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# Considerations of Choice of Law in the Doctrine of Forum Non Conveniens

A frequent consequence of a dismissal under the doctrine of forum non conveniens is that the action is tried under the substantive law of the alternative forum. The Supreme Court held in the 1981 case of *Piper Aircraft Co. v. Reyno*<sup>1</sup> that the possibility of a change in substantive law ordinarily should not be given conclusive or even substantial weight in the forum non conveniens inquiry.<sup>2</sup> In May of 1984, a California court of appeal announced a significant departure from this federal rule in California forum non conveniens law. In *Holmes v. Syntex Laboratories, Inc.*,<sup>3</sup> a product liability suit brought by British citizens against a California corporation, the court distinguished California forum non conveniens law from the federal doctrine articulated in *Piper*. The court held that, in determining whether an alternative forum is "suitable,"<sup>4</sup> California courts are required to consider the possibility that the applicable law in the alternative forum will be less favorable to the plaintiff.<sup>5</sup>

Although its precedential value remains unclear,<sup>6</sup> the *Holmes* deci-

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1. 454 U.S. 235 (1981).

2. *Id.* at 247.

3. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

4. *Id.* at 382, 202 Cal. Rptr. at 779.

5. *Id.* The *Holmes* court further held that even a foreign national's choice of a California forum is entitled to substantial deference. 156 Cal. App. 3d at 380-81, 202 Cal. Rptr. at 778. *Piper* had determined that in federal courts, a foreign plaintiff's choice of forum deserves less deference than the choice of a resident plaintiff. 454 U.S. at 255-56.

6. The first California court to give considered treatment to *Holmes* seemed fainthearted about following *Holmes*'s lead. *Rehm v. Aero Engines*, 164 Cal. App. 3d 715, 210 Cal. Rptr. 594 (1985). *Rehm* was an action by non-California plaintiffs injured in the crash in Canada of a plane whose engine had been overhauled by the defendant, a California corporation. On its facts, the case was quite similar to *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The plaintiffs contended that, under the authority of *Holmes*, the case could not be dismissed, since Canada did not have strict liability for defective products. 164 Cal. App. 3d at 721, 210 Cal. Rptr. at 597. Defendant argued, inter alia, that *Holmes* was wrong in light of *Piper*. *Id.*

The court of appeal declined a straightforward appraisal of *Holmes* by distinguishing its facts. In particular, it said that Canadian law was not as unfavorable a change from California law as British law had been in *Holmes*. *Id.* at 722, 210 Cal. Rptr. at 597-98. The court appeared uncomfortable with aspects of the *Holmes* decision, writing "Although we are tempted to explore some of the interesting questions raised by *Holmes*, and its diversions from *Piper*, we are not required to do so to resolve the case at bar." *Id.* at 721, 210 Cal. Rptr. at 597.

A recent California court of appeal decision reversing the forum non conveniens dismissal of a wrongful death action brought by an Australian family against a California heart-valve manufacturer explicitly declined to follow part of the *Holmes* decision, although it adopted other aspects of the *Holmes* court's analysis. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 175-83, 227 Cal. Rptr. 247, 252-57 (1986). The court rejected the *Holmes* court's substantive gloss on the factor of difference in choice of law rules, see *infra* text accompanying notes 136-47, stating:

sion is noteworthy in several respects. First, it declares that California forum non conveniens law diverges from the federal model.<sup>7</sup> This declaration is important in itself, and it also poses the question of which articulation of forum non conveniens law should be applied by a California federal court sitting in diversity jurisdiction.<sup>8</sup> Second, *Holmes* may have considerable practical impact in light of the proliferation of international

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Under California law, the purpose of comparing the differences in conflict of law rules and the differences in substantive law which will be applied, once the choice of law has been made in each alternative forum, is not simply to decide which forum would provide the most advantageous law from the viewpoint of the plaintiff. To the extent *Holmes* explicitly or implicitly directs otherwise, we decline to follow it.

*Id.* at 178, 227 Cal. Rptr. at 253. Elsewhere, however, the court recognized the *Holmes* decision's "substantive law analysis approach." *Id.* at 183, 227 Cal. Rptr. at 257. The court did not go so far as to endorse the substantial weight the *Holmes* court attached to the possibility of an unfavorable change in law, *see infra* text accompanying notes 124-47. The court wrote, "In *Holmes* . . . the court discussed the substantial disadvantage to plaintiffs if they were required to proceed under British law, . . . conclud[ing] that Britain was not a 'suitable' alternative forum. . . . Although the case [at bench] cannot turn on this disadvantage in different substantive law, we may permissibly consider it." *Id.* at 182, 227 Cal. Rptr. at 256-57.

7. *Holmes*, 156 Cal. App. 3d at 382, 202 Cal. Rptr. at 779.

8. The Supreme Court has never directly considered whether a federal court sitting in diversity should apply state or federal forum non conveniens doctrine under the Rules of Decision Act, 28 U.S.C. § 1652 (1982), and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In several cases, the court has been able to avoid the issue by assuming that state and federal doctrine were identical. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 529 (1947). The *Holmes* decision's explicit declaration of the divergence between federal and California forum non conveniens law revives this unresolved question.

Whether state forum non conveniens law should apply in federal court under the *Erie* doctrine depends in large part on the purposes forum non conveniens is serving. *Erie* requires that a federal court sitting in diversity apply the substantive law of the state in which it is located. Under the *Holmes* decision, which stresses the policy of using forum non conveniens to vindicate substantive legislative interests, *see infra* text accompanying notes 26-31, a district court sitting in diversity almost certainly should apply state forum non conveniens law. Moreover, a substantive approach by definition recognizes that a forum non conveniens decision is outcome determinative in the sense that it is likely to influence a litigant's choice of forum. *See Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965). Thus, the *Erie* doctrine would extend to this kind of substantive decision about governmental interests. *See Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 820 (1985). *Contra Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985) (*Erie* does not require the application of state forum non conveniens law, since the forum non conveniens doctrine is a rule of venue, not a rule of decision).

It also could be argued that regardless of the policies the doctrine is supposed to serve, a federal court should apply state forum non conveniens law under an outcome-determinative analysis. A frequent effect of granting a forum non conveniens motion, under any court's analysis, is that the case is decided under a different substantive law. If a federal court could dismiss a case that the state court would retain, then the "accident" of federal diversity jurisdiction" would enable a party to "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964); *see infra* note 165. *See also* Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1248 (1947). *But see*, Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law*, forthcoming in 4 INT'L TAX & BUS. LAW. 155 (1986) (arguing for the adoption of a federal common law of forum non conveniens applicable in both federal and state court where necessary to protect the federal interest in an effective foreign policy).

product liability litigation,<sup>9</sup> especially since forum non conveniens disputes often are driven by differences in the substantive law of the forums.<sup>10</sup> Finally, *Holmes* may be a harbinger of a substantively driven forum non conveniens doctrine that contrasts sharply with the private-law regulatory view that *Piper* indicates is held by the Supreme Court. It therefore invites reevaluation of the appropriate role of choice of law considerations in forum non conveniens decisions.

The first part of this Comment explores the policies behind the forum non conveniens doctrine and discusses relevant federal and California legal background. Part II analyzes the change in doctrine announced in the *Holmes* decision against the background of California precedent. Part III suggests that the *Holmes* decision applies a substantive model of forum non conveniens, and explores the merits of that approach. It concludes that forum non conveniens should incorporate substantive concerns, but that, even under a substantive model, the doctrine normally should not take account of the possibility of an unfavorable change in law.

## I

### LEGAL BACKGROUND

#### A. *Origins and Policies of Forum Non Conveniens*

The doctrine of forum non conveniens originated in equity as a gradually expanding exception to the requirement that a court take jurisdiction where jurisdiction was properly laid.<sup>11</sup> Perhaps in part because it

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9. See Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1278 (1981).

10. See Comment, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 384 n.65 (1980) (citing cases). The practice of forum shopping to try a case before a more sympathetic jury or in a forum that features a more favorable substantive law was one of the factors that prompted the development of the forum non conveniens doctrine. Stimson, *Limitations on the Exercise of Jurisdiction in Personam*, 10 HASTINGS L.J. 139, 142 (1958).

A possible indication of the impact in California of the *Holmes* decision is the class action suit filed shortly after *Holmes* on behalf of 26,000 victims of the chemical leak in Union Carbide's Bhopal plant. *Simhal v. Union Carbide Corp.*, No. 833-433, (Cal. Super. Ct. San Francisco County, filed Dec. 21, 1984). This case was later consolidated with the action in the Southern District of New York. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986).

11. Forum non conveniens thus began as a jurisdictional concept. The doctrine has its origins in several Scottish cases in the nineteenth century, which used the term "forum non competens" to dismiss cases "both where the court lacked jurisdiction and where it was not expedient for the due administration of justice to hear the case." Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 387 n.35 (1947) (citing cases); see Comment, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947). An embryonic version of the doctrine first appeared in American law as early as 1801. *E.g.*, *Willendson v. Forsoket*, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (No. 17,682). Federal admiralty courts used it to decline jurisdiction over suits between foreigners. See Comment, *supra* note 10, at 375. The use of the doctrine in such cases was approved by the United States Supreme Court in 1885. *The Belgenland*, 114 U.S. 355, 364-65 (1885). Gradually, the doctrine was applied in other narrowly defined areas of litigation, such as suits between aliens and

developed as an exceptional and discretionary equitable remedy, the contours of the doctrine often have been unclear. Forum non conveniens has meant many things to many courts.<sup>12</sup> From the inception of the doctrine, commentators have remarked on the courts' confusion as to what makes a forum appropriate and on the poor predictability in the doctrine's application.<sup>13</sup>

A major source of this ambiguity is that courts have woven together in their application of forum non conveniens at least three different policy rationales for the doctrine.<sup>14</sup> First, there is convenience to the litigants. The central concern here is that the defendant should not be forced to litigate in the plaintiff's chosen forum when an alternative forum would be much more convenient. A second policy is convenience to the courts. The goal of this policy is to allocate the forum state's judicial resources so as to avoid adjudication of essentially imported controversies. Finally, a few courts, like the court in *Holmes*, have come at least implicitly to consider whether the state has a substantive interest in the outcome of the litigation.

### 1. Convenience to the Parties

The policy of convenience to the parties focuses on sheer efficiency concerns—as between two forums, which will minimize the parties' outlay of time and money? Litigation can present a number of practical problems, such as access to evidence and cost of obtaining witnesses, that can make trial more or less “easy, expeditious and inexpensive.”<sup>15</sup> An impartial trial court might be the most fair and effective arbiter of when the burdens on the defendant are so great that they should be reallocated by a change in venue.<sup>16</sup>

Courts that focus on this policy refer to factors such as “balancing of conveniences” and “relative ease of access to proof.”<sup>17</sup> Battles about

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suits involving the internal affairs of foreign corporations. See generally Comment, *supra*, at 921-24. It gained broader currency after its recognition in a 1929 law review article. See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). The modern law of forum non conveniens has developed in part in response to changes in the law of personal jurisdiction, which have exposed defendants to potential hardship and contributed to an enormous increase in judicial business. See Stein, *supra* note 8, at 803-05.

12. See Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1234 (1947).

13. *Id.* at 1247. Ehrenzweig referred to “the chaos of forum non conveniens” in a much-cited critique. See Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 58 n.4 (1967). See also Schlesinger, *Methods of Progress in Conflicts of Laws—Some Comments on Ehrenzweig's Treatment of “Transient” Jurisdiction*, 9 J. PUB. L. 313, 323-24 (1960) (“[T]here has been a complete failure to develop a reliable standard.”); Barrett, *supra* note 11, at 402 & n.112.

14. See generally Barrett, *supra* note 11, at 404-09.

15. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

16. See Comment, *supra* note 11, at 931.

17. See *id.*

these factors tend to be especially keen in international product liability cases, in which the defendant often is subject to jurisdiction in forums oceans removed from the place of injury and much of the evidence. The strongest and most influential modern articulation of this policy appears in *Piper Aircraft Co. v. Reyno*.<sup>18</sup> In holding that the possibility of an unfavorable change in law should not be given conclusive or even substantial weight in a forum non conveniens motion, the Supreme Court stated that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient."<sup>19</sup>

## 2. Convenience to the Courts

Another focal point for the forum non conveniens inquiry is convenience to the courts. Here, the efficient allocation of resources is again the concern, but judicial rather than private resources are weighed in the balance. Some of the "public-interest factors" listed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*<sup>20</sup> reflect this policy. For example, the "appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws,"<sup>21</sup> is a factor focusing on efficient allocation of judicial resources, since complicated conflict of laws inquiries generally will not pose problems of convenience to the litigants.

