development of a coherent approach. U.S. corporate law is traditionally regulated at the state level, making courts (especially federal courts) reluctant to encroach on what is seen as the states' domain.[10]

This Article's analysis proceeds as follows. The first Part presents the current state of the law. It analyzes the main approaches that courts take when determining jurisdiction within corporate groups. It then examines the attribution question before the *Bauman* Court and the consequences of the Court's (limited) response.

The second Part develops the argument against borrowing corporate law to determine jurisdiction within corporate groups. It outlines the argument that importing corporate law is not required by existing law. It then examines four reasons that corporate law is not an effective source of jurisdictional limits. Corporate law has addressed when separately organized business entities are so intertwined that they can be treated as a single entity. The first objection is accordingly not that it is wholly irrele-

[6] Transcript of Oral Argument at 43, *Daimler AG*, 134 S. Ct. 746 (No. 11-965).

[7] 134 S. Ct. 746 at 759.

[8] *See, e.g.*, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337–38 (1925); Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1134 (9th Cir. 2003).

[9] *See, e.g.*, *Cannon Mfg.*, 267 U.S. at 337–38; *Harris Rutsky*, 328 F.3d at 1134; *see also* Brief of Amica Curiae Professor Lea Brilmayer Supporting Petitioner at 6–7, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965).

[10] *See, e.g.*, Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977).

vant, but rather that it poses practical problems. In particular, the corporate law doctrine of veil piercing is a mess and introduces its own uncertainty. The second point is that some of the worries present when the veil is pierced to impose liability are simply not relevant to jurisdiction. In particular, broad jurisdiction over corporate parents would not incentivize them to spin off risky ventures. The third objection points out that the relevant portion of the corporate group depends on the area of law at issue; the relevant unit for torts is different from that for antitrust, for instance. The multiple sources for line drawing within corporate groups undermine the rationale for giving corporate law priority; corporate separateness is not inviolate. Finally, even if corporate law were used to determine when two entities should be treated as one, it generally does not determine when a separate entity should be held responsible for another entity's acts. This important category ultimately turns on the degree of control that would make it fair to bring a defendant into court for the acts of another.

I. THE STATE OF THE LAW

A. *Judicial Approaches to Jurisdiction in Corporate Groups*

U.S. state and federal courts have repeatedly had to address whether the contacts of a subsidiary should count as those of the parent for establishing personal jurisdiction. Terminology sometimes obscures the law in this area, but two main strands exist. One relies on corporate law doctrines that override the formal separation of distinct corporate entities. The other relies on doctrines that courts have (often misleadingly) labeled agency law. The classic distinction is whether the two entities are so intertwined that they are essentially one (veil piercing/alter ego and single enterprise theories) or whether the entities are separate, but the contacts of one can be imputed to the other.[11]

Courts have sometimes borrowed the corporate law doctrines of veil piercing and enterprise liability to determine whether they have personal jurisdiction over corporate defendants. In substantive corporate law, when courts decide to "pierce the corporate veil," shareholders normally entitled to limited liability must satisfy corporate obligations with personal assets. The corporation is treated as the "alter ego" of the shareholder.

When veil piercing is imported into the jurisdictional analysis, the contacts of the subsidiary with the forum territory are imputed to the parent because parent and subsidiary are essentially a single entity.[12] The

[11] In their influential article *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, Lea Brilmayer and Kathleen Paisley called the former "merger" and the latter "attribution." 74 CAL. L. REV. 1, 14 (1986).

[12] *See, e.g.*, Systems Div., Inc. v. Teknek Elect., Ltd. 253 F. App'x 31, 37 (Fed. Cir. 2007) ("The exercise of jurisdiction over an alter ego is compatible with due process because a corporation and its alter ego are the same entity—thus, the jurisdictional

legal standard for jurisdictional veil piercing varies. Some courts simply import the liability standard, noting that courts treat entities as alter egos when corporate formalities are ignored and the entities lack separateness and when this lack of separation creates some sort of wrong, fraud, or injustice.[13] Other courts look to the degree of control that the parent exercises, the extent to which corporate formalities are observed, or some combination of the two.[14]

A related corporate law doctrine looks at the enterprise as a whole to determine when separately organized legal entities should be treated as a unified enterprise. In substantive corporate law, courts look at the lines between different parts of a corporate group for the purposes of imposing liability. A classic case of so-called "enterprise liability" arose in the context of tort law. The court had to determine whether separately organized corporations that each owned two New York City cabs could be treated as a single enterprise.[15] The court said no, looking to factors like whether the assets of the separately organized corporations were intermingled.[16] The "single enterprise" basis for personal jurisdiction similarly overrides the organization of the corporate group into separate legal entities by treating them as a single organization for jurisdictional purposes. It has several varieties and labels, depending in part on the court system in which it was addressed.[17]

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contacts of one are the jurisdictional contacts of the other for purposes of the *International Shoe* due process analysis.").

