COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME XIX Summer 2023 Issue III

ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

VOLUME XIX | ISSUE III | Summer 2023

LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board, I am excited to present the summer 2023 issue of the Columbia Undergraduate Law Review. The articles featured in this edition were selected from a range of submissions, touching on a variety of legal issue areas and representing a plethora of esteemed institutions. This new cohort of editors, composed entirely of underclassmen, many new, to the CULR community, were selected from a highly competitive pool of applicants. I am excited to present the following articles made possible through the work and diligence of the authors and CULR's editors collaborating across the country and the globe.

In *Enemy Of All Mankind: Enshrining Universal Civil Jurisdiction In Human Rights Law To Hold Multinational Corporations Accountable In Our Globalized World*, Clair Ellis addresses the rise of multinational corporations across the globe and their absence in legal structures meant to protect human rights. Ellis utilizes a nuanced legal analysis integrating various theories and historical cases to identify the current legal discrepancies that have allowed multinational corporations to operate with few civil liabilities for perpetuating human rights violations. Taking into account the current realties of the world stage she proposes a set of recommendations to help maintain accountability against corporate entities by expanding universal civil jurisdiction in the United States as well as across the globe.

In *Advocating Desertion: Can the Government Prosecute Seditious Speakers?*, Jack Gigante offers insight into the tension between free speech of the citizenry as outlined in the First Amendment and the legitimate interests of the government especially during times of crisis, such as war. He traces the historical development of this tension and the evolving standards of the Supreme Court as they addressed the ability of the government to prosecute seditious speech during times of war. Gigante then ties in a more modern case regarding seditious speech, *United States v Ali Al-Timimi,* as an example of seditious speech being prosecuted. His analysis of the case serves as a key foundation for his argument to implement a revised judicial standard of free speech rights that keeps the door open for the government to prosecute seditious speech in times of war.

I am proud of the summer edition of this publication and all of the work that went into it. The world is rapidly changing and with it so is the law, I believe these articles underscore CULR's enduring commitment to fostering legal conversation and bringing forward undergraduate voices into complex and critical legal issues that will define our futures. I am hopeful that you will delve into the pressing legal issues and arguments presented thoughtfully and incisively by the authors herein.

Thank you for your continued readership and support of the Columbia Undergraduate Law Review.

Sincerely,

Karun Parek
Executive Editor, Print (Summer)

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

TABLE OF CONTENTS

Enemy of All Mankind: Enshrining Universal Civil Jurisdiction in Human Rights Law to Hold Multinational Corporations Accountable in our Globalized World

Claire Marie Ellis | Columbia University

Edited by Cara SoHee Wreen, Christopher Abt, Emily Ni, Jake Lee, Maya Lerman, Michael Chan, Obse Abebe, Yeibin Andrews

Table of Contents

Introduction

When you picture a pirate in your mind, do you see a Blackbeard type, with eyepatch and pegleg, a depraved villain who abuses other humans and then sails away on the high seas, beyond the color of law, with his wooden ship weighed down by stolen wealth? Could you picture Nestlé and Cargill, weighed down by a combined $252 billion in revenue in 2021,[1] sailing away from justice for six trafficked Malian child laborers in Cote d'Ivoire, forced to cultivate cocoa for fourteen-hour days and tortured when attempting to escape from insufferable plantations,[2] to offer the cheapest price for hot chocolate? On the international stage, multinational corporations (MNCs) are the "Pirates Incorporated"[3] of our globalized political economy, and the international laws which are meant to hold these "pirates" accountable are presently absent from human rights doctrine. Customary law debates regarding the implied existence of the corporate entity as a duty-bearer under human rights law are inconclusive, and MNCs abuse their favorable position under the law—neither held to account by universal criminal jurisdiction like individual malefactors nor like states parties with legal obligations to respect, protect and fulfill the human rights of their citizens. The legal "invisibility" of MNCs in human rights law[4] and pessimism about the Corporate Social Responsibility virtue-signaling of private business self-regulation beg the following question: How can multinational corporations face civil liability for human rights violations given their unclear jurisdictional status as extraterritorial entities under the existing international legal regime?

To respond to this question, I will first survey scholarly literature contextualizing this paper's topic in an era of mass globalization and the unchecked rise of the MNC as a global superpower. Then, I will offer a brief legal history of the Alien Tort Statute, a United States statute that has been reinterpreted by human rights lawyers to overcome extraterritorial jurisdiction for the worst violations in civil suits. Finally, I will define "universal civil jurisdiction" in a human rights context and summarize key arguments in favor of its expansion or advocating for its non-existence. My analysis consists of two large sections, the first an exploration of the extant frameworks for universal civil jurisdiction and corporate liability split into three parts. First, examining the existence of the corporation as a possible subject in international customary human rights law and whether a norm for universal civil jurisdiction can be extrapolated from the well-established standard of universal criminal jurisdiction for *jus cogens*. Second, a brief political science approach to human rights engagement from the United States in the international sphere, hampered by the presumption against extraterritoriality and the canonical limitations on judicial activism. Third, an exploration of relevant, creative strides for binding corporate accountability as a model in the European Union across member states. The second half of my analysis will consist of recommendations for future action, building on the evidence of a hazy basis for civil universal jurisdiction for corporate accountability in the law to call for a binding treaty and a clarification of state policy and enforcement for corporate compliance. My recommendations will be accentuated by a current crisis of globalization, the COVID-19 supply crisis, to assert the urgency and political necessity of clarifying the role of corporate actors in international human rights law.

Literature Review

A. Globalization and Human Rights

William I. Robinson, a premier sociological scholar on the theory of globalization, has written that capitalist globalization is a true world war, between "a global rich and powerful minority" and "the global poor, dispossessed and outcast majority," in which everyone on the planet and the planet itself cannot escape involvement.[5] The economic component of

globalization, hyper-liberalism, supports the elimination of state intervention in the economy to achieve the conditions for the total mobility of transnational capital. Many scholars theorize that the untamed rise of globalization has coincided with the death of the "nation-state based world order,"[6] and in its place, the transnational corporation has become a formidable international entity. Traditionally in human rights law, in order to respect the sovereignty of complying states, the nation-state is enshrined as the duty-bearer for human rights on behalf of its citizens.[7] The complicated jurisdictional nature of MNCs, however, means that the state where the company was incorporated may not be the same as the state where the violation occurred, leaving disputes between state courts a matter of course. This "spatial decentralization" of transnational capital away from nation-states is exploited by MNCs "to wring further concessions from global labor,"[8] often producing in countries with less robust human rights protections (such as the prohibition of child labor) and importing the products to wealthier markets. Such practices along the supply chain are legal and, in fact, good business.

The characterization of the MNC as an "unchecked" authority in the international economic-political arena arises from its relative institutional immunity, having unclear status under international law. John G. Ruggie attributes this to a "fundamental disjuncture" between its economic and legal structure. The group of firms that make up the MNC as an economic organization operate as a corporate structure; but legally the group itself is not a corporation, that is, a separate legal entity.[9] In practice, this means that the "parent company" enjoys "limited liability" for risks committed by its subsidiaries, and, to make matters more complicated, these subsidiaries will often have their own subsidiaries or affiliates operating under the same principle of limited liability. The parent company is only liable for torts caused by subsidiaries in "exceptional situations," such as "demonstrable negligence, fraud, or other illicit conduct that the corporate parent directed or of which it had knowledge and did nothing to stop."[10] In the example of Nestlé's labor abuse, in 2019, Nestlé essentially pleaded ignorance regarding their dependence on child slave labor, as they could only trace 49% of their product purchasing to the farm level.[11]

Holding parent companies like Nestlé liable for negligence is known as "piercing the corporate veil" and is often compared to a freakish strike of lightning; that is, "rare, severe, and unprincipled."[12]

Besides the structural power of MNCs that protects them like a fortress from litigation, some scholars have gone so far as to describe the MNC as "invisible" under international law.[13] While human rights law might be said to "contemplate" transnational corporations, it ultimately places the correlative duty onto the state of incorporation, and these duties are only bestowed if the state has ratified the existing human rights law and incorporated it domestically. Without any supranational legal regime for corporate liability for human rights violations, the ultimate authority over MNCs is themselves, a model euphemistically coined Corporate Social Responsibility (CSR). Skeptics of the philosophy and practice of CSR in an increasingly globalized economy fear that CSR "represents tactical moves by business to avoid or undermine the prospects of robust public regulations" and "helps sustain corporate impunity."[14] At this juncture, where CSR feels like a condescending gesture from corporate overlords, human rights scholars argue that a paradigmatic shift to institutionalized corporate liability is long overdue.[15]

B. The History of the Alien Tort Statute

While the existence of supranational jurisdiction and corporate liability for multinationals are highly disputed, there is a jurisdictional avenue in civil cases for these very violations. In the United States, there is a peculiar line of domestic law which provides first-instance civil

jurisdiction for torts committed by aliens or on foreign soil. Referred to as the Alien Tort Statute (ATS) of 1789, enacted when the United States was a fledgling country trying to demonstrate its legitimacy on the foreign policy stage, the ATS was largely dormant until revisited by clever human rights lawyers in 1980. The watershed ATS Case, *Filártiga v. Peña-Irala*, ushered in a wave of human rights litigation, and the category of defendants under the ATS soon expanded from individual private actors and states to private corporations.[16]

However, in a fatal blow to human rights scholars and activists, the 2014 Supreme Court case *Kiobel v. Royal Dutch Petroleum Co.* upheld the presumption against extraterritoriality for cases which do not "touch and concern" the United States "with sufficient force."[17] This decision was a product of a shift to bring more "foreign-cubed cases" under the ATS, defined as "suits brought by non-US nationals, against non-US citizens, states or corporations, for conduct outside the United States."[18] Although many of the ATS cases against MNCs did not lead to favorable verdicts for plaintiffs, there was power in the idea that "a human rights law-suit before US federal courts…promised victims and supporting activists their day in court and potential vindication of their suffering through judicial acknowledgement."[19] Unlike traditional cases of piracy, in which crimes are committed in *mare liberum* ("the high seas"), the Court in *Kiobel* recognized that permitting the scope of US jurisdiction to expand too far across the globe would impinge on the prescriptive jurisdiction of other nation-states—in the case of *Kiobel*, Nigeria, the territory where the violations occurred, and the Netherlands and England, where two the parent companies operate.[20]

Some legal scholars, optimistic or cautious in their own right, maintain that the ATS is not dead yet. David S. Bettwy passionately argues that *Kiobel*'s "relevant conduct" analysis may have inadvertently funneled ATS litigation towards private military contractors (PMCs),[21] as debates surrounding liability for war crimes from an increased use of contracted drones by the United States become more potent. Furthermore, Tyler Becker has incorporated the separation of powers critique from *Kiobel* and asked relevant choice of law questions pertaining to impending ATS suits against "individual corporate officers, directors, and employees."[22] Knowing the history and the foibles of the ATS is crucial to contextualize the demand for mechanisms of corporate liability in international human rights law, but whether or not the ATS is dead for good is beyond the competence of this author to decide. While individual human actors may be tried or sued for secondary liability, it is politically and symbolically necessary that the corporations themselves are taken to court, publicly denounced, and mandated to pay damages to victims from their own deep pockets. A corporate patsy or two taking the fall is not justice.

C. Defining Universal Civil Jurisdiction

At this uncertain juncture in the judicial interpretation of the ATS, paramount questions about the future of universal civil jurisdiction for the most serious human rights torts by corporate actors remain unquestioned. ATS cases are sometimes cited as evidence of a customary international norm of universal civil jurisdiction, which "gives nations the power to apply their own law (known as 'prescriptive jurisdiction') to extraterritorial conduct of 'universal concern' such as piracy and the slave trade."[23] Not a single justice in *Kiobel* adopted the principle of universal civil jurisdiction, with Justice Breyer concurring that this was in an effort to "minimize international friction."[24] Stewart and Wuerth confess that the reason the 200-year old ATS is so difficult to interpret is the policy conflict within it: on one side, "the need to redress horrific violations of the most fundamental human rights," and on the opposing side, "the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed."[25]

Those on the opposing side present myriad arguments in favor of limiting the jurisdictional reach of the ATS. The first major critique is that empowering the ATS will disempower the prescriptive jurisdiction of the nation-state in which the alleged tort took place. In favor of upholding the presumption against extraterritoriality, Paul D. Mora argues that an Act of Congress applying abroad would be a violation of international law, which "recognizes the horizontal nature of the legal order by allocating States a *prima facie* exclusive prescriptive jurisdiction over conduct and the consequences of events occurring within their sovereign territory."[26] These opponents emphasize that they would not be averse to an expansion or clarification of the notoriously muddy ATS, but they insist it must come from Congress, not the bench,[27] a principle known as judicial deference consistent with the American political principle of the separation of powers.

Human rights-oriented legal scholars and activists take a more generous, legal realist approach to the expansion of the ATS and its basis for universal civil jurisdiction. The two theoretical foundations for this argument, which are characteristic of legal realist schools of thought, are (1) that customary human rights law is not static, but changes significantly over time and thus must be flexible, and (2) that there is political and activist potential in legislating from the bench, as long as judicial deference and other nations' sovereignty are respected. In defense of the principle of universality for peremptory crimes against humanity (*jus cogens*), Alreem Kamal notes that the canonical presumption against extraterritoriality, long exalted in the United States, is in need of an upgrade considering that "international law has experienced profound changes of considerable import and consequence, such that extending the reach of certain statutes to foreign territories no longer constitutes an offense to international legal principles."[28] Lucas Curtis also supports that "judicial deference to the political branches is, in effect, a dialogue," and that "hard-line rules which make unilateral statements about the applicability of the statute may directly conflict with future human rights obligations."[29] Whether it is better to be ahead of the human rights curve or remain conservatively behind until that norm has been crystallized is certainly an approach informed by political philosophy and a state's individual commitment to the human rights movement.