Similarly, courts have a strong convenience interest in avoiding undue congestion in their dockets, since "[a]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin."<sup>22</sup> Conversely, the "local interest in having localized controversies decided at home"<sup>23</sup> may be rationalized under a convenience to the courts policy.<sup>24</sup>

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18. 454 U.S. 235 (1981); see *infra* text accompanying notes 48-56; *Pain v. United Technologies Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

19. *Piper*, 454 U.S. at 256. Although this statement on its face need not refer to the *parties'* convenience, the *Piper* opinion at this point cites to two sources that clearly focus on that policy. See *Pain v. United Technologies Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980) ("At best citizenship serves as an inadequate proxy for the American residence of plaintiff, which in turn is only one indicator of how inconvenient it may be for the plaintiff to litigate his case in a foreign forum, as measured by the *Gilbert* factors of private interest.") (emphasis added) (footnote omitted), *cert. denied*, 454 U.S. 1128 (1981); Comment, *supra* note 10, at 382-83 ("[I]t is undoubtedly true that American citizens, taken as a class, tend to possess characteristics that make foreign litigation *inconvenient for them*. It is entirely proper that such characteristics be weighed in a court's balancing of the *parties' inconveniences*.") (emphasis added) (footnote omitted).

20. 330 U.S. 501, 508-09 (1947); see also *infra* text accompanying notes 40-47.

21. *Gulf Oil*, 330 U.S. at 509.

22. *Id.* at 508.

23. *Id.* at 509.

24. *But see* text accompanying notes 153-73 (arguing that this factor necessarily implicates substantive concerns).

The convenience to the courts policy helps explain why some trial courts are empowered to raise the *forum non conveniens* motion *sua sponte*. Section 410.30 of the California Code of Civil Procedure, for example, provides that a court can entertain the *forum non conveniens* issue upon the "motion of a party or its own motion."<sup>25</sup> If convenience to the parties were the sole policy embodied in *forum non conveniens* doctrine, judicial initiation would be inapposite.

### 3. *Substantive Legislative Interests of the Forum*

A third policy that also could animate the *forum non conveniens* doctrine is the substantive legislative policies of the forum. By applying an analysis similar to that employed in some choice of law inquiries, *forum non conveniens* could focus on whether the forum has a sufficient interest in the litigation to justify retaining jurisdiction.<sup>26</sup> Courts applying this policy would consider not only convenience to the courts and the parties, but also whether the forum in its legislative policies has expressed an interest in controlling the type of conduct at issue. This approach suggests an alternative interpretation of the Supreme Court's statement that "[t]here is a local interest in having localized controversies decided at home."<sup>27</sup>

This policy is not prominent in current articulations of the doctrine. It has been at most implicit in *forum non conveniens* law, but it has played a role in some jurisdictions.<sup>28</sup> For example, New York courts historically refused to grant *forum non conveniens* motions in commercial cases, even when the plaintiff was a nonresident and the defendant could show serious inconvenience.<sup>29</sup> The rationale for this rule was that the state had an interest in encouraging commercial activity and growth by ensuring commercial entities the use of its courts.<sup>30</sup> This interest

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25. CAL. CIV. PROC. CODE § 410.30 (West 1973).

26. "Interest" here refers to the idea of a governmental interest developed by Brainerd Currie. Currie proposed a two step analysis for whether a government has an interest in the application of its law in a given case. First, the court construes and interprets the forum's law to determine what social, economic, or administrative governmental policy it expresses. Second, the court analyzes the state's relationship to the litigation to determine whether application of the state's law can reasonably be expected to effectuate the policy. If it can, the state is said to have an interest in the application of its law. See, e.g., Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958); see also Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter Currie, *Married Women's Contracts*]. Cf. Greenberg, *supra* note 8, at 183 n.231 (urging a broader formulation of governmental interest, embracing the sensitivities and dignity of a nation, in the context of *forum non conveniens* decisions in international cases).

27. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

28. See notes 69-74 and accompanying text.

29. Barrett, *supra* note 11, at 405 (citing cases).

30. *Id.*

barred a *forum non conveniens* dismissal even when it would have been appropriate in a tort cause of action arising out of similar facts.

A more pronounced example of a substantively driven *forum non conveniens* doctrine is provided by the *Holmes* court, which anchored its holding on California's substantive regulatory "interest in regulating the foreign marketing of defective products developed here."<sup>31</sup> The decision thus emphasized the forum's interest in the application of a specified substantive policy, not just its interest in providing a forum for certain kinds of plaintiffs. Under this rationale, a court applying *forum non conveniens* law must consider the forum's interest in the application of its law.

#### 4. *Factors Sounding Under Different Policies*

Some factors considered in the *forum non conveniens* inquiry may serve more than one of these policies, in which case the interpretation of the factor may depend upon which policy the court is emphasizing. For example, many jurisdictions, including California,<sup>32</sup> will not grant a *forum non conveniens* dismissal against a resident plaintiff. Under a convenience to the parties approach, courts may see residency as ensuring that the litigation is convenient for at least one party.<sup>33</sup> Under a convenience to the courts approach, they could conclude as a matter of allocation of finite judicial resources that residents should have priority of access to forums in their own state. This priority arguably is independent of any interest in vindication of the forum's substantive interests and amounts to a recognition that a primary role of courts is to provide local citizens with a forum for redress of their complaints.<sup>34</sup> Finally, under a substantive approach, the state might be seen as having an overriding interest in ensuring that the disputes involving its residents are resolved in accordance with the substantive policies of the state.

Similarly, the policy of not imposing jury duty "upon the people of a community which has no relation to the litigation"<sup>35</sup> may express a convenience to the courts concern for not squandering jury service on

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31. 156 Cal. App. 3d 372, 391, 202 Cal. Rptr. 773, 788 (1984). See *infra* note 95.

32. See *infra* text accompanying notes 65-68.

33. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient."); Comment, *supra* note 10, at 381 ("The plaintiff's citizenship may perhaps be a good proxy for his convenience; all other things being equal, one might well suppose that an American citizen can sue more conveniently at home than abroad.").

34. Thus, California courts have reasoned that since California residents support the judicial system, the state has a strong interest in assuring its citizens are not denied compensation as a result of the inconvenience and expense of bringing suit in a distant forum. Ryan & Berger, *Forum Non Conveniens in California*, 1 PAC. L.J. 532, 547 (1970) (citing *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967)).

35. *Gulf Oil*, 330 U.S. at 508-09.

imported controversies. It also can be integrated with a substantive approach, however, since it prescribes a sensitivity to those fact patterns that implicate a forum's interest in the application of its substantive policies.

The forum non conveniens decisions that focus on abuse of process<sup>36</sup> also allow for varying interpretations. If a plaintiff has "resort[ed] to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself,"<sup>37</sup> then it may be important to decline jurisdiction to provide for the parties' convenience. Refusal to sanction abuses of process, however, also implicates the courts' interest in procedural integrity and efficient allocation of judicial resources.

### B. Federal Law

The development and current status of federal forum non conveniens law are reflected in the two Supreme Court decisions that dominate the field: *Gulf Oil Corp. v. Gilbert*<sup>38</sup> and *Piper Aircraft Co. v. Reyno*.<sup>39</sup>

#### I. Gulf Oil Corp. v. Gilbert

The Supreme Court's first authoritative statement of the forum non conveniens doctrine occurred in *Gulf Oil Corp. v. Gilbert*.<sup>40</sup> The plaintiffs in *Gulf Oil* brought a diversity suit in the Southern District of New York alleging the negligent burning of a warehouse in Virginia.<sup>41</sup> The Court held that the trial court had not abused its discretion in granting a forum non conveniens dismissal.<sup>42</sup> While the Court specifically declined to catalog the circumstances that would justify exercise of the doctrine,<sup>43</sup> it did formulate what has become a well-known list of two sets of factors: private-interest factors and public-interest factors.<sup>44</sup> The private-interest factors comprised "relative ease of access to sources of proof; availability

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36. See Comment, *supra* note 11, at 930-31; see also Comment, *supra* note 10, at 376. Courts focusing on abuse of process speak in terms of "imposition on the court's jurisdiction," "oppression," or "harassment." *Id.* The English conception of the doctrine apparently relied heavily on the idea of abuse of process. Comment, *supra* note 11, at 911.

37. *Gulf Oil*, 330 U.S. at 507.

38. 330 U.S. 501 (1947).

39. 454 U.S. 235 (1981).

40. 330 U.S. at 504. The plaintiff in *Gulf Oil* was a Virginian, the defendant was doing business in Virginia, the alleged tort occurred in Virginia, and nearly all the evidence was in Virginia. See Comment, *supra* note 10, at 375. *Gulf Oil* was decided in conjunction with *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947), which stressed the propriety of a forum non conveniens dismissal when the plaintiff's choice of forum is so vexatious or oppressive to the defendant "as to be out of all proportion to plaintiff's convenience." *Id.* at 524.

41. 330 U.S. at 502-03.

42. *Id.* at 512.

43. *Id.* at 508.

44. *Id.*

of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."<sup>45</sup> These factors are considered to ensure that the litigation is convenient for the parties.

The public-interest factors implicitly focused on the forum's convenience interests. These included the impropriety of imposing jury duty on members of a community that has no relation to the litigation and the "local interest in having localized controversies decided at home."<sup>46</sup> Another public-interest factor the Court considered was problems of conflict of laws. The focus here, however, was not on any possible unfairness to the plaintiff but rather on the practical burdens that a court might encounter if it had to "untangle problems in conflict of laws, and in law foreign to itself."<sup>47</sup> That is, the Court was not concerned with the issue of which law was to apply in the controversy, but only with the possible procedural complications of making that determination.

## 2. *Forum Non Conveniens in an International Setting: Piper Aircraft Co. v. Reyno*

The Supreme Court refined federal forum non conveniens doctrine in *Piper Aircraft Co. v. Reyno*.<sup>48</sup> *Piper* was a wrongful death action initiated in a California state court by a California representative of the estates of five Scottish citizens killed in an airplane crash in Scotland. The defendants were the company that had manufactured the plane in Pennsylvania and the company that had manufactured the plane's propellers in Ohio. After the defendants removed the case to federal court, the action was transferred to Pennsylvania pursuant to 28 U.S.C. § 1404(a).<sup>49</sup> After defendants agreed to submit to jurisdiction in Great

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45. *Id.*

46. *Id.* at 508-09.

47. *Id.* at 509.

48. 454 U.S. 235 (1981).

49. 28 U.S.C. § 1404(a) (1982) is a federal housekeeping measure enacted in 1948 in part to mitigate the potential harshness of a forum non conveniens dismissal. *See Note, supra* note 9, at 1261 n.31; *see also* *Harrison v. United Fruit Co.*, 141 F. Supp. 35, 36 (S.D.N.Y. 1956). The requirements for application of § 1404(a) are much less stringent than those for a forum non conveniens dismissal. *See Ryan & Berger, supra* note 34, at 547. One corollary to the relative ease of transfer, at least where the defendant moves for a change of venue under § 1404, is that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). There is thus no change in applicable law upon a § 1404 transfer.

The *Holmes* court placed great weight on the existence of § 1404(a), arguing that "federal courts . . . have broader discretion to grant forum non conveniens motions than do state courts, because of their authority to transfer venue to a federal court in another state rather than simply stay or dismiss the action." 156 Cal. App. 3d at 378, 202 Cal. Rptr. at 776. However, § 1404 does not

Britain and to waive the statute of limitations, the district court granted a forum non conveniens dismissal, holding that Scotland was the appropriate forum.<sup>50</sup> The Court of Appeals for the Third Circuit reversed. It held that dismissal was barred automatically where a change of forum would produce a change in applicable law.<sup>51</sup>

The Supreme Court reversed, deciding that the district court had not abused its discretion in dismissing the action. The core of the Court's holding was that the possibility of an unfavorable change in law should not be given conclusive or even substantial weight in the forum non conveniens inquiry, unless the remedy in the alternative forum is so inadequate as to be no remedy at all.<sup>52</sup> The Court wrote:

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.<sup>53</sup>

The Court also held that a foreign plaintiff's choice of forum merits less deference than the choice of an American plaintiff.<sup>54</sup> The Court reasoned that the normal deference for an American citizen's choice hinges on an assumption that the choice is convenient. "When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."<sup>55</sup> Under this reasoning, a resident plaintiff's choice of forum merits deference, but only because it indicates that the trial almost certainly will be convenient for at least one party. The same presumption does not extend to the choice of a foreign plaintiff. This distinction between foreign and resident plaintiffs underscores that in federal forum non conveniens law, no particular significance adheres to a change in substantive law; it assumes importance only when it is so extreme as to affect the predicate

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authorize transfer to a foreign forum. Thus, in an international setting, the existence of § 1404(a) cannot justify a different forum non conveniens calculus for state as compared with federal courts. See also *infra* note 165 (arguing that *Van Dusen* provides implicit support for a substantive model of forum non conveniens).

50. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 737-38 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

51. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

52. *Piper*, 454 U.S. at 247-51, 255.

53. *Id.* at 250.

54. *Id.* at 256.

55. *Id.* at 256; see also *Pain v. United Technologies Corp.*, 637 F.2d 775, 797-98 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

inquiry into the existence of an alternative forum. Therefore, "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."<sup>56</sup>

### C. California Law

The *forum non conveniens* doctrine was recognized by name in California in *Price v. Atchison, Topeka & Santa Fe Railway*.<sup>57</sup> In its first articulation of the doctrine, the California Supreme Court relied almost exclusively on the list of factors from *Gulf Oil*. This indicates that at its birth California *forum non conveniens* law was seen as substantially similar to its federal counterpart.<sup>58</sup>

The California doctrine of *forum non conveniens* soon became encumbered by a multitude of judicially recognized factors.<sup>59</sup> Moreover, although the doctrine was codified in 1970,<sup>60</sup> subsequent judicial and scholastic elaboration have further complicated the law;<sup>61</sup> a leading case

56. *Piper*, 454 U.S. at 247.

57. 42 Cal. 2d 577, 268 P.2d 457 (1954), *cert. denied*, 348 U.S. 839 (1954). In *Price*, the California Supreme Court affirmed the trial court's grant of a *forum non conveniens* motion in a Federal Employers' Liability Act action for personal injuries sustained by the New Mexico plaintiff in New Mexico while he was working for the defendant railroad company, a Kansas corporation doing business in New Mexico and California. *Id.* at 586-87, 268 P.2d at 462-63.

58. The court's acceptance of *forum non conveniens* in California rested heavily on a convenience-to-courts rationale. *See id.* at 583-84, 268 P.2d at 461 (stressing the alleviation of the burden on courts and jurors as a consequence of adopting the *forum non conveniens* doctrine).

59. *See Barrett*, *supra* note 11, at 402.

60. CAL. CIV. PROC. CODE § 410.30 (West 1973). Section 410.30 was meant neither to enlarge nor to restrict the scope of *forum non conveniens* as it had been developed in the courts. Subsection (a) provides:

When a court upon motion of a party or its own motion finds that in the interests of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.

*Id.* The accompanying commentary instructs a court not to entertain a suit "if it believes that the forum of filing is a seriously inconvenient forum for the trial of the action." *Id.*, Judicial Council comment at 490. The commentary goes on to list several factors culled from various sources, principally the *Gulf Oil* decision. It continues with the passage that strongly impressed the *Holmes* court, in which it states that the two most important factors favoring retention of jurisdiction are: (1) not disturbing the plaintiff's choice of forum except for weighty reasons, and (2) not dismissing unless a suitable alternative forum is available. *Id.* at 492.

Arguably, neither of these factors should be part of the *forum non conveniens* inquiry proper. The second is best seen as a factual precondition to entertaining a *forum non conveniens* motion. The first may be merely an expression of an allocation of burden of proof in a *forum non conveniens* motion. *See infra* text accompanying notes 99-147.

61. *See, e.g.*, Ryan & Berger, *supra* note 34, at 540 for a typical potpourri of relevant factors. The *Holmes* court culled factors from ten California cases in its analysis, citing Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976); *Price v. Atchison, Topeka & Santa Fe Railway*, 42 Cal. 2d 577, 268 P.2d 457 (1954); *Dendy v. MGM Grand Hotels Inc.*, 137 Cal. App. 3d 457, 187 Cal. Rptr. 95 (1982); *Hemmelgarn v. Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980); *International Harvester Co. v. Superior Court*, 95 Cal. App. 3d 652, 157 Cal. Rptr. 324 (1979); *Jagger v. Superior Court*, 96 Cal. App. 3d 579, 158 Cal. Rptr. 163 (1979); *Henderson v. Superior Court*, 77 Cal. App. 3d 583, 142 Cal. Rptr. 478 (1978); *Brown v. Clorox Co.*,

lists no fewer than twenty-five factors that a California court should consider in a forum non conveniens motion.<sup>62</sup> As a result, California doctrine is unwieldy, and commentators have remarked on its questionable predictive value.<sup>63</sup>

Nevertheless, the cases reveal distinctive tendencies in California forum non conveniens law. First, California courts distinguish between resident and nonresident plaintiffs, refusing to grant forum non conveniens dismissals against bona fide resident plaintiffs. Second, California places great weight on whether or not a corporate defendant maintains its principal place of business in California. Third, some California cases focus at least implicitly on whether the forum has an interest in the application of its substantive policies.

California courts have insisted on the distinction between resident and nonresident plaintiffs in the forum non conveniens analysis from the time the doctrine was first recognized in *Price*. The *Price* court concluded that when exercising its discretionary power to dismiss, the court constitutionally could distinguish between residents and nonresidents.<sup>64</sup> The distinction was critical again in *Archibald v. Cinerama Hotels*,<sup>65</sup> the California Supreme Court's most recent consideration of the forum non conveniens doctrine. *Archibald* was a class action brought by California residents against Hawaii hotel and motel operators, alleging a discriminatory rate structure. The supreme court reversed as an abuse of discretion the trial court's grant of a forum non conveniens dismissal, holding that a forum non conveniens dismissal is improper in California when the plaintiff is a California resident unless California cannot provide an adequate forum.<sup>66</sup> A California trial court may stay the action in response to a forum non conveniens motion against a bona fide<sup>67</sup> California resident, but it may not dismiss, even if the alternative forum is much more

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56 Cal. App. 3d 306, 128 Cal. Rptr. 385 (1976); *Chavarria v. Superior Court*, 40 Cal. App. 3d 1073, 115 Cal. Rptr. 549 (1974); *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970), *cert. denied*, 401 U.S. 1013 (1971).

62. *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970), *cert. denied*, 401 U.S. 1013 (1971).

63. See Comment, *Open Questions in California's Adoption of the Doctrine of Forum Non Conveniens*, 42 CALIF. L. REV. 690, 692 (1954) (*Gulf Oil* factors are very vague principles that provide inadequate guidance for California courts); see also Barrett, *supra* note 11, at 402 (noting the lower predictability arising from the many factors which make up the forum non conveniens doctrine).

64. 42 Cal. 2d at 582-83, 268 P.2d at 460 ("There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." (quoting *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387 (1929))).

65. 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976).

66. *Id.* at 859, 544 P.2d at 951, 126 Cal. Rptr. at 815.

67. The *Archibald* court acknowledged an exception where the nominal plaintiff is appointed as a representative of a nonresident real party in interest in order to gain access to California courts. *Id.* at 859 & n.6, 544 P.2d at 951 & n.6, 126 Cal. Rptr. at 815 & n.6.

convenient.<sup>68</sup>

Both the importance of a corporate defendant's principal place of business and the tendency of some California courts to take account of the state's substantive interests can be demonstrated by comparing *Great Northern Railway v. Superior Court*<sup>69</sup> with *Brown v. Clorox Co.*<sup>70</sup> In *Great Northern*, a nonresident real party in interest sued a defendant doing business in California on a claim arising out of a Washington accident.<sup>71</sup> The court held that the trial court had abused its discretion by denying a forum non conveniens dismissal. *Brown*, by contrast, involved a nonresident plaintiff suing a defendant with its principal place of business in California on a claim arising out of an accident in Washington.<sup>72</sup> The court there held that the trial court had abused its discretion by granting a forum non conveniens dismissal. The two cases thus demarcate one set of boundaries on a California trial court's discretion defined by whether the defendant had its principal place of business in California.<sup>73</sup>

This emphasis on the defendant's principal place of business could be explained under either a convenience to the parties or a convenience to the courts approach. The court in *Brown*, however, used it to ground an argument based upon the state's substantive legislative interest. The court concluded that since two of the three defendants were California corporations, California had a regulatory interest in "the manufacturing, . . . packaging, . . . distributing, and selling of products in [California] and sending those products from this state to other states."<sup>74</sup> This fac-

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68. *Id.* at 858-60, 544 P.2d at 950-52, 126 Cal. Rptr. at 814-16. By implication, a forum non conveniens dismissal could be appropriate against a nonresident plaintiff when the alternative forum is much more convenient.

It is worth stressing that the *Archibald* principle is less a part of the forum non conveniens calculus than an exception to it. *Archibald* holds that the entire inquiry is moot where the plaintiff is a California resident.

69. 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970), cert. denied, 401 U.S. 1013 (1971).

70. 56 Cal. App. 3d 306, 128 Cal. Rptr. 385 (1976).

71. 12 Cal. App. 3d at 107-08, 90 Cal. Rptr. at 463.

72. In *Brown*, an infant in Washington was injured by drinking some Liquid-plumr that was bought in Washington. The product's place of manufacture was uncertain. 56 Cal. App. 3d at 308-09, 128 Cal. Rptr. at 388.

73. See also *Appalachian Ins. Co. v. Superior Court*, 162 Cal. App. 3d 427, 437 n.3, 208 Cal. Rptr. 627, 632 n.3 (1984) (possible difference in forum non conveniens inquiry if a litigant not only conducted substantial business in the state but also had its principal place of business there).

74. 56 Cal. App. 3d at 313, 128 Cal. Rptr. at 391. The *Holmes* court was more direct. "This state has an interest in regulating the foreign marketing of defective products alleged to have been developed in California." 156 Cal. App. 3d at 389, 128 Cal. Rptr. at 784. See also *Hemmelgarn v. Boeing Co.*, 106 Cal. App. 3d 576, 580, 165 Cal. Rptr. 190, 192 (1980) ("Even where the plaintiff is out of state, but willing to shoulder the burden of inconvenience and additional expense of litigation in California, the motion to dismiss should be denied if plaintiff claims defendants are companies incorporated in California, maintain their principal place of business here, and conduct themselves

toring-in of California's interest foreshadowed a more pronounced substantive approach in the *Holmes* case.

## II.

### CALIFORNIA FORUM NON CONVENIENS DOCTRINE UNDER *HOLMES V. SYNTAX LABORATORIES, INC.*

#### A. *The Holmes Case*

*Holmes v. Syntex Laboratories, Inc.*<sup>75</sup> was one of a series of cases filed on behalf of British women allegedly injured as a result of using the oral contraceptive Norinyl.<sup>76</sup> The defendant, Syntex Laboratories, was a Delaware corporation with its principal place of business in California.<sup>77</sup> The plaintiff alleged that Syntex "caused and allowed" Norinyl to be distributed and marketed in England without adequate warning of its possible dangerous side effects.<sup>78</sup>

The defendants moved to dismiss the complaint on forum non conveniens grounds and agreed to submit to the jurisdiction of the British courts and waive any statute of limitations defense if the motion were granted.<sup>79</sup> The trial court, relying heavily on the United States Supreme Court decision in *Piper Aircraft Co. v. Reyno*,<sup>80</sup> granted the motion.<sup>81</sup>

The court of appeal reversed. While it agreed that California forum non conveniens law derived from federal law,<sup>82</sup> it held that the doctrine

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here so as to cause injuries to others in another state." (citing *Brown*, 56 Cal. App. 3d at 313, 128 Cal. Rptr. at 385)).

Note that California had a clearer connection to the litigation in *Brown* than in *Holmes*, since two of the *Brown* defendants were California corporations and the defendants in *Brown* actually manufactured, packaged, and distributed the harmful products.

75. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

76. See, e.g., *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Bewers v. American Home Prods. Corp.*, 99 A.D.2d 949, 472 N.Y.S.2d 637 (1984), *aff'd*, 64 N.Y.2d 630, 474 N.E.2d, 485 N.Y.S.2d 39 (1984).

77. *Holmes*, 156 Cal. App. 3d at 376, 202 Cal. Rptr. at 775.

78. *Id.* The complaint presented causes of action for negligence, strict liability, breach of warranty, and fraud and misrepresentation. *Id.* While the contraceptive apparently had been manufactured, marketed, and distributed in England by an independent subsidiary of Syntex not named in the complaint, the plaintiff alleged that the defendants had performed all premarketing research, chemical studies, animal studies, and clinical studies for Norinyl in California. *Id.* at 388, 202 Cal. Rptr. at 783.

After Syntex Laboratories moved for a forum non conveniens dismissal, the complaint was amended to name both Syntex U.S.A., Inc. and Syntex Corporation. Syntex U.S.A. was a Delaware corporation with offices in Palo Alto. Syntex Corporation, a Panamanian corporation with offices in Palo Alto, was the parent of both Syntex Laboratories and Syntex U.S.A. *Id.* at 376.

79. *Id.* at 376-77, 202 Cal. Rptr. at 775.

