

2017

## Deference to the Plaintiff in Forum Non Conveniens Cases

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### Recommended Citation

Brett Workman, *Deference to the Plaintiff in Forum Non Conveniens Cases*, 86 Fordham L. Rev. 871 (2017).

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# DEFERENCE TO THE PLAINTIFF IN FORUM NON CONVENIENS CASES

Brett J. Workman\*

*Plaintiffs bring transnational suits in the United States for various reasons. In response, a defendant might move to dismiss for forum non conveniens, arguing that a court in a foreign country is a more appropriate forum in which to proceed. When considering such a motion, a court scrutinizes the plaintiff's original choice of forum. The decisions resulting from forum non conveniens motions can at times appear inconsistent and unpredictable. The plaintiff's choice receives the greatest deference when the decision to file in the chosen forum is motivated by legitimate reasons. Bona fide connections to the forum strengthen the amount of deference. Such deference dissipates, however, if a plaintiff lacks such connections.*

*This Note analyzes several cases in an effort to understand why, based on each case's unique circumstances, the plaintiff's choice of forum received a particular level of deference. This Note then produces a synthesized list of factors that alter the level of deference a plaintiff's choice of forum receives under forum non conveniens analysis. An understanding of these factors provides increased predictability as to when a plaintiff's choice of forum might receive heightened deference under this common law doctrine.*

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#### INTRODUCTION

Consider, for example, the famous class action lawsuit that arose from a gas leak at a pesticide plant in Bhopal, India. The plant was operated by Union Carbide India Limited, an Indian company, of which Union Carbide Corporation, a U.S. company, was the majority shareholder.<sup>1</sup> The winds on an early December morning in 1984 blew a highly toxic gas from the plant toward the most densely populated part of the city of Bhopal. The fallout resulted in an estimated 2100 deaths directly attributable to the leak.<sup>2</sup> Further, the leak injured over 200,000 others, killed livestock, damaged crops, and interrupted businesses.<sup>3</sup> Most of the witnesses and relevant information regarding the construction of the plant, safety procedures, and, most importantly, injuries suffered by victims were located in India. Even though the plant was designed, constructed, and operated in India, many of the victims chose to sue in the United States.<sup>4</sup> Some 145 class actions were

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1. Union Carbide Corporation owned 50.9 percent of the stock of Union Carbide India Limited. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).

2. *Id.*

3. *Id.*

4. *Id.*

filed in U.S. federal courts on behalf of the victims. These were consolidated into a single class action in the Southern District of New York.<sup>5</sup>

It is not uncommon for foreign plaintiffs, like the Indian victims of the Bhopal tragedy, to seek access to American courts. U.S. courts can provide more favorable law, discovery, and, most significantly, the prospect of enormous jury verdicts unimaginable in the courts of other countries.<sup>6</sup> But there is a real cost to affording generous access to U.S. courts, both in terms of expending scarce judicial resources that might be applied to other pressing domestic needs and cutting off the foreign country's capacity to provide justice in its own courts, particularly when key evidence and actors are located there. Under the doctrine of forum non conveniens, U.S. federal and state judges have the latitude to dismiss a case where the balance cuts against a U.S. forum—even if the court technically has jurisdiction. The Southern District of New York invoked the doctrine in the *Bhopal* litigation when dismissing the lawsuit.<sup>7</sup>

In today's world of increasing global travel and commerce, plaintiffs with claims arising from incidents occurring in other countries favor U.S. courts.<sup>8</sup> Companies operating abroad must be keenly aware of potential liability in U.S. courts arising from their foreign operations.<sup>9</sup> Forum non conveniens is a judge-made doctrine which permits courts, in their discretion, to dismiss an action brought in a U.S. court, ostensibly for litigation in a more suitable foreign forum.<sup>10</sup> This doctrine is an important tool for filtering plaintiffs who assert claims with tangential connections to the United States.<sup>11</sup> Such exercise of discretion is guided by a multifactor test.<sup>12</sup> Although frequently invoked in transnational cases today, the forum non conveniens doctrine

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5. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F.2d 195, 197 (2d Cir. 1987).

6. *See Iraborri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (stating that factors that indicate forum shopping include “attempts to win a tactical advantage resulting from local laws that favor the plaintiff’s case, the habitual generosity of juries in the United States or in the forum district, the plaintiff’s popularity or the defendant’s unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum”). *But see In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244, 253 (S.D.N.Y. 2011) (noting foreign plaintiffs’ choice of a U.S. forum did not raise inferences of forum shopping since the plaintiffs resided all over the world and no forum was convenient for all plaintiffs’ residences).

7. The court did, in fact, defer to the adequacy and ability of Indian courts and conditionally granted the defendant’s motion to dismiss. *Union Carbide*, 634 F. Supp. at 867.

8. Donald Earl Childress, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’LL. 157, 162–63 (2012) (discussing why the United States is viewed as a “magnet forum” for transnational cases).

9. *See infra* Part I.E.

10. Childress, *supra* note 8, at 167–68 (discussing the wide discretion a court is vested with to dismiss a case with “foreign elements”); *see also* SIMONA GROSSI, *THE U.S. SUPREME COURT AND THE MODERN COMMON LAW APPROACH TO JUDICIAL DECISION MAKING* 97 (2015).

11. Childress, *supra* note 8, at 168–70 (discussing a study of a rising number of cases being dismissed for foreign factors such as foreign plaintiffs or application of foreign law).

12. Justice Antonin Scalia noted the “multifariousness of the factors,” *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994), while Justice Hugo Black had previously called them a “welter of factors,” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting).

originated as a judicial tool for choosing between different U.S. forums<sup>13</sup> and thus requires updating.<sup>14</sup>

This Note examines a subset of forum non conveniens cases in which the plaintiff's choice of forum receives heightened deference for reasons other than those often cited by courts. Typically, whether plaintiffs are U.S. nationals is one of the most important circumstances examined by courts when determining if a U.S. forum is proper. However, this factor is not always dispositive in favor of a U.S. forum, and, in some cases, a forum non conveniens dismissal has been denied when the plaintiff, or some of the plaintiffs, were foreign.<sup>15</sup> Accordingly, it is important to understand the other factors that go into forum non conveniens analysis as a general matter, regardless of the plaintiff's connection to the forum of choice. This Note parses instructive cases to elucidate a reasoned approach by which courts might determine when to defer to a plaintiff's choice of a U.S. forum.

Prior scholarship has chronicled the history of forum non conveniens.<sup>16</sup> Much has also been written about the various private and public interest factors contemplated by different jurisdictions when deciding a forum non conveniens motion.<sup>17</sup> The seeming judicial capriciousness of creating factors and assigning them arbitrary weight has resulted in calls for reform, codification, and even total abolishment of the doctrine. This Note does not argue for jettisoning the doctrine but rather attempts to discern deference-altering factors to provide guidance and predictability on the application of forum non conveniens for courts and litigants.

Part I of this Note provides a brief background of the doctrine. Specifically, it outlines the multifactor standard used to determine how much deference a plaintiff's choice of forum warrants. It also addresses judicial protections available to defendants in the United States. Part II discusses several cases with varying factual circumstances involving plaintiffs suing corporate defendants in a different forum than the one where the incident giving rise to the claim occurred. In all of these cases, the defendants moved to dismiss for forum non conveniens, albeit with differing results. Part III then compares and distinguishes these cases to discern common factors indicating when a plaintiff's choice of forum may or may not expect to receive heightened deference under forum non conveniens analysis.

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13. See *Gilbert*, 330 U.S. at 510–12 (determining that inconvenience would result from bringing a defendant to trial in New York for a case that belonged in Virginia).

14. David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 367–68 (1994) (discussing the technological developments that have multiplied the number of international disputes and facilitated American lawyers' ability to participate in these disputes).

15. See, e.g., *infra* Part II.A.4.

16. See *Mizokami Bros. of Ariz. v. Mobay Chem. Corp.*, 660 F.2d 712, 717 (8th Cir. 1981) (“[P]erhaps no list of [forum non conveniens] criteria is exhaustive.”). For a history of the doctrine, see RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 37–54 (2007); Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1, 9–22 (2013).

17. See *supra* note 16.

I. CONVENIENCE AND JUSTICE:  
THE EVOLUTION OF  
FORUM NON CONVENIENS DOCTRINE

Part I.A explains the development of forum non conveniens and how it is currently applied by federal courts. Part I.B then discusses the seminal cases that have set forth the amount of deference a plaintiff's choice of forum receives based on the plaintiff's nationality. While nationality is important, Part I.C shows how aspects of nationality, such as U.S. citizenship and residency, are not always dispositive but are typically only proxies for convenience. Next, Part I.D highlights a few of the state-level variations of the doctrine. Finally, Part I.E discusses how increasingly strict standards for finding personal jurisdiction over corporate defendants provides such defendants additional protection from litigation in U.S. courts.

A. *Gilbert and the Introduction of the Federal Doctrine*

Forum non conveniens vests trial courts with broad discretion to decline to hear a case, even when jurisdiction is proper, if an alternate forum is available.<sup>18</sup> A district court's ruling on a forum non conveniens motion will not be disturbed unless that judgment is found to be an abuse of discretion.<sup>19</sup> *Gulf Oil Corp. v. Gilbert*,<sup>20</sup> *Koster v. (American) Lumbermens Mutual Casualty Co.*,<sup>21</sup> and *Piper Aircraft Co. v. Reyno*<sup>22</sup> are the foundational U.S. Supreme Court precedents in forum non conveniens analysis.

Forum non conveniens presupposes at least two forums in which the defendant is amenable to suit and furnishes criteria for choosing between them.<sup>23</sup> A court, in a sense, makes a predictive determination about whether an alternative forum would be better suited to handle the matter.<sup>24</sup> In doing so, a court must examine whether an adequate alternative forum is

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18. GROSSI, *supra* note 10, at 97. Forum non conveniens derives from the Supreme Court's Article III power to control the administration of litigation before it, if necessary, "to prevent abuses, oppression, and injustice." *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985) (quoting *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888)); *see also* *Owens v. Superfos A/S*, 170 F. Supp. 2d 1188, 1193 (M.D. Ala. 2001). Article III did not, however, supply guidance regarding the administration of the business of the lower federal courts. Congress did not delegate actual authority to the lower courts until the Judiciary Act of 1789, which created both the district courts and the circuit courts. *See* Eduardo C. Robreno, *Learning to Do Justice: An Essay on the Development of the Lower Federal Courts in the Early Years of the Republic*, 29 RUTGERS L.J. 555, 558, 560–61 (1998). The federal courts of appeals as we know them today, however, were not created until 1891. *Id.*; *see also* Judiciary Act of 1891, ch. 517, 26 Stat. 826 (establishing circuit courts of appeals and defining and regulating the jurisdiction of the courts of the United States in certain cases).

19. *See* *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 557 (1946). A district court has substantial flexibility in evaluating a forum non conveniens motion, and each case depends on its own specific facts and circumstances. *Id.*

20. 330 U.S. 501 (1947), *superseded by statute*, Judicial Code and Judiciary Act, ch. 646, 62 Stat. 937 (1948), *as recognized in* *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

21. 330 U.S. 518 (1947).

22. 454 U.S. 235 (1981).

23. *Gilbert*, 330 U.S. at 506–07.

24. *Piper*, 454 U.S. at 241.

available.<sup>25</sup> Although parties may not enjoy the same benefits in a foreign forum as they might in an American court, the alternate forum is only inadequate if the available remedy is manifestly unsatisfactory.<sup>26</sup> If an adequate alternative forum exists, a court then determines whether a balancing of the private and public interest factors listed in *Gilbert* favors dismissal.<sup>27</sup> Relevant private interests include factors that promote the efficient trial of a case, such as access to sources of proof, the availability and cost of witnesses, and the possibility to view the premises.<sup>28</sup> Relevant public interests include administrative difficulties, the imposition of jury duty on a community with no connection to the litigation, the interest in avoiding any conflicts of law, and the application of foreign law.<sup>29</sup> *Gilbert* specifically addressed dismissals within the U.S. federal court system and was superseded by 28 U.S.C. § 1404, as stated in *American Dredging Co. v. Miller*.<sup>30</sup> The statute permits a district court that has jurisdiction over a case to transfer it nonetheless to another district court as a matter of convenience.<sup>31</sup> Today, therefore, the federal doctrine of forum non conveniens applies only in cases where the alternative forum is outside the United States.<sup>32</sup>

### B. Defining the Deference Standard Under *Koster* and *Piper*

A proper balancing of the *Gilbert* factors requires courts to determine how much deference a plaintiff's choice of forum should receive.<sup>33</sup> In *Koster*, a companion case to *Gilbert*, the Court asserted that a strong presumption of convenience exists when the plaintiff has brought an action in her home forum.<sup>34</sup> When a plaintiff is a U.S. citizen or resident, the heightened

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25. A forum is adequate if the parties will not be deprived of *all* remedies or treated unfairly. A foreign forum is available if the entire case, and all parties to that case, are subject to jurisdiction in that forum. *In re Air Crash Disaster near New Orleans, La.* on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987).

