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**A Call for Clarity Resulting from Daimler Ag v. Bauman:
Jurisdictional Veil Piercing in the Context of Parent and Subsidiary
Corporations and the Irrelevance of Fraud or Injustice**

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A CALL FOR CLARITY RESULTING FROM *DAIMLER AG V. BAUMAN*:
JURISDICTIONAL VEIL PIERCING IN THE CONTEXT OF PARENT AND
SUBSIDIARY CORPORATIONS AND THE IRRELEVANCE OF FRAUD OR
INJUSTICE

I. INTRODUCTION

In the years since *International Shoe v. Washington*,¹ the tenets of general personal jurisdiction have become somewhat mythical and surprisingly difficult to comprehend.² Likewise, although some consider it one of the most litigated concepts in corporate law,³ courts are hesitant to allow a plaintiff to pierce the corporate veil⁴ to obtain jurisdiction over a parent company.⁵ In January 2014, the Supreme Court of the United States squarely confronted both of these concepts in *Daimler AG v. Bauman*.⁶ In holding that Daimler was not subject to general jurisdiction in California, the Court rested its reasoning on a number of assumptions.⁷ Courts should retain these assumptions as part of their future jurisdictional veil-piercing analyses.

Daimler's impact is two-fold. First, corporations are no longer likely to be subject to general jurisdiction in fora other than their state(s) of incorporation and principle place of business.⁸ Formerly, the post-*Goodyear*⁹ consensus was that corporations would be subject to general jurisdiction in any

1. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

2. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628, 630 (1988).

3. 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, 446 (2004).

4. Though corporations are generally not liable for the actions or debts of their subsidiaries, “[p]iercing the corporate veil” refers to the judicially imposed exception to this principle by which courts disregard the separateness of the corporation and hold a shareholder responsible for the corporation’s action as if it were the shareholder’s own.” Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991). Throughout this note, the term “traditional veil piercing” is used to refer to the situation in which this vicarious liability is asserted.

5. Swain & Aguilar, *supra* note 3. In contrast with traditional veil piercing, this note uses the term “jurisdictional veil piercing” to refer to the assertion that a corporate entity is subject to jurisdiction in a forum based on the contacts of an affiliated entity.

6. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

7. *Id.* at 760.

8. See Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 197 (2014) (stating “that general jurisdiction is only available over a corporate defendant in the place of its incorporation, the place of its principal place of business, or, ‘in an exceptional case,’ in another forum where it is ‘essentially at home’”).

9. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

forum in which that corporation was “essentially at home.”¹⁰ Although the Court used the exact same language in both *Daimler* and *Goodyear*, the *Daimler* opinion stressed how unlikely it is for a corporation to have sufficient contacts to qualify for general jurisdiction in a location other than its state(s) of incorporation and principle place of business by noting that such an instance would require an “exceptional case.”¹¹ Perhaps more importantly, the Court also noted that “[g]eneral jurisdiction . . . calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.”¹² As Justice Sotomayor was quick to mention in her concurrence, this “proportionality approach” to analyzing an entity’s contacts instills a novel and somewhat unpredictable twist in jurisdictional precedent.¹³

Daimler’s second major impact, and the primary focus of this note, occurs in the process of piercing the corporate veil for the purpose of obtaining jurisdiction over a parent corporation. The Court prefaced its reasoning with the assumption that the California contacts of Mercedes-Benz USA, LLC (MBUSA), Daimler’s wholly-owned subsidiary, could be attributed to Daimler for the purpose of assessing general jurisdiction over Daimler in California.¹⁴ By making this assumption, the Court was able to decide the case on jurisdictional grounds¹⁵ and avoid dealing with an issue that has troubled courts for years—jurisdictional veil piercing. In so doing, the form of the Court’s reasoning provides a new framework for the analysis of this troubling issue that, if followed by lower courts, will significantly clarify the law and introduce some consistency into an otherwise unpredictable doctrine.

This note first presents the necessary background pertaining to the evolution of corporate entities and limited liability¹⁶ before briefly considering the origins and progression of personal jurisdiction.¹⁷ The discussion then

10. *Id.* at 2851. See also Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 551 (2012) (suggesting corporations may be subject to general jurisdiction in “places where they engage in such substantial, continuous, and systematic activity that those places are comparable to principal places of business”).

11. *Daimler AG*, 134 S. Ct. at 761 n.19.

12. *Id.* at 762 n.20.

13. *Id.* at 770–71 (Sotomayor, J., concurring) (“If anything, the majority’s approach injects an additional layer of uncertainty because a corporate defendant must now try to foretell a court’s analysis as to both the sufficiency of its contacts with the forum State itself, as well as the relative sufficiency of those contacts in light of the company’s operations elsewhere. Moreover, the majority does not even try to explain just how extensive the company’s in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.”).

14. *Id.* at 760 (majority opinion).

15. *Id.*

16. See *infra* Part II.A.

17. See *infra* Part II.B.

turns to an analysis of the different theories of veil piercing used by courts in the past.¹⁸ Next, this note examines the rampant confusion surrounding veil-piercing doctrine and proposes three things: first, the confusion is more form than substance;¹⁹ second, lower courts should follow the *Daimler* Court's lead and invert the traditional steps performed in the jurisdictional veil-piercing analyses;²⁰ and third, there is simply no justification for a finding of fraud or injustice when analyzing a parent corporation's contacts with a forum.²¹

II. BACKGROUND

The original corporate model consisted merely of the corporate entity and its shareholders.²² Indeed, until 1890, private corporations in the United States could not purchase stock or acquire any ownership interests in other corporations.²³ At this time in the nation's history, simple tests to assess jurisdiction and corporate identity were sufficient given the basic nature of the corporate structure.²⁴ Over time, however, as the corporate model has become increasingly dynamic and complex,²⁵ the tests by which courts determine whether the corporate form should be disregarded have also become more complicated.²⁶ This section first provides basic definitions of limited liability and personal jurisdiction, respectively. It then proceeds with a discussion of jurisdictional veil piercing before ending with the evolution of traditional veil piercing.

A. Definitions of Limited Liability and Piercing the Corporate Veil

Legal scholars have touted limited liability as “the greatest single discovery of modern times,”²⁷ but, as this statement indicates, limited liability

18. *See infra* Part II.C.

19. *See infra* Part III.A.1.

20. *See infra* Part III.A.2.

21. *See infra* Part III.A.3.

22. Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 606 (2005).

23. In 1890, New Jersey passed the first legislation allowing corporations to purchase stock in other corporations. *Id.* To some, this earned New Jersey the nickname of the “Traitor State.” *See* Lincoln Steffens, *New Jersey: A Traitor State, Part II—How She Sold Out the United States*, 25 MCCLURE'S MAG. 41, 41 (1905).

24. *See* Blumberg, *supra* note 22, at 608.

25. *Id.* at 607.

26. *Id.* at 608; *see, e.g.*, *Pro Tanks Leasing v. Midwest Propane & Refined Fuels, LLC*, 988 F. Supp. 2d 772, 783–84 (W.D. Ky. 2013) (listing twenty-two factors to be considered to determine the relationship between a parent corporation and its subsidiary).

27. NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT? STUDIES IN PRACTICAL POLITICS 82 (1912).

has not always been the rule.²⁸ In its most basic form, “[t]he rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest.”²⁹ Another basic proposition that flows logically from the first is the rule that a corporation and its investors are treated as distinct from one another.³⁰ Little by little, limited liability replaced “ancient doctrines of personal responsibility,”³¹ which, at one time, permeated the corporate landscape.³²

The current permutation of limited liability has been commonplace in the United States for roughly the past 175 years.³³ After the Industrial Revolution, at a time when growing businesses were in need of increased capital beyond the liquidity of their current investors, limited liability was seen as a way of generating investment from third-parties while simultaneously shielding these external parties from liability in excess of their contributions.³⁴ More recently, the principles of limited liability—once exclusively granted to corporations—have been extended to other types of business entities such as limited partnerships, limited liability companies, and limited liability partnerships.³⁵ Likewise, parent corporations with subsidiary com-

28. Prior to the widespread acceptance of limited liability, corporate shareholders could be held responsible for some outstanding obligations of the corporation in limited circumstances through “creditors’ bills” and other statutory creations. *See generally* Edwin H. Abbot, Jr., *Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation*, 23 HARV. L. REV. 37 (1909) (describing the then-existing processes through which shareholders could be made to shoulder corporate debts).

29. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985); *see also* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1309 (2007) (“[L]imited liability protects a corporation’s shareholders from personal responsibility for corporate obligations.”). Limited liability arose to foster feelings of security among corporate investors, thereby encouraging economic growth and increasing the flow of economic capital. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 604 (1986). Some commentators even argue that without limited liability, liquid securities markets would not be possible. Easterbrook & Fischel, *supra*, at 92.

30. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003) (“A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.”); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities.”).

31. Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 875 (2000).

32. Blumberg, *supra* note 22, at 603. Prior to the use of creditors’ bills, a creditor could simply file suit against a corporate shareholder personally in an attempt to satisfy an outstanding debt held by the corporation. *Id.*

33. *Id.* at 604 (“For more than 150 years in the United States and Continental Europe, and for more than 100 years in England, limited liability for shareholders has been the firmly established legal principal underlying corporation law.”).

34. John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 7 (1996).

35. Millon, *supra* note 29, at 1309.

panies also enjoy limited liability, and the parent and subsidiary are viewed as distinct legal entities.³⁶

However, this liability, or risk, does not simply vanish; instead, the risk is shifted away from the investors and onto others.³⁷ Although this is a favorable shift for the very reasons that led to the establishment of limited liability in the first place, a “creditor has little practical recourse against an insolvent corporation.”³⁸ Thus, the doctrine of piercing the corporate veil arose in equity to allow creditors of a corporation to disregard corporate formalities in certain situations.³⁹

B. Personal Jurisdiction

Personal jurisdiction is the power of a court to issue a binding judgment on a defendant.⁴⁰ The origins of this doctrine rest in *Pennoyer v. Neff*,⁴¹ in which the Court decided that one must be physically present or own property within a jurisdiction to be subject to a court’s jurisdiction therein.⁴² Given the explosion of interstate commerce and travel, it is not surprising that physical presence is no longer necessary, in many situations, to be subject to personal jurisdiction.⁴³ However, courts must still comply with

36. See 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 26 (perm. ed., rev. vol. 2014).

37. See Easterbrook & Fischel, *supra* note 29, at 91 (“Limited liability does not eliminate the risk of business failure but rather shifts some of the risk to creditors.”); Robert B. Thompson, *Agency Law and Asset Partitioning*, 71 U. CIN. L. REV. 1321, 1324 (2003). “Creditors” in this context refers both to those individuals or companies who voluntarily choose to engage in business with a certain corporate group and those who involuntarily are harmed by the actions of a corporation. Thompson, *supra*, at 1325. The former group—voluntary creditors—is generally seeking contractual remedies based on an underlying business transaction, whereas the latter—involuntary creditors—is more often comprised of tort claimants.

38. Matheson & Olson, *supra* note 34, at 8.

39. Millon, *supra* note 29, at 1310.

40. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 724 (1877).

41. *Id.*

42. *Id.* at 724. Service of process on the defendant within a forum sufficed to bring that defendant within the jurisdiction of a particular court for the purpose of an *in personam* judgment. *Id.* On the other hand, if a defendant was not served with process in the forum, but merely owned property there, the court could proceed *in rem* and bind the property owner in an amount not to exceed the value of the property. *Id.* As is evident, the hallmark of *Pennoyer* is physical presence—either of the defendant personally or the defendant’s property—within a forum.

43. *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of [*Pennoyer*] to the flexible standard of [*International Shoe*].”).

longstanding constitutional due process constraints when exercising jurisdiction.⁴⁴

The modern formulation of personal jurisdiction is a product of *International Shoe v. Washington*,⁴⁵ wherein the Court announced the axiomatic “minimum contacts” test.⁴⁶ This test, though perhaps a thorn in the side of many first-year law students,⁴⁷ is a surprisingly simple concept at its most basic level—to be subject to jurisdiction in a forum, a defendant must somehow act within that forum.⁴⁸ Framing the test in legal terms, the defendant over whom jurisdiction is sought must be within the reach of a state’s long-arm statute,⁴⁹ and the exercise of jurisdiction must comply with constitutional due process.⁵⁰ Like many areas of the law, however, the outer edges of this test have become increasingly confusing since its inception.⁵¹

C. The Intersection of Limited Liability and Personal Jurisdiction

Given the confusion surrounding the two above concepts, the nexus between them is infinitely more so.⁵² Consider the following illustration and hypotheticals to depict the issues in simple terms: Corporation *A*, incorporated in Germany, wholly owns Subsidiary *B*, incorporated in Delaware. If *B*’s sole purpose is to further *A*’s business in the United States, is *A* subject to personal jurisdiction in Delaware based on the fact that Delaware is *B*’s state of incorporation? If *A* manufactures widgets in Germany, and *B*’s only

44. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011).

45. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

46. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

47. Although none will likely choose *Pennoyer* over *International Shoe*.

48. See Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 618 (2014) (“At its heart, the law of personal jurisdiction is simple and elegant.”).

49. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 (1980).

50. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413–14 (1984).

51. Grossi, *supra* note 48, at 618 (“[D]espite this simple elegance, the United States Supreme Court has proven incapable of providing a coherent vision of the law of personal jurisdiction.”).

52. In 1992, one commentator noted that “[t]he current case law on the topic of jurisdiction over affiliated corporations is disjointed and inexplicit at best.” Daniel G. Brown, *Jurisdiction over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 601 (1992). Unfortunately, courts have done very little in the preceding years to clarify the issue. If anything, the problem may have become even more exacerbated by failed attempts to promote equitable outcomes; this failure has prompted some to advocate a complete abrogation of veil piercing. See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 481 (2001).

task is to distribute *A*'s widgets to the United States market, which company is liable in tort for damages caused by the widgets? Finally, if both of the above factual situations are true, and *A* incorporated *B* in Delaware solely to shield itself from liability in the United States, does the answer to either question change? An examination of the following Supreme Court cases shows the manner in which the Court has attempted to answer these questions. First, this section considers the jurisdictional issue, and the liability issues follow.

1. *The Cannon Doctrine: The Origin of Jurisdictional Veil Piercing*

The Supreme Court of the United States's only direct examination of jurisdictional veil piercing came in *Cannon Manufacturing Co. v. Cudahy Packing Co.*⁵³ There, Cannon Manufacturing Company ("Cannon"), which was incorporated in North Carolina, brought a breach of contract action in North Carolina state court against Cudahy Packing Company ("Cudahy"), which was incorporated in Maine.⁵⁴ After successfully removing the action to the Federal Court for the Western District of North Carolina, Cudahy entered a special appearance to contest the court's exercise of personal jurisdiction over it.⁵⁵ Cudahy argued that there was insufficient service of process and it was not "doing business"⁵⁶ in North Carolina sufficient to support jurisdiction.⁵⁷ To initiate the suit, Cannon served process on Frank Ross, who was Cudahy Company of Alabama's ("Cudahy-Alabama") registered agent in that state.⁵⁸ The district court dismissed the action and Cannon appealed.⁵⁹

At issue on appeal was "whether, at the time of the service of process, defendant was doing business within the state in such a manner and to such an extent as to warrant the inference that it was present there."⁶⁰ In support of its argument that jurisdiction was proper, Cannon unsuccessfully attempt-

53. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

54. *Id.* at 334.