80. 454 U.S. 235 (1981).

81. See *Holmes*, 156 Cal. App. 3d at 376-77, 202 Cal. Rptr. at 775.

82. *Id.* at 378, 202 Cal. Rptr. at 776.

in California had come to diverge from its federal counterpart in two crucial respects. First, “the rule of substantial deference to the plaintiff’s choice of forum has much greater importance” in California forum non conveniens law than in federal law after *Piper*, even when the plaintiff is a foreigner.<sup>83</sup> Second, “California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a forum non conveniens dismissal.”<sup>84</sup> The court held that because of the trial court’s failure to give adequate weight to these two principles, its decision to dismiss was an abuse of discretion.<sup>85</sup>

The court identified the plaintiff’s choice of forum and the possibility of an unfavorable change in law as the most important elements in the California calculus,<sup>86</sup> implying that they were distinct from and paramount to the list of public-interest and private-interest factors set down by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*.<sup>87</sup> “Having determined that the California law of forum non conveniens differs from federal law in two fundamental respects,”<sup>88</sup> the court proceeded to consider the list of twenty-five factors laid out in *Great Northern Railway v. Superior Court*.<sup>89</sup> The court consolidated these factors into five factors it considered most important for the *Holmes* case: the existence of a suitable alternative forum; defendant’s place of incorporation; the parties’ relationships to California; the burden on California courts; and the relative convenience to the parties.<sup>90</sup>

The court then evaluated the case in light of each of the five factors. In appraising the availability of a suitable alternative forum, it used a novel approach. Stating that “in the law, theory and reality sometimes diverge,”<sup>91</sup> the court considered British negligence law in its actual application to product liability litigation.<sup>92</sup> The court was impressed by studies plaintiffs cited that indicated British negligence law presented greater obstacles to recovery than American law.<sup>93</sup> The court concluded:

If the present litigation occurs in Britain, appellants . . . will be forced to litigate under a system of negligence law that the British themselves have condemned as inadequate in the field of defective products. The resulting disadvantage to appellants is a factor that constitutes denial of a “suitable” alternative forum under California law (though not, as required

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83. *Id.* at 380-81, 202 Cal. Rptr. at 778.

84. *Id.* at 381, 202 Cal. Rptr. at 778.

85. *Id.* at 391, 202 Cal. Rptr. at 785.

86. *Id.* at 378-79, 202 Cal. Rptr. at 776-77.

87. 330 U.S. 501 (1947).

88. *Holmes*, 156 Cal. App. 3d at 382, 202 Cal. Rptr. at 779.

89. *See id.* at 378 n.2, 202 Cal. Rptr. at 776 n.2.

90. *Holmes*, 156 Cal. App. 3d at 383, 202 Cal. Rptr. at 780.

91. *Id.* at 385, 202 Cal. Rptr. at 781.

92. *Id.* at 383-87, 202 Cal. Rptr. at 780-82.

93. *Id.* at 385, 202 Cal. Rptr. at 781.

under federal law, a denial of "any" remedy under *Piper*) and weighs heavily against a forum non conveniens dismissal.<sup>94</sup>

To the next two questions—defendant's principal place of business and the parties' relationship to California—the *Holmes* court supplied essentially the same answer: it was not unfair to require corporate defendants to defend a complaint against them in the forum where they have their principal place of business and where the tort allegedly was committed.<sup>95</sup>

The *Holmes* court disposed of the last factor on its list—the relative convenience of the parties<sup>96</sup>—by noting that the brunt of the inconvenience fell on the plaintiffs. That fact made the convenience issue of relatively little concern, since the plaintiffs, "for tactical reasons, [had] elected to shoulder the burden of litigating abroad."<sup>97</sup> As a result, this factor too weighed against dismissal.

The court summarized its holding in its assessment of the burden to the trial court of retaining jurisdiction. It evaluated that burden in light of the state's perceived substantive interest in regulating the in-state conduct of corporations with their principal place of business in California. The court wrote:

The burden imposed on the trial court, while substantial, would not be unfair, inequitable or disproportionate in view of the defendants' relationship to and alleged conduct in this state and the state's interest in regulating the foreign marketing of defective products developed here. While we are sensitive to concerns of creating or adding to trial court backlogs, California courts have a responsibility to provide a forum for litigation against corporations utilizing this state as their principal place of business for torts committed in California.<sup>98</sup>

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94. *Id.* at 387, 202 Cal. Rptr. at 782. The concurring opinion said explicitly that the trial court should have determined if British remedies for negligence would have been appropriate "in actual application." *Id.* at 392, 202 Cal. Rptr. at 786 (Low, P.J., concurring).

95. First, the court found that it was not unfair to require corporate defendants to defend a tort action in the forum where they have their principal place of business and where the tort allegedly was committed. *Id.* at 387, 202 Cal. Rptr. at 783. Second, using somewhat circular reasoning, the court concluded that since the connection between the defendant and California imposed upon the defendant an obligation to participate in judicial proceedings in the state, a forum non conveniens dismissal would be inappropriate. *Id.* at 387-88, 202 Cal. Rptr. at 783. Third, the court determined that the burden on the California courts was not disproportionate given the connection of the parties to the cause of action, and that this connection raised California's "interest in regulating the foreign marketing of defective products alleged to have been developed in California." *Id.* at 389, 202 Cal. Rptr. at 784.

96. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. at 256. ("[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . ."). See note 19, *supra*.

97. 156 Cal. App. 3d at 390, 202 Cal. Rptr. at 784.

98. *Id.* at 391, 202 Cal. Rptr. at 785.

### B. Analysis of the Holmes Opinion

This Section scrutinizes the *Holmes* opinion's use of doctrine and precedent. It argues that the *Holmes* court misconstrued doctrinal language in according substantial deference to the choice of a nonresident plaintiff. It then suggests the court mistakenly assumed that California law applied, but that in any event, its decision to factor the possibility of an unfavorable change of law into the forum non conveniens calculus was grounded in another faulty interpretation of doctrine.

As a preliminary matter, the *Holmes* opinion probably unduly emphasizes the divergence of federal and California forum non conveniens law. The emphasis is understandable, because under federal precedents, specifically *Piper Aircraft Co. v. Reyno*,<sup>99</sup> a forum non conveniens dismissal might have been required in *Holmes*, and certainly would not have been an abuse of discretion. In fact, however, California cases and statutory law did not so clearly diverge from federal law before *Holmes*. To the contrary, they relied heavily on federal precedent.<sup>100</sup> To reach its conclusion, moreover, the *Holmes* court had to overlook prominent contrary opinion. The United States Supreme Court in *Piper* perceived no divergence between federal and California forum non conveniens law, stating in a footnote, "California law on *forum non conveniens* dismissals [is] virtually identical to federal law."<sup>101</sup> In fact, any clear split between federal and California forum non conveniens law is a product of the *Holmes* decision itself.

#### 1. Deference to Plaintiff's Choice of Forum

One of the *Holmes* court's two principal holdings was that "a foreign plaintiff's choice of forum is still afforded substantial deference in California."<sup>102</sup> That holding overlooks the implication of the distinction California courts have drawn between resident and nonresident plaintiffs. It also gives independent weight to language properly viewed as an

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99. 454 U.S. 235 (1981).

100. Indeed, the forum non conveniens case that probably has had the greatest influence on California law is that of the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Each of the cases cited by the *Holmes* court, as well as the *Holmes* opinion itself, cites approvingly to *Gulf Oil*. See, e.g., *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 860, 544 P.2d 947, 952, 126 Cal. Rptr. 811, 816 (1976); *Brown v. Clorox Co.*, 56 Cal. App. 3d 306, 310, 128 Cal. Rptr. 385, 388 (1976); *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 109, 90 Cal. Rptr. 461, 464 (1970), cert. denied, 401 U.S. 1013 (1971); see also CAL. CIV. PROC. CODE § 410.30 Judicial Council comment 490 (West 1973) (citing *Gulf Oil* as the first illustrative case).

101. *Piper*, 454 U.S. at 248 n.13. The Third Circuit appellate opinion in *Piper*, which the *Holmes* court cited as the proper federal analog to California law, 156 Cal. App. 3d at 380, 202 Cal. Rptr. at 777-78, shared the same assumption. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 158 n.20. (3rd Cir. 1980) ("In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law."), rev'd, 454 U.S. 235 (1981).

102. *Holmes*, 156 Cal. App. 3d at 382, 202 Cal. Rptr. at 779.

expression of the allocation of burden of persuasion in a forum non conveniens motion rather than a part of the forum non conveniens inquiry proper.

Cases such as *Price* and *Archibald* that distinguish between resident and nonresident plaintiffs suggest that prior to *Holmes*, the mere fact that plaintiff had chosen a California forum merited no independent weight in the forum non conveniens calculus.<sup>103</sup> Another California case, *Great Northern Railway v. Superior Court*,<sup>104</sup> also contradicts the *Holmes* court's position. *Great Northern* was a wrongful death action arising out of a Washington resident's death in Washington. The defendant, a railroad with its principal place of business in Minnesota, had some tracks in California. The decedent's widow hired a California law firm whose employee was appointed administratrix of the estate, thereby becoming the nominal plaintiff.<sup>105</sup> The court of appeal held that the trial court's failure to grant a forum non conveniens dismissal had been an abuse of discretion, because the legitimate interests of the real party in interest were not served by trial in California.<sup>106</sup> The court wrote that "[i]t is . . . established law that the principle of *forum non conveniens* will not ordinarily apply when the plaintiff is a resident of the state where the action is brought. . . . But that rule is wholly inapplicable where the plaintiff is the *resident administrator of the estate of a nonresident decedent*."<sup>107</sup> *Great Northern* thus demonstrates that, before *Holmes*, California courts did not necessarily defer to the plaintiff's choice when the real party was a nonresident.<sup>108</sup>

In support of its contention that California law gave greater defer-

103. See *supra* notes 57-68 and accompanying text.

That California courts accord absolute deference to a resident plaintiff's choice of forum does not in itself preclude granting substantial deference to a nonresident plaintiff's choice. But the distinction among kinds of plaintiffs indicates that the courts do not perceive that a privileged status inheres in the mere act of filing a complaint. Rather, it is the attributes of a particular plaintiff, such as residency, that make her choice worthy or not worthy of deference. See Greenberg, *supra* note 8, at 162 n.66.

104. 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970).

105. *Id.* at 108, 90 Cal. Rptr. at 463.

106. *Id.* at 115, 90 Cal. Rptr. at 468.

107. *Id.* at 111, 90 Cal. Rptr. at 465 (emphasis in original).

108. The court wrote:

'[The administratrix] is merely the nominal plaintiff. Her residence in this District should have no weight in the scale which the Court must examine as to the equities which are presented on this motion, and upon which it must exercise its discretion. At the most, it would seem that her residence is a factor of relatively little consequence.'

*Id.* at 111, 90 Cal. Rptr. at 466 (quoting *Giles v. Western Airlines*, 73 F. Supp. 616, 617 (D. Minn. 1947)).

The *Great Northern* court further held it improper for a trial court to consider in a forum non conveniens motion the possibility that courts and juries in metropolitan areas might provide a larger recovery than in the alternative forum. *Id.* at 112, 90 Cal. Rptr. at 466. Since the prospect of a larger recovery may motivate a forum non conveniens dispute, this holding provides another argument against substantial deference to a plaintiff's choice as such.

ence to a plaintiff's choice of forum than did federal law, the *Holmes* court cited passages from California cases<sup>109</sup> all of which trace, ironically, to a proposition of federal law: the Supreme Court's statement in *Gulf Oil* that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of a forum will rarely be disturbed."<sup>110</sup> This language might suggest that courts of the plaintiff's chosen forum should give presumptive weight to the plaintiff's choice simply to honor the plaintiff's subjective preference that the case be heard there. However, case law and history suggest another interpretation.

The development of forum non conveniens coincided with the expansion of a court's ability to exercise personal jurisdiction over defendants.<sup>111</sup> Forum non conveniens was viewed as a device to limit this increased access.<sup>112</sup> In part because the doctrine began as an equitable, extraordinary remedy, the trial court's discretion to dismiss was limited to cases where the balance of factors strongly favored the defendant.<sup>113</sup> In light of this history, the language from *Gulf Oil* more logically expresses not some independent deference toward freedom of choice for those parties who file a complaint, but rather the idea that forum non conveniens is "by its nature a drastic remedy to be exercised . . . with caution and restraint."<sup>114</sup> That is, the language is a shorthand way of saying that forum non conveniens, which represents a judicial override of the legislature's decision to exercise jurisdiction, should be regarded as an extraordinary remedy available only in limited circumstances, as for example when the defendant otherwise might be subjected to significant and unnecessary inconvenience and expense.<sup>115</sup>

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109. *Holmes*, 156 Cal. App. 3d at 381, 202 Cal. Rptr. at 778.

110. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

111. See Stein, *supra* note 8, at 801-04.

112. See Comment, *supra* note 12, at 1234.

113. See *id.* at 1235. The caution with which the doctrine originally was circumscribed may be the result of a since-discredited theory that the right to sue in state courts was among the privileges granted to all United States citizens in the Privileges and Immunities Clause of the Constitution. See *id.* at 1235 & n.10. Though this conception eroded, its prior influence may have encouraged caution in exercising the discretion allowed under the forum non conveniens doctrine.

114. *Bechtel Corp. v. Industrial Indem. Co.*, 86 Cal. App. 3d 45, 49, 150 Cal. Rptr. 29, 31 (1978).

115. Ryan & Berger, *supra* note 34, at 536.

That this understanding of substantial deference to the plaintiff's choice applies in California is strongly suggested by a court of appeal case cited by the *Holmes* court, *International Harvester Co. v. Superior Court*, 95 Cal. App. 3d 652, 157 Cal. Rptr. 324 (1979). *International Harvester* was a wrongful death action by survivors of a California resident killed in a truck accident in Kansas. The named defendant was Sears, Roebuck & Co., the distributor of the truck tire blamed for the accident. Sears cross-complained against the truck manufacturer, *International Harvester*, seeking indemnity, and thereafter settled its cause of action with the plaintiff. *Id.* at 654-55, 157 Cal. Rptr. at 325. *International Harvester* moved for a forum non conveniens dismissal, contending that it would be more convenient to try the action in Kansas, where the accident had occurred. *Id.* at 655, 157 Cal. Rptr. at 325.

In denying the petition, the court accorded the same deference to Sears, the original defendant,

This interpretation suggests that the *Gulf Oil* language counsels caution in overriding the legitimate choice of a legislature as to when to exercise jurisdiction. It could be argued that forum non conveniens should be an extraordinary remedy not just because of distribution-of-power concerns, but also precisely in order to accord substantial deference to even a nonresident plaintiff's choice. Since the *Gulf Oil* language cannot on its own support the *Holmes* court's interpretation, however, this argument requires policy justifications, which the *Holmes* court did not provide. And while there are several possible rationales for considering a resident plaintiff's subjective preference as a factor in the forum non conveniens calculus,<sup>116</sup> the reasons for deferring to a nonresident's choice are at best obscure,<sup>117</sup> and the *Holmes* decision does not clarify

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as is normally enjoyed by the plaintiff in a forum non conveniens motion. *Id.* at 654, 157 Cal. Rptr. at 325 (citing California's interest in encouraging settlement with injured plaintiffs and the long pendency of the action in California). It cited to *Great Northern* with a small but significant shift in language: "denial of a motion to dismiss or abate for absence of a convenient forum will not be overturned on appeal unless the 'balance weighs strongly' in favor of *the moving party.*" *Id.* at 656, 157 Cal. Rptr. at 326 (citing *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 110, 90 Cal. Rptr. 461, 465 (1970)) (emphasis added).

Sears, however, had not made the original choice to sue in California; it counterclaimed after having been haled into court by the original plaintiff in the case. The court nevertheless required a strong showing from International Harvester, the moving party. This preferred-position balancing in favor of Sears could not have served a policy of deference to plaintiff's choice, since the plaintiff who had chosen California was no longer in the case. Thus, prior to *Holmes*, at least some California courts interpreted the "substantial deference" language to refer to the allocation of burden of proof in the exercise of an extraordinary remedy. Plaintiff's status was merely a proxy for this concern, not an independent factor of substantial weight.

116. Under a convenience to the parties approach, for example, the plaintiff's residency suggests that trial in the home forum would not be unduly burdensome. Under a convenience to the courts approach, the plaintiff's residency can serve as a connection that justifies retaining jurisdiction. And under a substantive approach, it can trigger a substantive interest in compensating residents for their injuries. See *supra* text accompanying notes 32-34.

None of these policies, however, justifies according substantial deference to the choice of a nonresident plaintiff. All other things being equal, such status indicates that trial in the chosen forum is likely to be less convenient to the parties. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."). A plaintiff's nonresident status is also a poor proxy for convenience to the courts. It increases the likelihood that the court will have to apply foreign law, or at least will have to make complicated choice of law decisions. See *Gulf Oil v. Gilbert*, 330 U.S. 501, 509 (1947). Finally, as modern choice of law theory has demonstrated, nonresident plaintiff status without more does not implicate substantive legislative interests of the forum. See generally *Currie, Married Women's Contracts*, *supra* note 26, especially at 237-41.

117. Although the *Holmes* court did not make them, arguments favoring deference to a nonresident plaintiff's choice can be offered, but they are relatively weak and bear little relation to the policies behind the forum non conveniens doctrine. For example, forums could decide that, as a policy matter, an injured party should have broad access to the courts. Such a policy also might be justified by the rationale that defendants are in general better able than plaintiffs to absorb the expense of litigating abroad. See *Stein, supra* note 8, at 817. But see *id.* at 816 ("[A]t common law, just the opposite principle, that suit must be brought where the plaintiff finds the defendant, was enshrined in a Latin maxim: *actor sequitur forum rei.*"). Finally, forums might conclude that there

them.

## 2. "Unsuitability" and Choice of Law

Under traditional forum non conveniens doctrine, a court will not dismiss unless an alternative forum is available in which the action can be heard.<sup>118</sup> The *Holmes* decision worked two important mutations on this principle. First, the court treated the availability of a suitable alternative forum as a discretionary factor within the forum non conveniens calculus, rather than as a threshold inquiry. Second, the court incorporated into its appraisal of a suitable alternative forum the possibility of an unfavorable change in law, holding that England was an unsuitable forum in large part because of its less-developed product liability law.

### a. *The Assumption California Law Would Apply*

A forum non conveniens dismissal in *Holmes* would have resulted in an unfavorable change in law only if California law would have applied were the trial held in California. However, the court made no explicit resolution of the choice of law issue. In fact, so tenuous was the action's connection to the state that a California court applying California choice of law rules might have been obliged to apply British law.

*Hernandez v. Burger*<sup>119</sup> was a California conflict of laws case involving an automobile accident in Mexico between California resident defendants and a Mexican plaintiff. The court of appeal sustained the trial court's finding that under governmental interest analysis, Mexico's law of limited damages should apply. The court wrote:

[N]o legitimate interest or policy of the State of California would be served by the application of its unlimited damages rule because the plaintiff is a resident and citizen of Mexico, the accident occurred in Mexico, and the only connection California has with the case is that the defendants happen to be California residents and that California is the forum.<sup>120</sup>

The court refused to recognize a regulatory interest in the case, stating that "California has no legitimate interest in the possible deterrent effect of its unlimited recovery rule on conduct in Mexico. . . . Indeed, with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest."<sup>121</sup>

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is little need to protect the convenience interest of a nonresident plaintiff when the plaintiff is willing and eager to litigate in their courts, *see Holmes*, 156 Cal. App. 3d 372, 390, 202 Cal. Rptr. 773, 784.

118. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947).

119. 102 Cal. App. 3d 795, 162 Cal. Rptr. 564 (1980).

120. *Id.* at 799, 162 Cal. Rptr. at 566.

121. *Id.* at 800-02, 162 Cal. Rptr. at 567-68; *see also* *Howe v. Diversified Builders, Inc.*, 262 Cal. App. 2d 741, 69 Cal. Rptr. 56 (1968). In *Howe*, a California court of appeal affirmed the application of Nevada law to a suit against California corporations by a Nevada resident for personal injuries

This precedent may be distinguished in that the pleadings in *Holmes* were drafted to allege tortious conduct in California.<sup>122</sup> Nevertheless, it is far from clear that California law would apply in *Holmes*, where, as in *Hernandez*, foreign nationals sued California residents for damages sustained in the alternative forum.<sup>123</sup>

*b. Unsuitability as a Discretionary Factor*

In most jurisdictions, the availability of an alternative forum is a prerequisite to the court's consideration of a motion to dismiss on forum non conveniens grounds.<sup>124</sup> At a minimum, the moving party must be able to identify another forum where the cause of action is not barred by the statute of limitations and where the moving party is amenable to service.<sup>125</sup> In addition, the Supreme Court has suggested that an alternative forum may be "unavailable" when the remedy it offers is "so clearly inadequate or unsatisfactory that it is no remedy at all."<sup>126</sup> If one of these circumstances exists, there is, in precise terms, no real forum non conveniens issue before the court; the other forum is inconvenient as a matter of law.<sup>127</sup> In these situations, some courts refuse outright to dismiss pursuant to a forum non conveniens motion.<sup>128</sup> More typically, the court will dismiss conditionally, subject to the alternative forum's becoming available, as for example when the defendant agrees to submit to jurisdiction or to waive the statute of limitations in the alternative forum.<sup>129</sup>

The *Holmes* court, however, gave the concept of suitable alternative forum a very different focus, holding in effect that adequacy should be assessed not as a precondition for the discretionary forum non conveniens inquiry, but rather as part of the discretionary calculus itself.

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sustained in the course of performing work in Nevada. The court wrote, "[N]o California 'interest' would be promoted by impairing the ability of California corporations to compete for business in other states by imposing upon them obligations to the residents of such states which those states do not impose upon foreign corporations or their own domestic corporations." *Id.* at 746, 69 Cal. Rptr. at 59.

122. See *supra* notes 76-78 and accompanying text.

123. See *Hernandez*, 102 Cal. App. 3d at 797, 162 Cal. Rptr. at 564.

124. See, e.g., *Ryan & Berger, supra* note 34, at 537-38 (availability of an alternative forum a prerequisite to consideration of a forum non conveniens motion); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.").

125. See *Ryan & Berger, supra* note 34, at 536-37.

126. *Piper*, 454 U.S. at 254.

127. See Comment, *supra* note 10, at 383 & nn.63, 64 (unavailability of alternative forum); see, e.g., *Tivoli Realty v. Interstate Circuit*, 167 F.2d 155, 156-57 (5th Cir. 1948) ("At least two such forums must be open before the doctrine comes in to play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law."), *cert. denied*, 334 U.S. 837 (1948).

128. See Comment, *supra* note 10, at 383 n.63 (citing cases).

129. *Ryan & Berger, supra* note 34, at 539.

The court held that as part of that discretionary evaluation, the trial court should consider the possibility of an unfavorable change in law.<sup>130</sup> In support of its more contextual definition of suitable alternative forum, the court seized upon language from the commentary in the California codification of the *forum non conveniens* doctrine which states that "the action will not be dismissed unless a *suitable* alternative forum is available to the plaintiff."<sup>131</sup> The *Holmes* court seems to have construed this language to mean that California law requires not only that there be an alternative forum where it is possible to commence an action and obtain a valid judgment against the defendant, but also that the alternative forum have a "suitable" substantive law.

This interpretation of the legislative commentary is not persuasive. First, the commentary itself states that the requirement of a suitable alternative forum is intended to preclude granting a *forum non conveniens* motion when the defendant is not subject to jurisdiction in the alternative forum or the suit would be barred there by the statute of limitations.<sup>132</sup> Second, the cited commentary relies upon a case that clearly construes "suitable alternative forum" in its orthodox sense of a forum in which the action can be brought.<sup>133</sup> The court in that case held that "forum non conveniens . . . presupposes at least two forums in which the defendant is amenable to process."<sup>134</sup> California law before *Holmes* thus had incorporated the same limited nondiscretionary concept of a suitable alternative forum as its federal counterpart.

It was a fairly significant departure from precedent for the *Holmes* court to treat suitable alternative forum as a relative notion located within the *forum non conveniens* calculus, rather than as a prerequisite to the invocation of the doctrine. Whether the *Holmes* court's departure was intentional or inadvertent, it enabled the court to consider "possible differences in conflict of law rules and any substantial disadvantage from a change in forum"<sup>135</sup> under a heading whose importance and legitimacy were well-established in case law.

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130. *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 381-82, 202 Cal. Rptr. 773, 778-79 (1984).

131. *Id.* at 379, 202 Cal. Rptr. at 777 (quoting CAL. CIV. PROC. CODE § 410.30 Judicial Council comment 490, 492 (West 1973)) (emphasis added by the *Holmes* court).

132. CAL. CIV. PROC. CODE § 410.30 Judicial Council comment, at 492.

133. *See Hill v. Upper Miss. Towing Corp.*, 252 Minn. 165, 89 N.W.2d 654 (1958).