26. *Piper*, 454 U.S. at 255 n.22; *see also* *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 828–29 (5th Cir. 1986) (rejecting the plaintiffs' contention that a suit in London Commercial Court would provide the defendants with certain policy defenses that are statutorily foreclosed in Louisiana). *But see* *Petersen v. Boeing Co.*, 108 F. Supp. 3d 726, 731–32 (D. Ariz. 2015) (finding Saudi labor courts inadequate because “blatantly discriminatory law” requiring testimony to be corroborated by two male, Muslim witnesses essentially foreclosed the relief the plaintiff sought).

27. *See Piper*, 454 U.S. at 254 n.22, 257; *Gilbert*, 330 U.S. at 507–09.

28. *See Gilbert*, 330 U.S. at 508.

29. *Id.* at 508–09.

30. 510 U.S. 443 (1994).

31. 28 U.S.C. § 1404(a) (2012). Additionally, 28 U.S.C. § 1406(a) permits federal courts to transfer claims to district courts in which the claim might have been brought initially. 28 U.S.C. § 1406(a).

32. *Am. Dredging Co.*, 510 U.S. at 449 n.2. The doctrine may apply, though, “in rare instances where a state or territorial court serves litigational convenience best.” *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

33. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. Supp. 2017).

34. *See Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). In forum non conveniens cases involving a foreign court, “the ‘home’ forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives.” *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991). Courts partially discount citizenship

deference normally afforded her choice of home forum is based on the presumption that this forum is, in fact, convenient from a system-level standpoint for the vindication of justice.<sup>35</sup> Although this presumption that the plaintiff's home forum is convenient can be overcome if the circumstances of the case so dictate,<sup>36</sup> defendants bear a heavy burden when invoking forum non conveniens.<sup>37</sup>

The world, however, has increasingly globalized since 1947 when *Gilbert* and *Koster* were decided. Forum non conveniens doctrine, then applied internationally rather than merely domestically, encountered new difficulties when the "foreign" alternative forum was a court in a foreign country, not an alternate U.S. federal district court.<sup>38</sup> In 1981, the Supreme Court confronted a case in which non-U.S. plaintiffs sought to sue in the United States over an air-taxi accident that occurred in Scotland. A United Kingdom commission judged the accident to be the result of pilot error based on theories of manufacturing defects of the U.S.-made plane and propeller. The Court in *Piper* found that when the plaintiff is foreign, it is much less reasonable to assume a U.S. forum is convenient—the converse of *Koster*.<sup>39</sup> The plaintiff's choice accordingly receives less deference,<sup>40</sup> the implication being that the choice of a U.S. forum had more to do with opportunism favoring one party over another, rather than overall convenience or a natural connection to the facts surrounding the dispute.<sup>41</sup>

Although U.S. citizens and residents receive greater deference than foreign plaintiffs, a U.S. plaintiff filing suit in her home forum is not necessarily

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when the plaintiff is a corporation doing business abroad and can expect to litigate in foreign courts. *Id.* at 1395.

35. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). But see *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) ("This case is puzzling in that . . . Du Pont, which is headquartered in Wilmington, Delaware, . . . [sought] to move the action against it to a forum more than 3,000 miles away."); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 106 (6th Cir. 1989) (noting that "[b]oth parties seem[ed] almost peculiarly willing" to be inconvenienced by having to proceed in a foreign jurisdiction).

36. See *Bohn v. Bartels*, 620 F. Supp. 2d 418, 430 (S.D.N.Y. 2007) (denying additional deference to a Texas resident living in Japan and suing in New York for an accident that occurred in Portugal).

37. *Piper*, 454 U.S. at 255–56 ("[This] strong presumption . . . may be overcome only when the private and public interest factors *clearly* point towards trial in the alternative forum." (emphasis added)).

38. GROSSI, *supra* note 10, at 83–88 (discussing how today the *Gilbert* transfer analysis would be insufficient for forum non conveniens purposes because the doctrine no longer "represent[s] a change of venue, but a change of sovereign jurisdictions").

39. *Piper*, 454 U.S. at 255–56.

40. See *id.*

41. While much scholarship debates whether foreign plaintiffs should be treated differently, forum non conveniens is nonetheless an accepted judicial doctrine. See *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 191 (3d Cir. 2008) (giving Dutch plaintiffs' "choice of forum a low degree of deference"); *Acosta v. JPMorgan Chase & Co.*, 219 F. App'x 83, 85–86 (2d Cir. 2007) (refusing to grant substantial deference to foreign national plaintiffs' choice of forum); *Taylor v. Tesco Corp. (US)*, 754 F. Supp. 2d 840, 843 (E.D. La. 2010) (noting that "citizens of the forum 'deserve somewhat more deference than foreign plaintiffs'" (quoting *Piper*, 454 U.S. at 225 n.23)).



insulated from forum non conveniens dismissals.<sup>42</sup> Some courts have considered the plaintiff's interests as an additional factor, while others have analyzed such interests separately or as part of an overarching assessment. The Fourth Circuit, on the one hand, has declined to categorize at which step of the analysis concern for the plaintiff's choice of forum should be weighed under *Gilbert*.<sup>43</sup> The Ninth Circuit, on the other hand, considers the residence of the parties and witnesses and the forum's convenience to be factors relating to the private interests of the litigants.<sup>44</sup> This Note does not opine as to which formulation of the analysis is preferable. Regardless of whether a court applies a two-step, three-step, or other multistep test, properly assessing the level of deference to be given to the plaintiff's choice of forum is essential.<sup>45</sup> Moreover, it is often the case that there are multiple plaintiffs in international litigation, only one or a few of whom might be U.S. nationals.

Although the doctrine has produced complex decisions, principles that guide when a plaintiff's choice of forum will receive heightened deference can be discerned from the jumble of cases. Discerning these principles can make forum non conveniens analysis more precise and more predictable.

### C. A Practical Determination of Deference

Even if jurisdiction over the parties and subject matter is established, thus empowering a court to hear a case, the court may still decline to do so if "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience" can be established or trial in the chosen forum is "inappropriate because of considerations affecting the court's own administrative and legal problems."<sup>46</sup> When neither the plaintiff nor the events giving rise to the claim have any bona fide connections to the United States, the suspicion of forum shopping increases and far less deference is given to the plaintiff's choice of forum.<sup>47</sup> A series of decisions from the Sixth Circuit aptly illustrates this analysis.

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42. *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *see also* *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980) (noting a trend away from according "talismanic significance" to American citizenship or residence).

43. *See* *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 804 n.7 (4th Cir. 2013) (declining to categorize plaintiffs' "fear and emotional trauma" within any one private interest factor and treating it instead as a general consideration of convenience).

44. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001).

45. Most courts apply the two-step forum non conveniens analysis to determine whether an adequate alternative forum is available and then balance the relevant private and public interests. All courts, however, engage in a third step, which determines the degree of deference afforded to the plaintiff's choice of forum. *WRIGHT ET AL.*, *supra* note 33, § 3828. The Second Circuit has explicitly prescribed a three-step analysis with the first step being to assess the level of deference owed to the plaintiff's choice of forum. *See* *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001).

46. *Koster*, 330 U.S. at 524.

47. *See supra* note 6 and accompanying text; *see, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011) (rejecting the proposition that a domestic plaintiff's choice of forum is lessened when joined by foreign plaintiffs); *Vivendi SA v. T-Mobile USA, Inc.*, 586 F.3d 689, 694-95 (9th Cir. 2009) (affording less deference to a U.S. coplaintiff's choice of forum because its role in the case was solely an "eleventh-hour effort[] to strengthen connections with the United States").

In *Kryvicky v. Scandinavian Airlines System*,<sup>48</sup> an American woman who had been living abroad moved from Brazil to Spain. While in Spain, her husband died in a plane crash near the Madrid airport.<sup>49</sup> She subsequently reestablished her U.S. residency in Michigan and brought a wrongful death action against an American company and a foreign company.<sup>50</sup> The Sixth Circuit determined that the district court properly afforded her choice of a U.S. forum more deference than if she were a foreigner, but nevertheless upheld the dismissal for forum non conveniens.<sup>51</sup>

In *Duha v. Agrium, Inc.*,<sup>52</sup> the plaintiff, a U.S. citizen and employee of the defendant corporation, accepted a long-term assignment in Argentina to help his employer's Argentine operations.<sup>53</sup> While in Argentina, the plaintiff alleged to have discovered employees engaging in bribery and other nefarious practices.<sup>54</sup> He informed his superiors of these practices and alleged that he was subsequently fired for doing so.<sup>55</sup> The employer contended the plaintiff was fired because he had offered the services of a prostitute to a subordinate as a work incentive.<sup>56</sup> While the plaintiff in *Kryvicky* had lived outside the United States for about nine years prior to her claim,<sup>57</sup> the plaintiff in *Duha* was abroad for a far shorter duration. He had not even completed the twenty-five months in Argentina initially agreed to in his employment contract.<sup>58</sup> Throughout his time in Argentina, the plaintiff also maintained a residence in Michigan where his immediate family lived.<sup>59</sup> The circuit court ultimately vacated the district court's dismissal for forum non conveniens and remanded the case.<sup>60</sup>

The final illustrative decision is *Hefferan v. Ethicon Endo-Surgery, Inc.*<sup>61</sup> An American, who had been living in Germany with his German wife for twelve years, suffered complications following a surgery. He and his wife brought an action against the American manufacturer of a surgical stapler that allegedly malfunctioned during his surgery, performed in Germany by German medical doctors.<sup>62</sup> The plaintiffs were unable to show any legitimate

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48. 807 F.2d 514 (6th Cir. 1986).

49. *Id.* at 515.

50. *Id.*

51. *Id.* at 516 (finding that the *Gilbert* factors weighed heavily in favor of Spain since the accident occurred there, the wreckage was there, and all relevant records were in the possession of Spanish authorities).

52. 448 F.3d 867 (6th Cir. 2006).

53. *Id.* at 868.

54. *Id.* at 870.

55. *Id.*

56. *Id.*

57. *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 515 (6th Cir. 1986).

58. *Duha*, 448 F.3d at 875.

59. *Id.*

60. *Id.* at 882. The district court did not indicate whether it gave heightened deference by virtue of the plaintiff being a U.S. citizen. Rather, the degree of deference the district court gave resembled the degree generally given to foreign plaintiffs. The court of appeals distinguished *Duha*'s situation from *Kryvicky*, however, since *Duha* maintained his residence in Michigan. *Id.* at 874–75.

61. 828 F.3d 488 (6th Cir. 2016).

62. *Id.* at 492.

reason for filing their suit in the United States. The American husband had neither maintained residency, as in *Duha*, nor even reestablished residency, as in *Kryvicky*. In fact, both plaintiffs in *Hefferan* were still living in Germany when they filed suit.<sup>63</sup> The Sixth Circuit concluded the district court did not abuse its discretion when it declined to afford the plaintiffs' choice of forum heightened deference.<sup>64</sup>

#### D. State Variations of the Procedural Doctrine

Many states also apply the forum non conveniens doctrine as a means for dismissing lawsuits more suitable to be litigated in an alternative, out-of-state forum.<sup>65</sup> The seminal Supreme Court cases articulating the federal forum non conveniens standard have greatly influenced analogous state legislation,<sup>66</sup> but interstate variations abound.<sup>67</sup> Such variation can sometimes make a state court, rather than a federal court, more attractive to certain plaintiffs.<sup>68</sup> Thus, applying a particular state's forum non conveniens standard, rather than the federal standard, could be the difference between adjudication in the United States or dismissal to a foreign forum. A brief discussion of the varying standards illustrates the versatility of the doctrine at the state level.

