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THE NOT-SO-STEALTHY REVOLUTION IN PERSONAL JURISDICTION
A RESPONSE TO MICHAEL HOFFHEIMER

Judy M. Cornett[*]

With elegant style and in devastating detail, Professor Michael Hoffheimer has analyzed the slow death spiral of personal jurisdiction under the Roberts Court.[1] He accurately identifies one source of the frustration scholars and lower courts have felt in trying to make sense of the Roberts Court's personal jurisdiction jurisprudence: the Court purports to be applying settled law while simultaneously unsettling well-established principles.[2] Professor Hoffheimer perspicaciously describes how this sleight of hand both leads to and masks the Court's failure "to offer a clear rule of decision," its failure "to explain the policies that motivate its changing approach to personal jurisdiction," and its implication that the lower courts are sloppily ignoring settled law when, in fact, they are struggling to apply the Court's newly adopted personal jurisdiction principles.[3] In the course of his analysis, Professor Hoffheimer displays a mastery of the history and current contours of personal jurisdiction as he urges the Court to "acknowledge" that it is recasting the law of personal jurisdiction, to "provide reasons" for its new, wildly restrictive agenda, and to "construct a narrative" that would explain why these new restrictions are required by the Due Process Clause or "some other appropriate constitutional authority."[4]

There are many stories that can be told about this line of six post-2011 personal jurisdiction cases.[5] Professor Hoffheimer has chosen a jurisprudential story, and he has chosen to focus on only one of the six decisions, *Bristol-Myers Squibb Co. v. Superior Court*.[6] Here, I want to tell, briefly, three more stories about the slow-motion disaster we are witnessing, and focus on another one of the six cases—*Daimler AG v.*

* College of Law Distinguished Professor, University of Tennessee College of Law. I would like to thank the editors of the Florida Law Review for the invitation to respond to Professor Hoffheimer's article. I am grateful to Professors Michael Hoffheimer and Valorie Vojdik for helpful comments on an earlier draft. I would also like to thank Tate Ball, UT Law class of 2019, and Heather Bosau and Gavin Smelcer, UT Law class of 2020, for outstanding research assistance.

1. Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018).

2. *Id.* at 552.

3. *Id.* at 499.

4. *Id.* at 552.

5. The six post-2011 cases are, in chronological order: J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); and Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017).

6. 137 S. Ct. 1773 (2017).

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Bauman[7]—which, in my view, is the poisoned well from which the four later decisions flow.[8]

The first story is the undue solicitude for corporations. Professor Hoffheimer alludes to the fact that in five of the six Roberts Court cases, large corporations triumphed over individual plaintiffs.[9] But he does not nail down the larger implications of this observation. As Justice Sotomayor noted in her concurrence in *Daimler*, it seems that corporations can be both "too big to fail" and "too big to sue."[10] Corporations have become, not just people, but favorites of American law. The Court in *Daimler* worried, with no factual basis, that the "continuous and systematic contacts" test did not allow corporations to predict with certainty where they would be subject to suit.[11] In fact, this is the only policy reason given by the Court for upending the settled law of general jurisdiction.

Yet, examination of cases decided by both the Supreme Court and the lower courts in the years between *Perkins v. Benguet Consol. Mining Co*.[12] and *Daimler* shows that corporations were doing a pretty good job of figuring out when their contacts with a state were "continuous and systematic" enough to yield general jurisdiction. As Professor Hoffheimer points out, the manufacturer and nationwide importer in *World-Wide Volkswagen Corp. v. Woodson*[13] and the parent corporation in *Goodyear Dunlop Tires Operations S.A. v. Brown*[14] did not contest personal jurisdiction in Oklahoma and North Carolina, respectively, but would not now be subject to general jurisdiction in those states.[15] Even the author of *Daimler*, Justice Ginsburg, noted in *J. McIntyre Machinery, Ltd. v. Nicastro*[16] that "the foreign manufacturer of the Audi in *World-Wide Volkswagen* did not object to the jurisdiction of the Oklahoma courts and the U.S. importer abandoned its initially stated objection. And most relevant here, the Court's opinion indicates that an objection to jurisdiction by the manufacturer or national distributor would have been

7. 571 U.S. 117 (2014).