134. *Id.* at 172, 89 N.W.2d at 660 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947)). The *Hill* court's conception of suitable alternative forum was, if anything, more mechanical. The court held that Tennessee was not a suitable alternative forum since the defendant was not subject to involuntary process in Tennessee, even though the defendant had offered to submit to jurisdiction there. *Id.*

135. 156 Cal. App. 3d at 383, 202 Cal. Rptr. at 780.

c. *Construing Unsuitability to Include the Possibility of an Unfavorable Change in Law*

Having defined suitability as a discretionary factor within the forum non conveniens calculus, the *Holmes* court went on to incorporate in its notion of unsuitability the possibility of an unfavorable change of law. The result was at odds with prior federal and California cases holding that a showing that recovery would be more difficult or even impossible in a foreign forum does not demonstrate that the alternative forum is inadequate.<sup>136</sup> Again, the decision's unorthodoxy was made to appear conventional. The court relied on a factor that in previous forum non conveniens cases had referred to an entirely different idea.

Comparing California and federal law, the court concluded that "California attaches far greater significance to the possibility of an unfavorable change in applicable law resulting from a forum non conveniens dismissal."<sup>137</sup> The court relied upon case law holding that among the factors relevant to a forum non conveniens inquiry is "[t]he difference in conflict of law rules applicable in this state and in [the] alternative forum."<sup>138</sup> The court concluded that a difference in the applicable law could work to deprive the plaintiff of a suitable alternative forum.<sup>139</sup>

The consideration of conflict of law rules is in fact firmly embedded in both federal and California forum non conveniens law, and has been recognized at least since *Gulf Oil Corp. v. Gilbert*.<sup>140</sup> Not before *Holmes*, however, was this factor given such a substantive rather than procedural twist. The reason given in prior case law for considering different conflict of law rules is to avoid practical difficulties of applying the conflict rules of another state.<sup>141</sup> Conventional forum non conveniens doctrine thus recognizes the convenience of trying the action in a forum that is familiar with the law to be applied. The commentary to Section 410.30 of the California Code of Civil Procedure incorporates this idea by quot-

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136. See *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984) (federal law); see also *Great N. Ry. Co. v. Superior Court*, 12 Cal. App. 3d 105, 112, 90 Cal. Rptr. 461, 466 (1970) (California law), cert. denied, 401 U.S. 1013 (1971).

137. *Holmes*, 156 Cal. App. 3d at 381, 202 Cal. Rptr. at 778.

138. *Id.* (citing *Great Northern*, 12 Cal. App. 3d at 113, 90 Cal. Rptr. at 466).

139. 156 Cal. App. 3d at 381-82, 202 Cal. Rptr. at 778-79.

140. 330 U.S. 501, 509 (1947). One reason this factor came to play a central role in forum non conveniens law is that the early cases recognizing application of the doctrine often involved knotty problems of conflict of law rules. For example, admiralty cases, interference-with-state-government cases, and internal-affairs-of-foreign-corporation cases share the common trait that the court often must determine difficult questions under laws of another jurisdiction. Comment, *supra* note 11, at 923-24; see also Blair, *supra* note 11, at 21-23.

141. *Gulf Oil*, 330 U.S. at 509. Conflict of laws issues implicate convenience to the court in deciding the case. They are among "those factors which go to make the trial of a case easy, expeditious, and inexpensive." Ryan & Berger, *supra* note 34, at 550, and cases cited therein. See *supra* text accompanying note 21.

ing a passage from *Gulf Oil*. "There is an appropriateness, too, in having the trial . . . in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."<sup>142</sup>

The language of Section 410.30, moreover, does not support the *Holmes* court's interpretation of the conflict of laws factor. The statute directs a court to stay or dismiss an action when it finds that in the interests of substantial justice the action should be heard in a forum outside the state.<sup>143</sup> The implication is that jurisdiction should normally be retained unless "substantial justice" demands otherwise. Therefore, if by "substantial justice" the statute referred to a comparison between substantive laws, it would be directing California courts to dismiss an action only when it appears that the laws of the alternative forum are more favorable or fair than the forum's own. This would entail the unusual decision that the forum's own law is so less fair than that of the alternative forum as to cause a failure of justice if jurisdiction were retained.<sup>144</sup> Rather, the failure-of-justice language must refer to practical problems that would arise if the suit *were heard* in the home forum,<sup>145</sup> as for exam-

142. CAL. CIV. PROC. CODE § 410.30 Judicial Council comment, at 493 (West 1973) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)); *see also* *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (E.D. Pa. 1980) (granting conditional forum non conveniens dismissal so that international product liability litigation could be heard in England), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982). The *Wyeth* court wrote: "A Court versed in the law that must govern the case and familiar with the people and the community in which the law is to govern, is better able to establish the appropriate legal standards and apply them . . ." *Id.* at 4.

Even sophisticated courts well versed in conflict of laws theory may be anxious and uncertain about applying the laws of a foreign country.

'[T]ry as we may to apply foreign law as it comes to us through the lips of experts, there is an inevitable hazard that . . . our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of a foreign court may be greater in theory than it is in fact.'

*Hernandez v. Cali, Inc.*, 32 A.D. 2d 192, 195, 301 N.Y.S.2d 397, 401 (1969) (quoting *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 667 (2d Cir. 1960) (Friendly, J.)); *see also* *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).

143. CAL. CIV. PROC. CODE § 410.30(a) (West 1973).

144. Moreover, the experience of courts that employ a better-law approach to conflict of laws indicates that few if any courts would be willing to declare foreign law more fair. *See* R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS* 338 (3d ed. 1981).

145. *See, e.g.*, CAL. CIV. PROC. CODE § 410.30(a) (West 1973) ("When a court upon motion of a party or its own motion finds that *in the interest of substantial justice an action should be heard in a forum outside this state*, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (emphasis added)); *see also* *Barrett*, *supra* note 11, at 393 (suggesting that under "the broad doctrine of *forum non conveniens* . . . any plaintiff . . . may be denied the right to bring his suit *when the ends of justice would be better served by trial in another court*" (emphasis added)); *cf.* *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 554-55 (1946) ("[The *forum non conveniens* doctrine] was designed as an 'instrument of justice.' *Maintenance of a suit away from the domicile of the defendant* . . . might be vexatious or oppressive. An adventitious circumstance might land a case in one court when in fairness it should be tried in another." (emphasis added) (footnotes omitted)); A. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 212 (1926) ("[T]he court will not hold its hand unless there be, in the circumstances of the case, such

ple, when crucial witnesses were unavailable, or production of witnesses and records would seriously disrupt a business,<sup>146</sup> or the court would be burdened with complex conflict of law inquiries.<sup>147</sup>

In its interpretation of prior doctrine and its application of precedent, then, the *Holmes* decision is flawed. It too willingly assumes that California had a sufficient interest to justify application of its law to the action. It exploits language defining *forum non conveniens* as an extraordinary remedy to promote a rule of substantial deference to non-resident plaintiffs that has no apparent basis in policy. Finally, by recharacterizing suitability of an alternative forum as a discretionary factor that takes into account the possibility of an unfavorable change in law, the opinion misinterprets the established factor of differences in conflict of law rules. The result of these departures from doctrine is that the *Holmes* decision has made new law. And while the court may be criticized for making new law under cover of precedent, the more important question remains: Did it make good new law?

### III

#### SHOULD THE FORUM NON CONVENIENS DOCTRINE TAKE ACCOUNT OF AN UNFAVORABLE CHANGE IN LAW?

This Part explores the *forum non conveniens* doctrine and the policies that underlie it in order to assess the core holding of the *Holmes* decision. It suggests that the *Holmes* decision applies a substantive model of *forum non conveniens* doctrine. It then argues that such an approach has merit, but that even under a substantive model, the decision of the *Holmes* court to factor into the *forum non conveniens* doctrine the possibility of an unfavorable choice of law was wrong.

##### A. *A Substantive Approach to Forum Non Conveniens*

The *Holmes* court's decision to overturn the *forum non conveniens* dismissal as an abuse of discretion rested on two dubious findings: that California gives substantial deference to a nonresident plaintiff's choice of forum and that California had "an interest in regulating the foreign

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hardship on the party setting up the plea as would amount to vexatiousness or oppression *if the court persisted in exercising jurisdiction.*" (emphasis added)).

146. See Barrett, *supra* note 11, at 381-82.

147. Moreover, a recent California court of appeal decision explicitly declined to follow the *Holmes* court's interpretation. *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 178, 227 Cal. Rptr. 247, 253 (1986) ("Under California law, the purpose of comparing the differences in conflict of law rules and the differences in substantive law which will be applied, once the choice of law has been made in each alternative forum, is not simply to decide which forum would provide the most advantageous law from the viewpoint of the plaintiff. To the extent *Holmes* explicitly or implicitly directs otherwise, we decline to follow it.").

marketing of defective products alleged to have been developed in California."<sup>148</sup> But however faulty the court's analysis of California's interest may have been, it is noteworthy that a state regulatory interest figured so prominently in a forum non conveniens analysis at all. The decision seems to marry forum non conveniens and California's governmental interest analysis approach to conflict of laws, which, unlike conventional forum non conveniens doctrine, is designed to consider substantive legislative interests.<sup>149</sup> Thus viewed, the case appears to announce a substantively driven forum non conveniens doctrine in California.<sup>150</sup>

Under a substantive approach to forum non conveniens, courts would be expected to factor in whether or not the forum has an interest in the application of its substantive policies, and whether or not such an interest would be defeated by declining to exercise jurisdiction. If a non-resident plaintiff's choice of forum were a legitimate state concern, granting a forum non conveniens motion that would force the plaintiff to bring her claim under a less hospitable law would injure the state interest in protecting the plaintiff's original choice. And if California had a legitimate regulatory interest in *Holmes*, the interest might have been defeated by the application of British law by a British court. Perhaps cases like *Holmes* and *Brown v. Clorox Co.*<sup>151</sup> mark a healthy evolution in forum non conveniens doctrine. Modern choice of law theory has come to address the question, "Does the forum have a sufficient interest to justify the application of its own law?" To a more limited extent, jurisdiction analysis now also considers the forum's interest.<sup>152</sup> Perhaps forum non conveniens as well should candidly incorporate a substantive component.

### 1. *The Case for a Substantive Approach*

Nearly all jurisdictions consider both convenience to the parties and convenience to the courts in their forum non conveniens analyses,<sup>153</sup> but few if any reserve an explicit role for the forum's substantive interests.<sup>154</sup> On its surface, this limitation accords with the intuitive sense that a procedural litigation-allocation device such as forum non conveniens should

148. *Holmes*, 156 Cal. App. 3d at 389, 202 Cal. Rptr. at 784; see also *id.* at 391, 202 Cal. Rptr. at 785.

149. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

150. See *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 183, 227 Cal. Rptr. 247, 257 (1986) (referring explicitly to the "*Holmes* substantive law analysis approach").

151. 56 Cal. App. 3d 306, 128 Cal. Rptr. 385 (1976). See text accompanying notes 72-74.

152. See, e.g., *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

153. *Barrett*, *supra* note 11, at 408 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). As noted, however, the way in which a factor such as plaintiff's residency is considered will be affected by the policy decision as to why it matters. See *supra* text accompanying notes 32-34.

154. See Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 217 (1985).

not be tainted by the concern for outcome that a substantive approach implies.<sup>155</sup> However, taking account of substantive concerns in the forum non conveniens doctrine may be desirable in theory and unavoidable in practice.

In practice, the cases that stress the policy of convenience to the courts inevitably contain judgments about the legitimate scope of the forum's interest in the application of its law.<sup>156</sup> The concern for conserving judicial resources is present in any trial; the decision of when and how to expend them will depend on the forum's connection to the controversy.<sup>157</sup> For example, while "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation,"<sup>158</sup> it presumably is appropriate to impose it where the state has an interest in the application of its substantive policy. Suits that implicate the state's interest are not necessarily more convenient to try, yet there is nevertheless "a local interest in having localized controversies decided at home."<sup>159</sup>

California's policy of not granting a forum non conveniens dismissal against a resident plaintiff provides another example. Adjudication is not always more convenient to the court when the plaintiff is a resident. In the words of the California Supreme Court, "[t]his limitation of the *forum non conveniens* doctrine does not rest on any conclusion derived from a balancing of conveniences; it reflects an overriding state policy of assuring California residents an adequate forum for the redress of grievances."<sup>160</sup>

It might be argued that to identify a substantive element inhering in the convenience-to-courts policy confuses the court's concern for its appropriate administrative function as a forum open to residents<sup>161</sup> with the substantive interests of the state. The policy of ensuring residents access to local forums, for example, could be framed in terms that make

155. Cf. P. FREUND, ON LAW AND JUSTICE 100 (1968) ("Much of law is designed to avoid the necessity for the judge to reach Holmes' 'can't help,' his ultimate convictions or values.").