While forcing states to follow the federal standard of forum non conveniens would be inconsistent with tenets of federalism,<sup>69</sup> states that follow the federal standard tend to see a decrease in transnational litigation.<sup>70</sup> California follows the rule that a plaintiff's choice of forum should rarely be

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63. *Id.* at 494.

64. *Id.*

65. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 298 (3d ed. 1996).

66. See Brian J. Springer, Comment, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PA. L. REV. 833, 843 n.53 (2015) (collecting state cases adopting the federal forum non conveniens standard).

67. State courts are unable to transfer a case to the courts of another state. *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (AM. LAW INST. 1971) ("A state will not exercise jurisdiction if it is a seriously inconvenient forum . . . provided . . . a more appropriate forum is available."). Illinois law specifies dismissal procedures premised on filing the same action in an alternate jurisdiction. ILL. SUP. CT. R. 187. Wisconsin law similarly permits its courts to enter an order to stay further proceedings. WIS. STAT. § 801.63(1) (2017).

68. David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 952–53 (1990).

69. LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION 486 (2d ed. 2015) ("[S]tate courts . . . protect federally-created as well as state-created rights. State courts . . . have jurisdiction over matters within federal judicial power, unless Congress exclusively committed a particular matter to the federal courts.>").

70. See *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996) ("Nothing in our law establishes a policy that Florida must be a courthouse for the world, nor that the taxpayers of the state must pay to resolve disputes utterly unconnected with this state's interests."); *AT & T Corp. v. Sigala*, 549 S.E.2d 373, 377 (Ga. 2001) (relying on inherent judicial power to adopt forum non conveniens as a way to discourage foreign plaintiffs from suing in Georgia courts to litigate tort claims in the United States). Additionally, the defendants in many transnational litigation cases are U.S. companies that are often residents of the forum state. Robertson & Speck, *supra* note 68, at 951–52.

disturbed<sup>71</sup> but limits its applicability to residents. Therefore, the plaintiff's choice of forum is largely unquestioned if the plaintiff is a resident of California, as the state posits a strong interest in assuring its own residents have access to an adequate forum.<sup>72</sup> Ultimately, though, the plaintiff's residence is but one of many factors used to assess convenience. The defendant's residence, for example, may also be considered.<sup>73</sup> By contrast, in *Myers v. Boeing Co.*,<sup>74</sup> the Washington Supreme Court affirmed a forum non conveniens dismissal of a Japanese airplane crash lawsuit, but declined to adopt *Piper*'s rule of affording less deference to a foreign plaintiff's choice of forum.<sup>75</sup>

In *Dow Chemical Co. v. Castro Alfaro*,<sup>76</sup> eighty-two Costa Rican banana workers and their wives claimed they suffered several medical problems, including sterility, as a result of exposure to a pesticide manufactured by Dow Chemical Company and Shell Oil Company.<sup>77</sup> The defendant corporations invoked forum non conveniens, but the Texas Supreme Court ruled that Texas's wrongful death statute abolished the forum non conveniens defense in cases of personal injury, even when the injury occurred in a foreign country.<sup>78</sup> Justice Lloyd Doggett, in a concurring opinion, adamantly declared that Texas citizens *are interested* in the activities of Texas-based companies operating abroad.<sup>79</sup> The Texas Supreme Court's decision in *Alfaro*, however, was an interpretation of the wording of a particular statute, one the Texas legislature subsequently modified.<sup>80</sup>

Other states fall somewhere in between. Connecticut, while acknowledging the *Piper* rule, sees itself as having a responsibility to out-of-state plaintiffs who have nonetheless properly invoked Connecticut's jurisdiction.<sup>81</sup> Delaware follows Connecticut and recognizes that when the plaintiff is not a resident of the state, the defendant faces a "somewhat lowered burden" for forum non conveniens dismissal.<sup>82</sup> This lowered

71. *See supra* Part I.B.

72. *See Stangvik v. Shiley Inc.*, 819 P.2d 14, 19–20 (Cal. 1991).

73. *Id.* at 20.

74. 794 P.2d 1272 (Wash. 1990).

75. *Id.* at 1280 (rejecting *Piper* because, as federal common law, it was not binding on the court; the cursory treatment in the majority opinion did not reflect a well-reasoned decision; and proper application of the *Gilbert* factors alone leads to equitable results).

76. 786 S.W.2d 674 (Tex. 1990).

77. *Id.* at 675.

78. *Id.* at 678–79.

79. *Id.* at 686 (Doggett, J., concurring); *see also id.* at 680 (majority opinion) (“[A] wrong does not fade away because its immediate consequences are first felt far away rather than close to home.”).

80. *See In re Smith Barney, Inc.*, 975 S.W.2d 593, 597 (Tex. 1998) (clarifying that the Texas legislature's amendment to section 71.051 of the Civil Practice and Remedies Code reaffirmed the forum non conveniens doctrine, thus altering the holding in *Alfaro*); *see also* Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, ADVOCATE, Fall 2003, at 74, 76, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=903134](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=903134) [<https://perma.cc/8URY-PWSX>] (“[T]he statutory amendments concern[ed] only § 71.051, [with] common law forum non conveniens remain[ing] applicable and unchanged in all non-personal injury and wrongful death cases.”).

81. *Picketts v. Int'l Playtex, Inc.*, 576 A.2d 518, 524–25 (Conn. 1990).

82. *Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832, 842 (Del. 1999).

burden, though, is balanced against the plaintiff's right "to litigate in his or her choice of forum."<sup>83</sup>

Some states also utilize forum non conveniens as an intrastate transfer mechanism when another jurisdiction within the state is more convenient. In such instances, the same considerations of fairness and convenience apply.<sup>84</sup> The fact that an issue involves international jurisdiction does not substantively alter the forum non conveniens analysis or compel a state to abandon state law for federal precedent.<sup>85</sup>

Not all states, however, permit intrastate transfer for the sake of convenience. Ohio limits intrastate transfer to situations in which it is necessary to transfer a case out of a county because venue is improper or to ensure a fair and impartial trial.<sup>86</sup> Transfer is not permitted from one *proper* venue to another.<sup>87</sup> The rationale is that transfer for the sake of convenience is unnecessary in a state as geographically small as Ohio, where depositions can be used to remedy any inconvenience to witnesses.<sup>88</sup>

#### *E. Defendants' Safeguards After Goodyear, Nicastro, and Bauman*

The recent Supreme Court decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>89</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>90</sup> and *Daimler AG v. Bauman*<sup>91</sup> provide multinational corporate defendants organized and operating abroad further protection against being constitutionally subject to personal jurisdiction for civil lawsuits in the United States.

The plaintiffs in *Goodyear* were the U.S. citizen-parents of two minor children who were killed in a bus accident outside Paris, France. The parents brought an action in North Carolina state court alleging that a defective tire manufactured in Turkey caused the accident.<sup>92</sup> The plaintiffs named Goodyear USA, an Ohio corporation, and three of its foreign subsidiaries organized and operating in Turkey, France, and Luxembourg as defendants.<sup>93</sup> While Goodyear USA did not contest that jurisdiction was proper in North Carolina, the three foreign subsidiaries asserted North Carolina lacked personal jurisdiction over them.<sup>94</sup> The Court agreed, holding that because the accident occurred in France and the tire alleged to have caused the

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83. *Id.*

84. *See* Dawdy v. Union Pac. R.R., 797 N.E.2d 687, 696 (Ill. 2003); *see also* First Am. Bank v. Guerine, 764 N.E.2d 54, 57 (Ill. 2002) (reaffirming that the intrastate forum non conveniens doctrine is Illinois law).

85. *See* Bochetto v. Piper Aircraft Co., 94 A.3d 1044, 1051 (Pa. 2014).

86. Dobrovicz v. Manns, No. 08CA3064, 2009 WL 2172512, ¶ 7, at \*3 (Ohio Ct. App. July 17, 2009).

87. *See id.* ¶ 8–9, at \*3.

88. *See id.* ¶ 7–8, at \*3 (explaining Ohio Rules of Civil Procedure 3(C)(1) and (4)); *see also* Chambers v. Merrell-Dow Pharm., Inc., 519 N.E.2d 370, 377 (Ohio 1988).

89. 564 U.S. 915 (2011).

90. 564 U.S. 873 (2011).

91. 134 S. Ct. 746 (2014).

92. *Goodyear*, 564 U.S. at 918.

93. *Id.*

94. *Id.*

accident was manufactured and sold abroad, the connection between the forum and the underlying incident did not permit a North Carolina court to exercise general jurisdiction over the foreign corporation.<sup>95</sup>

In *Nicastro*, a U.S. national filed a products-liability suit in New Jersey state court after being seriously injured while using a metal-shearing machine manufactured in England, where the manufacturer was incorporated and operated.<sup>96</sup> Because the question concerned the authority of a New Jersey state court to exercise jurisdiction, only the corporate defendant's purposeful contacts with New Jersey were relevant.<sup>97</sup> Ultimately, the Court held that for jurisdiction to be proper, the British manufacturer needed to do more than direct marketing and sales efforts at the United States generally; it needed to engage in conduct purposefully directed at New Jersey.<sup>98</sup> After *Nicastro*, it seems a defendant will not be subject to personal jurisdiction based on a pure stream-of-commerce theory.<sup>99</sup>

In *Bauman*, twenty-two Argentinian residents filed a complaint in the United States seeking to hold Daimler, a German company, vicariously liable for its Argentinian subsidiary's alleged collaboration with state security forces to kidnap, detain, torture, and kill certain workers.<sup>100</sup> Instructed by *Goodyear*, the Court determined that allowing this Argentina-rooted case to be adjudicated in California would deny out-of-state defendants the ability to structure their activities so as to render them not liable to suit.<sup>101</sup>

The upshot of this trilogy of recent Supreme Court personal jurisdiction precedents is greater constitutional protection for corporate defendants facing lawsuits relating to activities or events abroad. Consequently, there is more

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95. *Id.* at 919–20. Other Goodyear USA affiliates did indeed distribute a small percentage of the foreign subsidiaries' tires within North Carolina. *Id.* The tires were typically custom ordered to equip specialized vehicles. *Id.* The tire involved in the accident even conformed to U.S. Department of Transportation standards and bore markings required for sale in the United States. *Id.* However, the specific type of tire involved in the accident, manufactured by Goodyear Turkey, was never distributed in North Carolina. *Id.* at 921–22. Foreign corporate defendants may receive further protection by courts' unwillingness to pierce the corporate veil and consolidate the foreign subsidiaries' ties with North Carolina with those of the parent company. The plaintiffs in their brief, however, did not request that the Court disregard the petitioners' subsidiary status, and the Court, therefore, did not consider this "single enterprise authority." *Id.* at 930. However, because "corporate veil-piercing standards for jurisdiction and liability differ significantly, . . . jurisdiction can exist where liability does not." BORN, *supra* note 65, at 153.

96. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011).

97. *Id.* at 877.

98. *Id.* at 885–86 (finding that the British manufacturer did not own property, pay taxes, have an office, or advertise in New Jersey).

99. Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 638–41 (2013) (discussing how *Nicastro* provided no clarity on the stream-of-commerce approach to due process with the plurality seemingly endorsing an even narrower analysis).

100. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014). The events giving rise to this claim occurred between 1976 and 1983, during Argentina's "Dirty War," in which Argentina's military dictatorship waged a campaign against suspected left-wing political opponents. *Id.* at 751; see also *Dirty War*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Dirty-War> [<https://perma.cc/E8XQ-KXZ9>] (last visited Oct. 16, 2017).

101. *Bauman*, 134 S. Ct. at 761–62.

space for a U.S. court to defer to the plaintiff's choice of a U.S. forum over any such defendants that pass the more restrictive personal jurisdiction test. However, the safeguards against overly generous findings of personal jurisdiction are not available to all defendants. While case law provides little guidance on the relative weight ascribable to any individual factor in forum non conveniens analysis, certain patterns are perceptible.