55. *Id.*

56. Then-Judge Cardozo's oft-cited remark from *Tauza v. Susquehanna Coal Co.* epitomized the basis of "doing business" jurisdiction which was controlling in the pre-*International Shoe* years where presence was a prerequisite for personal jurisdiction. See *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917) ("We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts.").

57. *Cannon*, 267 U.S. at 334.

58. *Id.*

59. *Id.*

60. *Id.* at 334-35.

ed to persuade the Court that the North Carolina actions of Cudahy-Alabama could, by virtue of its relationship with Cudahy, be imputed to the latter company sufficiently to show Cudahy's physical presence in North Carolina.⁶¹

Rejecting this argument, the Court noted that "[t]he corporate separation, though perhaps merely formal, was real."⁶² Cudahy-Alabama was simply the instrumentality through which Cudahy chose to distribute its products in North Carolina according to the Court.⁶³ Although, as its wholly owned subsidiary, Cudahy completely dominated and controlled Cudahy-Alabama both financially and commercially, and likely established the subsidiary "solely to secure . . . some advantage under the local laws," "[t]he existence of the Alabama company as a distinct corporate entity [was] . . . in all respects observed."⁶⁴ Thus, jurisdiction was improper because Cudahy had no physical presence in North Carolina.⁶⁵

Cannon's legacy is exemplified by the modern approaches to jurisdictional veil piercing.⁶⁶ For example, in 1993, the United States Court of Appeals for the Fourth Circuit, in *Mylan Laboratories, Inc. v. Akzo, N.V.*,⁶⁷ opined that Maryland "has adopted the so-called 'agency' test in deciding whether to pierce the veil separating parent corporations from their subsidiaries for jurisdictional purposes."⁶⁸ According to that court, this "agency" test is a direct descendent of *Cannon*, and the central inquiry is determining

61. *Id.* at 335.

62. *Id.* at 337. The Court also was careful to distinguish the case at bar from its earlier considerations of piercing the corporate veil to impose liability on a parent company. *See id.* ("There is here 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 Hence, cases concerning substantive rights . . . have no application.")

63. *Cannon*, 267 U.S. at 335.

64. *Id.*

65. *Id.* at 338. Although *Cannon's* "physical presence" requirement obviously pre-dates *International Shoe*, which casts some doubt on its jurisdictional underpinnings, the doctrine descending from it that adheres to "the proposition that, as long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in the forum state may not be considered in determining jurisdiction over the other," is arguably still sound. *See Swain & Aguilar, supra* note 3, at 455; *see also Pro Tanks Leasing v. Midwest Propane & Refined Fuels, LLC*, 988 F. Supp. 2d 772, 779 (W.D. Ky. 2013) (discussing the impact of modern minimum contacts on doing business jurisdiction).

66. For more discussion on these approaches, *see infra* Part III.A.1.

67. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56 (4th Cir. 1993).

68. *Id.* at 61. Although an exact count is difficult because many jurisdictions apply both the agency and alter-ego approaches, the agency test is performed in at least five other jurisdictions. *See, e.g., Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1273 (11th Cir. 2002); *Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir. 2001); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 541 (7th Cir. 1998); *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 466 (1st Cir. 1990).

how much control a parent corporation exerts over its subsidiary.⁶⁹ Likewise, the United States Court of Appeals for the Fifth Circuit, in *Hargrave v. Fibreboard Corp.*,⁷⁰ noted that the “alter-ego” approach is a product of *Cannon*.⁷¹ After concluding that the parent corporation had not exercised the requisite degree of control over its subsidiary to subject the parent to alter-ego jurisdiction, the court dismissed the parent from the suit, noting “[t]he Lone Star of Texas may shine brightly throughout the world, but its long arm is not judicially all encompassing.”⁷²

The Supreme Court of the United States addressed, albeit briefly, both of these tests in *Daimler*—a case that, in the concise words of Justice Ginsburg, “concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.”⁷³ There, a number of Argentinian residents brought suit against DaimlerChrysler Aktiengesellschaft (“Daimler”), the German manufacturer of Mercedes-Benz automobiles.⁷⁴ The plaintiffs filed their complaint in the United States District Court for the Northern District of California seeking to hold Daimler vicariously responsible for the acts⁷⁵ of Mercedes-Benz Argentina (“MB Argentina”), one of Daimler’s subsidiaries.⁷⁶

69. See *Mylan Labs., Inc.*, 2 F.3d at 61 (“Originally advanced by Justice Brandeis in *Cannon* . . . , this test allows a court to attribute the actions of a subsidiary corporation to the foreign parent corporation only if the parent exerts considerable control over the activities of the subsidiary.”). In making this determination, Maryland courts are guided by the following factors: whether the parent must approve significant decisions made by the subsidiary; whether the two companies keep separate books and/or records; whether the subsidiary has some purpose for its existence independent from serving the parent; and whether the parent had actual or constructive knowledge that its actions would have impact in Maryland. *Id.* at 61–62.

70. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983).

71. *Id.* at 1160. The Fifth Circuit is joined by at least six other jurisdictions in applying the alter-ego jurisdictional veil-piercing test. See *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003); *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001); *T & N v. Pa. Ins. Guar. Ass’n*, 44 F.3d 174, 182 (3d Cir. 1994); *I.A.M. Nat’l Pension Fund, Benefit Plan A v. Wakefield Indus., Div. of Capehart Corp.*, 699 F.2d 1254, 1259 (D.C. Cir. 1983); *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974).

72. *Hargrave*, 710 F.2d at 1160.

73. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014).

74. *Id.*

75. The plaintiffs alleged that during Argentina’s “Dirty War,” the name given to the Argentinian military dictatorship in existence from 1976 to 1983, MB Argentina conspired with Argentinian government security “to kidnap, detain, torture, and kill plaintiffs and their relatives.” *Id.* at 751.

76. *Id.* at 751–52.

Daimler moved to dismiss the complaint for lack of personal jurisdiction.⁷⁷ In response, the plaintiffs asserted Daimler itself had a physical presence in California or, in the alternative, the California contacts of another one of Daimler's indirect⁷⁸ subsidiaries, Mercedes-Benz USA (MBUSA), could be attributed to Daimler for the purpose of establishing personal jurisdiction over the parent.⁷⁹ MBUSA is a Delaware limited liability corporation with its principal place of business in New Jersey, and it is Daimler's sole domestic importer and distributor of Mercedes-Benz vehicles.⁸⁰ The plaintiffs predicated their vicarious jurisdiction assertion on MBUSA's contacts in California, which included at least three different offices located throughout the state.⁸¹ The district court granted Daimler's motion to dismiss,⁸² but the Ninth Circuit ultimately reversed holding that Daimler was subject to personal jurisdiction in California under the agency jurisdictional test.⁸³

The Ninth Circuit's fractured decisions in the line of cases⁸⁴ directly leading to *Daimler* are instructive on the confusion abounding between the agency and alter-ego approaches. In its first opinion, the court expressly stated, contrary to a number of district court misinterpretations⁸⁵ of its precedent, the exertion of control by a parent over its subsidiary is a necessary finding when applying the agency test.⁸⁶ Specifically, according to the court, a two-step inquiry must be performed:

First, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Control must be over and above that to be expected as an incident of ownership. Second, the agent-subsidiary must also be sufficiently important to the

77. *Id.* at 752.