[13] *See, e.g.*, *Harris Rutsky*, 328 F.3d at 1134–35 ("To satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, the plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." (alteration in original) (internal quotation marks omitted)); Applied Biosystems, Inc. v. Cruachem, Ltd., 772 F. Supp. 1458, 1463 (D. Del. 1991) (noting that "[u]nder the alter ego or piercing the corporate veil doctrine, courts will ignore the corporate boundaries between parent and subsidiary if fraud or inequity is shown"); United Ins. Grp. Agency, Inc. v. Patterson, No. 299631, 2011 WL 5067251, at *3–4 (Mich. Ct. App. Oct. 25, 2011) (per curiam; unpublished opinion) (citing the standard for piercing the veil to impose liability in a case considering personal jurisdictional veil piercing). *See generally* Peter Oh, *Veil Piercing*, 89 TEX. L. REV. 81, 84 (2013) (noting that most courts considering veil piercing for liability purposes consider whether there is "complete control and domination" and whether a shareholder committed "a fraud, wrong, or injustice that has proximately caused unjust loss or injury to the plaintiff").

[14] *See* Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CAL. L. REV. 731, 744–45 (2008) (reviewing cases of jurisdictional veil piercing).

[15] Walkovsky v. Carlton, 223 N.E.2d 6, 7 (N.Y. 1966).

[16] *Id.* at 10.

[17] *See* BLUMBERG ET AL., *supra* note 3, § 28.01; Hannah L. Buxbaum, *The Viability of Enterprise Jurisdiction: A Case Study of the Big Four Accounting*, 48 U.C. DAVIS L. REV. 1769 (2015).

Unlike alter ego and single enterprise theories, the agency approach to establishing personal jurisdiction treats the parent and subsidiary as separate legal entities, but imputes the contacts of the subsidiary to the parent because the subsidiary acts as an agent of the parent. Courts generally treat jurisdiction as proper if a relationship satisfies all of the requirements of traditional agency law: namely, that the agency relationship is created when the agent and principal both consent that the agent will act on the principal's behalf and subject to its control.[18] What is more varied is how courts have developed more expansive jurisdictional standards under the "agency" label.[19]

Rather than merely duplicating the agency analysis from the body of law about liability, in the jurisdictional context courts often used the term agency to refer to a relationship characterized by control but that is broader than that rooted in agency law. Before *Daimler AG v. Bauman*, courts used a standard that relied on a relationship of delegation or substitution. This focus was captured in standards that allowed personal jurisdiction over a parent when it was affiliated with a local entity whose services "are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available."[20] Courts sometimes write of this explicitly as a "substitution" rationale: "[T]he agent [must] perform some service or engage in some meaningful activity in the forum state on behalf of its principal such that its presence substitutes for the presence of the principal."[21] This latter interpretation of jurisdictional agency is that most affected by the *Daimler AG v. Bauman* opinion, and is discussed at more length below.

In 2014, the U.S. Supreme Court had the opportunity to provide guidance to courts about the application of these theories to corporate groups. *Daimler AG v. Bauman* squarely raised the question of whether and when a subsidiary's contacts "count" as those of the corporate parent

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[18] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

[19] A specific instance of the agency theory is jurisdiction based on participation in a conspiracy. The activities of a particular part of a conglomerate are imputed to another part because they have engaged in a conspiracy and the co-conspirator acts as an agent of the other co-conspirators. *See, e.g.*, Santa Fe Tech., Inc. v Argus Networks, Inc, 42 P.3d 1221, 1234 (N.M. 2002) (exercising jurisdiction over nonresidents based on agency and conspiracy, and noting the similarities); Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1393 (7th Cir. 1983) (holding that actions by one conspiracy participant in Illinois "provide the requisite minimum contacts between the remaining members of the conspiracy and the [forum state]"). S*ee generally* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis,* 52 FORDHAM L. REV. 234, 255 (1983) (proposing limits to the conspiracy theory of jurisdiction).

[20] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000); *see also* Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 423 (9th Cir. 1977).

[21] Doe v. Unocal Corp., 248 F.3d 915, 930 (9th Cir. 2001) (internal quotation marks omitted).

for the purposes of general jurisdiction.[22] The next Part analyzes the opinion's (limited) effect on the theories of jurisdiction in corporate groups outlined above.

B. Daimler AG v. Bauman

In *Daimler AG v. Bauman*,[23] Argentine plaintiffs sued DaimlerChrysler Aktiengesellschaft (DaimlerChrysler AG), a German stock company. The allegation was that a wholly-owned Argentine subsidiary of defendant, DaimlerChrysler AG, had participated in the torture and disappearance of plaintiffs and their family members in Argentina.[24] The initial claims rested on the Alien Tort Statute and Torture Victims Protection Act,[25] although by the time the case reached the Supreme Court, intervening case law had diminished the viability of the substantive allegations. The difficulty for plaintiffs was in finding a basis for personal jurisdiction over DaimlerChrysler AG in U.S. federal court in California.[26] This was made even more difficult by the facts that all the conduct had taken place outside of the U.S. and all the plaintiffs were non-U.S. plaintiffs.