## II. A PECULIAR FORM OF ORDER: THE DISCRETIONARY NATURE OF THE DOCTRINE

Courts have taken widely disparate approaches to forum non conveniens analysis.<sup>102</sup> As a common law, judge-made standard consisting of multifarious factors, there is a legitimate concern that uniform and predictable application of the doctrine is almost impossible.<sup>103</sup> Discerning specific factors, though, aids in creating uniformity and predictability when determining the amount of deference a plaintiff's choice of forum will receive. The cases discussed in this Part involve plaintiffs who brought actions against defendants in forums other than those in which the incident giving rise to the action occurred. In these cases, the plaintiff's choice of forum was either upheld or very seriously considered before granting the forum non conveniens motion.

These cases fall into three categories. First, Part II.A examines dispositive deference decisions where the plaintiff's choice of forum received heightened deference and the court denied the forum non conveniens motion. Second, Part II.B examines cases where the plaintiff's choice of forum received heightened deference but the court granted the motion to dismiss on forum non conveniens. Finally, Part II.C discusses cases in which the plaintiff's choice of forum did not receive heightened deference and the court granted the defendant's motion to dismiss.<sup>104</sup>

### A. Heightened Deference, FNC Motion Denied

In the following cases, a plaintiff brings an action in her preferred U.S. forum, and the court affords this forum choice heightened deference under forum non conveniens analysis.

#### 1. *Guidi v. Inter-Continental Hotels Corp.*

In *Guidi v. Inter-Continental Hotels Corp.*,<sup>105</sup> a gunman entered a hotel restaurant in Egypt and began shooting, killing four people and injuring two

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102. See generally *id.* (discussing a wide range of conflicting approaches); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002) (discussing an updated analysis to resolve differing forum non conveniens approaches across federal courts).

103. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); see also GROSSI, *supra* note 10, at 97.

104. This Note does not analyze cases in which a forum non conveniens dismissal was denied for reasons unrelated to deference to the plaintiff's choice of forum.

105. 224 F.3d 142 (2d Cir. 2000).

others. The gunman later surrendered to Egyptian police. His claimed motivation was religious extremism directed at foreigners. After being prosecuted and adjudged insane, he was committed to a government hospital. Three years later, he escaped the hospital and, that same day, killed ten more people in an attack on a tour bus.<sup>106</sup>

The widows of two American businessmen who were killed during the first attack sued the American corporate manager of the hotel in the Southern District of New York for wrongful death and personal injury.<sup>107</sup> The hotel moved to dismiss the action for forum non conveniens. It argued that information critical to its defense could only be obtained in Egypt, the costs of defending in New York would be prohibitive, it would be unable to implead Egyptian third parties in a New York forum, and an Egyptian court would be better able to administer Egyptian tort law.<sup>108</sup> Additionally, the families of the other two deceased victims in the first incident—an Italian judge and a French lawyer—had already commenced wrongful death actions in Egypt.<sup>109</sup> The district court agreed that these factors decisively favored the Egyptian forum and granted the hotel's motion to dismiss.<sup>110</sup> Under the district court's analysis, the fact that the U.S. plaintiffs were not citizens of New York weakened the presumption that a federal district court in New York was a suitable forum.<sup>111</sup>

The Second Circuit reversed, finding that for U.S. citizens, the specific state where a plaintiff resides is not relevant to forum non conveniens analysis.<sup>112</sup> In so holding, the court emphasized that the purpose of a forum non conveniens inquiry is not only to determine where trial will be most convenient for the parties, but also to determine which forum would best serve "the ends of justice."<sup>113</sup> The court of appeals further stated that the widows and victims "of a murderous act . . . are strongly adverse to litigating in a country where foreigners have been the target of hostile attacks, and have concerns for their personal safety if required to travel [to the foreign locale] to bring their suit."<sup>114</sup> This concern, according to the Second Circuit panel,

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106. *Id.* at 143–44.

107. Merrill Kramer and his wife joined their personal injury claim to the widows' wrongful death claims. *Id.* at 144. Kramer was with the now-deceased husbands of Guidi and Hoffman in Egypt and was shot during the attack but survived his injuries. *Id.*

108. *Id.*

109. *Id.* Related litigation abroad is a powerful factor favoring dismissal. Avoiding inconsistent factfinding and sparing litigants additional costs from duplicative lawsuits are significant advantages to having all parties seeking recovery assert their claims in a single forum. See William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1676 (1992).

110. *Guidi*, 224 F.3d at 144.

111. See *id.* at 146.

112. *Id.* at 146 n.4 ("[T]he 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives." (quoting *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991)).

113. *Id.* at 147 (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947)).

114. *Id.*



avored keeping the action in New York despite any inconvenience to the corporate defendants.<sup>115</sup>

### 2. *Dorfman v. Marriott International Hotels, Inc.*

A plaintiff's choice of forum may also receive heightened deference even when the injury is not as extreme as an act of terrorism. In *Dorfman v. Marriott International Hotels, Inc.*,<sup>116</sup> Laura Dorfman suffered personal injuries upon exiting an unlevelled elevator while a guest at the Budapest Marriott Hotel in Budapest, Hungary.<sup>117</sup> Although the facts in *Dorfman* were distinguishable from *Guidi*, the trial court found that case instructive as to whether local interests justified keeping the suit in New York.<sup>118</sup> As in *Guidi*, the defendant corporation was a hotel incorporated in the United States and doing business abroad.<sup>119</sup> The court found that adjudicating injuries Americans suffered abroad due to the alleged fault of American corporations acting overseas is a local concern and worth the relatively minimal costs of local adjudication.<sup>120</sup>

Ultimately, even though the plaintiff did not suffer from something as extreme as a terrorist attack, as in *Guidi*, the court determined that a series of emotionally traumatic experiences abroad, coupled with Dorfman's advanced age, made travel to litigate in Hungary a serious burden.<sup>121</sup> This showing of convenience by the plaintiff, who brought suit in her home forum, sufficiently outweighed any inconvenience to the defendant by not litigating in Hungary.<sup>122</sup>

### 3. *DiFederico v. Marriott International, Inc.*

In *DiFederico v. Marriott International, Inc.*,<sup>123</sup> the Fourth Circuit held that "fear, emotional trauma, and associated logistical complexity" were sufficient grounds for denying a forum non conveniens motion to dismiss.<sup>124</sup> Albert DiFederico, a former U.S. naval officer serving as a civilian contractor for the U.S. Department of State in Pakistan, was killed in a terrorist attack when a truck containing over 1000 pounds of explosives, artillery shells, mortar bombs, and shrapnel exploded and engulfed the Marriott Islamabad Hotel in fire. Fifty-six people were killed and at least 266 more were injured.<sup>125</sup>

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115. *Id.* at 147–48.

116. No. 99 Civ. 10496 (CSH), 2001 WL 69423 (S.D.N.Y. Jan. 3, 2002).

117. *Id.* at \*1.

118. *Id.* at \*8.

119. *Id.* The court permitted limited discovery to determine whether the defendants were subject to the court's jurisdiction. *See id.* at \*4.

120. *Id.* at \*8.

121. The plaintiff described herself as a youthful octogenarian and alleged that her injuries were caused by defective, dangerous, or hazardous conditions in, on, or about the elevator. *Id.* at \*1.

122. *Id.* at \*8–9.

123. 714 F.3d 796 (4th Cir. 2013).

124. *Id.* at 805.

125. *Id.* at 799.

DiFederico's widow and three sons sued Marriott, an American-based company, rather than Hashwani Hotels Limited, for insufficient security measures concomitant with the threat level in Pakistan.<sup>126</sup> The plaintiffs alleged that the Islamabad franchise was required to comply with the standards and protocols dictated by Marriott from its corporate security offices in Bethesda, Maryland.<sup>127</sup> As such, essential sources of proof included testimony from the architect of Marriott's security plan and documents explaining specific policies and procedures.<sup>128</sup>

In reversing the district court on an abuse of discretion standard of review, the Fourth Circuit concluded that the plaintiffs had supplied sufficient evidence attesting to the risks to Americans who travel in Pakistan.<sup>129</sup> Finding *Guidi* analogous, the Fourth Circuit began its inquiry by considering the DiFedericos' argument that convenience and justice began with avoiding the fear and emotional trauma associated with pursuing their case in Pakistan.<sup>130</sup> The court found it indisputable that logistical complexities and expenses associated with travel to Pakistan, let alone the fear and emotional trauma of doing so, would sufficiently inconvenience the plaintiffs.<sup>131</sup> If the plaintiffs heeded the State Department's warnings, they would have to avoid facilities catering to Americans. The court reasoned this would likely necessitate hiring bodyguards and someone to help them access basic amenities and navigate an unfamiliar cultural setting.<sup>132</sup>

The district court agreed with Marriott's argument that fear and emotional trauma were irrelevant in the convenience analysis because there was no need for the plaintiffs to actually travel to Pakistan.<sup>133</sup> The circuit court disagreed. It noted that a civil litigant generally has a right to access all judicial proceedings, and that here, since this was a wrongful death action, the plaintiffs themselves could be necessary witnesses.<sup>134</sup> It ultimately determined that "it would be a perversion of justice to force a widow and her

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126. The Marriott Islamabad was a franchise hotel owned and operated by Hashwani Hotels Limited, a public company organized under the laws of Pakistan. *Id.* at 800.

127. *Id.*

128. Marriott hired Alan Orlob to assess risk, security measures, and procedures for all Marriott branded hotels. *Id.* at 806. Marriott instituted new security measures under Orlob's direction. *Id.* Orlob outlined these policies and procedures in his testimony to the U.S. Senate regarding the attack, specifically addressing the adequacy of Marriott Islamabad's protective measures. *Id.*

129. *Id.* at 804. A State Department travel warning referenced nine separate terrorist attacks on U.S. citizens in the country since 2006 and warned that terrorist groups would continue to seek opportunities to attack locations where U.S. citizens were known to visit. *Id.* at 805. The DiFedericos further pointed to data that documented nearly 12,000 terrorist-related deaths in Pakistan between 2003 and 2011. *Id.* at 804–05.

130. *Id.* at 804.

131. *Id.* at 805.

132. *Id.*

133. *Id.* Marriott cited to two cases discussed below in Parts II.B–C. *See* Harp v. Airblue Ltd., 879 F. Supp. 2d 1069 (C.D. Cal. 2012); Niv v. Hilton Hotels Corp., 710 F. Supp. 2d 328 (S.D.N.Y. 2008), *aff'd* 358 F. App'x 282 (2d Cir. 2009).

134. As potential witnesses, the plaintiffs' inability to provide testimony regarding their relationship with the decedent would place them at a disadvantage since the defendant could easily exploit such a lack of testimony. *Id.*

children to place themselves in the same risk-laden situation that led to the death of a family member.”<sup>135</sup>

#### 4. *Licea v. Curacao Drydock Co.*

Dismissal from the plaintiff’s choice of forum under the circumstances of *Licea v. Curacao Drydock Co.*<sup>136</sup> would also have failed to serve the convenience of the parties and “the ends of justice” and was therefore not warranted.<sup>137</sup> Cuban nationals who resided in Florida alleged they were trafficked under threat of physical and psychological harm, including the threat of imprisonment, from Cuba to Curaçao by the operator of a drydock facility and the Cuban government.<sup>138</sup> The plaintiffs were forced to work in slave-like conditions for 112 hours per week, performing services on ships and oil platforms.<sup>139</sup> The plaintiffs alleged that they had successfully escaped the facility and were hunted by the defendant and agents of the Cuban government within Curaçao all the way to Colombia, where they were granted political asylum.<sup>140</sup>

The *Licea* court determined the plaintiffs’ cause of action intimately related to their fear of traveling to Curaçao.<sup>141</sup> The court thus concluded that the only alternative forum to U.S. federal court was one that the plaintiffs alleged they were forced to enter and had never lived as free men. Requiring these plaintiffs to litigate in the country into which they were allegedly trafficked, held in captivity, and faced ongoing danger would be an undue prejudice and inconvenience.<sup>142</sup>

#### 5. *Doe v. Terra Properties, Inc.*

Even when several alternate forums are available, the defendant may have a heavy burden in demonstrating any offsetting disadvantage to litigating in the plaintiff’s chosen forum. *Doe v. Terra Properties, Inc.*,<sup>143</sup> an Illinois state court case, arguably created a new test for forum non conveniens cases involving sexual assaults. A tenant who alleged she was sexually assaulted in her apartment brought a personal injury suit against the company that

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135. *Id.*

136. 537 F. Supp. 2d 1270 (S.D. Fla. 2008).