8. For example, the California court in *Bristol-Myers Squibb* could have, prior to *Daimler*, exercised general jurisdiction over the pharmaceutical company with respect to the non-forum plaintiffs' claims. The court would not have been forced to consider specific jurisdiction over the non-forum plaintiffs' claims in *Bristol-Myers Squibb* if the Supreme Court had not eviscerated general jurisdiction in *Daimler*.

9. Hoffheimer, *supra* note 1, at 548.

10. Justice Sotomayor actually referred to the defendant here as "too big for general jurisdiction." *Daimler*, 571 U.S. at 143 (Sotomayor, J., concurring in the judgment).

11. *Id.* at 138–39.

12. 342 U.S. 437 (1952).

13. 444 U.S. 286 (1980).

14. 564 U.S. 915 (2011).

15. Hoffheimer, *supra* note 1, at 502.

16. 564 U.S. 873 (2011).

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unavailing."[17] If Justice Ginsburg is here referring to specific jurisdiction, the Court's holding in *Walden v. Fiore*[18] would change this result, and if she is referring to general jurisdiction, she herself authored the opinion in *Daimler* that changes the result. At oral argument in *Daimler*, Justice Kagan asked whether the plaintiff's position would make Daimler subject to suit in all 50 states, and when counsel answered that it would, she responded, "[T]hat has got to be wrong."[19] But thanks to the Court's decision in that case, Walmart, the largest retailer in the world, appears to be subject to jurisdiction for any claim in only three states: Delaware, its state of incorporation; Arkansas, where it has its principal place of business; and whatever state the cause of action "arises in or is related to."

As Professor Hoffheimer notes, this result is only reinforced by the Court's analysis in *Bristol-Myers Squibb*. The Court's insistence that the reasonableness inquiry must privilege the "burden on the defendant" above all other interests goes unexplained.[20] Although Justice Alito states that the burden must be evaluated in practical terms, this is not what the Court actually does. It seems more absurd for a corporation like Walmart to be amenable to jurisdiction in only three states than to subject it to general jurisdiction in all 50 states. It seems, in fact, that the Court is not so much concerned with the "burden" on the defendant as with the inconvenience of the forum generally. Even positing a worst case scenario in which an injury is caused by Walmart in South Florida and the plaintiff sues in northern Alaska, where the defendant's contacts do not relate to the cause of action, the real concern is not the burden on Walmart—which surely has the wherewithal to defend itself in the furthest reaches of the U.S.—but rather the inconvenience of litigating a claim in Alaska where witnesses and evidence are probably in Florida and where Florida jurors, rather than Alaskans, would be more willing to serve as jurors. If this is right, then the defense of forum non conveniens adequately protects Walmart from having to try a case in Alaska that arose in Florida. There is no need for the undue solicitude of a constitutional doctrine to protect the nation's largest retailer.[21]

As predicted by Justice Sotomayor in her concurrence, this result has had two deleterious effects.[22] First, it has sent scholars and plaintiffs scrambling to find alternative bases for the assertion of general

17. *Id.* at 907 (Ginsburg, J., dissenting).

18. 571 U.S. 277 (2014).

19. Transcript of Oral Argument at 31, Daimler AG v. Bauman, 571 U.S. 117 (2014) (No.11-965).

20. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017).

21. Justice Sotomayor makes this point in her concurrence in *Daimler*. *See Daimler*, 571 U.S. at 156 (Sotomayor, J., concurring in the judgment).

22. *See Daimler*, 571 U.S. at 142–60 (Sotomayor, J., concurring in the judgment).