78. MBUSA was actually wholly owned by another of Daimler's subsidiaries, DaimlerChrysler North America Holding Corporation. *Id.* at 752 n.3.

79. *Daimler AG*, 134 S. Ct. at 752.

80. *Id.*

81. *Id.* Importantly to the Court, MBUSA's activity in California only accounted for 2.4% of Daimler's worldwide business. *Id.* However, Justice Sotomayor noted this 2.4% made Daimler \$4.6 billion in 2004. *Id.* at 767 (Sotomayor, J., concurring).

82. *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at *9-10 (N.D. Cal. Nov. 22, 2005).

83. *Bauman v. DaimlerChrysler Corp. (Bauman II)*, 644 F.3d 909, 912 (9th Cir. 2011).

84. *Bauman v. DaimlerChrysler Corp. (Bauman I)*, 579 F.3d 1088, 1095 (9th Cir. 2009), *reh'g granted and opinion vacated*, 603 F.3d 1141 (9th Cir. 2010); *Bauman II*, 644 F.3d at 920, *rev'd sub nom. Daimler AG*, 134 S. Ct. 746.

85. *See In re W. States Wholesale Natural Gas Litig.*, 605 F. Supp. 2d 1118, 1134 (D. Nev. 2009); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 344 F. Supp. 2d 686, 694 (W.D. Wash. 2003); *Synopsys, Inc. v. Ricoh Co.*, 343 F. Supp. 2d 883, 887 (N.D. Cal. 2003); *Modesto City Sch. v. Riso Kagaku Corp.*, 157 F. Supp. 2d 1128, 1133 (E.D. Cal. 2001).

86. *Bauman I*, 579 F.3d at 1095.

parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.⁸⁷

Although the first part of this test aligns with other circuits,⁸⁸ the second part—the part with which the Supreme Court ultimately took issue⁸⁹—is a novel concept. After granting the appellants’ petition for rehearing,⁹⁰ the court then conflated its own aforementioned rule by examining the “sufficiently important” prong first.⁹¹ Holding this prong satisfied, the court then compared the degree of control required by the agency approach to that required by the alter-ego analysis and noted that the agency “test requires the plaintiffs to show an element of control, albeit not as much control as is required to satisfy the ‘alter ego’ test.”⁹² In the following two and a half pages, the court minced words to refute the defendant’s argument that the right to control, as opposed to *actually* exercising control, was an insufficient basis upon which to satisfy the second prong of this test.⁹³ Unlike the agency test, the court noted, not only does the alter-ego approach demand a greater showing of control by the parent over the subsidiary, but it also requires a showing of fraud or some other injustice.⁹⁴ In this respect, the Ninth Circuit was attempting to contrast its version of the agency test and the traditional formulation of piercing the corporate veil.

The Supreme Court emphatically reversed the Ninth Circuit and held that “[e]xercises of personal jurisdiction so exorbitant . . . are barred by due process constraints on the assertion of adjudicatory authority.”⁹⁵ Although the Court noted that it “need not pass judgment on invocation of an agency theory in the context of general jurisdiction,” it continued on to discuss the Ninth Circuit’s jurisdictional veil-piercing theories, which, for the most part, parallel the tests performed in other jurisdictions.⁹⁶ Rather than performing the alter-ego test, in support of which Daimler argued, the Court noted that “[t]he Ninth Circuit adopted a less rigorous test based on what it described as an ‘agency’ relationship.”⁹⁷ Chiding the use of a test that “always yield[s] a pro-jurisdiction answer,” the Court concluded its discussion by noting that

87. *Id.*

88. As a somewhat ironic twist, the court also noted that the Fifth Circuit “conflate[d] agency and alter ego jurisdiction” in *Hargrave*. *See id.* at 1096.

89. *See Daimler AG*, 134 S. Ct. at 759.

90. *Bauman I*, 603 F.3d 1141 (9th Cir. 2010).

91. *See Bauman II*, 644 F.3d 909, 920–22 (9th Cir. 2011), *rev’d sub nom. Daimler AG*, 134 S. Ct. 746.

92. *Id.* at 920.

93. *Id.* at 922–24.

94. *Id.* at 920.

95. *Daimler AG*, 134 S. Ct. at 751.

96. *Id.* at 759.

97. *Id.*

“[t]he Ninth Circuit’s agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”⁹⁸

2. *The Evolution of Traditional Veil-Piercing Doctrine*

As addressed later in this note, the similarities between jurisdictional and traditional veil-piercing doctrines are a primary source of the confusion that surrounds veil-piercing jurisprudence as a whole.⁹⁹ Thus, to present a fuller picture of the issues, this section briefly traces the evolution of the traditional formulation of piercing the corporate veil, which first arose to allow a creditor to seek satisfaction of a corporate obligation from an individual or entity that otherwise would be protected by the principles of limited liability.¹⁰⁰ The following cases provide examples of the Court’s treatment of this issue over the years.

Although courts had been considering limited liability and the abrogation thereof for many years prior, current jurisprudence on piercing the corporate veil picked up steam around the time of the Great Depression.¹⁰¹ For example, consider the Supreme Court’s decision in *Chicago, Milwaukee, and St. Paul Railway Co. v. Minneapolis Civic & Commerce Association*.¹⁰² There, the Court pierced the veil after finding that one company was “a mere agency or instrumentality for doing [another company’s] bidding.”¹⁰³

In *Chicago*, the Court was confronted with a situation in which the Eastern Company (“Eastern”) and the Milwaukee and Omaha Companies (“Milwaukee/Omaha”) were allegedly overcharging for certain carrier taxes.¹⁰⁴ The Court examined the contractual relationship between the compa-

98. *Id.* at 759–60 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011)).

99. *See infra* Part III.A.1.

100. *See supra* notes 27–39 and accompanying text.

101. STEPHEN B. PRESSER, *PIERCING THE CORP. VEIL* § 1:3 (2014). Presser indicates that the cases in which courts actually pierced the veil were “few and far between” prior to this time, likely because corporations were seen in a more favorable light in the prosperous, pre-Depression years. *Id.*

102. *Chi., Milwaukee, & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass’n*, 247 U.S. 490 (1918).

103. *Id.* at 497. This language led to the development of another veil-piercing approach called the “mere instrumentality” test which is largely synonymous with the “alter-ego” theory. *See FLETCHER, supra* note 36, at § 41.10 (“Under the alter ego doctrine, when a corporation is the mere instrumentality or business conduit of another corporation or person, the corporate form may be disregarded.”).

104. *Chi., Milwaukee, & St. Paul Ry. Co.*, 247 U.S. at 493–94. In essence, the plaintiff was alleging that each company was collecting a carrier tax even though the two companies were one in the same. *Id.*

nies and rejected Eastern's claim that it was a separate and distinct entity from Milwaukee/Omaha because, by contract, Eastern effectively surrendered "all freedom of corporate action."¹⁰⁵ The Court first clarified some of its earlier decisions¹⁰⁶ by affirming that ownership of another company's stock will not, in and of itself, "create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two."¹⁰⁷ However, the Court then distinguished the facts at bar from these earlier decisions, noting that this principle had been "repeatedly held not applicable" when one company purchased another's stock "for the purpose . . . of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies."¹⁰⁸ When "justice . . . may require," the Court insisted it would not "be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist."¹⁰⁹

The Court's next representative¹¹⁰ decision came twenty-six years later in *Anderson v. Abbott*.¹¹¹ This case concerned the 1929 incorporation of Banco Kentucky Company ("Banco") by National Bank of Kentucky ("National") and Louisville Trust Company ("Louisville").¹¹² The same directors and officers operated all three companies, and Banco traded a majority of its corporate stock to National and Louisville in exchange for a majority of their stock.¹¹³ Thereafter, Banco began purchasing or trading for stock in a number of other local and national entities, most of which were banks.¹¹⁴ In November 1930, about a year later, National and Louisville both failed, and

105. *Id.* at 497. Under this contract, Eastern surrendered to Milwaukee/Omaha all power to issue and transfer stock, be financially independent, operate its own track, make its own operating decisions, and conduct business with other carriers. *Id.*

106. *See* *United States v. Del., Lackawanna, & W. R.R. Co.*, 238 U.S. 516 (1915); *Interstate Commerce Comm'n v. Stickney*, 215 U.S. 98 (1909); *U.S. ex rel Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366 (1909); *Peterson v. Chi., Rock Island, & Pac. R.R. Co.*, 205 U.S. 364 (1907); *Pullman's Palace-Car Co. v. Mo. Pac. Ry. Co.*, 115 U.S. 587 (1885).