Looking through the lens of globalization and faced with the frustrating impunity of MNCs for human rights torts, Jennifer L. Karnes is critical of federal judges having "unfettered discretion over ATS claims," but is also pragmatic about the fact that passing an amendment or a law expanding the ATS through a private lobby-controlled Congress would be a Sisyphean task.[30] Nevertheless, as ATS liability can still be wielded against individual corporate actors and executives, Karnes affirms that "these lawsuits have never been about winning but about getting a lot of bad publicity about corporations and building sympathy for the cause plaintiffs are involved in."[31] However, the question remains: is publicity for plaintiffs mere lip-service while MNCs continue uninhibited to pursue profits over people? Is it possible to bring corporations to court for human rights violations, or is it a pipe dream? For critics of this activist approach who demand something more tangible, this paper will examine the existence of various frameworks in international human rights customary law, as well as domestic and regional human rights law, to investigate the present and imagine the future of using human rights to pursue justice for the exploited global proletariat.

Existing Frameworks for Corporate Liability and Universal Civil Jurisdiction

Frameworks under International Customary Law

Without an express classification of the status of corporate extrajudicial entities as duty-bearers in human rights treaty law, it is germane to look to international customary law to

elucidate a basis for corporate liability for human rights violations. In addition to surveying the patchy presence of corporate entities in human rights customary law, this section will examine the principle of universal criminal jurisdiction with respect to universal civil jurisdiction, the former being a well-standing tenet of customary international law and the latter a gnarly bone of contention for human rights legal scholars.

The first question to be interrogated in this section is: Does international customary law recognize private actors like corporations (non-persons and non-states) as subjects of human rights law? To answer this question based on the most relevant case law, it is necessary to get into the weeds of the US Supreme Court's 2013 interpretation of the ATS in *Kiobel v Royal Dutch Petroleum*. Procedurally, the Supreme Court upheld the Second Circuit's interpretation of corporate liability prescribed by the ATS, making what Seventh Circuit Judge Posner coined an "outlier"[32] the last word. In *Kiobel*, the Second Circuit ruled that "a defendant's liability under the ATS must derive from an established norm of customary international law," and as international law places no explicit liability on corporations, the liability ought to be reserved for the state or states directly implicated.[33] By aligning actionable violations under the ATS with international legal norms, *Kiobel* rejected universal corporate liability, sending the decision of whether corporate actors are considered persons in the law (and thus able to be sued for a tort) to the state. The *Kiobel* decision is at best a missed opportunity for ATS litigation to develop and enforce customary international law, as natural court decisions "can constitute state practice and evidence of *opinio juris*, the two requirements of customary international law."[3435] Rather than advance the *Kiobel* causes of action based on universal jurisdiction, the Court shied away from interpreting evidence whether there exists a customary international law norm of universal civil jurisdiction, unanimously deciding that the 1789 Congress never intended for the ATS to extend that far.[36]

While the *Kiobel* judges decided to ignore the issue on foreign policy deference grounds, previous courts have maintained that there is precedent in international customary law, both for secondary corporate liability and torts of the gravest nature that constitute a basis for universal civil jurisdiction. Most notably, in 1995, the *Kadic* court asserted that there does preexist "an international norm for holding individual corporate officials liable for aiding and abetting the commission of human rights violations" in the Nuremberg Trials *Zyklon B Case*.[37] The case sentenced a business owner and employee to death for aiding and abetting acts of genocide by selling chemical toxins to concentration camps with the "knowledge" of their intention to use Zyklon B to commit mass murder.[38] The general rule for private actors under the ATS is that corporations can be sued under the theory of indirect liability, such as aiding and abetting, if their conduct is "so egregious" that it constitutes a violation of international law.[39] Thus far, courts have determined that non-state actors can be held liable for "war crimes, slave trading, genocide and the three Blackstone torts"[40]: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[41] The three Blackstone torts are considered "*hostis humani generis*," or enemy to all mankind and all states ubiquitously; thus, in seeking justice for these violations, any court reserves first instance to try the perpetrators, regardless of nationality or privacy status.[42]

In the Nuremberg Trials *Zyklon B Case,* the charges of aiding and abetting levied against individual malefactors were brought under universal criminal jurisdiction, which has a widely substantiated basis in international human rights law. The distinction between *jus cogens*, crimes of the gravest nature that invoke universal criminal jurisdiction, and the ATS's disputable basis for universal civil jurisdiction for non-person corporations leads to the second question for this

section: Does a basis for universal criminal jurisdiction in customary law suppose the existence of a complementary cause of action for universal civil jurisdiction? Extraterritorial prescriptive jurisdiction, whether criminal or civil, rests on the principle of universality in international customary law and is generally acceptable "owing to the particularly heinous and destructive nature of the conduct."[43] Criminal universality does not transfer to civil universality unless States establish a jurisdictional framework in the form of an international convention to support an application of extraterritorial prescriptive jurisdiction in civil cases. In the United States, a corporation may be sued as a person under the law, but a judge cannot condemn Nestlé SA to a life sentence. In short, there is no perfect equivalency between these two forms of jurisdiction as they belong to "two distinct regimes," and extrapolating one from the other is "not a proper application of international law."[44]

To dissect the most unanimous example of a human rights violation warranting universal jurisdiction, we can take the prohibition against torture. In the watershed ATS case *Filártiga v Peña-Irala*, the prohibition against torture was declared to be a "well-established, universally recognized" tenet of customary human rights law, to which State-parties are held liable.[45] Splitting with the Second Circuit in *Kiobel*, other courts affirmed that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[46] The abolition of torture is so consentient it appears explicitly in positive treaty law, in the form of the *United Nations Convention Against Torture* (UNCAT) of 1984. Article 14(1) of the UNCAT arguably establishes a legal framework for universal civil jurisdiction by requiring "contracting parties to provide an enforceable right to compensation in their domestic legal systems for acts of torture that have been committed abroad and have no nexus with the forum State."[47] Still, it is the UNCAT's non-binding, optional General Comment that clarifies legal redress is not subject to territorial limitations, which state parties are not required to ratify.

The formal limitations on Article 14's potential to unequivocally establish universal civil jurisdiction in cases involving official torture reify the limitations of the institutionalist approach to enshrining human rights that this author fundamentally opposes. Delineating that civil redress for offenses of torture lies in the authority of the State bolsters the principle of sovereignty and the bedrock of international law; however, this state-centric principle leaves a wide gorge in legal human rights protections for those who are neglected or forcibly denationalized by human rights violators, including the Nestlé trafficked laborers and stateless detainees in Guantanamo Bay. Recognizing that the authority of the nation-state in the global hegemon is declining and supranational corporations are rising in its place, it is crucial to enshrine a definitive basis for universal civil jurisdiction in international human rights law to attach to the peremptory norms that are considered so egregious in nature that the presumption against extraterritoriality is forcibly displaced.

Frameworks in United States Domestic Law

The Supreme Court's decision in *Kiobel* to willfully ignore the question of universal civil jurisdiction in the Alien Tort Statute frustrated future cases, but the Court acted conservatively to preserve US interests two-fold. First, the principle of judicial deference was upheld, and a clarification of the Alien Tort Statute for posterity was reserved for Congress to specify causes of action. The subsequent death of universal jurisdiction in *Kiobel* was a "triumph of the separation of powers critique of the ATS,"[48] which will be explored in greater detail later in this section. Related to the first, the Supreme Court intended to uphold sovereignty in foreign relations and preserve American interests with a retention of the presumption against extraterritoriality,

sacrosanct in US international relations philosophy. By quelling the threat of judicial overreach and meddling in the sovereign jurisdictions of other states, the US may have retained its impartiality, but this section argues that this indifference to universalizing human rights maintains American exceptionalism and reticence to subscribe to global principles of accountability, thus jeopardizing the United States' role as a human rights leader and cooperator.

While it is the role of the judiciary to interpret acts of Congress, this bizarre line of law from 1789 has puzzled judges, forcing them to hypothesize about the original intent of the ATS to determine just how far it can be stretched in application. Justice Breyer's opinion in *Kiobel* exemplifies this historical search into original intent that plagues strict formalist scholars of the law: he explains that the ATS was intended to "the Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms" (namely, pirates or other *hostis humani generis*) and to empower US courts "to act as agents of international law where there was a risk of a jurisdictional vacuum."[49] Preserving the US from becoming a "safe harbor" for international criminals is a speculative interpretation of the ATS, but it is a safe one that allows judges to refrain from stretching the statute past the point of no return. Working off the principle of judicial deference and avoiding legislating from the bench, the Court held in *Jesner v. Arab Bank* that foreign corporations categorically can not be tried under the ATS "absent further action from Congress."[50] In American politics, it is universally accepted that matters of foreign affairs (including recognizing a novel cause of action under the ATS) are not-justiciable and should be deferred to the executive or legislature. Returning to the example of universal civil jurisdiction for torture introduced by *Filártiga*, in 1991, Congress passed the Torture Victims Protection Act (TVPA) to provide an incontrovertible avenue for international torture victims to petition for redress in civil cases, filling a legislative gap regarding the presumption against extraterritoriality exclusively in the case of torture.[51] While an ATS Clarification Act has been proposed in the House this session to clarify the extraterritorial intent of the statute, it may not be "politically feasible" to expect that the ATS will be clarified to include corporate suits, because in Washington "corporate lobbies may have more clout over human rights groups."[52]

The second question regarding the separation of powers critique of the ATS is whether or not judges should uphold the "presumption against extraterritoriality." The "presumption" is a domestic canon of interpreting Acts of Congress to determine whether they can be applied abroad. As defined in the Supreme Court case *Morrison v. National Australia Bank*, the presumption provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[53] Fundamentally, the presumption recognizes that international law is organized horizontally, with sovereign States retaining a *prima facie* prescriptive jurisdiction over acts committed on their territory. Breyer's decision in *Kiobel* reflected a fear of "international friction[s]" in applying universal civil jurisdiction broadly.[54] Unlike piracy acts, which by definition are committed in *mare liberum* (the high seas) and thus beyond the jurisdiction of any individual state, United States judicial infringement on the first instance of other sovereign states could be an overstep resulting in "diplomatic strife."[55] As a matter of fact, "*Kiobel* noted that seven sovereign nations, including important US allies Canada and the United Kingdom, objected to the extraterritorial application of the ATS,"[56] and it goes without saying that the US would certainly object to its private citizens or corporations being tried outside our territory.

The Supreme Court upheld the presumption against extraterritoriality in *Kiobel* to preserve US foreign policy interests, but to what extent should national interests trump the pursuit of human rights across the globe? Both the presumption against extraterritoriality and the

original intent of the ATS were predicated on a contextual definition of "the law of nations"[57] and the modus operandi of the 18th-century pirate. The human rights international order as we know it arose post-WWII, a world cognizant of the dire threats to humanity from crimes *erga omnes* ("towards all"), regardless of the territory on which they are committed.[58] Many countries around the world have adopted progressive approaches to expanding universal jurisdiction for the gravest human rights violations, but the United States has heretofore refused to venture into the vanguard, either because of "an antiquated understanding of international law, or simply a brazen indifference thereto."[59] Maintaining a defensive, hard-line stance with deference to Congress in implementing advancements to customary international law jeopardizes the leadership of the United States on the global stage. The ATS was an attempt to legitimize our nascent country's credibility and prevent ourselves from becoming a "safe harbor" for enemies of all mankind; in the twenty-first century, if the United States fails to do its affirmative duty to apply extraterritoriality where all other avenues have been exhausted, we are aiding and abetting those modern pirates whose wealth we enjoy.

Frameworks in European and European Union Law

This paper has posited that the U.S. Alien Tort Statute is a rather quirky, and thus vexatious, little old line of statute; however, the content therein is reflective of radical demands for global cooperation and alliance towards *hostis humani generis*. The implied basis for universal civil jurisdiction in the ATS is not an aberrant, antiquated article of the law, but rather a progressive statute that has a European corollary. The Council of Europe Regulations allows EU member state courts to "assert jurisdiction over torts committed by corporations 'domiciled' in the European Union (EU) or by their foreign subsidiaries, even if the conduct took place outside the EU and against non-nationals."[60] Germany, Spain, and Sweden have actively exercised universal jurisdiction for grave human rights violations committed on foreign territory, including against non-state actors such as multinational corporations."[61] As a matter of fact, in 2004, the European Commission submitted an *amicus curiae* to an ATS case, reasserting that states including "Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden permit their courts to entertain civil claims in an *action civile* in criminal cases which are based on universal criminal jurisdiction."[62] Interestingly, Germany did briefly impose a judicial link between the forum state and the tort or underlying crime but subsequently abolished this standard in implementing legislation for the Rome Statute.[63] All this is to say that there is robust evidence, in *opinio juris* and state practice, of national courts affecting universal civil jurisdiction over human rights violations without a direct forum link. If U.S. courts were more open-minded and less hesitant to join its allies at the fore of universal civil jurisdiction, it is entirely rational to clarify that the ATS enshrines a similar jurisdiction.