137. *Id.* at 1275 (quoting *Guidi v. Inter-Cont’l Hotels Corp.*, 224 F.3d 142, 147 (2d Cir. 2000)). Further, factors that may have made it difficult for the defendants to defend in the Southern District of Florida, rather than Curaçao, had to be weighed against the importance of ensuring that a forum existed for actions that alleged violations of international law. *Id.* at 1274.

138. *Id.* at 1272.

139. *Id.*

140. *Id.*

141. Additionally, no proxy coplaintiffs were available to bring this action on behalf of the plaintiffs. *Id.* at 1275.

142. *Id.*

143. 632 N.E.2d 665 (Ill. App. Ct. 1994). Illinois courts employ the *Gilbert* framework in forum non conveniens cases. See *Fennell v. Ill. Cent. R.R.*, 987 N.E.2d 355, 359 (Ill. 2012); *Satkowiak v. Chesapeake & Ohio Ry.*, 478 N.E.2d 370, 372 (Ill. 1985).

managed the apartment complex.<sup>144</sup> The court found the conduct of the plaintiff—who had intentionally brought her action in an adjacent county and even requested the court’s permission to pursue her claim as an anonymous “Jane Doe”—evinced a great degree of mental distress.<sup>145</sup> Pursuing the claim under her real name would have further subjected her to public humiliation, embarrassment, and emotional trauma.<sup>146</sup> The Illinois Appellate Court reasoned that even when there are several available forums, the plaintiff’s choice in a case involving a criminal sexual assault should receive greater deference.<sup>147</sup>

The Illinois court also reasoned that any disadvantage to the defendant was minimal.<sup>148</sup> The convenience of trying the case in a forum closer to the defendant’s counsel’s office and the defendant’s home office offset the slightly higher cost of witness travel. If the judge in the alternate forum decided it would be troublesome for the jury to view the premises, such disadvantage was the same, if not greater, for the plaintiff. There was no guarantee, however, that the home county judge would have allowed the jury to view the premises.<sup>149</sup> The *Terra Properties* court denied the motion to transfer to the alternate county for forum non conveniens.<sup>150</sup> The court did not label the deference given to the plaintiff in a sexual assault case as a public or private interest factor, but instead saw it as invoking both.<sup>151</sup>

In summary, extreme circumstances appear to be essential for the plaintiff’s choice of forum to receive heightened deference. The extreme circumstances of these cases, though, bolster the already-heightened deference accorded based on U.S. citizenship or residency. These cases show that acts of terrorism, advanced age, trafficking, and emotional trauma have all been deemed central to a court’s decision to deny a defendant’s motion to dismiss for forum non conveniens. Such factors, however, are not dispositive and have received different treatment in other cases.

### *B. Heightened Deference, FNC Motion Granted*

In another set of cases discussed below, courts accorded heightened deference to the plaintiff’s choice of forum but nevertheless dismissed on forum non conveniens grounds. Analyzing the factual circumstances underlying each of these cases is instructive to further an understanding of the forum non conveniens doctrine.

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144. *Terra Props.*, 632 N.E.2d at 666.

145. *Id.*

146. *Id.*

147. *Id.* at 668. In Illinois, for purposes of an *interstate* forum non conveniens motion, a plaintiff’s “home forum” is the plaintiff’s home state. For an *intrastate* motion, however, the plaintiff’s “home forum” is the plaintiff’s home county. *Kwasniewski v. Schaid*, 607 N.E.2d 214, 216 (Ill. 1992).

148. *See Terra Props.*, 632 N.E.2d at 668.

149. *Id.*

150. *Id.*

151. *Id.*; *see also supra* notes 43–44 and accompanying text.

### 1. *Harp v. Airblue Ltd.*

In *Harp v. Airblue Ltd.*,<sup>152</sup> despite fear of travel to Pakistan, the district court dismissed a negligence case stemming from a fatal airplane crash in which all 152 passengers and crewmembers perished.<sup>153</sup> The flight took off from Karachi, Pakistan, and crashed on its final approach to Islamabad, Pakistan.<sup>154</sup> Four of the five plaintiffs were presumed to be citizens of Pakistan. Only Harp, suing as administrator for his deceased mother, who was a U.S. citizen and resident of Georgia, was alleged to be a U.S. citizen.<sup>155</sup> Although Harp's choice of forum merited greater deference as a U.S. citizen bringing suit in his home forum, overcoming such deference was not an insurmountable burden in the view of the California federal district court.<sup>156</sup>

Harp claimed he feared traveling to Pakistan given reports of terrorism, kidnapping, and murders directed at American citizens. He cited to U.S. Department of State travel warnings advising against travel to Pakistan.<sup>157</sup> The court acknowledged that although some of Harp's concerns may have been justified, his fear was unrelated to the events giving rise to the claim.<sup>158</sup> Harp also failed to provide any evidence of specific danger to himself or his witnesses.<sup>159</sup> Therefore, litigation in Pakistan was reasonable.<sup>160</sup>

### 2. *Tazoe v. Airbus S.A.S.*

*Tazoe v. Airbus S.A.S.*<sup>161</sup> also involved an airplane crash in which there was only one U.S. citizen among several other foreign plaintiffs. The accident involved an airplane, which overran a rain-soaked runway as it landed in São Paulo, Brazil, and resulted in the deaths of 187 passengers and crew, as well as twelve people on the ground. One U.S. citizen died in the crash; all other victims were citizens or residents of Brazil.<sup>162</sup> While the court readily found that the district court did not abuse its discretion by dismissing the complaints of the Brazilian family members, it hesitated to deny the U.S. citizen-victim's family members access to the U.S. judicial system.<sup>163</sup> The "unusually extreme and materially unjust" disadvantages the

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152. 879 F. Supp. 2d 1069 (C.D. Cal. 2012).

153. The plaintiffs sued in California state court. The defendant then removed to the federal district court and later moved to dismiss. *Id.* at 1072.

154. *Id.* at 1071–72.

155. *Id.* at 1072.

156. *Id.* at 1076.

157. *Id.* at 1075.

158. *Id.*

159. *Id.*; see also *Radian Int'l, LLC v. Alpina Ins. Co.*, No. C-04-4537 SC, 2005 WL 1656884, at \*2 (N.D. Cal. July 14, 2005) (rejecting plaintiff's arguments that Lebanon was an inadequate forum because of safety concerns based on State Department travel warnings).

160. *Harp*, 879 F. Supp. 2d at 1075. The court also rejected Harp's assertion that the corruption in Pakistan's judicial system may prevent resolution of the case. *Id.* at 1073. The court determined a Transparency International report, ranking Pakistan alongside Sierra Leone, Zimbabwe, Syria, Vietnam, Haiti, and Iran on its "Corruption Perception Index," was not specific to the resolution of Harp's claim. *Id.*

161. 631 F.3d 1321 (11th Cir. 2011).

162. *Id.* at 1328.

163. See *id.* at 1335.

defendants would face if the action proceeded in Florida, however, far outweighed the heightened deference generally afforded American citizens.<sup>164</sup> Such a decision is not uncommon in cases involving aviation crashes where the wreckage of the crash is in the foreign forum.<sup>165</sup>

### C. No Heightened Deference, FNC Motion Granted

*Koster* and *Piper* provide the basic rules for when heightened deference should or should not be afforded. However, as the cases discussed to this point have shown, application of such rules is rarely black and white. In contrast to the cases discussed in Parts II.A and II.B, the plaintiffs' choices of forum in this section did not receive heightened deference, and the courts granted the forum non conveniens motions.

#### 1. *Siegel v. Global Hyatt Corp.*

The U.S. citizen-plaintiffs in *Siegel v. Global Hyatt Corp.*<sup>166</sup> sought damages for negligence, wrongful death, and survival when an Al Qaeda in Iraq affiliated suicide bomber detonated explosives in the Grand Hyatt Amman hotel in Amman, Jordan.<sup>167</sup> Hyatt Hotels Corporation, headquartered in Chicago, Illinois, operated and managed the Grand Hyatt Amman.<sup>168</sup> The plaintiffs chose to bring an action against the defendant corporation in state court in Cook County, Illinois.<sup>169</sup>

The state appellate court reasoned that when a plaintiff chooses his or her own home forum *or* the site of the initial incident, it is reasonable to presume that the choice of forum is convenient.<sup>170</sup> The plaintiffs contended that the defendants' alleged negligence was based on policies created in Cook County. The trial court concluded, however, that the injury did not occur in Cook County, where the defendant's records relating to the bombing and the management of the hotel were stored, but rather in Jordan.<sup>171</sup> Additionally, with the exception of one estate administrator, the four plaintiffs were foreign to Cook County.<sup>172</sup> These facts overcame the presumption of convenience, and the plaintiff's choice of forum therefore received less deference.<sup>173</sup>

The trial court did not ignore evidence that some of the plaintiffs might feel an emotional burden if required to return to Jordan for trial.<sup>174</sup> The appellate court considered both *Terra Properties* and *Guidi* but ultimately

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164. *Id.* The defendants would be unable to compel third-party witnesses or produce documents from those witnesses and would be unable to implead any potentially liable third parties.

165. *See infra* note 254 and accompanying text.

166. No. 1-11-2832, 2013 WL 5436610 (Ill. App. Ct. Sept. 26, 2013).

167. *Id.* ¶ 5, at \*1.

168. *Id.*

169. *Id.*; *see also id.* ¶ 1, at \*1 (noting that Chicago is located in Cook County, Illinois).

170. *See id.* ¶ 31, at \*7; *Fennell v. Ill. Cent. R.R.*, 987 N.E.2d 355, 359, ¶ 18, at 360 (Ill. 2012) (applying Illinois cases based on the federal forum non conveniens standard).

171. *Siegel*, 2013 WL 5436610, ¶ 5, at \*1, ¶ 31, at \*7.

172. *Id.* ¶ 31, at \*7.

173. *Id.*

174. *Id.* ¶ 28, at \*6.

concluded that the cases did not support finding that the trial court abused its discretion.<sup>175</sup> While the court acknowledged that the plaintiffs may have trepidation about returning to Jordan, the evidence did not support any concern for personal safety.<sup>176</sup> The *Siegel* court determined that the plaintiffs' fear of returning to Jordan was too general since it was not specifically related to the cause of action.<sup>177</sup>

## 2. *Hilton International Co. v. Carrillo*

*Hilton International Co. v. Carrillo*<sup>178</sup> was an action in Florida state court that arose after terrorists attacked the Taba Hilton Resort in Taba, Egypt, killing thirty-five people and injuring hundreds more.<sup>179</sup> American and Israeli victims, along with survivors of deceased victims, brought an action against the resort owner alleging a failure to take sufficient security precautions.<sup>180</sup> Only three of the eight plaintiffs were U.S. citizens.<sup>181</sup> Only two of those three had connections to Florida—connections the appellate court considered “tenuous at best.”<sup>182</sup>

These two plaintiffs were the Carrillos, U.S. citizens living abroad.<sup>183</sup> The trial court determined that the Carrillos were Florida residents based on their contacts with the state before the bombing, which included a warranty deed and general familial contacts.<sup>184</sup> Indicia of continued residential intent after the bombing also existed, such as Florida driver's licenses and voter registrations.<sup>185</sup> Therefore, the trial court gave the plaintiffs' choice of forum an “edge” when balancing the private and public interests factors.<sup>186</sup> The trial court did not sever the six non-Florida plaintiffs from the action, but rather extended that “edge” to them.<sup>187</sup>

The appellate court reversed and granted the defendant's motion to dismiss for forum non conveniens.<sup>188</sup> It found the appellees' connection to Florida to be “too attenuated” and found Israel and Egypt to be “adequate and more

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175. *Id.* *Terra Properties* was a novel case and should be read narrowly to apply to forum non conveniens cases involving sexual assault. *See id.*

176. *Id.*

177. *Id.* ¶ 29, at \*6.