The extent to which a subsidiary's contacts "count" as those of the parent was directly raised. Personal jurisdiction was based on the contacts of an indirect U.S. subsidiary, Mercedes Benz USA, LLC (MBUSA). Although organized outside of California,[27] MBUSA was the sole U.S. importer and distributor of Mercedes-Benz cars, distributing them to independent dealerships in the United States, as well as advertising and providing sales support. MBUSA had a regional office and two centers in California, and its sales in California amounted to 2.4% of DaimlerChrysler AG's sales worldwide.[28]

To attribute these contacts to the German parent, plaintiffs relied on the argument that MBUSA, as the sole U.S. distributor, was so important to DaimlerChrysler AG that without it the parent company would itself undertake these activities in California. The plaintiffs and the lower courts applied the standard then valid in the Ninth Circuit: attribution of

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[22] Verity Winship, *Personal Jurisdiction and Corporate Groups:* DaimlerChrysler AG v. Bauman, 9 J. PRIV. INT'L L. 431, 436 (2013).

[23] 134 S. Ct. 746 (2014).

[24] First Amended Complaint at 1, Bauman v. DaimlerChrysler AG, No. CV 04-00194 RMW (N.D. Cal. Feb. 10, 2004).

[25] *Id.*; 28 U.S.C. § 1350 (2012); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

[26] *Daimler AG*, 134 S. Ct. at 750. Daimler AG was the successor to DaimlerChrysler AG, which created inconsistency in the formally named defendants as the case moved through the appeals process. However, as the Supreme Court noted, "[n]o party contends that any postsuit corporate reorganization bears on our disposition of this case." *Id.* at 751 n.2.

[27] MBUSA was a Delaware limited liability company, with its principal place of business in New Jersey. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 913 (9th Cir. 2011).

[28] *Id.* at 914.

the subsidiary's contacts to the parent was proper when the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a *representative* to perform them, the corporation's own officials would undertake to perform substantially similar services."[29] Although the courts called this an "agency" basis for attribution, this theory went well beyond the established body of agency law.

The trial court, after ordering jurisdictional discovery, dismissed for lack of personal jurisdiction.[30] The appellate court first agreed and found no personal jurisdiction, then reversed itself on rehearing, vacating its prior opinion.[31] An attempt to have the case heard en banc failed, prompting a strongly worded dissent.[32] When it got to the Supreme Court, Justice Breyer expressed regret that it had not been successfully resolved at that point.[33]

The Supreme Court ultimately held that the California court could not exercise general personal jurisdiction over DaimlerChrysler AG. The outcome itself was not surprising given the broad claim of jurisdiction. The plaintiffs essentially asserted that DaimlerChrysler AG could be sued on *any* claim in California state or federal courts based on the contacts of its subsidiary (which itself was also unrelated to the challenged conduct and was not a defendant). Most of the opinion focused on the standard for general jurisdiction, concluding that the corporation could be sued over a cause of action unrelated to the contacts between the defendant and the forum state only if it were "essentially at home in the forum State."[34] For corporations, "home" was limited to the state of incorporation and the principle place of business.[35]

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[29] *Id.* at 920 (alteration in original) (quoting Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001)).

[30] Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2005 WL 3157472, at *20 (N.D. Cal. 2005) (tentatively dismissing for lack of personal jurisdiction but ordering jurisdictional discovery); Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2007 WL 486389, at *1 (N.D. Cal. 2007) (final order granting the motion to dismiss after jurisdictional discovery was completed).

[31] *See* Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1098 (9th Cir. 2009) (initially affirming); Bauman v. DaimlerChrysler Corp., 603 F.3d 1141, 1141 (9th Cir. 2010) (granting rehearing and vacating prior opinion); Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011) (reversing the district court).

[32] Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 779 (9th Cir. 2011) (O'Scannlain, J, dissenting from denial of rehearing en banc) ("Our court's holding represents a breathtaking expansion of general personal jurisdiction, which is unwarranted in light of Supreme Court precedent, the precedent of our sister circuits, and our own precedents. Moreover, today's decision presents a gratuitous threat to our nation's economy, foreign relations, and international comity.").

[33] *See* Oral Argument, *supra* note 6, at 29–30 ("[S]uppose I think that this was crying out for an en banc" in light of *Goodyear*; "that's what [the circuit is] there for, to consider such a matter en banc.").

[34] *Daimler AG*, 134 S. Ct. at 751 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

[35] *Id.* at 760. The Court reiterated that a corporation's "home" is its state of incorporation or principal place of business, although in a footnote the Court

In reaching its conclusion about general jurisdiction, the Court had to address jurisdictional attribution within corporate groups. It addressed the "agency" theory that was the grounds for attributing the subsidiary's contacts to DaimlerChrysler AG. It did so briefly—in three paragraphs—and somewhat noncommittally. Ultimately, however, it held that it did not have to "pass judgment on invocation of an agency theory in the context of general jurisdiction" because the appeals court's analysis that focused on the subsidiary's importance could not "be sustained."[36] The appeals court had found the subsidiary sufficiently "important" in the sense that the parent would adopt other means to do the same thing if that subsidiary were unavailable. The Supreme Court indicated that this test would "always yield a pro-jurisdiction answer."[37] The application would "appear[] to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate," which the Court considered much too sprawling.[38]

Daimler AG v. Bauman accordingly has four main consequences for the law about attribution of contacts among members of corporate groups. First, it takes off the table the possibility of general jurisdiction ("all-purpose" jurisdiction) over a parent corporation that is neither organized in the forum state nor has its principal place of business there, regardless of the contacts or consent-to-jurisdiction of the subsidiary. It held that, even assuming that the contacts of MBUSA could have been attributed to the parent, general jurisdiction was lacking: "Daimler's slim contacts with the State hardly render it at home there."[39]

Second, the Court rejected a version of attribution that relied on substitution—the idea that the parent would have substituted itself or some other means if the subsidiary had not undertaken the particular role in state. Third, the Court rejected any version of attribution that would bring in all or nearly all parent companies that have in-state subsidiaries. The Court thus left in place a point of basic agreement among

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preserved the possibility that "in an exceptional case" a "corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19.