Admittedly, expanding universal civil jurisdiction has many logistical hurdles, namely the sheer volume of suits that might be brought with an expanded ATS. While judicial bloating is a serious consideration in the legal sphere, the EU has been at the forefront of advancing other strategies for corporate liability for human rights and environmental violations with a more proactive approach to business compliance. The Corporate Sustainability Due Diligence Directive of 2023 (CSDDD) has proposed more "effective protection of human rights included in international conventions," such as labor rights and healthy working conditions for employees of parent companies and their subsidiaries.[64] As a responsive enforcement mechanism, should companies fail to meet these standards, national administrative authorities will supervise these new rules and impose fines in cases of non-compliance.[65] Furthermore, "victims will have the

opportunity to take legal action for damages that could have been avoided with appropriate due diligence measures."[66] Avenues for civil redress in the CSDDD framework are of the utmost importance, as they grant active participation and engagement from the public in holding their governments to account for failing to protect them from the abusive practices of incorporated entities.

Ultimately, the CSDDD represents a fundamental overthrow of the global Corporate Social Responsibility (CSR) doctrine. While national CSR can be understood as "private business self-regulation" in a free market economy, nevertheless subject to national laws and governmental policy, global CSR is more nebulous and imprecise than its counterpart.[67] Without a binding treaty for corporate liability for human rights, global CSR is unenforceable and offers opportunities for white-washing (or "blue-washing" with regards to the United Nations Guiding Principles), which undermines the very purpose of the guidelines for businesses and human rights.[68] The CSDDD mandates that member states do their due diligence in holding EU-incorporated businesses accountable for cutting corners or abusing the powerless, and if they fail to do so, then citizens or civil society may hold them to it. This relationship between states and corporations is not one of collusion, but rather of mutual accountability to preserve the rights and dignity of those citizens who may be directly affected. Judicial recourse for civil suits is not the only solution to checking the rise of the MNC in human rights spheres, and the CSDDD is a positive step in reminding states of their present, binding obligations as duty-bearers to protect their rights-holders from third-party violators.

Recommendations for Future Action

This paper has examined in three parts the extant basis for universal civil jurisdiction in customary international law, U.S. domestic law, and the European Union. To summarize, the existence of corporate liability for torts of the gravest nature is implicit and rational in human rights customary practice and jurisprudence, yet without such language specifically included in human rights treaties, this norm may never crystallize. Extrajudicial torture is explicitly liable for a civil suit in both international human rights law and domestic law, from the UN Convention Against Torture to the Torture Victims Protection Act in the United States, but states have deliberately prohibited victims from trying to expand categories for a cause of action for universal civil jurisdiction, notwithstanding Congressional clarification. As case law from U.S. Federal Courts illustrates, barriers to an expansion of universal civil jurisdiction are contingent on the political climate, both nationally and on the global stage. Rather than advancing domestic law to be at the forefront of an expanding political and social climate that demands greater accountability for MNCs in an uber-globalized economy, the United States has been diffident and thus lags far behind its allies in the European Union. In regional law, we may see more frameworks, such as the CSDDD, targeting the issue of corporate immunity by emphasizing states' duties to protect the human rights of their citizenry.

The diversity and incongruity of national laws, a constant quandary for human rights lawyers, must coalesce to usher in the "transnational popular project" for corporate accountability that Robinson insists is the only way to combat the threat of globalization.[69] Thus, a collaborative, mutual approach to corporate governance is crucial in our globalized international order, with corporations, private citizens, and states all playing their parts. In short, we need both an international binding treaty for business and human rights *and* a nationwide clarification of the ATS in the United States. With the implementation of these two legal instruments, states must 3) implement binding initiatives domestically to enforce—not merely suggest—corporate compliance for human rights. In order to affect these three changes, above

all, we need a paradigmatic shift in the public opinion with regards to the unchecked power of the MNC to put pressure on stakeholders and trustees.

In June 2014, the UN Human Rights Council accepted a resolution from Ecuador and South Africa to establish a working group to draft a binding instrument on "Transnational Corporations and Other Business Enterprises with respect to human rights."[70] As of April 2023, the Working Group has submitted their Third Draft, which asserts that this binding instrument "shall apply to all business activities, including business activities of a transnational character."[71] Article 8 of the Third Draft specifies civil liability for legal persons does not have to be contingent upon a finding of criminal liability,[72] and Article 9 states that adjudicative jurisdiction may be vested in the state where the violation occurred, where an act or omission contributing to the violation occurred, where alleged legal or natural persons are domiciled, or where the victim is a national or domiciled.[73] Critics of a binding treaty who retain support for the soft Guiding Principles (GPs) assert that the Third Draft lacks a clear objective and that its exclusion of corporate stakeholders from treaty negotiation will backfire.[74] Both of these criticisms may hold true, with the United States characteristically opposing the treaty and other states skeptical of the treaty's language and intent. Corporations and the states they favor will probably never endorse an international, one-sized treaty to regulate private business compliance, for the same reason the GPs are largely unfollowed. CSR and the practice of self-regulation favors MNCs and their privileged position in the globalist marketplace. In the same way that corporations will not willingly turn themselves in or publicly shell out reparations to victims, they will also not consign to be pauperized by fines to state parties.

Likewise, the proposed Alien Tort Statute Clarification Act of 2022 to establish that the statute contains extraterritorial application may never go to the Senate Judiciary Committee.[75] While passing national or international legislation for corporate accountability for human rights under universal civil jurisdiction will be a constant uphill battle, I return to examining the crisis of globalization we are currently embroiled in and why calls for universal civil jurisdiction and corporate liability are more relevant today than ever. The COVID-19 pandemic revealed how much of our supply chains have become globalized and when disrupted, the world entered a "'law of the jungle' scenario, where individuals, corporations, and governments began violating previously established norms in order to ensure the survival and welfare of their people."[76] Realizing the severity of the crisis, international cooperation was sidelined, and nations began to hoard their stocks of personal protective equipment (PPE), including ventilators, masks, and gowns. Left up the creek without a paddle and the highest national rate of positive COVID-19 cases, after vehemently denying the existence of a pandemic in political media wars, the Trump administration resurrected the Defense Production Act (DPA) and signed an executive order to seize "10 million N95 respirators" from 3M China (an affiliate of a US manufacturing company) for use in the United States.[77] Mask cargo, en route for delivery to France, Germany, Thailand, and Brazil, were bought in cash by US officials and redirected domestically. This piratical seizure had the full force and power of the DPA behind it, a 1950 Korean War law which "gives almost unchecked power to the executive…to control all aspects of production and distribution logistics in the US…upon such conditions, and to such extents as he shall deem necessary or appropriate to promote the national defense."[78] The war-like state of emergency brought about by Trumpian negligence interpreted the vagueness of the DPA for US interests, prompting "former US Senator Phil Gramm to refer to [the Act] as 'The most powerful and potentially dangerous American law.'"[79] The extrajudicial reach of the DPA, regardless of the state of emergency, is considered by many affected parties to be an international legal violation, and

State Minister of the Interior of Berlin Adreas Geisal denounced it as "an act of modern piracy."[80]

This abuse of executive power during a time of extraordinary precarity for governments and economies all over the globe reveals just how fragile our domestic laws on extraterritoriality are in the present moment. Since our supply chains for MNCs are so interconnected, "all it takes is one greedy actor along the chain to cut everyone downstream off from the supplies they need."[81] When push comes to shove, the United States has and will continue to forego the standards and ethics of international law in order to protect its own citizens and businesses, and unless the status of MNCs in international law is clarified, there will be more foreign citizens suffocating from want of a ventilator. A stable, international legal system with remedies for victims and accountability mechanisms for perpetrators is crucial in times of placidity, and its absence is murderous in times of international crisis.

Now in 2023, COVID-19 has pulled back the curtain, and it is clear that we are engaged in a world war: between "a global rich and powerful minority" and "the global poor, dispossessed and outcast majority,"[82] between the handful of puissant MNCs that sail around jurisdictions with impunity and the voiceless laborers they exploit, between the US-opportunist demagogues that plunder PPE and the asphyxiated Global South, marooned without equipment and vaccines in the name of hyper-liberalism. Will the United States forsake the ATS and continue to be a "safe harbor" for these modern day pirates? Or will we batten down the hatches and join a global people's movement for expanding universal civil jurisdiction to hold these pirates accountable under international human rights law?

[1] "Nestlé Reports Full-Year Results for 2021." Nestlé Global, February 17, 2022. https://www.nestle.com/media/pressreleases/allpressreleases/full-year-results-2021.
[2] *Nestle USA, Inc. v. Doe et al*, 19 US 416 (2021).
[3] Jennifer L. Karnes, "Pirates Incorporated: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute," Buffalo Law Review 60, no. 3 (May 2012): 823-896.
[4] John Gerard Ruggie, "Multinationals as Global Institution: Power, Authority and Relative Autonomy," 12 *Regulation & Governance* 317, 320 (June 9, 2017)
[5] William I. Robinson, "Globalisation: nine theses on our epoch," 38(2) *Race & Class* 13, 14 (1996).
[6] Ibid, 16.
[7] *The Foundation of International Human Rights Law*, Universal Declaration of Human Rights, online at https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (visited July 25, 2023).
[8] Robinson, 19.
[9] Ruggie, 320.
[10] Ibid.
[11] Peter Whoriskey and Rachel Siegel, "Cocoa's child laborers." *The Washington Post* (5 June 2019).
[12] Ruggie, 320.
[13] Ibid.
[14] Ibid, 317.
[15] Ibid, 318; Joel R. Paul, "Holding Multinational Corporations Responsible under International Law," 24 *Hastings International & Comparative Law Review* 285, 285-296 (2001).
[16] Rachel Paul, "Interpreting Liability Under the Alien Tort Statute," 67 no. 3 *University of Miami Law Review* 705, 706 (Spring 2013).
[17] David P. Stewart and Ingrid Wuerth, "*Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Statute," 107 *American Journal of International Law* 601, 603 (2013).
[18] Nehal Bhuta, "The Ninth Life of the Alien Torts Statute — *Kiobel* and After," 12 *Journal of International Criminal Justice* 539, 540 (2014).
[19] Ibid, 541.
[20] Stewart and Wuerth, 618.
[21] David Shea Bettwy, "Drones, Private Military Companies and the Alien Tort Statute: The Looming Frontier of International Tort Liability," 47 *California Western International Law Journal* 1, 27 (2016).
[22] Tyler Becker, "The Liability of Corporate Directors, Officers, and Employees Under The Alien Tort Statute After *Jesner v. Arab Bank, PLC*," 120 *Columbia Law Review* 91, 92 (2020).
[23] Stewart and Wuerth, 618.
[24] Ibid.
[25] Ibid, 620.
[26] Paul David Mora, "The Alien Tort Statute After Kiobel: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains," 63 *International and Comparative Law Quarterly* 699, 707 (2014).
[27] Ibid, 613; Julian G. Ku, "Kiobel and The Surprising Death of Universal Jurisdiction Under The Alien Tort Statute," 107 *American Journal of International Law* 835, 839 (2013); Ernest A. Young, "Universal Jurisdiction, The Alien Tort Statute, and Transnational Public-Law Litigation After 'Kiobel,'" 64 *Duke Law Journal* 1023, 1028 (2015).
[28] Alreem Kamal, "The Alien Tort Statute & The Contemporary International Legal Order: Is the Retention of the Presumption Against Extraterritoriality Justified?" 54 *New York University Journal of International Law & Policy* 1089, 1093 (2022).
[29] Lucas Curtis, "The Supreme Court as a Tool of Foreign Policy?: Why a Proposed Flexible Framework of Established Judicial Doctrine Better Satisfies Foreign Policy Concerns in Alien Tort Statute Litigation Notes," 104 *Minnesota Law Review* 1647, 1680 (2020).
[30] Jennifer L. Karnes, "Pirates Incorporated: *Kiobel v. Royal Dutch Petroleum Co*. and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute," 60 no. 3 *Buffalo Law Review* 886, 891 (May 2012).
[31] Ibid, 894.

[32] Paul, 722
[33] Ibid, 712.
[34] Stewart and Wuerth, 618.
[35] Stewart and Wuerth, 619.
[36] Tyler Becker, "The Liability of Corporate Directors, Officers, and Employees Under The Alien Tort Statute After Jesner v. Arab Bank, PLC," 120 *Columbia Law Review* 91, 130 (2020).
[37] Ibid, 103.
[38] David Shea Bettwy, "Drones, Private Military Companies and the Alien Tort Statute: The Looming Frontier of International Tort Liability," 47 *California Western International Law Journal* 2, 34 (2016).
[39] Ibid.
[40] Paul, 716.
[41] Arron Honniball, "Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends," 36 *Adelaide Law Review* 279, 328 (2015).
[42] Mora, 709.
[43] Paul David Mora, "The Alien Tort Statute After Kiobel: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains." 63 The International and Comparative Law Quarterly 699, 719 (2014).
[44] Paul, 711.
[45] Ibid, 716.
[46] Ibid, 718.
[47] Julian G. Ku, "Kiobel and The Surprising Death of Universal Jurisdiction Under The Alien Tort Statute," 107 *The American Journal of International Law* 835, 841 (2013).
[48] Nehal Bhuta, "The Ninth Life of the Alien Torts Statute - Kiobel and after," *Journal of International Criminal Justice* 12, no. 3 (July 2014): 545.
[49] Ibid, 546.
[50] Becker, 99.
[51] Ernest A. Young, "Universal Jurisdiction, The Alien Tort Statute, and Transnational Public-Law Litigation After *'Kiobel*,'" *Duke Law Journal* 64, no. 6 (2015): 1028.
[52] Jennifer L. Karnes, "Pirates Incorporated: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute," *Buffalo Law Review* 60, no. 3 (May 2012): 891.
[53] Mora, 703-4.
[54] Ku, 840.
[55] Stewart and Wuerth, 607.
[56] Alicia Pitts, "Extraterritoriality and the Alien Tort Statute - Narrow Application Preserves Crucial Boundaries," *SMU Law Review* 71, no. 2 (Spring 2018): 612.
[57] "Alien Tort Statute," 28 U.S.C. § 1350 (1789).
[58] Alreem Kamal, "The Alien Tort Statute & The Contemporary International Legal Order: Is the Retention of the Presumption Against Extraterritoriality Justified?", *New York University Journal of International Law & Policy* 54 (2022): 1094.
[59] Ibid, 1100.
[60] Bhuta, 548.
[61] Kamal, 1097-8.
[62] "Universal Jurisdiction: The Scope of Universal Civil Jurisdiction," *Amnesty International* 1, 10 (July 2007).
[63] Ibid, 5.
[64] "Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains," *European Commission*, European Union, (23 Feb. 2022).
[65] Ibid.
[66] Ibid.
[67] Ruggie, 317.
[68] Ibid.
[69] William I. Robinson, "Globalisation: nine theses on our epoch," 38 *Race & Class* 27 (1996).