178. 971 So. 2d 1001 (Fla. Dist. Ct. App.), *enforced*, No. 06-04973 CA 22, 2008 WL 4448511 (Fla. Cir. Ct. July 7, 2008).

179. *Id.* at 1003.

180. *Id.* at 1003–04.

181. *Id.* at 1003.

182. *Id.* at 1006.

183. The Carrillos were abroad because Mr. Carrillo was a civilian employee of the U.S. Army Corps of Engineers. *Id.* at 1003, 1004 n.2.

184. *Id.* at 1004.

185. *Id.*

186. *Id.*; *see also* Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So. 2d 86, 90 (Fla. 1996) (adopting the federal forum non conveniens standard).

187. *Carrillo*, 971 So. 2d at 1004 (denying the motion to dismiss and applying Florida's “liberal joinder provision” after finding that the non-Florida plaintiffs' claims raised the same factual matters and questions of law); *see also* Carrillo v. Hilton Int'l Co., No. 06-04973 CA 22, 2007 WL 5555687 (Fla. Cir. Ct. June 5, 2007).

188. *Carrillo*, 971 So. 2d at 1003.

convenient forums.”<sup>189</sup> The plaintiffs acknowledged Israel was an adequate alternative forum, and the defendant stipulated it was amenable to process in both Egypt and Israel.<sup>190</sup> A country in which terrorists attacked innocent persons was not rendered inadequate by default. The court required some “direct, demonstrated, and adverse connection” to Egypt’s legal system.<sup>191</sup> It determined that no particularized, ongoing danger to the plaintiffs existed.<sup>192</sup> The court explicitly stated that “[t]he trauma of returning to the *country* in which the traumatic and horrifying events took place [was] not a factor precluding resolution of the claims by the judiciary of that country.”<sup>193</sup> It reasoned that “the ‘reliving’ of the bombing through testimony and trial [would] be traumatic irrespective of the country in which it occurs.”<sup>194</sup>

### 3. *Niv v. Hilton Hotel Corp.*

In *Niv v. Hilton Hotels Corp.*,<sup>195</sup> guests of a multinational hotel corporation alleged negligence and wrongful death in an action in New York federal court stemming from the same terrorist attack as in *Carrillo*. The plaintiffs contended that the hotel was a popular vacation destination for Israelis and marketed to Israeli tourists.<sup>196</sup> Israeli intelligence had issued warnings about possible terrorist attacks around the Jewish holidays of Rosh Hashanah, Yom Kippur, and Sukkot in the Sinai Peninsula, where the hotel was located.<sup>197</sup> Plaintiffs alleged that the hotel’s security did not meet the standards the warnings called for in the Sinai during that period of time, despite the foreseeability of an attack.<sup>198</sup>

The plaintiffs also petitioned the court, in determining the level of deference owed to their choice of forum, to consider the emotional burden they would suffer if forced to litigate in Egypt.<sup>199</sup> The *Niv* court recognized similarities to *Guidi* in that the plaintiffs were victims of an attack likely motivated by religious extremism targeted at Jewish and Israeli tourists.<sup>200</sup> It also acknowledged that the “plaintiffs [had] legitimate reasons for not wanting to return to Egypt, and that . . . the burden of pursuing their claim in

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189. *Id.* The appellate court disagreed with the trial court’s assessment of the Carrillos’ connections to Florida. *Id.* at 1006. The Carrillos did not reside in Florida or own property there *before the bombing*. *Id.* Further, the warranty deed was to Mr. Carrillo’s father. Additionally, Mrs. Carrillo acquired her Florida driver’s license and voter’s registration the year after the bombing. *Id.*

190. *Id.* at 1004–05.

191. *Id.* at 1005 (citing *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 352 F. Supp. 2d 787, 791 (E.D. Mich. 2004)).

192. *Id.*

193. *Id.* at 1006.

194. *Id.* at 1006 n.7 (“[An] ‘emotional burden’ . . . is not a factor taken into account by Florida courts following *Gilbert and Kinney*.”).

195. 710 F. Supp. 2d 328 (S.D.N.Y. 2008), *aff’d*, 358 F. App’x 282 (2d Cir. 2009).

196. *Id.* at 330.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 335.



Egypt could have impacted [their] decision to pursue their claims in [New York].”<sup>201</sup>

What the *Niv* court found distinguishable from *Guidi*, however, was that in *Guidi* the Second Circuit premised its reversal of the forum non conveniens dismissal on the district court’s “failure to give adequate significance to plaintiffs’ choice of forum as American citizens.”<sup>202</sup> In *Niv*, however, there was noticeable indication that forum shopping motivated the plaintiffs’ choice.<sup>203</sup> None of the 157 plaintiffs, who were Israeli and Russian citizens and residents, had any connection with the Southern District of New York, let alone with the United States.<sup>204</sup> The court therefore concluded that the plaintiffs’ choice of forum was not entitled to any heightened deference.<sup>205</sup>

### III. MAKING SENSE OF IT ALL: HEIGHTENED DEFERENCE FACTORS

The cases discussed in Part II encompass a breadth of circumstances, both preceding an injury and subsequent to bringing an action, considered by courts in deciding how to apply the doctrine of forum non conveniens. Despite the variation in factual circumstances, however, these cases do share common threads. Woven together, these threads produce certain factors that can guide future litigants and courts as to when a plaintiff’s choice of forum receives heightened deference.

These factors are based on objective facts, not on a subjective evaluation of the legitimacy of the plaintiff’s motives. The sort of factual information necessary for this inquiry is generally available to the judges and to the parties involved or is discoverable. Therefore, analyzing these factors is not beyond the limits of judicial capacity. For a procedural inquiry with transnational facets, it is practical to focus on a limited number of narrow exceptions, which can readily be established through information available to both courts and parties.

Drafting strict rules that state when a plaintiff’s choice of forum should receive heightened deference would be more predictable and easier to apply than current practice. Such rules would not, however, allow for the nuanced consideration necessary in individual cases. A need for judicial discretion still remains. This Note intends only to articulate guidelines for when a plaintiff’s choice of forum might be entitled to heightened deference.

#### A. *When Citizenship or Residency So Merits*

Although the plaintiff’s nationality is the starting point for any forum non conveniens analysis, citizenship and residency do not themselves guarantee an action brought against a multinational corporation will be heard in the

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201. *Id.*

202. *Id.* (citing *Guidi v. Inter-Cont’l Hotels Corp.*, 224 F.3d 142, 148 (2d Cir. 2000)).

203. *Id.* at 333.

204. *Id.* at 332.

205. *Id.* at 334.

United States.<sup>206</sup> *Goodyear*, *Nicastro*, and *Bauman* ensure corporate defendants have robust constitutional-level protection against a plaintiff's choice of forum in a suit with tenuous connections to the United States.<sup>207</sup> Even when a plaintiff is able to surmount the elevated personal jurisdiction hurdle, citizenship still does not guarantee unfettered access to an American forum.

The deference accorded to U.S. citizens and residents but denied to foreign plaintiffs (including those that retain a U.S. estate administrator)<sup>208</sup> and, to a certain extent, expatriates, is not due to any bias against non-U.S. citizens. Rather, this lack of deference exists because a foreign plaintiff's choice of a U.S. forum is not presumed to be convenient to him or her and is thus *prima facie* evidence of forum shopping.<sup>209</sup>

The series of Sixth Circuit decisions show how forum non conveniens is applied to ensure a convenient forum.<sup>210</sup> In those three cases, U.S. citizens brought actions against corporate defendants for incidents that occurred outside the United States. The Sixth Circuit granted or denied each forum non conveniens motion based on the plaintiff's connection to the United States. The plaintiff in *Duha* was on assignment overseas only temporarily, while the plaintiffs in *Kryvicky* and *Hefferan* were both residing overseas with noncitizen spouses.<sup>211</sup> Furthermore, in *Duha*, the alleged bribery and other shady business practices occurred in Argentina, but the action was brought in Michigan by a U.S. citizen who had maintained a residence in Michigan and whose immediate family still resided there.<sup>212</sup> The court therefore found that this uninterrupted connection to the United States supported the presumption of convenience.<sup>213</sup>

Although useful, citizenship and residency are only indirect estimates of whether a plaintiff's choice of forum was motivated by genuine convenience as opposed to forum-shopping opportunism.<sup>214</sup> Despite affording greater deference to the *Kryvicky* plaintiff's forum choice because she reestablished U.S. residency, the court there found that the *Gilbert* factors weighed heavily for dismissal.<sup>215</sup> The court determined Spain was an adequate, alternate forum and consequently granted the defendant's forum non conveniens motion.<sup>216</sup> The plaintiffs in *Hefferan*, by comparison, had lived overseas for twelve years, maintained no U.S. residence, and made no attempt to

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206. *See supra* Part II.B.

207. *See supra* Part I.E.

208. 28 U.S.C. § 1332(c)(2) (2012) (“[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . .”).

209. *See supra* Part I.B.

210. *See supra* Part I.C.

211. *See supra* Part I.C. A spouse's citizenship seems to have little to no bearing on deference analysis when the spouse is not a coplaintiff. *See Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 494 (6th Cir. 2016).

212. *Duha v. Agrium, Inc.*, 448 F.3d 867, 875 (6th Cir. 2006).

213. *Id.*

214. *See Hefferan*, 828 F.3d at 493.

215. *See Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517 (6th Cir. 1986).

216. *Id.* at 516–17.

reestablish residency before bringing suit.<sup>217</sup> These decisions show how citizenship and residency are only the beginning of a convenience inquiry and how the specific circumstances of each case require intensive examination.

This framework is not exclusive to the Sixth Circuit. It is used in other forum non conveniens cases by both federal and state courts.<sup>218</sup> The plaintiffs' choices of forums in *Guidi* and *Dorfman* received heightened deference as American citizens residing in the United States and bringing claims in their respective home forums.<sup>219</sup> These cases demonstrate situations in which the presumption of convenience is strongest and the plaintiff's forum choice most typically receives heightened deference. In both cases, it was reasonable to assume the forum was chosen naturally for the plaintiff's convenience and not to take advantage of the United States' reputation for outsized jury damage awards and liberal discovery.<sup>220</sup>

The court's decision in *Niv* was the clearest instance of the court affording the plaintiffs' choice of forum hardly a modicum of deference. None of the 157 plaintiffs were U.S. citizens and nothing indicated that any had connections to the United States.<sup>221</sup> When nationality or residency does not support the presumption of convenience, it is highly unlikely a plaintiff's choice of forum will receive heightened deference. Cases falling somewhere between these two extremes provide useful indicia for predicting when a plaintiff's choice of forum might receive heightened deference.

#### *B. When There Exists a Bona Fide Connection to the Chosen Forum*

Heightened deference is less common when there is only a single U.S. citizen on whom all other plaintiffs rely as their sole connection to the chosen U.S. forum. This phenomenon may be gleaned from *Tazoe* where only one of the 187 victims was a U.S. citizen.<sup>222</sup> The court, however, considered the U.S. citizen survivors' claims separately from those of the Brazilian survivors.<sup>223</sup> It determined that, because *Tazoe* was an American citizen, *Tazoe's* survivors' choice of forum was entitled to greater deference than the 186 other plaintiffs who were Brazilian.<sup>224</sup> The court required "positive evidence of unusually extreme circumstances . . . thoroughly convinc[ing]" them that "material injustice is manifest" before it would deny an American citizen access to U.S. courts.<sup>225</sup> The *Gilbert* factors, however, far outweighed any heightened deference, and the case was dismissed.<sup>226</sup> This case shows

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217. *Hefferan*, 828 F.3d at 494, 500.

218. *See, e.g., supra* Part II.

219. *See supra* Parts II.A.1–2.

220. *See supra* note 6 and accompanying text.

221. *See supra* notes 202–05 and accompanying text.

222. *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1328 (11th Cir. 2011).

223. *See id.* at 1330–37.

224. *Id.* at 1335.

225. *Id.* (quoting *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101 (11th Cir. 2004)).