[36] *Id.* at 759 ("[W]e need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.").

[37] *Id.*

[38] *Id.* at 759–60 ("The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were 'important' to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: 'Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist.'" (quoting *Bauman*, 676 F.3d at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc))).

[39] *Id.* at 760.

courts: that an in-state subsidiary does not automatically or necessarily result in personal jurisdiction over the parent.[40] Fourth and finally, the Court in *Daimler AG v. Bauman* specifically preserved the possibility that jurisdiction may be based on the acts of an agent for the purposes of specific jurisdiction.[41] As the Court said, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there."[42]

II. AGAINST IMPORTING CORPORATE LAW

Daimler AG v. Bauman has limited the options available to courts and litigants in some ways, curtailing the availability of general (rather than specific) jurisdiction over a nonresident parent and rejecting outright a notion of jurisdictional agency based on substitution or "importance" of the subsidiary's role. It has left open, however, other sources of jurisdiction over corporate parents and leaves wide open the basic normative question of when such jurisdiction is fair. Whether and when corporate law should be the source of these jurisdictional limits is the subject of this Part.

A. *Existing Caselaw Does Not Mandate the Use of Corporate Law*

The starting place for any discussion of the role of corporate law in imputing a subsidiary's contacts to establish personal jurisdiction is the Supreme Court's 1925 decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[43] There, plaintiffs brought a breach-of-contract claim in North Carolina against an out-of-state corporation. The only contacts between the out-of-state defendant and the forum state were through the North Carolina office of a wholly owned subsidiary.[44] The defendant moved to dismiss for lack of personal jurisdiction, and the Court concluded that an out-of-state parent was not "doing business" in the forum state based only

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[40] Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 706 n.* (1988) ("[A]ctivities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984) (personal jurisdiction over a parent does not "automatically establish jurisdiction over a wholly owned subsidiary"). *See generally* BLUMBERG ET AL., *supra* note 3, § 23.03 n.24.

[41] *Daimler AG*, 134 S. Ct. at 759 (suggesting that a subsidiary might "be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere," alluding to the possibility that an agency basis of jurisdiction might be viable in the context of specific rather than general jurisdiction); *see also* Brief for Petitioner at 24, *Daimler AG*, 134 S. Ct. 746 (No. 11-965) (acknowledging that "an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction").

[42] *Daimler AG*, 134 S. Ct. at 759 n.13.

[43] 267 U.S. 333 (1925).

[44] *Id.* at 334. The subsidiary itself was not organized in North Carolina. It was an Alabama corporation that was in charge of marketing the products within North Carolina and that had an office in that state. *Id.* at 334–35.

on the activity of its local subsidiary.[45] It rejected the argument that "corporate separation carefully maintained must be ignored in determining the existence of jurisdiction" even when a parent controlled the subsidiary.[46]

The *Cannon* precedent raises as many questions as it answers. For one, the opinion focuses on statutory language and expressly disclaims any constitutional holding, noting that "[n]o question of the constitutional powers of the State, or of the federal Government, is directly presented."[47] *Cannon* preserves the possibility of having a statute that would allow such attribution, further supporting the point that the holding is not about the constitutional limits.[48] Commentators have challenged both its reach and its continuing vitality, given the intervening standards articulated in *International Shoe*.[49] Professor Lonny Hoffman has also provided a persuasive historical account of *Cannon* that undermines any claims that *Cannon* dictates deference to the formal boundaries between corporations in all jurisdictional contexts.[50] In defense of *Cannon*, others have questioned the extent to which *Cannon* has been overtaken, conducting an empirical study that identified many instances in which courts relied on *Cannon* to justify deferring to the boundaries between separately organized corporations within a conglomerate.[51]

Some of *Cannon*'s language supports the argument that standards developed in the liability context should not be imported into the jurisdictional one. The *Cannon* Court noted that because "[t]here is . . . no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant," the "cases concerning substantive rights . . . have no application."[52]

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[45] *Id.* at 334.

[46] *Id.* at 336–35 ("Through ownership of the entire capital stock and otherwise, the defendant [out-of-state parent] dominates the [in-state] corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other States.").

[47] *Id.* at 336; BLUMBERG ET AL., *supra* note 3, § 23.05.

[48] 267 U.S. at 336.

[49] BLUMBERG ET AL., *supra* note 3, § 23.05. (noting that *Cannon* "no longer provides the constitutional definitive answer—if indeed it ever did" because "[i]t has been significantly undermined by the revolution in jurisdiction law" created by *International Shoe*, "the near-universal enactment of state long-arm statutes, and the emergence of modern doctrines of attribution of amenability to jurisdiction"); *see* Brilmayer & Paisley, *supra* note 11, at 14.