[70] "Binding Treaty," Business & Human Rights Resource Centre, Accessed April 29, 2023.
[71] "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises," *Open-Ended Intergovernmental Working Grou*p, Third Revised Draft (Aug 18, 2021): Art 3.1.
[72] Ibid, Art 8.2.
[73] Ibid, Art 9.1.
[74] Sara McBrearty, "The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity." *Harvard International Law Journal*, July 2016.
[75] Christopher Ewell and Oona Hathaway. "Why We Need the Alien Tort Statute Clarification Act Now," *Just Security* (Oct 27, 2022).
[76] Samuel Dodge, "Jurisdiction and MNCs in Times of Global Crisis," *Journal of Territorial and Maritime Studies* (Oct 21 2020).
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] William I. Robinson, "Globalisation: nine theses on our epoch," *Race & Class*, 38(2) (1996): 14.

Works Cited

Alien Tort Statute, 28 USC § 1350 (1789).

Alien Tort Statute Clarification Act, 117th Cong, H 4155. (2022).

Becker, Tyler. "The Liability of Corporate Directors, Officers, and Employees Under The Alien Tort Statute After *Jesner v. Arab Bank, PLC*," 120 *Columbia Law Review* 91, 91–130 (2020)

Bettwy, David Shea. "Drones, Private Military Companies and the Alien Tort Statute: The Looming Frontier of International Tort Liability." 47 *California Western International Law Journal* 1, 1-34 (Fall 2016).

"Binding Treaty," Business & Human Rights Resource Centre, online at https://www.business-humanrights.org/en/big-issues/binding-treaty/ (visited April 29, 2023).

Bhuta, Nehal, "The Ninth Life of the Alien Torts Statute - Kiobel and after," 12 *Journal of International Criminal Justice* 539, 550 (July 2014).

"Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (December 10, 1984).

Curtis, Lucas. "The Supreme Court as a Tool of Foreign Policy?: Why a Proposed Flexible Framework of Established Judicial Doctrine Better Satisfies Foreign Policy Concerns in Alien Tort Statute Litigation Notes." 104 *Minnesota Law Review*, (2020): 1647-1691. https://scholarship.law.umn.edu/mlr/3254/

Samuel Dodge, *Jurisdiction and MNCs in Times of Global Crisis*, (Journal of Territorial and Maritime Studies 2020), online at https://www.journalofterritorialandmaritimestudies.net/post/jurisdiction-and-mncs-in-times-of-global-crisis.

Christopher Ewell and Oona Hathaway, *Why We Need the Alien Tort Statute Clarification Act Now*, (Just Security Oct 27, 2022), online at https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now/ (visited February 18, 2022).

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

The Foundation of International Human Rights Law, Universal Declaration of Human Rights, online at https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law (visited July 25, 2023).

Honniball, Arron. "Private Political Activists and the International Law Definition of Piracy: Acting for Private Ends." *Adelaide Law Review*, Vol. 36, No. 2 (2015): 279-328. Available at: https://ssrn.com/abstract=3533785.

Jesner v. Arab Bank, PLC, 16-499 U.S. 1 (2018).

"Just and Sustainable Economy: Commission Lays down Rules for Companies to Respect Human Rights and Environment in Global Value Chains." *European Commission*, European Union, (23 Feb. 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

Kamal, Alreem. "The Alien Tort Statute & The Contemporary International Legal Order: Is the Retention of the Presumption Against Extraterritoriality Justified?" *New York University Journal of International Law & Policy* 54 (2022): 1089-1100.

Karnes, Jennifer L. "Pirates Incorporated: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute." *Buffalo Law Review* 60, no. 3 (May 2012): 823-896.

Kiobel v. Royal Dutch Petroleum Co, 10 US 1491 (2013).

Julian G. Ku, "Kiobel and The Surprising Death of Universal Jurisdiction Under The Alien Tort Statute." 107 *The American Journal of International Law* 835, 841 (2013).

Legally Binding Instrument to Regulate, in International Human Right Law, The Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, July 16, 2018

Sara McBrearty, "The Proposed Business and Human Rights Treaty: Four Challenges and an Opportunity," *Harvard International Law Journal*.

Paul David Mora, "The Alien Tort Statute After *Kiobel*: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains." 63 *The International and Comparative Law Quarterly* 699, 719 (2014).

Morrison v. National Australia Bank, 561 U.S. 247 (2010).

Nestle USA, Inc. v. Doe et al, 19 U.S. 416 (2021).

"Nestlé Reports Full-Year Results for 2021." Nestlé Global, February 17, 2022. https://www.nestle.com/media/pressreleases/allpressreleases/full-year-results-2021.

Paul, Joel R. "Holding Multinational Corporations Responsible under International Law." *Hastings International & Comparative Law Revue* 24 (2001): 285-296. https://repository.uchastings.edu/hastings_international_comparative_law_review/vol24/iss3/1.

Paul, Rachel. "Interpreting Liability under the Alien Tort Statute." *University of Miami Law Review* 67, no. 3 (Spring 2013): 705-736.

Alicia Pitts, "Extraterritoriality and the Alien Tort Statute - Narrow Application Preserves Crucial Boundaries," 71 *SMU Law Review* 607, 614 (Spring 2018).

William I. Robinson, "Globalisation: nine theses on our epoch," 38 *Race & Class* 13, 31(1996). https://doi.org/10.1177/030639689603800202.

John Gerard Ruggie, "Multinationals as Global Institution: Power, Authority and Relative Autonomy," *Forthcoming, Regulation & Governance* 317, 330 (June 9, 2017).

Sosa v Alvarez-Machain, 542 U.S. 692 (2004).

David P. Stewart and Ingrid Wuerth, "Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Statute," 107 *The American Journal of International Law* 601, 621 (2013). https://doi.org/10.5305/amerjintelaw.107.3.0601.

"Torture Victim Protection Act of 1991," 102–256, H.R. 2092, 106 Stat. 73 (March 12, 1992).

"Zyklon B Case: Trial of Bruno Tesch and Two Others," 9 British Military Court, Hamburg (1946). Accessed at: https://www.legal-tools.org/doc/10c581/pdf/.

"Universal Jurisdiction: The Scope of Universal Civil Jurisdiction," *Amnesty International* (July 2007). AI Index: IOR 53/008/2007. https://www.amnesty.org/en/wp-content/uploads/2021/07/ior530082007en.pdf.

Whoriskey, Peter and Rachel Siegel. "Cocoa's child laborers." *The Washington Post* (5 June 2019). https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/.

Young, Ernest A. "Universal Jurisdiction, The Alien Tort Statute, and Transnational Public-Law Litigation After *'Kiobel*.'" *Duke Law Journal* 64, no. 6 (2015): 1023–1127. http://www.jstor.org/stable/24691889.

Advocating Desertion: Can the Government Prosecute Seditious Speakers?

Jack Gigante | Georgetown University

"Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"

—Abraham Lincoln[1]

Introduction.

President Vladimir Putin aims to reclaim what he considers to be Russia's rightful place in history. Through false flag attacks and propaganda, Putin convinced Russians to support an aggressive war against a sovereign, democratic nation. Following the attack, he signed laws limiting speech about Ukraine, leading to imprisonment for major and minor offenses. A citizen faces up to fifteen years in prison for failing to call the war in Ukraine a "special operation" as propaganda demands.[2] The government shut down television stations and forbade journalists from publicly criticizing the war.[3] Putin is disdainfully hailed as one of the world's greatest antagonists of human rights.

President Volodymyr Zelensky leads Ukraine against a nuclear-weapons state that is massacring civilians. At the beginning of the invasion, he refused evacuation from the Ukrainian capital Kyiv, reportedly saying, "I need ammunition, not a ride."[4] The comedian turned international hero fights a David and Goliath war, a conflict many analysts believed he would lose in the first few days. Yet, he is winning. To that end, he has imprisoned 6,400 men for draft dodging, shut down television channels critical of his regime, and created strict publication rules, regulating the accepted languages of newspapers and banning others entirely.[5] *The Wall Street Journal* praises Zelensky as the definition of courage in our time. Many view him as the champion of Western values, chief among them liberalism and individual rights.[6]

What the public regards as justified government action in war heavily depends on context. Modern observers rightly condemn Putin's oppression, but applaud Zelensky's governance, castigating his targets as cowards and traitors. Considering their contexts, applause for both the censor and the censored is unsurprising. It is emotionally and morally easy for the West to differentiate between the Russian and Ukrainian governments, but it is legally challenging. The defendants in these examples were subject to their government's versions of due process, and the statutes allowing the respective governments these powers were perfectly legal. Various moral reasoning, obviously, can be quickly asserted, but the states involved are legally acting within their rights. Both groups of defendants were censored and sentenced for functionally the same reason: protecting the state during a war.

American history features long-standing tension between protected rights and legitimate government interests, with one of the most complicated being wartime free speech practices supported by the First Amendment. The extent to which the Constitution permits policymakers to legislate and balance speech or other rights with social necessities, especially in emergencies, remains a contentious issue. The law can simultaneously enact brutal suppression and measured regulation, so the government must carefully construe laws' texts and precedents to allow the state to carry out its duties while still protecting individual rights.

Traditionally, courts carve out exceptions and redefine what is considered protected speech, but these definitions often remain unclear. Additionally, as the government has not formally declared war since 1941, there is a dearth of case law regarding war's effect on individual rights. By examining the evolution of precedent and recent criminal cases, this paper intends to determine whether seditious speech, specifically the advocation of desertion, during war is still punishable under the law. This paper seeks to prove and, failing that, suggest that advocating desertion during a war is an active attack against the government, unmitigated by the marketplace of ideas. Advocating seditious acts in public or private is harmful in the context of war; the obfuscation surrounding wartime powers and the definition of imminence necessitates rapid clarification of precedent in the government's favor.

I.

A. Background and Evolution of the First Amendment.

First Amendment jurisprudence in American politics traces back to the Sedition Act of 1798, but it first received strict attention during the Civil War. The internal divisions during the era posed an existential threat. The Civil War's fraternal nature created unique dangers as citizens within the union committed seditious acts. In border states and beyond, citizens destroyed train tracks essential to the war effort while newspapers openly campaigned against the Union cause. People criticizing military enlistment were arrested, with one of the most famous cases being that of Clemente Vallandingham. His arrest prompted outrage as he had carefully qualified anti-war statements by saying things such as "I beg pardon, but I trust I am not discouraging enlistments."[7]

In the sixty years since the Sedition Act's repeal, the federal government passed no legislation restricting expression, placing Abraham Lincoln and his generals in the precarious position of determining how to execute the Constitution. The lack of clarity surrounding wartime powers made their task more complex. Contemporary scholars contended whether or not the Bill of Rights even applied under those circumstances.[8] Others argued that federal power limits "apply as if nothing going on since Sumter was different from what obtained earlier," unaltered by context.[9]

Lincoln, as was his wont, took a practical middle-ground approach. In 1862, Lincoln suspended Habeas Corpus for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice . . . affording aid and comfort to Rebels."[10] His generals took action through field orders, such as the infamous General Order Number 38, which involved shutting down local papers and arresting agitators, eventually leading to Vallandingham's imprisonment[11] While Lincoln seized unprecedented, extraordinary powers for the federal government, he "took care to root these claims of authority in the constitution." After much controversy surrounding Vallandingham's imprisonment, Lincoln avoided the issue by simply exiling him before his prosecution.[12] Lincoln recognized a bad actor's ability to cause rapid harm and defended the local generals' decisions to imprison agitators:

"Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked Administration of a contemptible Government, too weak to arrest and punish him if he shall desert. I think that in such a case to silence the agitator, and save the boy is not only constitutional, but withal a great mercy."[13]

Lincoln stood by his administration's actions based on the threat of tangible injury to the war effort caused by a person with malicious intent. The prairie lawyer argued that certain speakers labored not for political purposes but campaigned to damage "the Army, upon the existence and vigor of which the life of the Nation depends." In Lincoln's mind, the government possessed the right and duty to limit this speech. However, he took this special federal authority while repeatedly affirming that "the Constitution mattered," a style reflected in future court decisions.[14]

Despite Lincoln's informal navigation, speech surrounding desertion remained a dormant legal issue until the Supreme Court delivered the "wartime trilogy." This series of three foundational wartime cases set the precedent for modern First Amendment jurisprudence in response to the Espionage Act.[15] Congress passed the act in 1917 to prosecute sedition and other

domestic activity, creating what some have called the first modern "surveillance state," placing strict limits on speech.[16] It reads:

> "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished"[17]

The Espionage Act, which has never been repealed, resulted in the imprisonment of anti-war speakers. The three decisions of *Schenck v United States* (1919)*, Frohwerk v United States* (1919)*,* and *Debs v United States* (1919) all supported the act's limits on public speech in wartime.[18] Most famously, *Schenck v United States* unanimously upheld the conviction of a man criticizing the draft. The decisions were based on a doctrine known as clear and present danger. Oliver Wendell Holmes, the opinion's author, reasoned, "when a nation is at war many things that might be said in the time of peace are such a hindrance to its efforts," that the words are regulatable.[19] The government merely had to determine "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[20] There was no need to draw a causal link between words and action; speaking them was irresponsible and foreseeably injurious enough to deserve punishment.