226. *See id.*

how a court might approach an individual plaintiff's citizenship separately in forum non conveniens analysis. A court may not always, however, separately consider a U.S. citizen's ability to access American courts when the citizen is one among other plaintiffs.

In *Carrillo*, the court considered the claims of the surviving victims, which included Americans, Israelis, and a German, all together.<sup>227</sup> The appellate court determined that the trial court gave excessive deference to the plaintiffs' choice of forum.<sup>228</sup> Crucially, however, the trial court focused on the lack of a bona fide connection to Florida before the events related to the litigation arose in denying heightened deference.<sup>229</sup> Mrs. Carrillo registered to vote in Florida and obtained a Florida driver's license only *after* the attack.<sup>230</sup> Further, all plaintiffs were living overseas at the time of the attack, which occurred in Egypt.<sup>231</sup> The court could not reasonably presume that, even for the U.S. citizens, litigation in Florida was convenient when none of the plaintiffs resided in the state.<sup>232</sup>

This analysis mirrors that seen in *Hefferan*. From the perspective of U.S. courts across the country, the primary consideration that cuts against deference to the plaintiff's choice of forum is protecting against forum shopping. One indicator that raises courts' suspicions is the presence of multiple foreign plaintiffs tethered to a single U.S. plaintiff on whom they rely for heightened deference in the forum non conveniens analysis.<sup>233</sup>

In cases involving a citizen-administrator, the inquiry still centers on convenience. Citizenship and, with it, the presumption of convenience, cannot be manufactured. This is particularly true when that administrator's connection to the forum is irrelevant to the claim. The *Siegel* plaintiffs brought their action in the defendant's home forum of Cook County, Illinois.<sup>234</sup> The court, however, emphasized that deference is based on a *plaintiff's* connection to the forum, not the defendant's.<sup>235</sup> The plaintiffs themselves were foreign to Cook County, the sole exception being the special administrator.<sup>236</sup> The administrator's residence, however, was unrelated to the litigation.<sup>237</sup> Premising the claim on the *defendant's* connection to the

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227. *Hilton Int'l Co. v. Carrillo*, 971 So. 2d 1001, 1003–04 (Fla. Dist. Ct. App. 2008), *enforced*, No. 06-04973 CA 22, 2008 WL 4448511 (Fla. Cir. Ct. July 7, 2008).

228. *Id.* at 1006.

229. *Id.* It should be noted that the court examined the plaintiffs' connection to Florida specifically and not to the United States as a whole as in *Tazoe*. *Compare id.*, with *Tazoe*, 631 F.3d at 1335.

230. *Carrillo*, 971 So. 2d at 1006.

231. *See id.* at 1003.

232. *Id.* at 1006.

233. *See supra* Parts II.B, II.C.1.

234. *See supra* note 169 and accompanying text.

235. *See supra* Part II.C.1. Modern economic life demands that a multinational corporation's "home" be more broadly defined. Reynolds, *supra* note 109, at 1695 ("What may at first glance appear to be the defendant's home may upon closer inspection have no close connection with the defendant's business operations.").

236. *Siegel v. Glob. Hyatt Corp.*, No. 1-11-2832, 2013 WL 5436610, ¶ 31, at \*7 (Ill. App. Ct. Sept. 26, 2013).

237. *Id.*

forum invited the court to examine the actual source of the injury.<sup>238</sup> Once the court determined the injury at issue was the attack in Jordan, the administrator's connection to Cook County became wholly irrelevant:<sup>239</sup> the injury did not occur in the chosen forum. The plaintiffs' attempt to obtain heightened deference by anchoring their claim to a single administrator was therefore unsuccessful. With Jordan available as an adequate alternative forum, the forum non conveniens motion was granted and the case was dismissed.<sup>240</sup>

Less deference, it should be noted, is still some deference. The defendants in *Siegel* benefited from the same type of protection as in *Goodyear*, since the underlying incident was unrelated to the chosen forum.<sup>241</sup> The court also based its finding that the plaintiff's forum choice was entitled to less deference on the plaintiffs' failure to articulate any safety concerns about litigating in Jordan.<sup>242</sup> This allusion that fear may merit heightened deference is discussed further below. From these cases, it can be seen that U.S. citizenship or extended residency is almost always required to satisfy the presumption of convenience.<sup>243</sup>

An exception is found in *Licea*, in which the plaintiffs had a strong and compelling reason not to return to the forum in which the injury occurred.<sup>244</sup> In *Licea*, the plaintiffs were recent residents of Florida filing suit in the Southern District of Florida.<sup>245</sup> This recent residency is distinguishable from *Kryvicky*, in which the action was dismissed,<sup>246</sup> as it resulted from plaintiffs' admission to the United States as political refugees.<sup>247</sup> The reasons that the plaintiffs were unable to litigate in Curaçao or their home country of Cuba were not merely tangentially related to their claim but were in fact the precise reason for the claim.<sup>248</sup> They were able to overcome the problematic barriers of *Bauman* because the defendant provided Cuban forced laborers to satisfy contracts for services entered into in Florida.<sup>249</sup> The plaintiffs were further able to show that bringing suit in the United States was borne not out of forum shopping but out of necessity.<sup>250</sup>

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238. See *supra* notes 170–73 and accompanying text.

239. *Siegel*, 2013 WL 5436610, ¶ 31, at \*7.

240. *Id.* ¶¶ 31–38, at \*7–9.

241. See *supra* Part I.E.

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

243. See, e.g., *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 & n.6 (9th Cir. 2006) (finding that a resident alien is not a foreign plaintiff and is therefore entitled to heightened deference).

244. See *supra* notes 138–40 and accompanying text.

245. *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1272 (S.D. Fla. 2008).

246. See *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517–18 (6th Cir. 1986).

247. *Licea*, 537 F. Supp. 2d at 1272.

248. See *supra* notes 141–42 and accompanying text.

249. Complaint at 15, *Licea*, 537 F. Supp. 2d 1270 (No. 06-22128-CIV).

250. *Licea*, 537 F. Supp. 2d at 1274–75.

*C. When Disadvantages to the Defendant  
Are Not Oppressive or Vexatious*

A court may grant a forum non conveniens motion if there are oppressive or vexatious disadvantages to the defendant despite affording the plaintiff heightened deference.<sup>251</sup> In *Harp*, for example, Harp's choice of forum was given heightened deference but not dispositive weight.<sup>252</sup> The other plaintiffs were foreign citizens residing abroad, and the defendant was a Pakistani airline with its principal place of business in Islamabad.<sup>253</sup> Further, evidence bearing on defenses to liability in aviation accident cases almost always favors the forum where the accident occurred.<sup>254</sup> Despite heightened deference, the inquiry sought convenience, and convenience favored judicial action in Pakistan.<sup>255</sup>

When there are no compelling reasons to transfer, or the reasons for remaining in the chosen forum outweigh disadvantages to the defendant, the motion to dismiss may be denied. The plaintiff in *Terra Properties* brought her action in a different county than the one where the alleged sexual assault took place.<sup>256</sup> The court examined the plaintiff's connections to the chosen county, not the state as a whole.<sup>257</sup> As similarly seen in *Siegel*, neither the *Terra Properties* plaintiff nor the assault had any connection to the chosen county. The extreme emotional burden, embarrassment, and humiliation evidenced in *Terra Properties*, however, favored trial outside the plaintiff's home forum.<sup>258</sup> The court carefully considered any inconvenience to the defendant if required to litigate in the plaintiff's chosen forum and found that, for any disadvantage, some offsetting benefit existed.<sup>259</sup>

Consideration of such disadvantages is also implicit in *Guidi* and *DiFederico*, where the plaintiffs brought actions in their home forums.<sup>260</sup> A defendant who is unable to show any offsetting disadvantage to litigating in the plaintiff's home forum is not likely to overcome the presumption of

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251. *See* *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). *See generally supra* Part II.B.

252. *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1076–77 (C.D. Cal. 2012); *see also supra* notes 155–56 and accompanying text.

253. *Harp*, 879 F. Supp. 2d at 1076.

254. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 268 (1981) (affirming the district court's decision to grant the forum non conveniens motion in favor of Scotland, the location of the crash); *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1337 (11th Cir. 2011) (same, with respect to Brazil); *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 518 (6th Cir. 1986) (same, with respect to Spain); *Harp*, 879 F. Supp. 2d at 1077 (same, with respect to Pakistan).

255. *See supra* note 159 and accompanying text.

256. *See* *Doe v. Terra Props., Inc.*, 632 N.E.2d 665, 666 (Ill. App. Ct. 1994).

257. *See supra* note 147 and accompanying text.

258. *See supra* note 146 and accompanying text.

259. *See supra* notes 148–51 and accompanying text.

260. The DiFederico plaintiffs actually brought suit in the forum encompassing the defendant's principal place of business. *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 799 (4th Cir. 2013). *But see* *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) (“[T]he ‘home’ forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives.”).

convenience.<sup>261</sup> Although the attacks occurred at overseas hotels, the defendant in each case was the American corporate manager of a global hotel chain. In these cases, the plaintiffs received heightened deference, and the defendants were unable to show any oppressive or vexatious disadvantages.<sup>262</sup> This does not mean that a lack of disadvantage to the defendant makes litigation in the chosen forum convenient by default.

A plaintiff's forum choice can receive heightened deference even when disadvantages to the defendant are oppressive or vexatious. In *Kryvicky*, the plaintiff received heightened deference, but all of the *Gilbert* factors weighed strongly in favor of judicial action in Spain, the site of the crash.<sup>263</sup> This supports what was stated in *Harp* regarding the site of aviation accidents.<sup>264</sup>

*D. When Litigation in the Alternate Forum  
Is Infeasible Due to Extreme, Nongeneric Fear*

A plaintiff's choice of forum is entitled to heightened deference when a unique fear for personal safety directly relates to the claim. In *Licea*, the plaintiffs were able to bring their action in the United States because they received asylum after *escaping* Curaçao, where they had been held during the kidnapping.<sup>265</sup> The defendants did not address the fact that the only proposed alternative forum was one in which Cuban government agents and a private security firm hired by the defendant pursued the would-be plaintiffs under threat of deportation and punishment.<sup>266</sup> Trial in Curaçao would not only fail to serve the convenience of the parties but would also be at odds with the "ends of justice."<sup>267</sup>

The plaintiffs in both *Guidi* and *DiFederico* provided evidence of specific threats directly related to their respective claims.<sup>268</sup> In *Guidi*, the plaintiffs faced a very specific threat if required to litigate in Egypt.<sup>269</sup> These plaintiffs were atypical because they were widows or immediate victims of an act of terrorism specifically targeted toward foreigners. Additionally, the gunman responsible for the attack giving rise to the claim had in fact attacked again and killed ten more people.<sup>270</sup> In both *Guidi* and *DiFederico*, the reasons for

261. The defendant carries the burden of persuasion on each part of forum non conveniens analysis. See WRIGHT ET AL., *supra* note 33, § 3828. *But see* *Kleiner v. Spinal Kinetics, Inc.*, No. 5:15-CV-02179-EJD, 2016 WL 1565544, at \*7 (N.D. Cal. Apr. 19, 2016) (granting the California defendant's forum non conveniens motion, even though the plaintiffs filed suit in California because the incident giving rise to the cause of action occurred in Germany).

262. *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (listing the reasons why, when there are two parties to a dispute and the option is available, the dispute should be tried in the plaintiff's home forum).

263. *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 516 (6th Cir. 1986).

264. See *supra* notes 253–54 and accompanying text.

265. See *supra* notes 138–40 and accompanying text.

266. See *supra* Part II.A.4.

267. *Koster*, 330 U.S. at 527 (stating that the ultimate inquiry of forum non conveniens is "where trial will best serve the convenience of the parties and the ends of justice").