[50] Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1102 (2004).

[51] John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. REV. 445 (2004).

[52] 267 U.S. at 337.

Adoption of corporate law standards is also not mandated by more recent Supreme Court cases. No Supreme Court opinion since *Cannon* has squarely decided the appropriate scope of attribution or the source of applicable law. In *Rush v. Savchuk*, the Supreme Court specified that "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction," although it also noted that "[n]aturally, the parties' relationships with each other may be significant in evaluating their ties to the forum."[53] Elsewhere, the Court has held that personal jurisdiction over a parent does not "automatically" result in jurisdiction over a wholly owned subsidiary.[54] Nor are a subsidiary's in-state activities "*necessarily enough* to render a parent subject to a court's jurisdiction."[55]

The U.S. Supreme Court's 2011 opinion in *Goodyear* similarly did not rule out jurisdiction over subsidiaries based on the contacts of the corporate parent on a theory that they formed a "single enterprise" or by "piercing the corporate veil."[56] The parties raised the argument that personal jurisdiction should be based on the theory that the corporate parent and subsidiaries formed a single enterprise.[57] The Court simply noted that this argument was raised too late in the proceedings to be considered.[58] In doing so, it observed that "merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil.'"[59] Notably, the Court described the inquiries as "comparable," rather than mandating the use of state-law standards.

Only six Supreme Court decisions have cited *Cannon* at all,[60] and three of those opinions predated *International Shoe* and the establishment of the modern "minimum contacts" standard. In its 1988 opinion in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Court cited *Cannon* in the context of service of process, using it as support for the assertion that "the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise."[61] In its 1934 opinion in *New Colonial Ice Co. v. Helvering*, the Court cited it

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[53] 444 U.S. 320, 332 (1980).

[54] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984).

[55] Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 n.* (1988) (emphasis added). *See* BLUMBERG ET AL, *supra* note 3, § 23.02 n.24 (highlighting this language as an example of the Court's comments on jurisdiction in the context of corporate groups).

[56] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011).

[57] *Id.*

[58] *Id.*

[59] *Id.* (quoting Brilmayer & Paisley, *supra* note 11, at 14, 29–30.)

[60] *See* Volkswagenwerk, 486 U.S. at 705 n.*; Nat'l Carbide Corp. v. Comm'r, 336 U.S. 422, 438 n.21 (1949); New Colonial Ice Co., v. Helvering, 292 U.S. 435, 442 n.8 (1934); Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 419 (1932).

[61] 486 U.S. at 705 n.*.

in support of the "general rule" that "a corporation and its stockholders are deemed separate entities," although it also noted that "[o]f course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights."[62] Other cases cited *Cannon* without discussion in disputes about service of process, sometimes in the tax context.[63]

Daimler AG v. Bauman did not clear up questions about *Cannon*'s validity and force. The Supreme Court did not cite *Cannon* at all in either the majority opinion or in Justice Sotomayor's concurrence in the judgment, despite discussion of *Cannon* in the parties' briefs[64] and in amicus briefs.[65] The Court acknowledged that it had not previously addressed the question of "whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary."[66] As discussed further below, however, that left open many issues—including that raised in *Cannon* itself—of specific jurisdiction based on a subsidiary's contacts. The limits to what corporate law tells us about those open issues is the subject of the next Parts.

B. *Corporate "Veil Piercing" Is Unsystematic and Unhelpful*

Courts have evoked corporate law doctrines to determine whether two separately organized business entities are so intertwined that they can be treated as a single entity for jurisdictional purposes. Corporate law addresses this situation in the context of substantive liability through veil piercing and enterprise liability.[67] The easy case for overriding formal corporate boundaries to reach the shareholder(s) is when the corporate formalities are simply ignored. In one widely read case, the shareholder

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[62] 292 U.S. at 442.

[63] *See Nat'l Carbide*, 336 U.S. at 438 n.21, 439 (citing *Cannon* in the tax context in support of the assertion that "[a]s principal it would have been subject to service of process through its agents; as owner of the subsidiary it was not"); United States v. Scophony Corp. of Am., 333 U.S. 795, 812–13 (1948).

[64] *See, e.g.*, Brief for Petitioner at 11, 19–20, Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (No. 11-965) (citing *Cannon* in support of the proposition that "[t]his Court has long respected corporate separateness in the context of personal jurisdiction"); Brief for the Respondents at 28–29, *Daimler AG*, 134 S. Ct. 746 (No. 11-965); Reply Brief for Petitioner at 12 n.1, *Daimler AG*, 134 S. Ct. 746 (No. 11-965).

[65] *See, e.g.*, Brief for Professor Lea Brilmayer, *supra* note 9, at 12.

[66] *Daimler AG*, 134 S. Ct. at 759.