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jurisdiction over corporations. The two most popular are (1) broadening specific jurisdiction by an expansive definition of where a cause of action "arises" or "relates to" and (2) an argument that a corporation's registration to do business in a state and appointment of a registered agent for service of process constitutes consent to general jurisdiction.[23] A third alternative, the "exceptional case" caveat Justice Ginsburg wrote into the *Daimler* decision, appears to be a dead letter.[24]

Second, *Daimler* has sent the lower courts into a tailspin of uncertainty. Take, for example, *Erwin v. Ford Motor Co.*,[25] in which a widower filed a products liability suit against Ford, alleging that a defective airbag caused the death of his wife when her 2010 Ford Escape was involved in a crash. The suit was filed in the federal district encompassing the location of the crash, Hillsborough County, Florida.[26] This should be an easy case: there should be specific jurisdiction because the crash occurred in the district, and there should be general jurisdiction because Ford Motor Company has "continuous and systematic" contacts with Florida, including these undisputed contacts: "Ford maintains at least 110 Ford dealerships in Florida, sends thousands of vehicles to Florida each year to be sold in Florida, maintains an agent for service of legal process in Florida, and maintains a Regional Headquarters in Maitland, Florida."[27]

But the district court granted Ford's motion to dismiss for lack of personal jurisdiction.[28] There was no general jurisdiction over Ford because it is incorporated in Delaware and has its principal place of business in Michigan; this was not an "exceptional case" under Daimler because Ford's proportional contacts in Florida did not render it "at home" there.[29] There was no specific jurisdiction over Ford because "the 2010 Ford Edge at issue was not designed in Florida, was not originally sold by Ford in Florida or to a customer in Florida, and . . . the 2010 Ford Edge entered Florida without Ford's involvement."[30] Therefore, the claim did not arise out of or relate to Ford's contacts with Florida.[31] Where can

23. *See, e.g.*, Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 231, 260 (2014).

24. A survey of more than 400 post-*Daimler* cases discloses that in only two did the district court explicitly find an "exceptional case" for general jurisdiction under *Daimler*. *See* Sokolow v. PLO, 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014), *rev'd sub nom*. Waldman v. PLO, 835 F.3d 317 (2d Cir. 2016); Hendricks v. New Video Channel America, LLC, 2015 WL 3616983, at *3 (C.D. Cal. June 8, 2015).

25. 2016 WL 7655398 (M.D. Fla. Aug. 31, 2016).

26. *Id.*

27. *Id*. at *2.

28. *Id.* at *13.

29. *Id*. at *12.

30. *Id.* at *2.

31. *Id*. at *7.

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the plaintiff sue? Delaware or Michigan, and because the car was sold to plaintiff in Ohio, presumably in Ohio, or perhaps in Ontario, Canada, where the car was assembled.[32] But because of *Daimler*, Ford Motor Company, unlike Volkswagen in *World-Wide*, cannot be sued in Florida on a products liability claim arising from an automobile accident that happened in Florida.[33]

As illustrated by *Erwin* and noted by Professor Hoffheimer, "the costs to the plaintiff are real."[34] But personal jurisdiction is just one aspect of the diminishing access to justice resulting from the Court's recent civil procedure jurisprudence. In a short but descriptively titled article, *Don't Look Now, But the Doors to the Federal Courthouse Are Closing*,[35] Professor Arthur Miller surveyed the obstacles to litigation placed in the path of plaintiffs, beginning with the 1986 summary judgment trilogy, and continuing with *Wal-Mart Stores, Inc. v. Dukes*,[36] *AT&T Mobility v. Conception*,[37] and *Twombly/Iqbal*.[38] Professor Miller ended his analysis with *J. McIntyre*, contending that the plurality opinion "redefined the constitutional limits on personal jurisdiction,"[39] and concluding more generally, "[a] majority of the justices seem singularly concerned about the litigation burdens on corporations and governmental officials."[40] Professor Miller's conclusion has been amply vindicated by the five cases that succeeded *J. McIntyre*, particularly *Daimler*. And these cases take their place alongside *Atlantic Marine Construction Co. v. U.S. District Court*[41] and *Kindred Nursing Centers Ltd. Partnership v. Clark*,[42] both of which erect new barriers to plaintiffs' access to the civil justice system.

A final perspective on these six Roberts Court cases is the intra-Court

32. *See id*. at *2.

33. The district court granted the plaintiff's motion to transfer the case to the District of Delaware. Erwin v. Ford Motor Co., 2016 WL 9525590, at *2 (M.D. Fla. Sept. 27, 2016). It is unclear how the litigation of a Florida car wreck in Delaware serves the interests of anyone other than Ford, and maybe not even Ford, if their proof involves more than mere document production. *Cf.* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) ("Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.").