Among the goals of the First Amendment is promoting the exchange of ideas, but some speech subverts this principle. John Stuart Mill, the great utilitarian political philosopher, articulated that the marketplace of ideas encourages the advancement of society by allowing controversial, or even dangerous, expression. When a contentious opinion is allowed to be submitted, the hope is that "If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose the clearer perception of truth, produced by its collision with error."[21] Yet, as Holmes points out, some speech causes damage before the marketplace can reject it; after all, "the most stringent restriction of free speech would not protect a man in falsely shouting fire in a theater."[22] Hence, the transmission of ideas cannot be discussed in a vacuum—the time, place, and manner of a speech are inseparable from its nature.

However, Holmes' logic was narrowly tailored to special contexts where an idea causes damage before it can be evaluated. By placing conditions on constitutional speech restrictions, Holmes hoped to simultaneously permit the government to defend the nation and protect unpopular opinions. His clear and present danger test, which he never intended to invent, evolved beyond its narrow scope as successive cases greatly expanded the element's definitions. In the following years, the American government responded to the confusion surrounding the definition of imminence and rising social fears. In doing so, they began dismantling the spirit of the clear and present danger test.

Benjamin Gitlow, a socialist leader and Jewish immigrant, was convicted for publishing a pamphlet calling for the overthrow of the government. Since he did not give specific instructions or a date for this action, Gitlow did not have a chance of imminently causing an anti-government riot. Despite this temporal issue, the court ruled in the state's favor in *Gitlow v People of the State of New York* (1925). While there was no "evidence of any effect resulting from the publication," the court asserted the manifesto's "words imply urging action."[23] Justices feared

teaching these ideas would result in eventual action in the indefinite future, effectively dismantling the "present" aspect of the test.

Later, another member of the radical left, Eugene Dennis, was convicted at the height of the Red Scare for teaching the importance of overthrowing the government. Dennis claimed his speech was protected because he had merely discussed the "theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments," which is purely political speech and not highly likely to provoke the end of the government. Dennis did not incite action as much as he had discussed communist theory. In *Dennis v United States* (1951), however, the court disagreed. Chief Justice Vinson, who delivered the plurality opinion, claimed that some political speech was per se dangerous and unprotected and must further be balanced against government interest. Even if a threat is unlikely, the federal government is not required to "wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."[24]In *Dennis*, the court restricted the expression of earnest belief in an act of casual cruelty in the name of protecting American values. Under *Dennis*, speech did not necessarily have to be seditious or even threatening, it merely had to be politically distasteful enough to the ruling elite. With the 6-2 ruling, the court rang the clear and present danger test's death knell as participation in a political party became illegal: the final element, "danger," was dismantled.

Holmes vehemently protested the test's bastardization as it was removed from his original intent. SCOTUS delivered *Gitlow* and *Dennis* outside of a wartime context. Importantly, they left little protection for the ideas society found distasteful; therefore, the marketplace of ideas in America could not fully function. These rulings were not about protecting the state against harm before the public could evaluate the idea's viability, but about discriminating against political perspectives the majority found distasteful—endangering Communists and activists in the same breath. In labeling incitement unprotected and expanding that speech's definition through clear and present danger, the government could effectively censor with impunity. Justice Holmes's dissent in *Gitlow* aptly captures the issue in this expansion:

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[25]

The government, Holmes and Louis Brandeis argued, could still protect itself from dangerous consequences of speech if the market was allowed to reject these ideas in time. To ensure the protection of state and speech, legislatures needed only target speech that could provoke imminent, likely harm. While the pair never lived to see their opinion escape relegation to dissent, it eventually developed into modern precedent.

B. Current Precedent.

The court began dismantling these rulings shortly after *Dennis* as the Red Scare diminished and new justices joined the bench. *Yates v The United States* (1957) is often called the end of the Cold War in the Supreme Court.[26] Solicitors General could no longer vaguely gesture to the existential threat of communism to justify any government action, and instruction of abstract theory could no longer be restricted unless it "urged to do something, now or in the

future, rather than merely to believe in something."[27] Still, clear and present danger reigned for over a decade.

The Supreme Court created a new incitement test in *Brandenburg v Ohio* (1969), reversing a Klansman's conviction, an ironic or unironic move depending on one's cynicism. Clarence Brandenburg, the Klansman, was convicted of inciting rational violence for recording a speech before a burning cross.[28] The unanimous opinion drew strict requirements for speech, "Thus, advocacy would only be punished if the defendant: (1) expressly advocates law violation; (2) calls for immediate law violation; and (3) immediate lawless action is likely to occur."[29] The new test places heavy emphasis on a crime's temporality but fails to describe this restriction's scope adequately.

Brandenburg intentionally places a high burden on states, hoping to protect expression from repeated government intervention, but in doing so, allows ambiguity to fester. Scant few cases have attempted to define imminence as it pertains to incitement. It was clear "advocation of illegal action at some future indefinite time" does not suffice, as affirmed in *Hess v Indiana* (1973), but essential questions are left unanswered.[30] Imminence was always relegated to the background of advocacy cases, a tertiary factor at best in these rulings. The court ruled "weeks or months down the road did not satisfy the Brandenburg exception" in *NAACP v Claiborne Hardware Co*. However, the court largely decided the case on tort law regarding liability.[31]

The court means to protect the marketplace of ideas, but fails to describe speech's limits, especially as it applies to wartime sedition. The Constitution historically granted the government discretion during war. But, the court has recently indicated in oral arguments that this position no longer holds as much sway. Namely, decisions such as *Korematsu v United States* (1944), which permitted the racial mass imprisonment of citizens during WWII based on wartime powers, are referred to derogatorily in oral arguments, but have never been overruled.[32] Circumstance and hesitance have kept the court from clarifying the manner in which Constitutional rights apply during war. Without a wartime case, the significance of war itself is unclear. Thus, the law leaves legislatures without clear guidelines by which they must abide.

II.

A. United States v Ali Al-Timimi and Advocating Desertion.

Luckily, for legal scholars at least, the War on Terror resulted in cases analogous to the advocation of desertion. After 9/11, Ali Al-Timimi, a Virginia youth leader at a local mosque, spoke fervently to a group of acolytes on the necessity "to defend Islam by engaging in violent jihad against its enemies, including United States military forces."[33] Al-Timimi's audience heeded his advice and engaged in hostile action against US forces over the next weeks and months. Al-Timimi received ten counts for his words, notably, "inducing others to levy war against the United States" and "inducing others to attempt to aid the Taliban."[34] Al-Timimi appealed his case to the Supreme Court, but his 2005 conviction currently stands.

Notably, however, Mr. Al-Timimi's advocation was unspecific. Although a single witness claims Mr. Al-Timimi spoke about going to a terrorist training camp Lackshar-e-Taiba (LET), his testimony is called into question. Furthermore, the other principal witness claims that the discussion of LET began after Mr. Al-Timimi departed from the dinner. Not only that, but LET "was not declared a terrorist organization" at the time.[35] The meaning of his speech, while certainly seditious, may not meet the strictest possible standard the courts could apply.

There are crucial elements of Al-Timimi's conviction that hold important insights: (1) Al-Timimi's advocation was widely separated geographically and chronologically from its consequences; (2) his words were spoken privately to a specific group; and (3) he spoke in a

context akin to declared war. The Espionage Act, which would effectuate upon a declaration of war, outlaws incitement to desert under similar circumstances. Speakers specifically target soldiers and draftees to take criminal action at a time and place far from their incitement. Their interlocutors "offered more than abstract guidance" but "specific directions to his followers to achieve the jihadist [or any seditious] objectives."[36]

B. Private vs. Public Advocation and Solicitation

Ali Al-Timimi's incitement offers an important legal issue to the court: the difference between private and public advocacy. In *Brandenburg*, justices examined a public statement teaching abstract notions unlikely to produce rapid harm. Society rejected these ideas before harm could be done, evidenced by the lack of a race war in America. Still, sometimes speakers intentionally protect their speech from scrutiny. Al-Timimi concealed his words from the public and did not want his audience to encounter alternative perspectives. The marketplace of ideas that helped rationalize *Brandenburg*'s strict test was no longer at play.

Society at large does not view secretive speech as protected. When Michelle Carter instructed her boyfriend, Conrad Roy, via text to commit suicide because "the time is right and you're ready," people were in an uproar. The judge ruled that Carter had a special responsibility as she was the only one who knew of his imminent intent. By speaking in private without anyone else's knowledge, she could take advantage of Roy's "well-known weaknesses, fears, anxieties and promises" and, as such, "her conduct was wanton and reckless, and caused the death of Conrad Roy;" thus, not a free speech issue.[37] If Carter had said her words in public, others could interfere with and attempt to prevent their outcome.

Despite not drawing an official distinction, the law treats public advocacy differently than secretive speech. The language of the statutes convicting Al-Timimi makes no effort to qualify the forum of a defendant's speech.[38] Public orators like Brandenburg speak in ways similar to Al-Timimi but do so without arrest. The law implicitly prosecutes public sermons differently, which legal scholar Robert Tanenbaum argues is because "the preacher would be immune from prosecution because, in theory, the public "marketplace" would have the opportunity to rebut his reasoning and win over his listeners."[39]

Private incitement means to cause specific action and, thus, does not deserve the First Amendment's protection. When Ali Al-Timimi gave his homily, he both foresaw and intended the destructive result, meeting two of the three prongs in *Brandenburg.* The final prong, imminence, is trickier and ill-defined, with scant mentions by justices in fifty-three years of jurisprudence. Tanenbaum argues that "If the courts cannot successfully apply the public speech *Brandenburg* exception to Al-Timimi's private speech, then the Court should develop a non-*Brandenburg* standard to cover the secret advocacy of a detailed call to lawless action that has no opportunity for rebuttal in the "marketplace of ideas."[40] However, others still contend that his words should not be punished as advocacy, arguing that the government's depiction of Timim's words is inaccurate and based on unreliable eyewitness testimony.

Speech of a private nature with this level of specificity may operate under a different exemption than *Brandenburg*: solicitation. The Court created a different standard in *United States v Williams* (2008), allowing the prosecution of particular private speech, including child pornography solicitors and other felons.[41] In *Williams* and the following cases, imminence was not considered a factor in solicitation, with the Court ruling that "speech arranging a tryst with a minor can be criminal solicitation even if the encounter is to take place in a week or a month."[42] Under this conception, if a speaker were to directly instruct a soldier to abandon his weapons and flee once he was deployed in the field, it may be possible for the government to intervene.

Mr. Al-Timimi's lawyer, Thomas Huff, argues that solicitation should be applied to Al-Timimi's ongoing appeal, and under that standard, his client could be exonerated. Mr. Huff believes "*Brandenburg* is a poor fit for the government's case" because "criminal solicitation is different and should turn on whether it is abstract advocacy where advocating illegal conduct, in general, is protected while directing a specific person to do specific conduct is not."[43] Mr. Huff hopes to make a deceptively simple First Amendment argument: (a) speech of this nature, being unpublic and directed at a specific group, is best classified as solicitation; (b) solicitation demands a high level of specificity towards explicitly illegal acts that Timimi does not meet; and, therefore, (c) the Court can not allow this conviction to stand. This approach effectively balances the public's interests against individual rights, placing an exacting evidentiary burden on the government without precluding its ability to prosecute dangerous acts.

In addition to the distinction between public and private speech, another issue may be at play: Islamophobia. Al-Timimi was tried in the years following 9/11 when there was an atmosphere of fear surrounding the dangers of domestic terrorism. Despite the obvious imminence and fact-based issues, Timimi only managed to file a direct appeal a record seventeen years after his 2005 conviction. Mr. Huff attributes the law's neglect to the context of his conviction, saying, "people that close to D.C. were not so inclined to second guess the prosecution," raising the ignored issue of context in speech cases.[44]

C. Does War matter?

Historically, domestic law is altered when war is declared. In Ancient Rome, the cradle of modern democracy, a consul could elect a dictator during an emergency. The dictator held unlimited powers for the duration of an emergency, and Roman citizens were unprotected by the law for the duration of his stay. Even without the office of dictator, Roman leaders held special powers during war and crisis.[45] The Western world continues this tradition throughout its history, as constitutions and common law recognize the need for an especially empowered government.