107. *Chi., Milwaukee, & St. Paul Ry. Co.*, 247 U.S. at 500.

108. *Id.* at 501; *see also Del., Lackawanna, & W. R.R. Co.*, 238 U.S. 516; *United States v. Lehigh Valley R.R. Co.*, 220 U.S. 257 (1911).

109. *Chi., Milwaukee, & St. Paul Ry. Co.*, 247 U.S. at 501.

110. *See* PRESSER, *supra* note 101, at § 3:2 (noting that the broad language of *Anderson* has been frequently cited in support of "veil-piercing in situations where there has been no fraud, to support the use of undercapitalization as a ground for ignoring limited liability, and to support the articulation of federal veil-piercing standards less rigorous than those of state law").

111. *Anderson v. Abbott*, 321 U.S. 349 (1944).

112. *Id.* at 352.

113. *Id.*

114. *Id.* at 352-53.

receivers were appointed to salvage what assets they could.¹¹⁵ National's receiver, Anderson, proceeded against Banco and successfully obtained a judgment,¹¹⁶ from which he only recovered \$90,000 from the corporation.¹¹⁷ Anderson then brought the present suit against Banco's individual stockholders under a statutory provision providing for double liability of shareholders in banking institutions¹¹⁸ to satisfy the remaining balance on the judgment.¹¹⁹ The Court also left undisturbed, for lack of clear error, the lower courts' findings that National and Louisville had organized Banco in good faith lacking any fraudulent intent.¹²⁰

Echoing its earlier language about not being "blinded or deceived by mere forms of law," the Court looked to the substance of Banco's dealings and held that the shareholders were individually liable for the balance of Anderson's judgment.¹²¹ Although the Court ultimately assessed liability against the shareholders on a statutory basis, Justice Douglas spoke briefly about limited liability noting that it "is the rule not the exception[,] and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."¹²² Furthermore, "[t]he fact that incorporation was desired in order to obtain limited liability does not defeat that purpose."¹²³ However, the Court then noted that this rule will not stand when abrogating limited liability "is so 'essential to the end that some accepted public policy may be defended or upheld.'"¹²⁴ According to Justice Douglas,

115. *Id.* at 354.

116. *See* *Laurent v. Anderson*, 70 F.2d 819 (6th Cir. 1934) (including the unsuccessful appeal of the district court's judgment against Banco).

117. *Anderson*, 321 U.S. at 354.

118. This statutory provision, 12 U.S.C. § 64, provided the following before it was repealed in 1959: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock." *See* *Forrest v. Jack*, 294 U.S. 158, 161 (1935). Thus, even without piercing the corporate veil, there was statutory liability for bank investors individually.

119. *Anderson*, 321 U.S. at 354.

120. *Id.* at 356.

121. *Id.* at 363 (citing *Chi., Milwaukee, and St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918)).

122. *Id.* at 362.

123. *Id.* at 361.

124. *Id.* at 362 (citing *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926)). *Berkey* is perhaps the single most cited case on the topic of piercing the corporate veil. *See* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company*, 51 OKLA. L. REV. 427, 444 (1998). Therein, Judge Cardozo noted that "[t]he whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor." *Berkey*, 155 N.E. at 61.

these public policy concerns include fraud,¹²⁵ grossly disproportionate operating capital relative to the nature of the business, and subrogation of legislative policy.¹²⁶

The final Supreme Court decision this note considers is the Court's relatively recent opinion in *United States v. Bestfoods*,¹²⁷ which answered a question concerning a parent company's liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹²⁸ for a subsidiary's actions.¹²⁹ CERCLA contains a provision permitting the U.S. to seek indemnification for the costs associated with chemical clean-up from "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."¹³⁰ The government brought this action against a number of parent companies and their subsidiaries,¹³¹ which had owned and operated the Michigan facility at issue in the case, in an attempt to offset the Environmental Protection Agency's multi-million dollar clean-up initiative there.¹³²

The Court, in a unanimous opinion written by Justice Souter, held that derivative liability¹³³ for a subsidiary company's actions can only attach

125. *Anderson*, 321 U.S. at 362. Importantly, however, the Court simply stated that fraud was a sufficient, though not necessary, reason for dispensing with the corporate form. *See id.* ("The cases of fraud make up part of that exception . . . [b]ut they do not exhaust it.")

126. *Id.* at 362–63. All three of these have become factors considered by modern courts. *See supra* note 161 and accompanying text.

127. *United States v. Bestfoods*, 524 U.S. 51 (1998).

128. 42 U.S.C. § 9607 (2014).

129. *Bestfoods*, 524 U.S. at 55.

130. 42 U.S.C. § 9607(a)(2).

131. Briefly, the chain of corporate decent is as follows. The contamination began around 1957 under Ott Chemical Company's ("Ott I") ownership of the plant at issue. *Bestfoods*, 524 U.S. at 56 n.3. Eight years later, CPC International Inc. (CPC) formed Ott Chemical Company ("Ott II") as its wholly owned subsidiary and purchased Ott I with CPC stock; after this merger, many of Ott I's officers and directors stayed on with Ott II and also took positions with CPC. *Id.* at 56–57. Story Chemical Company ("Story") purchased Ott II in 1972, but Story later went bankrupt in 1977. *Id.* at 57. After the finality of Story's bankruptcy proceedings, the Michigan Department of Natural Resources (MDNR) discovered the extent of the contamination of the facility and sought a purchaser to mitigate the cost of the clean-up. *Id.* Aerojet-General Corp. responded to MDNR and formed a wholly-owned subsidiary, Cordova Chemical Company of California ("Cordova CA"), to purchase the facility from the bankruptcy trustee. *Id.* Cordova CA then incorporated Cordova Chemical Company of Michigan as its wholly owned subsidiary to operate the facility. *Id.* at 56–57. Prior to the beginning of these proceedings, CPC assumed operations under the name Bestfoods. *Id.* at 56 n.3.

132. *Id.* at 57–58.