[67] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011) ("merging parent and subsidiary for jurisdictional purposes requires an inquiry 'comparable to the corporate law question of piercing the corporate veil'") (quoting Brilmayer & Paisley, *supra* note 11, at 14, 29–30). Because veil piercing overrides the norm that the corporate form provides shareholders with limited liability, it has given rise to hundreds of articles and commentaries. Christina Boyd & David Hoffman, *Disputing Limited Liability*, 104 NW.U. L. REV. 853, 854 n.10 (2010) (noting that a search for references to veil piercing in law journals identified more than 5400 results).

had used corporate accounts to pay a long list of personal expenses, including "alimony and child support payments to his ex-wife, education expenses for his children, maintenance of his personal automobiles, [and] health care for his pet."[68] As the court observed, the shareholder "did not even have a personal bank account! (With 'corporate' accounts like these, who needs one?)."[69]

Importing this law into questions about the reach of courts has practical problems, however. The first is the obvious point to anyone who has dealt with the substantive version of piercing the corporate veil: the area of the law is notoriously unsystematic.[70] Veil piercing has inspired much invective from judges and commentators. It has been compared to a "lightning strike" and called "the scourge of corporate law."[71] Inspiring this invective is the lack of a coherent theory to guide courts and a disconnect between the practice of courts and the legal theories, which would predict, for instance, that courts would be more willing to pierce the corporate veil in favor of a tort creditor than a contract creditor.[72]

Beyond this inherent unpredictability, courts vary in the choice-of-law rule they apply as well as the substantive legal standard, making it very difficult to predict ex ante what legal rule applies. A comprehensive treatise on substantive veil piercing spends more than a thousand pages on the various state and federal standards.[73] Choice-of-law rules further complicate the question of which legal standard applies. In particular,

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[68] Sea-Land Serv., Inc. v. Pepper Source, 941 F.2d 519, 521 (7th Cir. 1991); *see also* Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569–70 (7th Cir. 1985) ("[A] corporate entity will be disregarded and the veil of limited liability pierced when two requirements are met: First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." (internal quotation marks omitted).

[69] *Sea-Land Serv. Inc.*, 941 F.2d at 521.

[70] *See* Hoffman, *supra* note 50, at 1075–84 (making the "pragmatic" and "normative" arguments against importing veil piercing).

[71] Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."); Oh, *supra* note 13, at 81, 85; Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926) (opinion by Cardozo, J.) (doctrine is caught "in the mists of metaphor"); BLUMBERG, THE LAW OF CORPORATE GROUPS, *supra* note 3, at 8 (calling piercing the corporate veil "jurisprudence by metaphor or epithet").

[72] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1058 (1991) (finding that courts pierced the veil in a higher percentage (41.98%) of contract claims than tort claims (30.97%)). *But see* Oh, *supra* note 13, at 144 (finding that this discrepancy may be explained once fraud is treated as a separate variable).

[73] *See generally* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL (2014); *see also In re* Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1447, 1449 (N.D. Ala. 1995) (applying the veil piercing laws of 90 of 94 existing judicial districts in an MDL).

states vary in whether they treat questions of piercing the corporate veil as an "internal affair," which would be governed by the law of the state of incorporation (often Delaware), or not, in which case it would be governed by another state's laws, often the law of the state where litigation was filed.[74] Delaware, for example, applies "the law of the entity in determining whether the entity's separate existence is to be disregarded" for personal jurisdiction.[75] In other instances, courts use the law of the state in which the issue is being litigated. For instance, a court in Ohio imported the Ohio formulation of the standard for piercing the corporate veil to reach a company organized in Japan based on the contacts of its subsidiary, which was organized in California.[76]

This variation among state choice-of-law rules, applicable substantive standard, and accompanying procedural rules makes the outcome and even the legal standard unpredictable if courts simply import substantive veil piercing into the jurisdictional context. It thus reduces predictability, an interest particularly acute in the context of courts' reach. As the Supreme Court has repeatedly said:

> By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[77]

C. *Jurisdictional and Substantive Veil Piercing Create Different Incentives*

A second objection to simply importing corporate law is that the consequences of permitting courts to reach the parent corporation would be different for jurisdictional rather than liability purposes. One argument against broad veil piercing to impose liability is that it would

[74] *In re Silicone Gel Breast Implants*, 887 F. Supp. at 1449 ("Many states would call for this court, when addressing 'alter ego' and other 'veil piercing' issues, to apply the law of Delaware, where Bristol and MEC are incorporated. But, under choice-of-law rules in other jurisdictions, this court may be obliged to apply the laws of many different states. Because of variations in applicable state law, summary judgment could be proper in some cases while not warranted in others."); Oh, *supra* note 13, at 113–14 (noting that some but not all states apply the law of the state of incorporation, and suggesting that these differences make veil-piercing claims "susceptible to some forum shopping").

[75] EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V., No. 3184-VCP, 2008 WL 4057745, at *73 (Del. Ch. Sept. 2, 2008) (quoting HMG/Courtland Props., Inc. v. Gray, 729 A.2d 300, 309 (Del. Ch. 1999)).

[76] Estate of Thomson *ex rel.* Estate of Rakestraw v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 362–63 (6th Cir. 2008) (looking to Ohio law about veil piercing in the liability context as the basis for determining personal jurisdiction on an alter-ego theory).

[77] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citation and internal quotation marks omitted); *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).

push corporations to contract for services with free-standing companies rather than to conduct business through companies related by share ownership. They might spin off the riskiest parts of the business.[78] It is not clear that organizing in that way would benefit anyone, including the tort creditors who might be seen as the potential beneficiaries of liberal veil piercing.