268. See *supra* Parts II.A.1, II.A.3.

269. See *supra* notes 113–15 and accompanying text.

270. See *supra* Part II.A.1.

keeping the case in the plaintiffs' chosen forums were based not only on convenience but also the ends of justice.<sup>271</sup>

The credibility of the fear in *DiFederico* was evidenced by State Department travel warnings regarding attacks against U.S. citizens and westerners, as well as 12,000 terrorist-related deaths between 2003 and 2011.<sup>272</sup> Fear of such attacks entitled the plaintiffs to heightened deference.<sup>273</sup> Four years after *DiFederico*, the *Harp* court determined that Pakistan was safe enough for litigation. In *Harp*, the plaintiff's concerns about terrorism, kidnapping, and murders directed against American citizens were considered in determining whether Pakistan would be an adequate and available alternative forum.<sup>274</sup> The fear and trauma in *DiFederico*, however, tipped the private interest factors in favor of the plaintiff's choice of a U.S. forum.<sup>275</sup> Although the plaintiffs' fear was considered under different parts of the analysis in each case,<sup>276</sup> it is the *type* of fear which is distinguishable.

The *Harp* plaintiffs were presumed to be residents of Pakistan,<sup>277</sup> so threats of terrorism against foreigners were seemingly less applicable. Further, even though the citizen-administrator received heightened deference, the claim arose from a domestic plane crash due to mechanical problems, not an act of terror as in *DiFederico*. The court also noted there were significantly less political undertones in a negligence suit regarding a plane crash than in *DiFederico* where a high-profile terrorist attack killed a government contractor.<sup>278</sup> *Harp* was not a political refugee as in *Licea*, nor was he bringing politically charged claims against Pakistani officials.<sup>279</sup>

For a plaintiff's choice of forum to outweigh disadvantages to the defendant, the fear must be specific to the plaintiff and the claim. Generic fear will not do. By the time *Niv* was decided seven years after *Guidi*, the court cited to the fact that tourists were visiting Egypt as justification that Egypt was an adequate forum for litigation.<sup>280</sup> Grouping the plaintiffs with all other tourists, though, disregarded the emotional trauma the plaintiffs may

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271. See *Koster*, 330 U.S. at 527.

272. *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 804–05 (4th Cir. 2013).

273. *Id.* at 803–04.

274. See *supra* notes 157–60 and accompanying text.

275. See *supra* notes 129–35 and accompanying text.

276. Compare *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1075 (C.D. Cal. 2012), and *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337 (S.D.N.Y. 2008), *aff'd* 358 F. App'x 282 (2d Cir. 2009) (rejecting safety and emotional trauma concerns in determining whether Egypt would be an adequate and available alternative forum), with *DiFederico*, 714 F.3d at 804–05 (acknowledging that fear and emotional trauma could be considered among different private interest factors but ultimately declining to categorize it within any single factor).

277. See *supra* note 155 and accompanying text.

278. *Harp*, 879 F. Supp. 2d at 1075.

279. See *supra* Part II.B.1.

280. The Southern District of New York also determined the *Guidi* plaintiff's fear of litigating in Egypt was unfounded because there was no evidence of any attacks having been initiated against those parties bringing suit in Egypt. Compare *Guidi v. Inter-Cont'l Hotels Corp.*, No. 95 CIV. 9006 LAP, 1999 WL 228360, at \*2 (S.D.N.Y. Apr. 20, 1999), *overruled* by 224 F.3d 142 (2d Cir. 2000), with *Niv v. Hilton Hotels Corp.*, 358 F. App'x 282 (2d Cir. 2009) (affirming the Southern District's decision regarding the adequacy of Egypt as an available forum).



have felt, as they personally were victims of terrorism.<sup>281</sup> This illustrates the difficulty inherent in identifying emotional trauma as a factor, which might entitle a plaintiff's forum choice to heightened deference.

Individuals respond to trauma differently. There are cases of obvious emotional trauma, but the lack of an objective definition for courts to apply makes this a difficult factor to predict. At one end of the spectrum are cases where the emotional trauma is atypical and recognizable. In *Terra Properties*, the plaintiff herself was the victim of sexual assault.<sup>282</sup> In *Guidi*, the plaintiffs were widowed as a result of the attack giving rise to the suit.<sup>283</sup> The same was true in *DiFederico*, where a widow and her three now-fatherless sons brought a wrongful death and survivorship action as a direct result of the attack for which they were suing.<sup>284</sup>

Yet there are cases like *Dorfman* in which the plaintiff was injured stepping off an elevator.<sup>285</sup> *Dorfman* did not include a survivorship claim nor was the plaintiff the victim of any criminal act. Dorfman only generally alleged a series of emotionally traumatic, but unspecified, experiences in Hungary.<sup>286</sup> This, coupled with the plaintiff's advanced age, persuaded the court that travel to Hungary for litigation was a serious burden.<sup>287</sup> Additionally, there was no overwhelming fear rendering Hungary an inadequate forum in *Dorfman*. *Dorfman* seems wrongly decided when compared to these other cases, which demonstrated significantly more trauma enabling them to meet the requirement of specific fear.

These confounding decisions exemplify the difficulty of objectively defining emotional trauma. If emotional trauma is a reason for affording heightened deference and the plaintiff need only bring a survivorship claim to demonstrate such trauma, then plaintiffs such as those in *Siegel* should automatically receive such deference since they sought damages for negligence, wrongful death, and survival.<sup>288</sup> The *Siegel* court acknowledged the emotional burden the plaintiffs might have felt if required to return to Jordan but found no threat to their safety.<sup>289</sup> Therefore, it did not afford the plaintiff's chosen forum heightened deference.<sup>290</sup>

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281. See *supra* Part II.C.3.

282. See *supra* Part II.A.5; see also *Doe v. Terra Props., Inc.*, 632 N.E.2d 665, 667 (Ill. App. Ct. 1994) ("It is often said that a rape victim usually is raped twice, once by the assailant and once by the legal system. Any normal person who has witnessed a rape victim testifying in court as to all of the gruesome details should leave the courtroom wishing never to witness such an event again. If the testimony of a rape victim can make bystanders extremely uncomfortable, then what of the victim herself?").

283. See *supra* Part II.A.1.

284. See *supra* Part II.A.3.

285. These injuries did, however, require medical attention in Hungary and surgery in the United States. *Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 CIV. 10496 (CSH), 2001 WL 69423, at \*1 (S.D.N.Y. Jan. 29, 2001).

286. See *supra* notes 121–22 and accompanying text.

287. See *supra* Part II.A.2.

288. See generally *Siegel v. Glob. Hyatt Corp.*, No. 1-11-2832, 2013 WL 5436610 (Ill. App. Ct. 26, 2013).

289. See *supra* notes 174–77 and accompanying text.

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

*Carrillo* seemingly took the right approach by stating that trauma should not be a preclusive factor for resolution of a claim by the judiciary of the country in which the initial incident occurred.<sup>291</sup> Emotional trauma needs to be objectively defined if it is to be an independent factor in determining when a plaintiff's choice of forum should receive heightened deference. An objective definition is necessary for the predictability this Note seeks to provide, but because such a definition cannot be parsed from the cases presented, it is not listed as a deference-altering factor.

*E. When Plaintiffs Avail Themselves  
of a Foreign Forum*

Perhaps the reason generalized fear does not outweigh inconvenience is because usually such fear unsuccessfully dissuades the plaintiff from traveling to the forum in the first place. Several cases imply that the alternate forum is less convenient when the plaintiff, victims, or both were present for reasons other than leisure. Said another way, voluntary presence in the foreign forum suggests an assumption of risk. The plaintiffs in *Licea* are at one end of the spectrum. They were kidnapped from their homes in Cuba and forced to endure slave-like conditions in Curaçao. Leaving the forum required escape, successful evasion of government agents, and a grant of political asylum by Columbia.<sup>292</sup>

Similarly, but to a much lesser extent, the victim in *DiFederico* was in Pakistan as an employee of the U.S. government.<sup>293</sup> The victims in *Guidi* were in Egypt on business.<sup>294</sup> This is not to say that traveling to a forum on business is the same as being forced there under threat of physical and psychological harm. It does indicate, however, that, but for business purposes, the victims likely would not have been in the forum to begin with. In other words, it would have been more convenient for them just to stay home. The victims in *Guidi* and *DiFederico* had families in the United States while they were overseas, and, in that regard, they are similar to the plaintiff in *Duha*, who received heightened deference because his immediate family remained at home in Michigan.<sup>295</sup>

Considering the plaintiffs' reasons for being in the forum where the incident occurred goes hand in hand with a discussion of nationality as an indicator of convenience. The deference accorded a plaintiff's choice of a U.S. forum is diminished when the plaintiff was intentionally in the forum where the incident occurred. The rationale is that a plaintiff with a legal dispute arising from her decision to be abroad should expect any incidental disputes to be resolved abroad as well. In *Carrillo* and *Hefferan*, the U.S. plaintiffs were already living overseas when the incident giving rise to the

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291. *See supra* Part II.C.2.

292. *See supra* Part II.A.4.

293. *See supra* Part II.A.3.

294. *See supra* Part II.A.1.

295. *See supra* Part I.C.

claim occurred.<sup>296</sup> The attack giving rise to *Carrillo* and *Niv* occurred at a resort hotel where the plaintiffs were spending the holidays.<sup>297</sup>

Imagine if the plaintiffs in *Carrillo* and *Niv* had instead brought claims against the hotel for food poisoning contracted during their stay. It would be unreasonable to think such a claim would be heard in the United States. The court's reasoning in these cases, as discussed above, focused more on the lack of connection to the United States rather than on an affirmative connection to the foreign forum. In *Harp*, the flight at issue took off from Karachi, Pakistan and crashed on final approach to Islamabad, Pakistan.<sup>298</sup> The flight did not crash while passing over Pakistan from some other country of origin, which would have bolstered an argument that the plaintiffs were involuntarily in the country. Therefore, if a forum is convenient enough for a plaintiff to travel to in the first place, a court will likely find it is convenient enough for any subsequent litigation.

Considering whether the plaintiffs purposefully availed themselves of a foreign forum is somewhat analogous to the inquiry in personal jurisdiction cases like *Goodyear*, *Nicastro*, and *Bauman*. In such cases, the crux of the analysis is whether the defendant has purposefully availed itself of the relevant U.S. forum state. If the defendant has not purposefully availed itself, then there is no jurisdiction. Similarly, it makes sense to treat a plaintiff's choice of a U.S. forum with less deference when the plaintiff purposefully avails him or herself of a foreign forum state with respect to acts or events giving rise to legal action.

#### CONCLUSION

Claims arising from incidents abroad are inevitable in a world of global travel and commerce. The number of international lawsuits brought in U.S. courts is increasing. Managing transnational litigation efficiently and fairly requires judicious management of access to these courts, which are subject to competing demands. Although companies doing business abroad can structure their operations so as to minimize the likelihood of being subjected to personal jurisdiction in any given forum, this does not mean that they are immune to suits in the United States. When subject to suit in the United States, a defendant may attempt to invoke forum non conveniens to move the action to an alternate, and likely more advantageous, forum.

Given the diminished need to protect against unfairness to the defendant due to recent decisions from the Supreme Court, courts are able to afford

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296. See *supra* Parts I.C, II.C.2. Mr. Carrillo had been living abroad for work as a civilian employee of the U.S. Army Corps of Engineers. See *supra* note 183. The appellate court, however, doubted the couple's intent to return to Florida. See *supra* note 189 and accompanying text.

297. *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 329–30 (S.D.N.Y. 2008), *aff'd* 358 F. App'x 282 (2d Cir. 2009). Further, the *Niv* plaintiffs' Israeli counsel purportedly told a reporter that the plaintiffs filed their claim in New York because of "the awareness of the Americans to terror activities since the Twin Tower disaster, and the fact that the proceedings there will be conducted before a jury, which usually awards higher amounts of compensation, including penalty compensation." *Id.* at 333.

298. See *supra* Part II.B.1.

heightened deference to the plaintiff's choice of forum under certain circumstances. Guided by the ultimate inquiry of convenience and justice, courts undertake a fact-based inquiry when considering a motion to dismiss for forum non conveniens. Despite varying applications of forum non conveniens, its utility can be improved by discerning particular factors that indicate when a plaintiff's choice of forum will receive heightened deference. Identifying specific, fact-based factors reduces the doctrine's complexity and keeps the inquiry well within the capacity of the judiciary by avoiding any subjective journey down a rabbit hole of speculation. A more focused analysis provides predictability both to courts and litigants and allows for the tightened consideration necessary to ensure justice and convenience in individual cases where the convenience of plaintiff's chosen forum is at issue.