133. Derivative liability is "[l]iability for a wrong that a person other than the one wronged has a right to redress." BLACK'S LAW DICTIONARY 997 (9th ed. 2009). In the context of corporate law, piercing the corporate veil results in derivative liability because, in so doing, a plaintiff is seeking to hold one corporation liable for the acts of another. *See, e.g.,* *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994). Direct

where the corporate veil may be pierced; otherwise, “a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable [under CERCLA] in its own right as an operator of the facility.”¹³⁴ In so doing, the Court reaffirmed its stance on both the principles of limited liability and piercing the corporate veil, and it further clarified the requisite, as opposed to normal, amounts of control exercised by a parent over its subsidiary needed to create derivative liability.¹³⁵ “[I]t is hornbook law,” the Court said, “that the exercise of the ‘control’ which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary.”¹³⁶ However, “if the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s [or subsidiary’s] behalf,” then the veil may be pierced and the parent or shareholder may be held liable.¹³⁷

Finally, the Court also discussed the ramifications, or lack thereof, of the same individuals working for both a parent corporation and its subsidiary.¹³⁸ Adopting language from several circuits, the court opined, “it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary’s acts.”¹³⁹ Furthermore, “directors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.”¹⁴⁰ The Court then reiterated the presumption that individuals are acting on behalf of whichever entity whose hat they are currently wearing and mentioned that “it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility.”¹⁴¹

Thus, to return to the earlier-posed hypotheticals,¹⁴² a parent company’s reasons for incorporating a subsidiary are almost irrelevant when considering either jurisdiction or liability. If German company *A* incorporated *B* in

liability, on the other hand, results when “the parent is directly a participant in the wrong complained of.” William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 208 (1929). Because CERCLA, by its own terms, provides for the liability of owners and/or operators of facilities, it imposes direct liability on these actors when certain conditions are present. *Bestfoods*, 524 U.S. at 65.

134. *Bestfoods*, 524 U.S. at 55.

135. *Id.* at 61–62.

136. *Id.* (citation and alterations omitted).

137. *Id.* at 62.

138. *Id.* at 69.

139. *Id.* (quoting *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 57 (2d Cir. 1988)).

140. *Bestfoods*, 524 U.S. at 69 (quoting *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997)).

141. *Id.* at 69–70.

142. See introduction to Part II.C.

Delaware and used *B* as its sole distributor in the United States, *Daimler* instructs that *B* would most certainly be subject to general jurisdiction in Delaware, its state of incorporation. To establish jurisdiction over *A*, however, a plaintiff would be required to show that *A* itself has sufficient contacts in a given jurisdiction. Although incorporating *B* counts as a contact, this action is not dispositive in determining jurisdiction over the foreign parent. Likewise, the principles of limited liability will shield *A* from liability in the United States for *B*'s actions. This shield will remain strong unless a plaintiff can successfully pierce the corporate veil between *A* and *B*.

III. ARGUMENT

Between its holding concerning the proper formulation of the general jurisdiction inquiry and its strong dicta related to jurisdictional veil piercing, *Daimler* has largely rendered unnecessary any inquiry into the various jurisdictional veil-piercing tests. In attempting to establish general jurisdiction¹⁴³ over a parent corporation on the basis of its subsidiary's contacts, the proper inquiry is now simply to assume the contacts of the subsidiary are attributable to the parent and to then analyze the parent's total contacts with the forum. If the combined contacts are insufficient to establish general jurisdiction over the parent under the newly-minted *Daimler* standards, then there is no reason to proceed with the confusing tests concerning jurisdictional veil piercing. Only if the combined contacts are sufficient to subject the parent to general jurisdiction in the chosen forum should a court apply the jurisdictional veil-piercing tests. Finally, in the rare circumstance a court successfully establishes the first inquiry and progresses to the veil-piercing analysis, it is entirely unnecessary for a court to demand a finding of fraud or injustice when considering the issue of jurisdictional veil piercing.

A. Keep It Simple

Personal jurisdiction is one of the most basic and fundamental concepts in the legal world;¹⁴⁴ as such, all courts must have a keen understanding of the doctrine and its intricacies.¹⁴⁵ Thus, courts and litigants can largely avoid

143. The focal point of this argument is general jurisdiction because, in the application of specific jurisdiction, only the substantive liability veil-piercing analysis will be relevant in the majority of suits. If the parent's action or inaction directly injures a plaintiff, that plaintiff is generally free to file suit against the parent wherever that harm occurred. If a subsidiary corporation's actions cause the injury complained of, and the injured party sues the subsidiary directly to recover, the plaintiff, to recover from the parent based on the subsidiary's actions, must then establish the requirements traditionally articulated to pierce the veil.

144. This is not to say the doctrine is not without its own set of baffling issues.

145. See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 608 (1990).

the confusion that runs rampant when applying the various tests for jurisdictional veil piercing simply by assuming imputation and dealing with the personal jurisdiction issue first. This section will focus primarily on the current state of bewilderment surrounding jurisdictional veil piercing and will then propose a modest solution to the problem, using the Supreme Court's analysis in *Daimler* to illustrate.

1. *The Problem with Jurisdictional Veil Piercing*

Despite variance from court to court in the names given to, and factors included in, a particular court's approach, all of the jurisdictional veil-piercing tests share several commonalities. For example, the primary two approaches—agency and alter-ego—are both fundamentally concerned with the amount of interconnectedness between a parent and its subsidiary and whether the parent exerts an overly substantial amount of control over the subsidiary.¹⁴⁶ The requisite amount of control to pierce the corporate veil in this context is so substantial that the parent and subsidiary must be, for all practical purposes, the same entity.¹⁴⁷ The similarities between the approaches seem to have led the courts to haphazardly use words in performing their analyses without considering any legal significance subscribed thereto, and this has created an abyss of diverging approaches without much genuine substantive distinction.

Consider the evolution of the *Cannon* doctrine,¹⁴⁸ which led to the development of both the “agency” and “alter-ego” jurisdictional doctrines.¹⁴⁹

146. See *Sprint Nextel Corp. v. iPCS, Inc.*, CIV.A. 3746-VCP, 2008 WL 2737409, at *10 n.76 (Del. Ch. July 14, 2008) (“These two methods for establishing jurisdiction involve showing either that the absent parent instigated the subsidiary’s local activities or that the absent parent and the subsidiary are in fact a single legal entity.”). In so many words, the courts generally seem to require, in the agency analysis, so much from the parent in examining whether it “instigated the subsidiary’s local activities” that the parent, rather than the subsidiary, is actually performing the activities. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 531 (5th Cir. 2014); see also William A. Voxman, *Jurisdiction over a Parent Corporation in Its Subsidiary’s State of Incorporation*, 141 U. PA. L. REV. 327, 340 (1992) (discussing the similarities between the two approaches despite the names given thereto).

147. Compare *F. Hoffman-La Roche, Inc. v. Super. Ct.*, 130 Cal. App. 4th 782, 796 (2005) (“To invoke alter ego, two conditions must be met: 1) there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist; and 2) there must be an inequitable result if the acts in question are treated as those of the corporation alone.”), with *In re Chinese Drywall*, 753 F.3d at 531 (“[T]he parent corporation, to be liable for its subsidiary’s acts under the . . . agency theory, must exercise control to the extent the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.”).

148. See *supra* notes 53–72 and accompanying text.

Although it is certainly not unusual for a Supreme Court case to lead to divergent approaches in varying circuits, the amount or degree of actual divergence in these two theories is little more than nominal. In *Mylan Laboratories*,¹⁵⁰ the Fourth Circuit Court of Appeals considered the following factors in its application of the agency¹⁵¹ test: “whether significant decisions of the subsidiary must be approved by the parent”;¹⁵² whether the two companies maintain separate records and accounting procedures; whether the companies conduct separate directors’ meetings; and the degree of interdependence between the companies, which requires the subsidiary company to “have some independent reason for its existence.”¹⁵³

When compared to a representative Fifth Circuit Court of Appeals alter-ego analysis, the similarities between the two tests are obvious.¹⁵⁴ According to the Fifth Circuit, the alter-ego approach allows the exercise of personal jurisdiction over a nonresident parent corporation if that parent “exerts such domination and control over its subsidiary ‘that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction.’”¹⁵⁵ After its discussion of *Cannon*, the court then presented the following factors as relevant to the determination: the amount of stock ownership the parent holds in the subsidiary; whether the parent exerts control over the internal business affairs of the subsidiary; and other “relevant facts and circumstances surrounding the operations of the parent and subsidiary.”¹⁵⁶ In this final catch-all category, the court’s analysis focused on the presence or absence of common corporate officers between the companies, whether corporate formalities were observed, and whether the companies maintained separate accounting systems and records.¹⁵⁷

Thus, regardless of the name given to the approach, both tests share the same origin in *Cannon*, the same objective to determine the degree of con-

149. Compare *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (discussing *Cannon* in the development of the agency test), with *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003) (discussing *Cannon*’s influence on the alter-ego test).