In contrast, jurisdictional rules do not create the same incentive to spin off companies because setting up a contractual relationship rather than equity ownership would not necessarily avoid jurisdiction. The U.S. Supreme Court, for instance, held that a long-term contractual relationship between franchisor and franchisee justified personal jurisdiction. In *Burger King Corp. v. Rudzewicz*, the Court stopped short of holding that a contract alone "constitute[s] a 'contact' for purposes of due process analysis."[79] It did, however, hold that the long-term relationship established by a franchise agreement satisfied constitutional due process requirements.[80] The fact that the relationship was established through contract rather than through equity ownership did not avoid jurisdiction.

D. Line-Drawing in Corporate Groups Has Multiple Sources

The third objection is that multiple sources exist for line-drawing within corporate groups. In other words, the segment of the group that matters for any one issue depends on the legal area and background law, undermining the choice of corporate law as the primary source for determining which parts of the corporate group are relevant for jurisdiction.

Picture a corporate group as a network of separately organized corporations or other business entities. They could be related by equity ownership or by contract, depending on how broadly "corporate group" is defined. Each of the legal entities is a node in a network of relation-

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[78] *See, e.g.*, WILLIAM A. KLEIN, JOHN C. COFFEE, JR. & FRANK PARTNOY, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES, 148–50 (11th ed. 2010) (noting the incentives that liberal veil piercing would create); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1931 (1991) ("[A]bolishing limited liability simply for wholly-owned subsidiaries would create an incentive for a parent corporation to distribute to other shareholders . . . [a] subsidiary's stock in order to be able to invoke limited liability.").

[79] 471 U.S. at 478.

[80] In *Burger King*, a Florida franchisor sued a Michigan-based franchisee in Florida federal court alleging breach of the franchise agreement. Despite the complete lack of physical ties between the Michigan franchisee and the state of Florida, the Court concluded that the voluntary negotiation and acceptance of a franchise agreement with a franchisor headquartered in Florida, and anticipation of a long-term relationship of "exacting regulation of [the franchisee's] business from Burger King's Miami headquarters" satisfied the due process requirement that "defendant purposefully established minimum contacts within the forum." *Id.* at 479–80.

ships, and courts and legislatures draw boundaries around different sets of them for any given question.

At the extremes, someone who advocates for complete corporate separateness would draw a separate circle around each node. A proponent of enterprise theory in its strongest form would circle the whole group related through equity ownership (and perhaps even some contractual relationships).[81] The problem is figuring out the source of the boundary determination. For each legal issue, what part of that network is relevant? Is it the individual, separately incorporated company? Is it the whole group that is related by equity ownership? Is it the corporate group as disclosed in Securities and Exchange Commission filings?

When is a corporate parent responsible for the acts of a subsidiary for liability purposes? The answer is "it depends." One of the things on which it depends is the substantive law at issue.[82] An example helps illustrate this point. Tax looks to whether a corporate group is a "unitary business" to apportion state income taxation.[83] It looks to the "underlying economic realities of a unitary business," rather than whether a business is composed of separately organized subsidiaries and affiliates.[84]

Similarly, courts have sometimes looked at the statute to be enforced when deciding whether to reach the shareholder for substantive liability purposes. A New Jersey court imposed liability on a corporate parent for efforts to clean up mercury.[85] It looked to the state statute governing toxic spills to "conclude that the Legislature intended that the privilege of incorporation should not, under the circumstances that obtain here, become a device for avoiding statutory responsibility."[86]

These forms of imposing liability beyond the single legal entity undermine the strongest version of corporate separateness that would treat legal separation as inviolate and universal. Given this variation in the sources of line drawing for substantive claims, why should the corporate veil piercing standard applied to tort and contract claims apply to jurisdiction even when the dispute is about an entirely different legal claim?

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[81] BLUMBERG, THE LAW OF CORPORATE GROUPS, *supra* note 3, at 24 (indicating that under "enterprise theory" a court would have jurisdiction over the whole enterprise when one part is within the territory).

[82] *See, e.g.*, *id.* at 24–25; Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 304–20 (1996) (surveying legal areas that have developed statutory standards for "control" within the enterprise group).

[83] Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 223 (1980).

[84] Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 440–41 (1980) (assessing whether income was from "a functionally integrated enterprise" rather than deferring to "the form of investment" to determine apportionability).

[85] State Dep't of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 165–66 (N.J. 1983).

[86] *Id.* at 165 ("A contrary result would permit corporations, merely by creating wholly-owned subsidiaries, to pollute for profit under circumstances when the Legislature intended liability to be imposed."); *see also* Anderson v. Abbott, 321 U.S. 349, 363, 368–69 (1944) (holding bank shareholders liable, focusing on "realities not forms").

This variation in line-drawing within the corporate group has consequences for those who view substantive liability and personal jurisdiction as inevitably linked, so that a corporate parent should not be brought to court for something for which it could not be held substantively liable.[87] The variation also has consequences if the driving concern is with the due process question of when "maintenance of the suit does not offend traditional notions of fair play and substantial justice."[88] One way to assess fairness is to look at expectations and predictability. A parent company could not reasonably expect that corporate boundaries are always inviolate, barring such identity of parent and subsidiary that they are essentially one entity. Instead, the reasonable expectation would be that where the line is drawn depends on the function of that line and the background law.