While the American Constitution carves out wartime powers for the federal government, precedent makes little effort to articulate their scope and limits, perhaps intentionally. Chief Justice William Rehnquist believed "[t]he traditional unwillingness of courts to decide constitutional questions unnecessarily also illustrates in a rough way the Latin maxim *Inter arma silent leges*: In time of war the laws are silent." Rehnquist and other scholars argue that wartime powers must be pragmatically ambiguous and that this ambiguity was, in fact, the founders' intent.[46]

Rehnquist's words stand to reason when observing the Court's demure approach to deciding wartime cases. Even seemingly clear-cut cases are often ruled in the government's favor. *Korematsu v United States* essentially ruled that Fourteenth Amendment discrimination protections did not apply the same way in war because "the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because [similar] action[s] in times of peace would be lawless."[47] *Korematsu* may be "excoriated as one of the two or three worst moments in American constitutional history" by legal scholars, but its precedent stands, supporting the idea that rights operate differently during a war.[48] Speech, therefore, logically would also operate differently during a time of war.

The United States, however, has not formally been at war since 1945, and thus no concrete precedent on war and speech has been developed. Despite Congressionally authorized uses of military force and exercises of professional prerogative—as in the Vietnam War, the Iraq War, and the Bosnian War—no president has wielded their formal, most expansive wartime powers since 1945.[49] Arguably, *Schenck* and *Korematsu*, based on the government's special

wartime prerogatives, are still the law of the land.[50] After all, *Schenck* was predicated upon "whether the words used are used in such circumstances" (those circumstances being war) "that they will[] bring about the substantive evils that Congress has a right to prevent."[51] *Brandenburg*'s incitement definition makes no effort to address war, and it is unclear the extent to which it applies within that context.

III.

A. Applying Brandenburg to Advocation of Desertion

While it is difficult to apply *Brandenburg'*s elements to the advocation of desertion, finding intentionally seditious speech is not. An individual who is outspoken against a war is likely unshy about their intent to impede the war effort. Some speakers, such as the famous Civil War agitator Clement Vallandingham, may attempt to qualify statements by denying their objective impedes a war, but juries may still find defendants guilty, motivated by patriotism or xenophobia. It is a similarly plausible concern that men facing the unspeakable horrors of war may be swayed to abandon their posts.

Imminence, however, is a more problematic hurdle to overcome. Soldiers and potential draftees incited to certain actions against the government intrinsically do so in distant times and places. Seditious speakers specifically target the group, a requirement in *Hess*, before they have the opportunity to desert, which potentially comes weeks or months after the speech is delivered in a distant place.[52] The Court's offhand statement in *NAACP* that advocating action "weeks or months down the road did not satisfy the *Brandenburg* exception" further limits prosecutors.[53] In *Brandenburg'*s terms, imminence seems to initially halt prosecuting Al-Timimi's chronologically separated seditious speech.

Yet in *United States v Ali Al-Timimi* (2005), Al-Timimi was convicted for "inducing others to conspire to levy war against the United States" months after his speech.[54] Al-Timimi is currently navigating the appeals process, but it does not appear his conviction is in serious danger of being overturned on First Amendment grounds.[55] Mr. Huff believes it is likely to turn on whether the government can point to specific facts in the record to support its charge that Al-Timimi solicited the men to commit treason; "on the law, just substance, those charges will be hard for the government."[56] However, the alleged content, private nature, and the context of his speech mimic seditious advocacy. Because the court has not yet overturned a conviction wholly based on imminence, Al-Timimi's case demonstrates the way courts allow the government to apply incitement. His imprisonment is a testimony to the nature of seditious speech during national emergencies: without protection.

B. War Matters.

The marketplace of ideas during times of war functions differently than during times of peace — especially for soldiers. The First Amendment means to construct an environment promoting the proposition and criticism of various ideas and, in doing so, allows society to prosper in the long run. Emergency, short-run situations, however, are not conducive to a functioning marketplace. In the same way that the government holds special authority over economic markets and administrative bodies in war, the same ought to be true for speech.

Even the smallest actions can have seismic consequences during a war, and speech to and with soldiers holds a special danger. When a soldier is drafted, they are dragged from their ordinary life and sealed off from the world. Soldiers' correspondence and speech are naturally restricted. They can not speak out against the war in protest nor encourage others to engage in behavior negatively affecting the war efforts.[57] When writing home in World War II, soldiers were required to describe their actions in general terms, and their communications were

examined by the military's office of censorship.[58] If a soldier specified their location, the government feared spies back home would use that information against the armed forces or harm morale, prompting the adage "loose lips sink ships."[59] Speech to soldiers harming morale or hindering their capability to perform their duty can be considered seditious. The court has affirmed the legality of such restrictions multiple times over the years, saying in *Parker v Levy* (1974) that the military is "a specialized society separate from civilian society" and thus receives a separate set of protections.[60] Soldiers, the court reasoned, have a special duty to act in accordance with and in pursuit of the war effort, precluding the disclosure of personal information which can reasonably be said to contravene that duty.[61]

When speaking to soldiers or draftees in a war, especially before deployment, the nature of soldiers' lives causes immediate harm, even for public advocacy rather than private solicitation. When Oliver Wendell Holmes proposed the law would "not protect a man in falsely shouting fire in a theater," he protested the negative outcome that would result.[62] An outcome, he cautioned, that came before the truth could mitigate the harm. Soldiers live a unique life, one marked by death, hardship, and often internationally important decisions. A soldier or draftee, like the men receiving leaflets in *Schenck,* who is about to be sent to the other side of the world or put through basic training deserves confidence in his comrades and nation. The government has a duty to create an army as absent of desertion as possible to protect the people serving on the front line, not just the nation. Just as the court allows convictions of private advocacy, limits are reasonable on public speech to soldiers and potential draftees during war.

C. Deeply Rooted in our History and Tradition.

The court's shift to a new style of jurisprudence also supports this worldview. *Dobbs v Jackson Women's Health Organization* (2022) used an emerging test to consider whether women had the right to an abortion, asking whether it was "deeply rooted in [our] history and tradition" and "whether it is essential to our Nation's scheme of ordered liberty."[63] The test evaluates expansions of constitutional rights using these questions. Free speech has dramatically expanded in recent years, contrasted with when "it was commonplace at the Founding for state law to prohibit defamation, libel, and conspiracy."[64] Therefore, applying the court's new 'historical' approach may be conducive to a narrow reading of wartime speech's limits.

When deciding a case regarding a desertion advocate, there is plenty of historical evidence supporting state action against wartime agitators for the court to consider. Since the Civil War and beyond, governments have regulated wartime speech.[65] Even without the current precedent which already supports this practice, common government practice in past centuries reflects approval of imprisoning wartime agitators. While the court has yet to elucidate the limits to applying the history and tradition test, should it be deemed appropriate, such an evaluation should closely align with the legal punishment of seditious speech.

As to whether allowing such seditious speech "is essential to our Nation's scheme of ordered liberty," this paper argues the exact opposite.[66] Preserving the liberty of Americans is tied to the government's ability to wage war effectively, which can only possibly be achieved through suppressing mutinous speech. *Brandenburg* reasonably wanted to protect individual rights to expression, but *Dennis*, while admittedly overzealous, captured an essential truth: the government has a right and duty to defend itself.[67] Certainly, that right is limited in peacetime, but speech in war affects injury rapidly, and the government must be empowered to act proactively.

Conclusion.

The Espionage Act or any similarly worded statute, triggered upon a declaration of war, should stand. If the court fails to apply *Brandenburg's* test, it should stand by its ruling in *Schenck* and place wartime speech into its own category. The advocation of desertion during wartime is an active attack against the government unmitigated by the marketplace of ideas. Specific, seditious advocation causes inherent injury during a war, and the ambiguity of wartime powers and incitement requires clarification in the government's favor. The government needs to, and can, punish seditious speakers during a war.

Earlier, this paper juxtaposed Vladimir Putin and Volodymir Zelensky, questioning the people simultaneously praising and condemning censorship, arguing that the difference was obvious morally but difficult legally. The founders conceived of the Bill of Rights as a way to "fortify the rights of the people against the encroachments of the Government," yet that same generation passed the Alien and Sedition Acts.[68] Legal scholars endlessly chase a perfect interpretive doctrine for the First Amendment, but the clear and present danger test's gradual bastardization demonstrates the futility of such attempts. The *Brandenburg* test is a wartime ruling, but some contexts change the nature of our society, which is why the court avoids setting hard limits on wartime powers. The truth is, no legal doctrine prevents Putin's oppression and allows Zelensky to contain domestic threats. It is just a question of degrees and terms. At best, we can contain expanded powers to times of crisis through our institutions and hope the hand that wields the sword will do so justly.

However, we can insulate speech in peacetime while allowing the government to protect itself. The *Brandenburg* test effectively and continuously protected advocating speech for over fifty years. The government can still punish seditious speech through the solicitation standard in *Williams* in peacetime so long as it meets a high evidentiary standard. Simple abstract advocation to specific groups should be only punishable in times of war. Turning to Ali Al-Timimi's conviction, following this doctrinal approach, given the absence of a congressionally declared war, if the government sufficiently proves he directly and explicitly attempted to elicit illegal action, his conviction stands with respect to First Amendment objections. If they fail to make that connection, however, the court should reject Timimi's conviction. The two possible free speech outcomes reflect a mature balancing of rights and government interest, one intrinsic to American tradition.

[1] Geoffrey R. Stone, "Abraham Lincoln's First Amendment," 78 *New York University Law Review* 1 (2003).
[2] Celina, Tebor. "Russia Increases Censorship with New Law: 15 Years in Jail for Calling Ukraine Invasion a 'War'." USA Today. Gannett Satellite Information Network, March 9, 2022. https://www.usatoday.com/story/news/world/ukraine/2022/03/08/russia-free-speech-press-criminalization-misinformation/9433112002/.
[3] Anton Troianovski and Valeriya Safronova. "Russia Takes Censorship to New Extremes, Stifling War Coverage." The New York Times. The New York Times, March 4, 2022. https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html.
[4] Sharon Braithwaite. "Zelensky Refuses Us Offer to Evacuate, Saying 'I Need Ammunition, Not a Ride'." CNN. Cable News Network, February 26, 2022. https://www.cnn.com/2022/02/26/europe/ukraine-zelensky-evacuation-intl/index.html.
[5] "Ukraine Bans pro-Russian TV Stations – DW – 02/03/2021," dw.com (Deutsche Welle, February 3, 2021), https://www.dw.com/en/ukraine-zelenskiy-bans-three-opposition-tv-stations/a-56438505; Serhiy Guz, "Why Ukraine's New Media Law Threatens Press Freedom," (openDemocracy, November 7, 2022), https://www.opendemocracy.net/en/odr/ukraine-media-law-press-freedom/; Emma Albright and Cameron Manley, "Zelensky Blasts Schroeder, Lobbies XI in New Push to Maximize Support," Worldcrunch (Worldcrunch, August 5, 2022), https://worldcrunch.com/in-the-news/ukraine-russia-war-latest-news-germany-china.
[6] Karl Rove, "Zelensky Defines Courage in Our Time," *The Wall Street Journal*, 2022.
[7] Stone, "Abraham Lincoln's First Amendment," 8.
[8] J. Matthew Gallman, *The North Fights the Civil War: The Home Front,* 128 (1994).
[9] Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* 262 (1973).
[10] Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), [hereinafter Lincoln, Proclamation], in 5 *The Collected Works of Abraham Lincoln* 436, 437 (Roy P. Basler ed., 1953). 11 Robert E. Sterling, Civil War D.
[11] Stone, "Abraham Lincoln's First Amendment," 5.
[12] Ibid 19.
[13]Ibid.
[14] Stone, "Abraham Lincoln's First Amendment", 19.
[15] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 791.
[16] Ralph Engelman and Carey Shenkman. *A Century of Repression: The Espionage Act and Freedom of the Press*. University of Illinois Press, 2022. http://www.jstor.org/stable/10.5406/j.ctv2vt03t6.
[17] "Espionage Act of 1917," 15 June 1917. Courtesy of the Library of Congress.
[18] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 791.
[19] 249 US 47 (1918).
[20] Ibid.
[21] John Stuart Mill. *On Liberty.* London: J.W. Parker and Son, 1859.
[22] 249 US 47 (1918).
[23] 268 US 652 (1925).
[24] 249 US 494 (1951).
[25] 268 US 652 (1925).
[26] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 812.
[27] 354 US 298 (1957).
[28] 395 US 444 (1969).
[29] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 804.
[30] 414 US.105 (1973).
[31] 458 US 886 (1982)
[32] Becky Little. "Korematsu Ruling on Japanese Internment: Condemned but Not Overruled." History.com. A&E Television Networks, June 27, 2018. https://www.history.com/news/korematsu-japanese-internment-supreme-court.
[33] 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).