156. See Stein, *supra* note 11, at 821-22 (discussing the extent to which "the evaluation of public factors under *Gulf Oil* does constitute a substantive judgment about the extent of the respective forums' stakes in the controversy . . ."); see also *id.* at 840.

157. See *Brown v. Clorox Co.*, 56 Cal. App. 3d 306, 313, 128 Cal. Rptr. 385, 391 (1976):

Every lawsuit tried places a burden upon the courts, but at least one of the functions of courts is to try lawsuits. . . . In the case before us, the relationship of the respondents to this state, and the activities of those respondents . . . does not lead to a conclusion that prosecution of this action in this state would 'place a burden on the courts of this state which is unfair, inequitable or disproportionate.'

*Id.* (quoting CAL. CODE CIV. PROC. § 410.30 Judicial Council comment (West 1973)).

158. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

159. *Id.* at 509.

160. *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 859, 544 P.2d 947, 951, 126 Cal. Rptr. 811, 815 (1976).

161. See *supra* notes 34, 64, & 157.

it appear fundamentally different from a forum's substantive interest in who wins the case and why. A primary administrative function of the court is to provide a forum for residents to bring their grievances. But framing the policy in this way does not invalidate a substantive model, because courts' constitutive purposes can be variously expressed. As well as being meant to provide a forum for residents, courts also are set up to apply legislative policies to cases that implicate the forum's interest in those policies.<sup>162</sup> Labelling one function "substantive" and the other "administrative" only obscures the fact that in either case, judgments about which burdens a court should shoulder depend on the forum's interest in the controversy.

If convenience-to-courts interests properly entail consideration of substantive concerns, then rejecting any accounting for substantive concerns requires limiting the forum non conveniens calculus to factors of convenience to the parties. This approach would represent a radical parsing of the doctrine as it has been applied in all jurisdictions; even the *Piper* decision recognizes the continuing vitality of the *Gulf Oil* public-interest factors.<sup>163</sup> More importantly, a model based exclusively on the parties' convenience would ignore the choice of law issues that underlie most forum non conveniens disputes.<sup>164</sup> It seems disingenuous and ill-advised to resolve the real point at issue only incidentally under the banner of maximizing convenience to the parties. Since the parties so frequently are fighting over whether the forum should retain jurisdiction and apply its own law,<sup>165</sup> it makes better sense for the court to apply an analysis tailored to that issue, evaluating, along with the balance of conveniences, the question whether the forum has an interest in the applica-

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162. Cf. *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392, 394 (2d Cir. 1933) (Learned Hand, J.) ("Though it is quite true that courts are primarily maintained for the benefit of citizens, access to them is only to secure justice.").

163. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981).

164. See note 10 and accompanying text.

The plaintiff in *Piper* admitted candidly that she filed suit in the United States "because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland." *Piper*, 454 U.S. at 240.

165. The Supreme Court's decision in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), may implicitly recognize the choice of law implications that inhere in forum non conveniens decisions, and therefore may lend additional support to a substantive model. The Court held in *Van Dusen* that a transfer in the federal system under Section 1404(a) "should be, with respect to [applicable] law, but a change of courtrooms." *Id.* at 639 (footnote omitted). However, the Court explicitly reserved the question whether the law of the transferor forum would apply where the state court in the forum state would have granted a forum non conveniens motion. *Id.* at 640. The implication is that forum non conveniens dismissals normally entail a change in applicable choice of law rules. In a transferred case in which the state court would dismiss on forum non conveniens grounds, it therefore might be necessary to apply the law of the transferee forum in order to preserve parallelism between the federal and state systems. Cf. Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 348-51 (1960). This recognition in turn acknowledges the substantive consequences of forum non conveniens decisions.

tion of its substantive policies.<sup>166</sup>

The recent forum non conveniens dismissal in the Bhopal disaster litigation seems to have adopted such an approach. In its consideration of the balance of public-interest factors, the court added a new entry to the *Gulf Oil* list: "The Interests of India and the United States."<sup>167</sup> The plaintiffs had argued that a dismissal would promote a double standard of liability for multinational corporations, and urged that "American courts should administer justice to the victims of the Bhopal disaster as they would to potential American victims of industrial accidents."<sup>168</sup> In rejecting this argument and granting the conditional dismissal,<sup>169</sup> the court analyzed at length the interests of the two sovereigns in the litigation, which revealed "the immense interest of various Indian governmental agencies in the creation, operation, licensing and regulation, and investigation of the plant."<sup>170</sup> The court concluded, "No American interest in the outcome of this litigation outweighs the interest of India in applying Indian law and Indian values to the task of resolving this case."<sup>171</sup>

The other side of the spectrum from a forum non conveniens doctrine purged of all substantive concerns is a purely substantive model, under which dismissal would be barred as a matter of law when the forum has an interest. This approach is also faulty. It would emasculate the doctrine and leave it merely replicative of choice of law analysis. Under a pure substantive model, a court would lack the discretion to dismiss when the forum had an interest in the litigation, even if other factors pointed strongly towards dismissal; likewise, it would not be able

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166. An alternative suggestion is that the court integrate into its forum non conveniens analysis its particular jurisdiction's choice of law doctrine. The court would then be factoring in whether local law would be likely to apply if jurisdiction were retained, which in most jurisdictions is a very different inquiry from whether the forum has an interest in the application of its substantive policies. Only two jurisdictions currently employ interest analysis, and the majority use either the traditional vested-rights theory of the original Restatement or the Restatement Second "Most Significant Relationship" approach. Kay, *Theory into Practice: Choice of Law in the Courts*, 54 MERCER L. REV. 521, 591-92 (1983). The 14 states that have adopted the Restatement Second approach, *see id.*, do address the forum's interest, but only in a roundabout way, *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(1971), *id.* comment e, that is likely to further complicate forum non conveniens analysis, *see infra* note 175. Interest analysis is proposed here as a ready tool—one that happens to be imported from a particular choice of law doctrine—to aid in determinations of when it is fair or just to decline jurisdiction and thereby effect a change of law. The arguments for a substantive approach, however, do not extend to a mechanistic replication at the forum non conveniens stage of a jurisdiction's individual choice of law doctrine.

167. *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 862 (S.D.N.Y. 1986).

168. *Id.*

169. The court dismissed the case subject to a number of conditions, most notably that Union Carbide submit to discovery governed by rules and procedures contained in the Federal Rules of Civil Procedure. *Id.* at 867.

170. *Id.* at 863-64.

171. *Id.* at 867.

to retain jurisdiction when it would be necessary to apply the law of the alternative forum. In the words of the Supreme Court, "if conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless."<sup>172</sup>

The appropriate role for substantive concerns in the forum non conveniens doctrine, then, is as another factor to be weighed in the balance. A court might properly pose an additional question in the forum non conveniens litany: "Does the forum have an interest in applying its law to the litigation?" Thus, the *Holmes* decision might point the way, however clumsily, to a welcome adjustment in the doctrine.

A court applying a substantive approach would not necessarily have to limit itself to gauging the forum's interest in the application of its law. One way of viewing the forum non conveniens doctrine is as a fine-tuning discretionary device to screen out those cases that should not be tried in

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172. *Piper*, 454 U.S. at 250; see *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 182, 227 Cal. Rptr. 247, 256-57 (1986) (commenting on the *Holmes* court's analysis of "suitability" and choice of law, see *supra* text accompanying notes 118-47, and holding that "the case cannot turn on this disadvantage in different substantive law.").

Giving conclusive weight to a forum's interest in the litigation also would substantially reduce the number of forum non conveniens dismissals, and this result would aggravate some practical problems the doctrine is designed to alleviate. It would harm the convenience-to-courts interests that have been a vital part of the forum non conveniens doctrine in several ways. First would be an increase in the business of already congested courts, especially in states with recovery rules favorable to plaintiffs. Cf. *Atchison, T. & S.F. Ry. v. District Court*, 298 P.2d 427 (Okla. 1956) (Oklahoma Supreme Court grants forum non conveniens motion where litigation has little connection to the state, because to do otherwise "would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal, and the doctrine of forum non conveniens would thereby be rendered completely ineffective."), *cert. denied*, 352 U.S. 879 (1956). The impact would be especially pronounced in international product liability litigation, which typically involves a large investment of judicial resources.

Another practical problem with a pure substantive model is that it could force defendants to sue for indemnification in the alternative forum. When the alternative forum is the situs of the injury and much of the evidence, often some tortfeasors are not subject to jurisdiction in the chosen forum. The parties may have to endure the burden of trial on the merits in the chosen forum followed by a suit for indemnification in the alternative forum. A related difficulty is the possibility of inconsistent verdicts. See *Hemmelgarn v. Boeing Co.*, 106 Cal. App. 3d 576, 588-89, 165 Cal. Rptr. 190, 196-97 (1980) (Court of Appeal affirms a forum non conveniens dismissal because California's interest in just apportionment in multiparty tort litigation would be better served by trial in Canada).

The *Holmes* approach, moreover, would lead courts into especially burdensome and intricate choice of law inquiries. See *Piper*, 454 U.S. at 251. The *Holmes* approach requires courts to compare actual patterns of application of law between the two forums. They thus would have to receive and consider evidence of actual outcomes in the alternative forum, second-guessing the efficacy with which the alternative forum's legislative policies have been applied. This also raises a related concern that a forum non conveniens dispute could lead to a protracted adjudication that could significantly forestall recovery. For example, the trial on the merits in *Piper* was delayed two and a half years while the forum non conveniens motion was litigated to the Supreme Court. Under the *Holmes* mutation, a forum non conveniens motion could assume the scope of a full trial, with courts having to consider and rule on the intricacies of the alternative forum law in its actual application.

the home forum, notwithstanding that jurisdiction is properly founded there. As such, it allows for consideration of factors that currently have no bearing on other litigation-allocation inquiries, such as the plaintiff's contacts to the forum, which currently play but a very slight role in jurisdiction analysis.<sup>173</sup>

Similarly, whereas interest analysis rejects weighing the interests of competing forums, *forum non conveniens* might allow for balancing the intensity of the forum's interest against the intensity of the alternative forum's interest. An example is provided by the opinion in the Bhopal disaster litigation, in which the court concluded that "[t]he Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology."<sup>174</sup> Thus, factoring in substantive concerns could cut both ways. It might weigh in favor of dismissal that the alternative forum has a substantially greater interest in the litigation, even though the home forum's interest is adequate to apply its own law.<sup>175</sup>

## 2. *Unfavorable Change in Law Under the Substantive Model*

A substantively driven *forum non conveniens* doctrine would not support the *Holmes* decision, because under governmental interest analysis California probably lacked an interest sufficient to justify application of its law.<sup>176</sup> In fact, California's interest in the *Holmes* litigation was

173. See *Keeton v. Hustler*, 465 U.S. 770, 779-80 (1984).

174. *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 865 (S.D.N.Y. 1986). See Currie, *The Constitution and the "Transitory" Cause of Action* (pt. 1), 73 HARV. L. REV. 36, 81 (1959).

175. Cf. Currie, *Married Women's Contracts*, *supra* note 26, at 240 (civilized states might properly decline to apply their law when their own interest is slight and the alternative forum's is substantial and legitimate). Allowing for comparisons of the intensity of competing forums' interests, as opposed to simply asking whether the chosen forum has an interest, does accord with *forum non conveniens*'s role as a discretionary doctrine. Furthermore, deferring to another forum with a substantially greater interest might be an attribute appropriate to an evolved system of justice, cf. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (upholding choice-of-court clause specifying litigation in England, because it would be parochial not to recognize the competency of many foreign forums); *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (comity interest in the recognition of foreign judgments), and also might advance the forum's substantive policies in the long run by encouraging other forums to reciprocate, cf. Currie & Schreter (now Kay), *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1361 (1960).

On the other hand, such a "most significant relationship" approach, cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), could entangle courts in more complicated comparisons, contrary to the convenience-to-courts policy of *forum non conveniens*. See note 142 and accompanying text; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981) ("The doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law.").

176. See *supra* notes 119-23 and accompanying text.

Others of the "Pill Cares" kindred to *Holmes*, see note 76 and accompanying text, rejected

less than Pennsylvania's interest in *Piper*. The tortious conduct alleged in *Piper* posed a danger to the residents of Pennsylvania, as well as to those of Scotland.<sup>177</sup> To the extent the defendants in *Piper* were marketing defective airplane engines or propellers, Pennsylvania residents bore part of the risk of those defective products. In contrast, the gravamen of the complaint in *Holmes* was a failure to warn foreign citizens.<sup>178</sup> An American corporation's duty to warn with respect to products marketed in the United States is governed by domestic regulatory schemes entirely distinct from the British system.