34. Hoffheimer, *supra* note 1, at 550.

35. Arthur R. Miller, *Don't Look Now, But the Doors to the Federal Courthouse Are Closing*, LAW SCH.: MAG. N.Y.U. 65 (2012), http://www.law.nyu.edu/sites/default/files/NYU_Law_Magazine_2012.pdf [https://perma.cc/49QX-NNCE].

36. 564 U.S. 338 (2011).

37. 563 U.S. 333 (2011).

38. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

39. Miller, *supra* note 35, at 67.

40. *Id.* at 68.

41. 571 U.S. 49 (2013).

42. 137 S. Ct. 1421 (2017).

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dynamic revealed in this seven-year sequence of decisions. How did the coalition of the three female justices, who dissented in *J. McIntyre*, fracture so badly that two of the justices who opposed the discourse of state sovereignty and power there ended up supporting that very discourse in *Bristol-Myers Squibb*? In *J. McIntyre*, Justice Kennedy framed personal jurisdiction as a matter of "the power of a sovereign" and a defendant's "intention to submit to the power of a sovereign."[43] This discourse—jarringly different from the discourse of fairness initiated by *International Shoe*—drew a rebuke from Justice Ginsburg, writing for herself and Justices Kagan and Sotomayor: "I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*."[44]

Yet, despite this stated commitment to fairness as the touchstone for personal jurisdiction, Justice Ginsburg wrote an opinion in *Daimler* that adopts an ultra-formalistic test for general jurisdiction.[45] Justice Ginsburg asserts in her *J. McIntyre* dissent that "the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests,"[46] but she and Justice Kagan agreed in *Daimler* that the basis for general jurisdiction over corporations should be the legal fiction of the corporation's "domicile."[47] The third member of the *J. McIntyre* dissenting coalition, Justice Sotomayor, concurred in *Daimler* that California lacked personal jurisdiction over the German corporation on reasonableness grounds.[48] But she disagreed with the majority's new test for general jurisdiction.[49] She predicted a number of practical problems that would result from *Daimler*, and she has been proven right in *Bristol-Myers Squibb.*

It is clear that neither Justice Ginsburg, an iconic hero of women's rights, nor Justice Kagan, a liberal ex-Dean of Harvard Law School, is a class warrior. Despite Justice Sotomayor's warnings, neither seems to have grasped the deleterious effect that *Daimler* would have on the little

43. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882 (2011).

44. *Id.* at 910 (Ginsburg, J., dissenting).

45. Although the Court purportedly adopted the "at home" test, that test implies factual analysis, which is not required. Factual analysis is required only when the "exceptional case" exception is invoked. The real test for general jurisdiction involves only identification of the states of incorporation and principal place of business, not analysis of facts regarding the defendant's relationship with the forum state.

46. *J. McIntyre*, 564 U.S. at 899 (Ginsburg, J., dissenting).

47. Daimler AG v. Bauman, 517 U.S. 117, 137 (2014).

48. *Id.* at 142.

49. *Id.*

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guy.[50] If we look for differences in the three women's backgrounds that might explain why Justice Sotomayor appreciates the impact of personal jurisdiction doctrine on individual plaintiffs, we find remarkable similarities. All three were born in New York City, albeit in three different boroughs: Ginsburg, in Brooklyn; Kagan, in Manhattan; and Sotomayor, in the Bronx.[51] All three earned both undergraduate and law degrees from Ivy League institutions—Ginsburg, from Cornell and Columbia; Kagan, from Princeton and Harvard; and Sotomayor, from Princeton and Yale.[52] But after law school graduation, we see Justice Sotomayor taking a different path from the others.