[34] 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).
[35] Thomas Huff, interview by Jack Gigante, December 13, 2022.
[36] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 809.
[37] Alanna Durkin Richer. "Conviction Upheld for Woman Who Urged Boyfriend's Suicide." AP NEWS. Associated Press, February 6, 2019. https://apnews.com/article/north-america-us-supreme-court-ma-state -wire-us-news-ap-top-news-abd449bd66274f698e9ff4d4c2247a8e.
[38] 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).
[39] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 816.
[40] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 817.
[41] 553 US 285 (2008).
[42] *United States v. Evelyn Sineneng Smith*. December 9, 2019. *Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party*. Supremecourt.gov. https://www.supremecourt.gov/DocketPDF/19/19-67/124856/20191209115753057_19-67acVolokh.pdf
[43] Thomas Huff, interview by Jack Gigante, December 13, 2022.
[44] Ibid.
[45]Britannica, T. Editors of Encyclopaedia. "Roman dictator." *Encyclopedia Britannica*, May 27, 2022. https://www.britannica.com/topic/Roman-dictator.
[46] Samuel Issacharoff and Richard H. Pildes. "Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime." Oxford University Press and New York University School of Law 2004, I.CON, Volume 2, Number 2, 2004, pp. 296–333
[47] 323 US 214 (1944).
[48] Samuel Issacharoff and Richard H. Pildes. "Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime." 311.
[49] Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 4th ed. (Lawrence: University of Kansas, 1997): 256–295.
[50] Becky Little. "Korematsu Ruling on Japanese Internment: Condemned but Not Overruled." History.com. A&E Television Networks, June 27, 2018. https://www.history.com/news/korematsu-japanese-internment-supreme-court.
[51] 249 U.S. 47. (1918).
[52] 414 U.S. 105 (1973).
[53] 458 US 886 (1982)
[54] 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).
[55] Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", 819; 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).
[56] Thomas Huff, interview by Jack Gigante, December 13, 2022.
[57] Elizabeth Beaumont. "Rights of Military Personnel." Rights of Military Personnel, 2009. Accessed December 10, 2022. https://www.mtsu.edu/first-amendment/article/1131/rights-of-military-personnel#:~:text=Indicative%20of%20the%20military's%20special,unbecoming%20an%20officer%20and%20a.
[58] Franklin D. Roosevelt, Executive Order 8985 Establishing the Office of Censorship. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. https://www.presidency.ucsb.edu/node/210516.
[59] Jonathan Clarke. "Rhetoric before Reality: Loose Lips Sink Ships." *Foreign Affairs* 74, no. 5 (1995): 2–7. https://doi.org/10.2307/20047295.
[60]417 U.S. 733 (1974).
[61] Ibid.
[62] 249 US 47. (1918)
[63] No. 19-1392, 597 U.S. ___ (2022).
[64] Alicea, J. Joel "Dobbs Abortion Ruling Is a Triumph for Originalists." *City Journal*, June 24, 2022. https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists; Jud Cambell. "Natural Rights and the First Amendment." *The Yale Law Journal* 127, no. 2 (2017): 246–321. http://www.jstor.org/stable/45098034.
[65] Stone, "Abraham Lincoln's First Amendment," 19.
[66]142 S. Ct. 2228, 2242 (2022)
[67] 249 U.S. 494, (1951).
[68] James Madison. *Cong. Register, I, 423-37 (also reported in Gazette of the US., 10 and 13 June 1789).*

Works Cited

Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 5 The Collected Works of Abraham Lincoln 436, 437 (Roy P. Basler ed., 1953). 11 Robert E. Sterling, Civil War D

Alicea, J. Joel "Dobbs Abortion Ruling Is a Triumph for Originalists." *City Journal*, June 24, 2022. https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists.

Beaumont, Elizabeth. "Rights of Military Personnel." Rights of Military Personnel, 2009. Accessed December 10, 2022. https://www.mtsu.edu/first-amendment/article/1131/rights-of-military-personnel#:~:text=Indicative%20of%20the%20military's%20special,unbecoming%20an%20officer%20and%20a.

Braithwaite, Sharon. "Zelensky Refuses Us Offer to Evacuate, Saying 'I Need Ammunition, Not a Ride'." CNN. Cable News Network, February 26, 2022. https://www.cnn.com/2022/02/26/europe/ukraine-zelensky-evacuation-intl/index.html.

Brandenburg v Ohio, 395 US 444 (1969).

Britannica, T. Editors of Encyclopaedia. "Roman dictator." *Encyclopedia Britannica*, May 27, 2022. https://www.britannica.com/topic/Roman-dictator.

Cambell, Jud. "Natural Rights and the First Amendment." *The Yale Law Journal* 127, no. 2 (2017): 246–321. http://www.jstor.org/stable/45098034.

Clarke, Jonathan. "Rhetoric before Reality: Loose Lips Sink Ships." *Foreign Affairs* 74, no. 5 (1995): 2–7. https://doi.org/10.2307/20047295.

Dennis v US, 249 US 494 (1951)

Dobbs v Jackson Women's Health Organization, 142 S. Ct. 2228, 2242 (2022)

Emma Albright and Cameron Manley, "Zelensky Blasts Schroeder, Lobbies XI in New Push to Maximize Support," Worldcrunch (Worldcrunch, August 5, 2022),

Engelman, Ralph, and Carey Shenkman. *A Century of Repression: The Espionage Act and Freedom of the Press*. University of Illinois Press, 2022. http://www.jstor.org/stable/10.5406/j.ctv2vt03t6.

"Espionage Act of 1917," 15 June 1917.

Fisher, Louis. *Constitutional Conflicts Between Congress and the President*. 4th ed. (Lawrence: University of Kansas, 1997): 256–295.

Franklin D. Roosevelt, Executive Order 8985 Establishing the Office of Censorship. Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/210516.

Gitlow v The people of the State of New York, 268 US 652 (1925).

Guz, Serhiy. "Why Ukraine's New Media Law Threatens Press Freedom." (openDemocracy, November 7, 2022). https://www.opendemocracy.net/en/odr/ukraine-media-law-press-freedom/.

Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* 262 (1973).

Hess v Indiana, 414 US 105 (1973).

Huff, Thomas, interview by Jack Gigante, December 13, 2022.

John Stuart Mill. *On Liberty.* London: J.W. Parker and Son, 1859.

J. Matthew Gallman, *The North Fights the Civil War: The Home Front* 128 (1994).

Karl Rove, "Zelensky Defines Courage in Our Time," *The Wall Street Journal*, 2022.

Little, Becky. "Korematsu Ruling on Japanese Internment: Condemned but Not Overruled." History.com. A&E Television Networks, June 27, 2018. https://www.history.com/news/korematsu-japanese-internment-supreme-court.

Madison, James. *Cong. Register, I, 423-37 (also reported in Gazette of the US., 10 and 13 June 1789).*

NAACP v Claiborne Hardware Co., 458 US 886 (1982).

Parker v Levy, 417 U.S. 733 (1974).

Richer, Alanna Durkin. "Conviction Upheld for Woman Who Urged Boyfriend's Suicide." AP NEWS. Associated Press, February 6, 2019. https://apnews.com/article/north-america-us-supreme-court-ma-state -wire-us-news-ap-top-news-abd449bd66274f698e9ff4d4c2247a8e.

Samuel Issacharoff and Richard H. Pildes. "Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime." Oxford University Press and New York University School of Law 2004, I.CON, Volume 2, Number 2, 2004, pp. 296–333

Schenck v United States, 249 US 47. (1918).

Spitzer, Tanya B. "Sophie Scholl and the White Rose: The National WWII Museum: New Orleans." The National WWII Museum | New Orleans. The National World War II Museum, February 21, 2020. https://www.nationalww2museum. org/war/articles/sophie-scholl-and-white-rose.

Stone, Geoffrey R. "Abraham Lincoln's First Amendment," 78 *New York University Law Review* 1 (2003).

Tanenbaum, Robert S. "Preaching Terror: Free Speech or Wartime Incitement?," *American University Law Review* 55, no.3 (February 2006): 785-819.

Tebor, Celina. "Russia Increases Censorship with New Law: 15 Years in Jail for Calling Ukraine Invasion a 'War'." USA Today. Gannett Satellite Information Network, March 9, 2022. https://www.usatoday.com/story/news/world/ukraine/2022/03/08/russia-free-speech-press-criminalization-misinformation/9433112002/.

Troianovski, Anton, and Valeriya Safronova. "Russia Takes Censorship to New Extremes, Stifling War Coverage." The New York Times. The New York Times, March 4, 2022. https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html.

"Ukraine Bans pro-Russian TV Stations – DW – 02/03/2021," dw.com (Deutsche Welle, February 3, 2021), https://www.dw.com/en/ukraine-zelenskiy-bans-three-opposition-tv-stations/a-56438505.

"Ukraine's Orthodox Churches and the Fight for the Country's Soul." *The Economist*, The Economist Newspaper, 11 Dec. 2022, www.economist.com/europe/2022/12/11/ukraines-orthodox-churches-and-the-fight-for-the-countrys-soul?utm_campaign=r.the-economist-sunday-today&utm_medium=email.internal-newsletter.np&utm_source=salesforce-marketing-cloud&utm_term=12%2F11%2F2022&utm_id=1417334.

United States v Ali Al-Timimi, 1:04-cr-385 (LMB) (E.D. Va. Aug. 18, 2020).

United States v Evelyn Sineneng Smith. December 9, 2019. *Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party*. Supremecourt.gov. https://www.supremecourt.gov/DocketPDF/19/19-67/124856/20191209115753057_19-67acVolokh.pdf

United States v Williams, 553 U.S. 285 (2008).

Yates v US, 354 US 298 (1957).

Liability in the Digital Age: A Critical Examination of Twitter v Taamneh and the Supreme Court's Understanding of Content-Serving Algorithms

Martina Daniel, Jay Bowling, Sebastian Pallais-Aks | Columbia University

Abstract

Twitter v Taamneh (2017) considered whether Twitter, Google, and Facebook could be held secondarily liable for an ISIS terrorist attack under the Anti-Terrorism Act (ATA) for aiding and abetting, primarily via the defendants' content-serving recommendation algorithms. Plaintiffs argued that the sophistication of these algorithms was the central reason that defendants' involvement rose to the level of aiding and abetting, differentiating them from other truly passive services. This article critically scrutinizes whether the Court's opinion in granting summary dismissal of these claims reflected an accurate comprehension and characterization of these algorithms, their purpose, and what they achieve. If, in fact, the Court's understanding was flawed, it is possible that the evidence, when viewed through a more accurate lens, might indicate a more participative role by the defendants. This piece aims, therefore, to shed light on a series of judicial mischaracterizations that could significantly shift the legal narrative of this case, thereby providing reasoning for why this case deserved to go to trial where the sophisticated role of these algorithms could be accurately assessed.

The first section will thereby establish the intricacies of *Twitter v Taamneh*, secondary liability, and the legal history of liability of online platforms for actions taken by their algorithms. The subsequent section will examine the specific oversights of the decision, demonstrating the lack of understanding exhibited by the Supreme Court in its characterization of content-serving algorithms. The final section will propose how to fill this critical gap in the ability of our legal system to resolve disputes involving sophisticated digital-age technology.

Background on *Twitter v Taamneh* & Liability Considerations

On January 1st, 2017, Abdulkadir Masharipov killed 39 people and injured 69 others in carrying out a terrorist attack in support of the Islamic State of Iraq and Syria (ISIS), a designated foreign terrorist organization under statutory authority.[1] In *Twitter v Taamneh*,[2] the family of one of the individuals killed, Nawras Alassaf, filed a lawsuit against three major online platforms—Facebook, Twitter, and Google (as the owner of YouTube)—alleging that the three companies (hereafter, defendants) were secondarily liable for the attack under the Antiterrorism Act's section 2333(d)(2).[3] Alassaf's family (hereafter, plaintiffs) specifically argued that the defendants "knowingly" allowed ISIS to recruit, fundraise, and spread propaganda via their platforms and content-serving algorithms — even going so far as to allege that the defendants have "profited from the advertisements placed on ISIS' [content]."[4]

The 1990 Antiterrorism Act (ATA), of which Section 2333 is a part, aimed "to deter terrorism, provide justice for victims, [and] provide for an effective death penalty."[5] Section 2333(a) of the act enables individuals to bring civil lawsuits when an act of international terrorism directly affects them or their next of kin.[6] In 2016, the Justice Against Sponsors of Terrorism Act (JASTA) was enacted, adding to 2333(a) of the ATA with the edition of 2333(d)(2), establishing secondary liability for terrorist acts, stating that: "for an injury arising from an act of international terrorism [by] a foreign terrorist organization…liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance [to] the person who committed such an act of international terrorism."[7]

This modern common law understanding of secondary liability in the context of content-serving algorithms, like those at issue in *Twitter v Taamneh* arises, more specifically, from liability considerations in cases of copyright infringement, where there may be "imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer [the actor who is directly liable for an act], even if the defendant initially lacks knowledge of the infringement."[8] Further categorized as 'vicarious infringement,' such a concern arises when the defendant (a) is in a position to be a supervisor of the "infringing activity" and (b) possesses a "direct financial interest" in it.[9] Understanding the nature of secondary liability from its origins in copyright infringement is critical to understanding whether the role of the defendants in *Twitter v Taamneh* was substantive enough to earn such a label, especially considering that online platforms are indeed held liable for copyright infringement that occurs on their platforms.[10]

Viacom International Inc. v Youtube International Inc.[11] (2012) is an exemplary case of secondary liability involving copyright infringement, with the plaintiff's claims bearing striking similarities to those of the plaintiffs in *Twitter v Taamneh*. In this case, Viacom sued Youtube (and again its owner, Google) for permitting the upload of hundreds of thousands of videos containing content owned by Viacom without permission.[12] Anticlimactically, the parties involved in *Viacom* ultimately settled, leaving no judicial precedent for content-serving platforms to be under any definitive legal obligation to regulate their contents.[13] *Twitter* then picked up where *Viacom* left off — continuing to explore the legal question of whether Facebook, Twitter, and Google may be held liable for the content posted to their platforms. *Twitter v Taamneh*, however, complicated this question further with its claims under the Antiterrorism Act, especially due to the Act's nebulous language, thereby necessitating an examination of the recommendation algorithms at issue as well as a precise definition of the Act's language of "aid[ing] and abet[ting]" and "substantial assistance."[14]