150. *Mylan Labs., Inc.*, 2 F.3d at 61.

151. This test, according to the court, should be used “in deciding whether to pierce the veil separating parent corporations from their subsidiaries,” and it “allows the court to attribute the actions of a subsidiary . . . to the foreign parent corporation only if the parent exerts considerable control over the activities of the subsidiary.” *Id.*

152. This is the central factor. *Id.*

153. *Id.* (quoting *Harris v. Arlen Props., Inc.*, 260 A.2d 22, 29 (Md. 1969)).

154. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983).

155. *Id.*

156. *Id.* at 1160.

157. *Id.*

trol exercised by the parent over its subsidiary, and many of the same factors.¹⁵⁸ As Professor Stephen Presser recently noted:

We should be wary of the creation of doctrinal approaches, involving picturesque terms such as “mere instrumentality,” “business conduit,” “single business enterprise,” or “alter ego,” and their attendant lengthy check-off lists, which might obscure the purposes of the doctrine of limited liability. It would be wiser for judges to understand all of these doctrinal approaches as involving the same issues as the classical “piercing the corporate veil” doctrine.¹⁵⁹

Along these same lines, consider the factual data Peter Oh uncovered in his empirical study on veil piercing.¹⁶⁰ Professor Oh found thirty-two factors commonly used by the courts to justify piercing the corporate veil. The five most popular reasons—fraud, misrepresentation, injustice, unfairness, and domination—are less than surprising;¹⁶¹ however, that cases reveal such a laundry list of vague terms brings truth to the earlier warning that veil piercing has turned into “jurisprudence by metaphor.”¹⁶² Professor Oh concluded that “a simple tally of factors appearing in decisions may provide an optical illusion, rather than an accurate portrait, of the reasons why veil-piercing succeeds.”¹⁶³ Therefore, in an effort to promote what they view as equitable

158. For a circuit-by-circuit breakdown of agency and alter-ego jurisdictions, see *supra* notes 68 and 71, respectively.

159. Stephen B. Presser, *The Bogalusa Explosion, “Single Business Enterprise,” “Alter Ego,” and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary “Abuse” Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 428 (2006).

160. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 133 (2010). Oh’s objective was to build upon Richard Thompson’s landmark 1991 study, see Thompson, *supra* note 4, by testing Thompson’s methodology and clarifying the dataset to specifically account for claims of fraud or misrepresentation. Oh, *supra*, at 85–90. Importantly, Oh’s work apparently uses the traditional definition of “piercing the corporate veil,” and it is thus centered on affixing liability to one party based on the acts of another. See *id.* at 106 (“As a preliminary matter, veil-piercing is a remedial instrument for satisfying a judgment that stands apart from a matter’s substantive cause(s) of action.”). His specific accounting for fraud, however, allows the data to apply in the jurisdictional context since the presence of fraud or injustice is nearly the only factor differentiating the jurisdictional alter-ego test from the liability approach.

161. Oh, *supra* note 160, at 134.

162. PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 8 (1983) [hereinafter *PROCEDURAL PROBLEMS*].

163. Oh, *supra* note 160, at 133; see also PHILLIP BLUMBERG, *THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 107 (1987) (“There are two basic problems. First, the standards employed are conclusory and the metaphors do not provide a useful basis for decision of a particular case. Second, . . . [c]ourts applying ‘piercing the veil jurisprudence’ frequently rely on ‘piercing the veil’ decisions arising in very different areas of law.”); Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding*

outcomes, the courts seem merely to be grasping at straws to select whatever factors fit into the facts presented; this approach does little more than breed uncertainty for other courts and business planners alike.¹⁶⁴

2. Daimler's Implied Solution

The most efficient course of action when faced with a jurisdictional veil-piercing issue is first to assume the subsidiary's contacts in a forum can be imputed to the parent and second to assess the parent's total contacts with the forum. Rather than launching into a full-blown analysis of the Ninth Circuit's various jurisdictional veil-piercing tests, the *Daimler* Court simply skirted the issue noting the following:

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.¹⁶⁵

These assumptions enabled the Court to focus the remainder of its opinion on personal jurisdiction and to decide the case on the due process concerns associated therewith.¹⁶⁶ In so doing, the Court was able to answer the easier question and avoid resolution of the harder issue,¹⁶⁷ while also creating, knowingly or unknowingly, a new framework for the analysis of jurisdictional veil-piercing questions.

As described above,¹⁶⁸ the traditional course of action—regardless of the particular jurisdiction—when dealing with this issue has been to first conduct a searching analysis of the factors necessary to impute a subsidiary

the Doctrine of Piercing the Corporate Veil, 76 OR. L. REV. 853, 855 (1997) (“At best, such terms are unhelpful. All too often, they confuse the issue.”).

164. PROCEDURAL PROBLEMS, *supra* note 162, at 8.

165. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). The Court was presumably able to make these assumptions based on a number of the Ninth Circuit's findings that the parties either agreed on or failed to contest. *Id.* at 758. The primary question the Court sought to answer in this section of the opinion was whether Daimler's contacts with the State of California rendered the parent sufficiently “at home” to be subject to general jurisdiction in that state. *Id.* Because Daimler did not object to the lower court's finding that MBUSA was subject to general jurisdiction in California, the Court just took this as given and moved on. *Id.*

166. *Id.* at 762.

167. See 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.4 (3d ed. 1998); Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in Daimlerchrysler v. Bauman*, 66 VAND. L. REV. EN BANC 111, 114 (2013). However, an examination of MBUSA's contacts in California would have arguably left open the bigger question of Daimler's contacts therein, though possibly making that question easier to answer in the end.

168. See *supra* Part II.C.1.

company's contacts in a forum to its parent, and this analysis has created mass uncertainty throughout veil-piercing jurisprudence. The fact-intensive nature of the jurisdictional veil-piercing inquiry makes it a tedious and time-consuming endeavor.¹⁶⁹ After *Daimler*, however, courts would be wise to answer the jurisdiction question first because the court need not address the veil-piercing issue unless the parent and subsidiary have contacts that, when combined, establish a sufficient basis upon which to exercise jurisdiction over the parent.¹⁷⁰ Thus, *Daimler* may have further called into question the validity of the *Cannon* doctrine.¹⁷¹ Likewise, to the extent that courts in the past considered jurisdictional veil piercing to be, more or less, the only step in asserting general jurisdiction over a parent corporation,¹⁷² *Daimler* makes clear that the parent must also have contacts sufficient to support the exercise of general jurisdiction.¹⁷³

169. See WRIGHT ET AL., *supra* note 167, at § 1069.4.

170. Additionally, it seems clear that neither the veil-piercing issue nor the jurisdiction question need be addressed at length if the chosen forum is the parent's state of incorporation or principle place of business because "[t]hese bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler AG*, 134 S. Ct. at 760.

171. See PROCEDURAL PROBLEMS, *supra* note 162, at 47 (arguing that *Cannon*'s continuing validity is seriously questionable); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 28–29 (1986) (collecting cases and providing possible explanations for various courts' departure from *Cannon*). *But see* Swain & Aguilar, *supra* note 3, at 483 ("The central conclusion of this article is that the *Cannon* doctrine is as strong a precedent today as it was the day after it was decided.").