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plaintiffs' argument that a governmental interest existed that was sufficiently compelling to justify denial of a forum non conveniens motion. The *Holmes* court, in fact, provides the sole discordant voice in a chorus of contrary holdings. See, e.g., *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982); *Bewers v. American Home Products Corp.*, 99 A.D. 2d 949, 472 N.Y.S.2d 637 (1984), *aff'd*, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984).

The cause of action in *Harrison*, for example, is nearly indistinguishable from *Holmes*. The plaintiffs in *Harrison* alleged that defendant, an American corporation with its principal place of business in Pennsylvania, caused the marketing, sale, and distribution of the contraceptives in the United Kingdom through its independent subsidiary there. The complaint, like the one in *Holmes*, was framed to focus on alleged tortious conduct in Pennsylvania consisting of "marketing the drugs and placing them in the stream of commerce with knowledge that the warning accompanying the drugs was inadequate, thus creating an unreasonable risk of harm, irrespective of where the drugs were sold." *Harrison*, 510 F. Supp. at 3 (emphasis in original). Adopting a line of argument that would first gain judicial approval in *Holmes*, the plaintiffs further argued that Pennsylvania had "an interest in and direct concern with the safety of products which emanate from its borders, and with conduct which occurs within Pennsylvania which may cause harm to others, regardless of where that harm may have occurred." *Id.*

The district court was not persuaded. It held that even assuming production and marketing decisions had been made by the defendant in Pennsylvania, there was no regulatory interest weighing in favor of retaining jurisdiction. The court wrote:

[T]he courts of the United States are ill-equipped to set a standard of product safety for drugs sold in other countries. . . . The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country.

*Id.* at 4 (emphasis in original).

177. See Note, *supra* note 9, at 1280. It could be argued that even though the alleged conduct posed no threat to California plaintiffs, California nevertheless had an interest in the case. The argument would be that American product liability law has developed not only to protect American plaintiffs, but also to deter and regulate American companies, regardless of whom their conduct threatens, and to ensure that no victims of American industrial development go uncompensated. See Note, *supra* note 9, at 1273-74; Speiser, *A Solution to the Bhopal Dilemma*, Nat'l L.J., Feb. 3, 1986, at 13, col. 1 ("Yet, if Judge Keenan granted Union Carbide's request to decline jurisdiction, he would relegate the Indian claimants to unconscionably meager compensation and would stifle the deterrent power of American law, which is capable of forcing our multinational corporations to take more care for human life."); Greenberg, *supra* note 8, at 182-83 (federal foreign policy interest).

Currie and Kay coined the term "altruistic interest" to describe and evaluate a forum's application of its own law to benefit nonresidents even when such application would not advance the specific legislative policy embodied in the law. E.g., Currie & Schreter, *supra* note 175, at 1361. They concluded that such an "interest" might be sufficient to withstand a due process attack against the application of the forum's law. *Id.*

178. 156 Cal. App. 3d 372, 376, 202 Cal. Rptr. 773, 775 (1984).

However, a substantive model seems particularly apt in international product liability cases such as *Holmes*. The core concerns facing the courts in these cases are less issues of convenience<sup>179</sup> than issues of when it is fair or just to impose American standards of liability on foreign transactions, or, viewed from the opposite perspective, when it is fair to allow "American defendants reaping profits from overseas operations [to] be subject to less stringent liability standards."<sup>180</sup> The contribution of a substantive model to that problem would be to help screen out those cases in which the forum had no interest in the application of its substantive policies, a technique like that brought by choice of law interest analysis to similarly difficult questions of policy. In *Holmes*, for example, it is the real possibility that California had no interest in the case that makes the court's eagerness "to export California law"<sup>181</sup> so problematic. If California had no substantive interest, the *Holmes* court's conclusion that California law would provide a more enlightened resolution to the case<sup>182</sup> seems academic.

Moreover, the assumption that California's product liability law would have achieved a more just result in the case is troubling and may be unwarranted.<sup>183</sup> Alternative forums like Great Britain have worked out their own policy resolutions of risk-allocation problems, which could be defeated by exposure to American standards of liability merely because jurisdiction lies over an American parent of a foreign company.<sup>184</sup> The subsidiary companies presumably will internalize the cost of higher liability by passing the increased cost of doing business along to

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179. International product liability cases, in fact, often present the ironic situation of parties asking the court to make litigation more inconvenient for them. Typically, the American defendants are arguing trial would be more convenient abroad, while the foreign plaintiffs are only too happy to shoulder the "burden" of litigating in the United States. See Note, *supra* note 154, at 215-16.

180. *Id.* at 220.

181. See Stein, *supra* note 8, at 840.

182. *Holmes*, 156 Cal. App. 3d at 383-86, 202 Cal. Rptr. at 780-82.

183. The wisdom of a kind of "better law" approach to forum non conveniens is all the more questionable in light of the finding that those jurisdictions that adopt Professor Leflar's better-law approach to choice of law almost inevitably apply the forum's own law. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 144, at 338; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 298-99 (1966). The better law becomes tantamount to local law. Thus, in application, the apparently paternalistic better-law approach may be merely parochial.

184. See Besharov & Reuter, *Tort Laws Hobble U.S. Business Abroad*, Wall St. J., Oct. 28, 1985, at 22, col. 3.

Other countries do not want, and cannot afford, U.S. levels of liability. It is another expression of the well-known American ideological imperialism to expect other nations to want not only U.S. technology but also all the legal protections that Americans have put in place for themselves, including strict liability in manufacturing, liberal recovery for pain and suffering, broadly defined consequential damages, and unrestricted punitive damages. That these are luxuries that Americans have acquired only recently, along with videocassette recorders and personal computers, is a matter of indifference.

*Id.* at col. 5.

Besharov & Reuter further point out that holding American companies doing business abroad

local consumers, a response that neutralizes the policy choices made in the alternative forum.<sup>185</sup>

Under this analysis, the *Holmes* court's overreaching to apply California law may have been altruistic and high-minded in design, but imperialistic in result. A New York District Court implied as much in its recent analysis of a similar paradox presented by the Bhopal disaster litigation. The court wrote:

It would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country. . . .

. . . .

. . . [T]o retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.<sup>186</sup>

Charges of imperialism can run both ways, of course, which may be one reason to avoid them altogether. Refusing to "inflict" our standards on a developing nation—by granting a forum non conveniens dismissal—may be more "sadly paternalistic." In international product liability cases like *Holmes*, for example, there is the sense that in the real world, rather than the legal world in which the motion is heard, a real cause of

to U.S. standards of tort liability impedes their ability to compete in the local markets against local companies not exposed to similar risks. *Id.* at col. 4.

See also Note, *supra* note 154, at 223.

185. See Besharov & Reuter, *supra* note 184.

Even if the U.S.'s trade competitors were willing to adopt the U.S.'s high level of liability, it is doubtful that Third World peoples would want to buy it, embedded in exports and investments. It is a fact they tolerate lower product and workplace safety than Americans do because they value economic development more highly than safety—just as the U.S. once did.

*Id.* at col. 5. Cf. Currie & Schreter, *supra* note 175, at 1366-67 (unjustified impairment of other forum's interests for California to apply its law to workers' compensation claim of New York citizen hired in California to work in Alaska, where he was injured) ("In the pursuit of its altruistic interests, a state must stop short of treading upon the interests of other states . . . . It is one thing for a state to be generous to nonresidents at the expense of its own residents and enterprises; it is quite another to be generous to nonresidents at the expense of other nonresidents, or even of residents, or local enterprises, whose activities bring them within the protection of another state's policy. . . . At most, California can assert an altruistic interest in extending the benefits of its laws to nonresidents where the burden is borne by California enterprise; but that interest must yield when it conflicts with a direct interest on the part of another state.").

Moreover, American courts routinely recognize judgments issued by foreign courts against American citizens. See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895). This practice implicitly recognizes that many jurisdictions raise no serious questions of fairness or incompetence even though they may provide recoveries which are inadequate by American standards. Comment, *supra* note 10, at 387. See Note, *supra* note 154, at 214. It is inconsistent with this tradition of comity to routinely deny forum non conveniens motions whenever there might be an unfavorable change in law.

186. *In Re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 864, 867 (S.D.N.Y. 1986); see *Harrison v. Wyeth Laboratories*, 510 F. Supp. 1, 4 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982).

injuries to innocent plaintiffs is American companies' use of underdeveloped nations as a safe harbor for industrial expansion. Thus framed, the issue becomes less whether we are subjecting foreign countries to American standards of liability, and more whether we are forcing innocent foreign citizens to share disproportionately in the risks of American business enterprises.

More to the point, recognizing the relevance of the state's substantive interest does not justify factoring the possibility of an unfavorable change of law into the *forum non conveniens* calculus. That possibility is an inadequate proxy for the intensity of a forum's interest, or even for the existence of an interest. A forum's interest in the application of its substantive policies depends on its connection to the case, not on the policy decisions of other forums.<sup>187</sup> The question a court seeking to apply a substantively driven conception of *forum non conveniens* would address is, "How substantial is this forum's connection to the case?" The possibility of an unfavorable change in law does not speak to that question.<sup>188</sup>

The *Holmes* court's approach compounded this problem by not only factoring in the possibility of an unfavorable change in law, but giving it substantial, and perhaps conclusive, weight. Allowing the possibility of an unfavorable change in law to weigh so heavily deprives *forum non conveniens* of the equitable benefits it offers as a discretionary doctrine. Taking notice that a less favorable law will apply hardly requires an exercise of discretion,<sup>189</sup> and the effect of incorporating it into a discretionary doctrine is to insulate from direct scrutiny the kind of decision most appropriately reviewed *de novo*.<sup>190</sup>

Moreover, the substantial role the *Holmes* court assigned to the possibility of an unfavorable change in law deprives the *forum non conveniens* doctrine of any independent vitality. In most *forum non conveniens* disputes, the law of the alternative forum is likely to be less favorable to the plaintiff who is contesting the motion. An unfavorable change in law will be the almost inevitable result of granting a *forum non*

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187. It might be appropriate for a court to look to the law of the alternative forum to determine if it is identical to its own. Under a substantive model, this might weigh in favor of granting a *forum non conveniens* motion, since dismissal would not defeat the forum's interest. Even in such a case, however, the alternative forum's law does not speak to the home forum's *interest*, but only to the absence of a conflict in *policies*.

188. In fact, although few cases would present the question, a forum's interest could be equally disserved by a change of law favorable to the plaintiff. Under a substantive approach, the possibility of a favorable change in law would be no more or less significant than the possibility of an unfavorable change in law. This again is because the issue is the *interest* of the home forum, which is completely independent of the *policy* of the alternative forum.

189. The same can be said of according substantial deference to the plaintiff's choice of forum, a further indication that that factor is meant to allocate the burden of proof in a *forum non conveniens* inquiry, not to be part of the trial court's discretionary analysis. See *supra* text accompanying notes 102-17.

190. Cf. Stein, *supra* note 8, at 840.

conveniens dismissal. The effect of the *Holmes* court's approach, therefore, is to merge forum non conveniens and choice of law into a single inquiry. Dismissal will likely be foreclosed where the forum has an interest sufficient to justify application of its own law. If forum non conveniens is to have a meaningful role, however, it must address questions other doctrines do not answer. Otherwise, it might just as well be abolished as a superfluous step whose purposes already are served by other litigation-allocation doctrines.<sup>191</sup>

#### CONCLUSION

The opinion of the court of appeal in *Holmes* misinterpreted precedent and served none of the policies that drive the forum non conveniens doctrine. The case nevertheless may be valuable in pointing the way towards a role for substantive concerns in the forum non conveniens inquiry. Decisions about what is convenient to the court inevitably contain judgments about the forum's connection to the litigation and necessarily implicate the state's interest in the application of its substantive policies. Although substantive concerns should not be conclusive, factoring them into the forum non conveniens calculus is consistent with the doctrine's role as an equitable, discretionary, and unique litigation-allocation device.

However, taking account of an unfavorable change in law is not justified even under a substantive model of forum non conveniens. An unfavorable change in law is a poor proxy for the home forum's interest in or connection to the litigation. Furthermore, giving substantial weight to the possibility of an unfavorable change in law conflicts with the discretionary nature of the doctrine, and, because forum non conveniens disputes so frequently are driven by a desire for the more favorable substantive law, it deprives the doctrine of any independent role.

*Harry Litman\**

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191. See Stewart, *Forum Non Conveniens: A Doctrine in Search of A Role*, 74 CALIF. L. REV. (forthcoming July 1986); see also Stein, *supra* note 8, at 784-85:

[C]ourts invoking the [forum non conveniens] doctrine have taken into consideration the very question purportedly addressed by jurisdiction, venue, and choice of law: which government has the appropriate relationship to the parties and the controversy to justify resolving the dispute in its courts or under its law. . . . So used, the forum non conveniens doctrine has come to accommodate the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law.

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