E. Corporate Law Does Not Address Attribution

Even if corporate law were used to figure out when two entities are so interrelated that they are essentially the same, it would not answer the question of when one entity controls another to such a great extent that it is fair to bring that defendant to court.

In the conglomerate or corporate group context, there is often no debate that the various entities respected formal boundaries by keeping separate accounts and formal separation. That certainly was the case in *Daimler AG v. Bauman*, where all parties conceded that the parent and subsidiary respected the corporate formalities.[89] The difficult case is when corporations rather than individuals are involved, and when the basic corporate formalities are respected. The question is when it is fair to "count" one entity's contacts as the contacts of the other when separately organized business entities maintain their formal separation.

The corporate law response to this question is quite limited. It permits the separate organization of subsidiaries; permits the ownership of shares by other corporations; and provides for liability of controlling shareholders in limited circumstances.[90] Some courts have also folded an assessment of control into the veil-piercing standard, particularly in the

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[87] Brief for Professor Lea Brilmayer, *supra* note 9, at 7. ("Decoupling 'jurisdictional' contacts from 'responsibility' contacts ultimately generates incoherence. After all, it is the substantive law that creates the justification for imposing a burden on an individual in the first place; until the state adopts a substantive law that distributes responsibility, no plaintiff has any basis for recovery *against anyone*. What makes vicarious responsibility possible at all is the very web of substantive legal rules that prescribe the attribution of responsibility discussed above.").

[88] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

[89] Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2005 WL 3157472, at *11 (N.D. Cal. 2005) ("Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of DCAG.").

[90] Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

context of corporate parents and subsidiaries rather than individual shareholders.[91]

But generally courts must look beyond corporate law to determine attribution. Agency law is a likely candidate as it deals with precisely the kind of issue raised in jurisdictional attribution, albeit in the context of substantive liability. It is driven by the question of when one entity's acts bind another, so even if it is not imported as a constraint on jurisdiction, courts might well draw on it as a source of comparable analyses of control. Indeed, the Court in *Daimler AG v. Bauman* expressly preserved a role for agency law in specific jurisdiction.[92] The role of agents in establishing jurisdictional contacts for corporations goes back to *International Shoe*, the case that established the modern standard for personal jurisdiction. There the Court acknowledged that "[s]ince the corporate personality is a fiction, . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[93] It went on to say that the key question was whether courts will deem "those activities of the corporation's agent within the state . . . to be sufficient to satisfy the demands of due process."[94]

CONCLUSION

Daimler AG v. Bauman defined the outer limits of jurisdiction over parent companies based on a subsidiary's contacts. It curtailed general jurisdiction and rebuked the Ninth Circuit for its expansive definition of "agency" jurisdiction, which would reach most parents and subsidiaries. Otherwise, however, it leaves courts to muddle through such questions as: When is vicarious jurisdiction over a corporate parent fair? If it is fair when there is control, how much control is enough? Corporate law does

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[91] PHC–Minden, L.P. v. Kimberly–Clark Corp., 235 S.W.3d 163, 175 (Tex. 2007) (stating that to pierce the corporate veil for jurisdictional purposes, "the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary" and "the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship" (quoting BMC Software Belg. v. Marchand, 83 S.W.3d 789, 799 (Tex. 2002))); *see also In re* Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1447, 1452 (N.D. Ala. 1995) (noting—in the context of substantive veil piercing—that although veil piercing standards varied, "all jurisdictions require a showing of substantial domination"); William J. Rands, *Domination of a Subsidiary by a Parent*, 32 IND. L. REV. 421, 443 (1999) (examining veil piercing of a subsidiary to make its parent corporation liable for the subsidiary's obligations and suggesting that control is an important part of the analysis).

[92] 134 S. Ct. 746, 759 n.13 (2014).

[93] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[94] *Id.* at 317. Engaging with agency law in the context of personal jurisdiction is also unavoidable because state long-arm statutes sometimes explicitly provide for jurisdiction when certain acts are performed directly by the defendant or through an agent. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-209 (West 2014).

not provide a full answer. This Article makes the case for looking beyond corporate law to areas that are a better fit for determining one of the main open questions—how much control would make it fair to bring a particular corporate defendant to court?

The last point is simply to think about what problem imputing contacts within a corporate group is trying to solve. Particularly as multinationals and other corporate groups take on force, the worry may be with jurisdictional gaps: some actors and actions may not be reached by any court. As Judge Posner suggested, the "broader principle" involved in jurisdictional attribution is "that a corporation should not be able to insulate itself from the jurisdiction of the states in which it does business by the simple expedient of separately incorporating its sales force and other operations in each state."[95] Courts are left with the difficult task of balancing the benefits of respecting corporate separateness—predictability and risk management—with accountability for corporate actions even when they are not directly undertaken and even when they are made in the context of a complicated network of related but separately organized entities.

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[95] IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 541 (7th Cir. 1998) (Posner, C.J.).