172. See, e.g., *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 565 (M.D. Pa. 2009) ("A court may acquire general jurisdiction over a defendant under two alternative theories. First, a court may obtain jurisdiction over any defendant that exhibits systematic and continuous contacts with the forum. Second, a court, already imbued with general jurisdiction over a corporation, may obtain jurisdiction over an affiliated entity when the two companies have fully integrated their operations and function as a single, unified entity.").

173. See *GoldenTree Asset Mgt. LP v. BNP Paribas S.A.*, 13 C 00435, 2014 WL 4100445, at *6 (N.D. Ill. Aug. 20, 2014) ("In focusing on the forum contacts of the Illinois subsidiaries, *GoldenTree* misses the entire point of the Court's decision in *Daimler*: general jurisdiction over the parent corporation must be predicated on an analysis of whether the *parent* corporation's affiliations with the forum state as so systematic and continuous as to make the *parent*—not the subsidiaries—at home in the forum state."). *Cf. In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 531 (5th Cir. 2014) ("*Daimler* therefore embraces the significance of a principal-agent relationship to the specific-jurisdiction analysis, though it suggests that an agency relationship alone may not be dispositive.").

3. *The Irrelevance of Fraud or Injustice in Jurisdictional Veil Piercing*

In the rare circumstance a court finds a parent company is subject to general jurisdiction in a particular forum based on the assumed imputation of its subsidiary's contacts in that forum, a court must then discern whether imputation was proper by applying one of the jurisdictional veil-piercing tests. As described above, the differences in the tests are more nominal than substantive,¹⁷⁴ and this is even more so after the Court's recognition of the issues accompanying the Second and Ninth Circuits' "sufficiently important test."¹⁷⁵ The primary difference between the main two jurisdictional veil-piercing tests—agency and alter-ego—is the necessity imposed in some jurisdictions that a finding of alter-ego requires the parent company to have committed an abuse of the corporate form.¹⁷⁶ While this requirement is logically imposed when assessing vicarious liability, in the context of assessing jurisdiction over a person or entity, what matters—or what *should* matter—is the extent of that person or entity's contacts in the forum.¹⁷⁷

Since its inception, traditional veil-piercing analysis has, for the most part, required some showing of fraud or injustice to hold a parent corporation vicariously liable for its subsidiary's debts.¹⁷⁸ The common thread running through many of the cases that impose vicarious liability is some sort of deception or abuse by the entity creating the subsidiary and voluntary or involuntary third parties.¹⁷⁹ In this context, the fraud or injustice element is logical because the privilege of conducting business as an incorporated entity has been abused.¹⁸⁰ In the case of voluntary contractual creditors, the injured third parties are deceived as to the true identity of the company with which they are dealing;¹⁸¹ on the other hand, involuntary tort creditors seek to enforce an unsatisfied judgment against an affiliated entity for the

174. See *supra* Part III.A.1.

175. See *Daimler AG*, 134 S. Ct. at 759–60; *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 225 (2d Cir. 2014).

176. See FLETCHER, *supra* note 36, at § 43.70 (discussing the differences between the jurisdictions that require a finding of fraud or injustice and those that do not).

177. See *Calder v. Jones*, 465 U.S. 783, 788 (1984).

178. See FLETCHER, *supra* note 36, at § 43 (“[G]enerally, absent fraud or bad faith, a corporation will not be held liable for the acts of its subsidiaries or other affiliated corporations.”).

179. See *Presser*, *supra* note 159, at 412–13.

180. See *Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926).

181. See, e.g., *Chi., Milwaukee, & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 497 (1918); *Birbara v. Locke*, 99 F.3d 1233, 1238 (1st Cir. 1996); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 693 (5th Cir. 1985).

“wrong” of inadequately capitalizing the subsidiary.¹⁸² Thus, in these instances, the courts will not allow a parent company to take advantage of the privilege of limited liability as a result of the parent’s malfeasance.¹⁸³

However, many of these arguments completely erode when placed in the context of determining the extent of a given court’s jurisdiction over an affiliated entity. Given that the hallmark of personal jurisdiction is action within a forum,¹⁸⁴ and this action can be performed directly by an actor or indirectly at the bequest of a principal,¹⁸⁵ there is simply no justification for imposing a semi-substantive element, such as fraud, on an otherwise procedural question.¹⁸⁶ When determining jurisdiction, “a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’”¹⁸⁷ Although an inquiry into fraud or injustice may be appropriate in assessing specific jurisdiction when that fraud constitutes the contact on which jurisdiction is predicated,¹⁸⁸ what matters when assessing general jurisdiction is the extent to which a “corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”¹⁸⁹ It goes without saying that being “at home” in a state does not require the commission of a fraud.

182. See *Fid. & Deposit Co. of Md. v. Commercial Cas. Consultants, Inc.*, 976 F.2d 272, 276 (5th Cir. 1992); *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Green v. Equitable Powder Mfg. Co.*, 95 F. Supp. 127, 131 (W.D. Ark. 1951); see also *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

183. See Cohen, *supra* note 124, at 458.

184. See *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 447 (1952) (“Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.”).

185. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

186. Cf. PROCEDURAL PROBLEMS, *supra* note 162, at 71–72 (noting that there is often a mismatch between the reasons articulated by courts in support of jurisdictional veil piercing and the underlying substantive causes of action).

187. *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

188. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (“Adjudicatory authority is ‘specific’ when the suit ‘aris[es] out of or relate[s] to the defendant’s contacts with the forum.’”) (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). Cf. *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (“Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction.”).

189. *Daimler AG*, 134 S. Ct. at 761 (quoting *Goodyear*, 131 S. Ct. at 2851).

IV. CONCLUSION

Daimler largely alleviated any practical utility served by the current tests for jurisdictional veil piercing in the context of general jurisdiction. Through the Court's clarification that a corporation is, more often than not, only subject to general jurisdiction in its state of incorporation and principal place of business,¹⁹⁰ and through the form of its analysis,¹⁹¹ the Court provided a new framework for the analysis of jurisdictional veil-piercing issues.

When attempting to establish general jurisdiction over a parent corporation on the basis of its subsidiary's contacts, lower courts should first assume that the subsidiary's contacts can be imputed to the parent and analyze whether those combined contacts are sufficient to subject the parent to general jurisdiction. If the answer to this inquiry is "no," there is simply no need to conduct any permutation of the jurisdictional veil-piercing tests because the exercise of jurisdiction would offend constitutional due process considerations.

On the other hand, if a court answers "yes" to this question, only then should a court analyze whether the subsidiary's contacts can properly be imputed to the parent. In contrast to the context of piercing the corporate veil to hold a parent substantively liable for the debts or actions of a subsidiary, the addition of a fraud or injustice requirement is completely unnecessary in performing a jurisdictional veil-piercing analysis. Thus, the proper formulation of this second step simply asks whether a subsidiary corporation "is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court."¹⁹²

The impact of these changes, if followed, would present a substantial clarification to the laws surrounding jurisdictional and traditional veil piercing, and a clarification is desperately needed given the current state of disrepair in the jurisprudence on these issues. Not only would this change go a long way toward providing a clearer picture of the law, but it also would not be a difficult thing for courts to implement because they already perform both steps. The courts can dismiss a majority of cases simply by inverting the order in which these steps are performed.

190. *See id.* at 761 n.19 ("We do not foreclose 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.") (emphasis added).

191. *Id.* at 760.

192. *See, e.g.,* *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir. 2002).

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