Both Ginsburg and Kagan embarked upon clerkships with federal judges: Ginsburg, with Southern District of New York Judge Edmund L. Palmieri; and Kagan, with D.C. Circuit Judge Abner Mikva and then Justice Thurgood Marshall.[53] After her clerkship, Justice Ginsburg moved directly into academia, first at Columbia, then at Rutgers, and finally back to Columbia before moving to the ACLU.[54] At the ACLU, Ginsburg engaged in appellate practice, arguing six cases before the U.S. Supreme Court.[55] Justice Kagan practiced law for about two years at a Washington, D.C. firm before entering academia, first at the University of Chicago and then at Harvard Law School, where she served as Dean for five years.[56] Justice Ginsburg moved directly from the ACLU to a seat on the U.S. Court of Appeals for the D.C. Circuit, while Justice Kagan left Harvard Law School to become Solicitor General in the Obama Administration.[57] In that role, she, too, argued six cases before the Supreme Court.[58] Thus, when they ascended to the Supreme Court, both Ginsburg and Kagan had little or no experience in the trenches of law practice. Both went directly from elite law schools to law school professorships to high-level appellate practices (and, in Ginsburg's case, to a federal court of appeals) before ascending to the Supreme Court.

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50. In *J. McIntyre*, Justices Breyer and Alito worried about requiring the the Appalachian potter to defend in distant forums, but in *Daimler*, they were willing to impose that same burden on individual plaintiffs in order to vindicate the abstract burden on large corporate defendants.

51. *Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies [https://perma.cc/H83U-94DE] (last visited Feb. 6, 2019).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Ruth Bader Ginsburg*, OYEZ, https://www.oyez.org/justices/ruth_bader_ginsburg [https://perma.cc/CY4V-764A] (last visited Feb. 18, 2019).

56. During her time in academia, Justice Kagan took time off to serve as Associate White House Counsel and Deputy Assistant Director for Domestic Policy in the Clinton White House. *Current Members*, *supra* note 51.

57. *Id.*

58. *Elena Kagan*, OYEZ, https://www.oyez.org/justices/elena_kagan [https://perma.cc/9ZH5-65BB] (last visited Feb. 18, 2019).

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In contrast, upon her graduation from law school, Justice Sotomayor became an assistant district attorney in the New York District Attorney's office, where she prosecuted all sorts of crime, from prostitution to child pornography to murder.[59] She stayed in that position for five years and had a short-lived solo practice before joining Pavia and Harcourt in Manhattan as an associate.[60] During her eight years there, she specialized in civil litigation and arbitration in the fields of intellectual property and international law.[61] In 1992, she became a judge on the U.S. District Court for the Southern District of New York, where she served for six years before ascending to the Second Circuit in 1998.[62] In fact, Justice Sotomayor is the only sitting Justice who has served as a District Court judge.[63]

It is undoubtedly her experience as a civil litigator and a trial judge, even more than her Puerto Rican heritage or her childhood residency in public housing, that has enabled Justice Sotomayor to predict the negative effects of the Court's recent personal jurisdiction decisions. Just as she saw that it was unfair to require the plaintiff in *J. McIntyre* to go to England to sue the manufacturer,[64] so she foresaw that *Daimler* would force plaintiffs like Erwin into inconvenient forums and would deprive some plaintiffs of any forum at all.[65] If experience as a civil litigator and trial court judge is necessary for Supreme Court justices to appreciate the practical effects of their rulings, then we need to revise the qualifications for elevation to the Court. Looking for Circuit Court judges who have also served as District Judges might be a wise course if we wish to avoid, or remedy, precedents like *Daimler* that have disastrous ripple effects.

Professor Hoffheimer has done a great service by pointing out the jurisprudential deficiencies in the Roberts Court's personal jurisdiction decisions. Focusing on *Bristol-Myers Squibb*, he has effectively demonstrated the threats posed by these decisions, including the potential destruction of the liberal joinder rules of the Federal Rules of Civil Procedure. As we continue to see the *Daimler* dominoes fall, we can only hope that Justice Sotomayor's practical, prescient arguments begin to sway her colleagues.

59. SONIA SOTOMAYOR, MY BELOVED WORLD 240–50 (2013).
60. *Id.* at 258–60.
61. *Id.*
62. *Id.* at 293.
63. *Current Members*, *supra* note 51.
64. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 904 (2011) (Ginsburg, J., dissenting).
65. Daimler AG v. Bauman, 517 U.S. 117, 159 (2014) (Sotomayor, J., concurring in the judgment).

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