Both the defendants and plaintiffs readily acknowledged the central role of content-serving algorithms in the generation of defendants' profits.[15] These content-serving algorithms are defined as the use of artificial intelligence in analyzing extensive caches of user data to provide individualized content and advertisements based on users' viewing tendencies and preferences — content that is barely screened by humans beforehand, if at all.[16] In this piece, we will call the algorithms at issue "content-serving algorithms" rather than using the decision's language of "recommendation algorithms," as we find that these algorithms do significantly more than merely recommend content on the basis of stated preferences; they actively 'serve up' content to users on the basis of extensive data about every user and the user profiles they resemble. Crucially, these algorithms are meant to automate what human editorial workers might otherwise do and what would be impossible to do at the scale that these platforms operate on: select and promote content that is most likely to ensure a user spends more time on the platform, utilizing extensive data sources to more effectively accomplish this purpose on an individualized scale.[17] Although both parties in *Twitter v Taamneh* acknowledged the vital role of these algorithms in generating company profits and platform engagement, plaintiffs emphasized that the algorithms simply went too far, resulting in defendants knowingly and directly enabling ISIS' efforts.[18]

When the plaintiffs first brought their case, the District Court dismissed the complaint on account of a failure to state a claim, but the Ninth Circuit reversed.[19] The Supreme Court noted the lack of definition within the statute for crucial terms ("aids and abets" and "substantial assistance") and ultimately took issue with the manner in which the Ninth Circuit defined these terms.[20] Both the Ninth Circuit and the Supreme Court determined that "aids and abets" may be defined via common law as "a conscious, voluntary, and culpable participation in another's wrongdoing" and agreed on the factors required for this definition, they departed in their reasoning of whether or not these factors were fulfilled.[21] Both the Ninth Circuit and the Supreme Court utilized a three-prong test, as instructed by Congress and established in *Halberstam v Welsh*, to determine whether Twitter's behavior constituted aiding and abetting, requiring that (1) the party assisted by the defendant engages directly in a "wrongful act that causes an injury"; (2) the defendant is "generally aware of his role as part of an overall illegal or tortious activity" when he provides the aid; and (3) the defendant "knowingly and substantially" assisted the injurious act.[22]

The Ninth Circuit ultimately found that all of these factors were entirely present: (1) ISIS, as the party assisted by the defendants, performed a wrongful and injurious act; (2) the defendants were generally aware that ISIS used their platforms for recruiting and advertising; (3) the companies' "general awareness" which they themselves acknowledged constituted "knowing assistance," fulfilling the first portion of the final factor.[23] Ultimately, the Ninth Circuit further found that this assistance was also "substantial," concluding that two factors—that the defendants' contributions were allegedly crucial to ISIS's expansion and that they were provided over a sizable period of time—outweighed the mitigating factors, primarily that the defendants did not intend to help ISIS, that they actually made some efforts to stop ISIS from taking advantage of their services, and that they had at most an "arms-length" relationship with ISIS.[24] The Ninth Circuit therefore reversed the opinion of the district court, determining that the allegations made were plausible and ought to go to trial.[25]

The Supreme Court aligned with the Ninth Circuit on the first two factors, assigning ISIS as the assisted party and acknowledging a general cognizance by the defendants of their use by ISIS.[26] However, the Supreme Court departed from the Ninth Circuit's reasoning on the third

factor, finding that the plaintiffs failed to demonstrate that the defendants "knowingly and substantially" assisted the attack to the extent necessary for them to be considered culpable participants in the Reina attack *specifically*.[27] In the Court's words, the internet companies did not "culpably 'associate [themselves] with' the Reina attack, 'participate in it as something that [they] wishe[d] to bring about,' or seek 'by [their] action to make it succeed.'"[28] Crucially, the Court established a direct comparison between content-serving platforms and email, cell phones, and the internet as a whole, noting that "we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large."[29] On May 18, 2023, in a unanimous decision, the Supreme Court reversed the judgment of the Ninth Circuit.[30]

This decision is merely the most recent development in a prolonged historical progression of the legal framework for the liability of tech companies for their algorithms. Since the advent of the Communications Decency Act of 1996 and its salient Section 230(c)(1), online service providers (and users of interactive computer services) have essentially possessed immunity from liability for publishing content provided by third-party users.[31] The act specifically states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[32] Section 230 emerged slightly over a decade after the birth of the internet, primarily in response to lawsuits against content providers primarily geared towards internet discussion — lawsuits that resulted in a confrontation with the role of internet service providers and whether they ought to be considered "publishers" or, alternatively, "distributors" of content.[33] The ultimate determination was that the latter was more appropriate, thereby establishing internet service providers as not liable for the content they *distribute*.[34]

There have been a series of cases challenging Section 230 and continuous urges for updates and reassessments of the Section's terms, but it remains the primary means for internet service providers to sidestep liability for the content published on their platforms.[35] (*Zeran v Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *Fair Hous. Council of San Fernando Valley v Roommates.com*, LLC, 521 F.3d 1157 (9th Cir. 2008), *Milgram v Orbitz Worldwide, LLC*, ESX-C-142-09 (N.J. Super. Ct. August 26, 2010)). Though the courts admit that the section has provided more sweeping protections from liability than were originally intended, they hold that it is the responsibility of Congress to pass legislation clarifying these terms—not that of the courts.[36] Despite the crucial nature of Section 230 for a majority of cases considering online platforms' liability, *Twitter v Taamneh* evaded the question by focusing narrowly on the provisions of the Antiterrorism Act, solely considering liability within the framework of this act, relegating Section 230 to a future step that was never reached.

Though Section 230 was not so much as mentioned in *Twitter v Taamneh*, it was the primary focus of the claim brought forward in *Gonzalez v Google*, a case decided in tandem with *Twitter*.[37] *Gonzalez* bore striking similarities to *Twitter*, entailing a group of ISIS terrorists who set off attacks throughout Paris, France, resulting in the deaths of 130 individuals, including Nohemi Gonzalez.[38] Gonzalez's family then sued Google, as owner of YouTube, under the Antiterrorism Act, accusing Google of liability in a direct and secondary manner for the terrorist attack that led to Gonzalez's death.[39] On the secondary liability front, the plaintiffs accused Google of "aid[ing] and abett[ing]" the Paris attacks by permitting ISIS to utilize YouTube to, "recruit members, plan terrorist attacks, issue terrorist threats, instill fear, and intimidate civilian populations," specifically utilizing recommendation algorithms to recommend ISIS-related videos to users.[40] The complaint further alleged direct liability due to Google's failure to entirely

remove ISIS-related content despite the company's authority and ability to do so.[41] In this manner, Gonzalez argued Google was not only a "unique and powerful tool of communication" but an "essential and integral part" of ISIS's terrorism.[42] The ruling ultimately stated merely that, "[The Court] decline[s] to address the application of Section 230 to a complaint that appears to state little, if any, plausible claim for relief. Instead, [The Court] vacate[s] the judgment below and remand[s] the case for Ninth Circuit to consider plaintiffs' complaint in light of [the Court's] decision in *Twitter*."[43]

Of particular interest is the fact that *Gonzalez v Google* and its relationship to Section 230 is a mere extension of the 2019 case *Force v Facebook,*[44] which originally established the concept that content-serving algorithms are wholly neutral—simply an aspect of content distribution and not of publishing— hereby making platforms not liable for terrorist content distributed by their sites and establishing a liability shield outside the content of the ATA.[45] In *Force*, the Supreme Court declined to hear the case.[46] In *Gonzalez v Google*, the Supreme Court built on *Force* by once more refusing to clarify the scope of Section 230 while also complicating the question with the ATA, thereby binding *Gonzalez v Google* to the same fate as *Twitter* under the Antiterrorism Act.

The intricacies underpinning *Twitter v Taamneh* and the history preceding it provide an avenue to reconsider and analyze the Courts' outdated understanding of algorithms in the present day. The ensuing section will therefore comprehensively examine the *Twitter v Taamneh decision* and its flawed understanding of content-serving algorithms in more specific terms. This section will elucidate that, regardless of the ultimate decision in *Twitter v Taamneh*, the decision contained significant misunderstandings and critical mischaracterizations of content-serving algorithms that possess profound implications for not just this case, but future cases involving online platforms' liability in a similar capacity. Upon delineating the decision's flaws, the final section will propose an approach for reconsidering the present legal framework for assessing the liability of online platforms for the effects of their technology: implementation of a specialized judicial system utilizing magistrate judges who have a technical understanding of the complexities and specifics of algorithms. Having such a system in place to handle legal questions relating to complex questions of technological innovation would have provided *Twitter v Taamneh* with a fair chance for its claims to be heard and a more definitive answer to questions of how the new age of algorithms ought to be approached and where its boundaries ought to be drawn.

Analyzing the Technological Understanding Demonstrated in the Court's Opinion

In its written opinion, the Court delved extensively into the functionalities of recommendation algorithms utilized by online platforms, aiming to determine whether the defendants offered substantial assistance.[47] Noteworthy is the Court's own concession that secondary liability under the ATA could be found if "the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable terror attack."[48] Hosting and presenting content may be a routine service, but automatically matching content most likely to entice user engagement, including terrorist content, is only achieved through the use of the most advanced proprietary algorithms and data stores developed for such a task. But, to determine if the Court's conditions were met, the function, purpose, and use of these content-serving algorithms must be precisely and accurately understood. This is why the Court's comprehension and characterization of such technology is critical to a legal determination of culpability. Accordingly, we consider three key descriptions of the defendant's technology at the center of the Court's opinion that are

clear mischaracterizations of said technology: that the content-serving algorithms treat all content the same[49]; that the defendants played only a "passive"[50] role due to the use of algorithms for serving content; and the comparison of defendant's platforms to entirely unrelated analog services like the US Postal Service and phone service providers.[51]

In the Court's first central mischaracterization of content-serving algorithm technology, the unanimous majority opinion stated that because the defendant's platforms treat all content the same in this case, meaning that they treat ISIS content "just like any other content,"[52] they can't be said to have aided and abetted ISIS specifically. In other words, because the algorithm examines all content, this constitutes equal treatment to both content from illegal actors and everyone else for that matter. This proposition by the Court can only be explained by a lack of understanding of the actual function and purpose of the recommendation algorithms employed by the defendants: to determine which content will be successful and *treat it differently* than other content. These algorithms, akin to human marketers, copywriters, and editors in traditional media companies, are designed not to treat all content equally, but instead to perform targeted segmentation of content based on vast data gathered about users; data from both their own platform and from user activity across the web.[53] [54] Leveraging this data, the algorithm identifies content most likely to engage specific users, which by definition causes some content to be seen less while actively selecting only certain content to promote.[55] Thus, the defendant's algorithms managed, with great efficiency, to pinpoint users who were most likely to engage with ISIS content. This approach is merely a more sophisticated and better-informed version of the methods used in segmented marketing and targeted advertising strategies—strategies that *differentiate* content based on user preferences and behaviors, not treat all content the same. The difference, however, is that the algorithms are meticulously engineered to exceed human capacity in discerning and promoting content, amplifying billions of specific pieces while dampening at least as many others. As the Brookings Institute explains, "Whereas editors once decided which stories should receive the broadest reach, today recommender systems determine what content users encounter on online platforms—and what information enjoys mass distribution."[56] Brookings goes on to explain how most content is filtered out, rather than kept in for recommendation: "After checking to ensure the inventory doesn't include content that shouldn't be shared, recommender systems will then carry out a "candidate generation" or "retrieval" step, reducing the thousands, millions, or even billions of pieces of content available in the inventory to a more manageable number."[57] This thereby demonstrates that the Court erroneously inferred that the algorithms' *consideration* of all content meant that the defendants treated all content the same and ignored the sophisticated content differentiation the algorithms undertake to identify the most 'successful' pieces for individual users. *Most* content is not matched, as the Court suggests, but only a select array of content, calculated to achieve the highest engagement, is actually presented to users.[58] Online platforms' amplification of select content suggests that the algorithm determined it fell into this category of content with higher success potential, clearly indicative of a greater differentiation in content dissemination than the Court claims.

While the Court understood that the algorithm operates based on user preferences, this is a vast oversimplification and overlooks the depth and intricacy of their operation. It's not merely about pairing content with obvious and direct interests, like connecting a cooking enthusiast with generic cooking recipes. Instead, the algorithms delve into a vast web of indirect data points, gleaning insights not just from explicit interactions on the platform, but from a plethora of activities both on and off the platform.[59] For instance, a user isn't shown ISIS content only when

they've directly expressed an interest in extremism or terrorism. Rather, they can be targeted based on a subset of data points that overlap with users who *have* engaged with such content, or just similar content. The algorithm identifies these nuanced correlations, making deeply informed predictions about what specific content a user might find engaging—even if that user has never directly shown an interest in it. This is why it is so effective at recruiting in particular.[60] This intricate process is a far cry from simple preference matching; it's a sophisticated prediction with the ultimate goal of maximizing user engagement and platform growth.[61] This fundamental mischaracterization seems to have directed the Court to incorrect conclusions about the actual functionalities of these algorithms, thereby necessarily affecting their ruling.

It stands to reason that a more nuanced understanding of the defendants' content-serving algorithms could alter the legal interpretation of the case at hand. Given the detailed understanding that ISIS had of the way these algorithms function — differentiating content that is seen from that which is not — they deliberately leveraged this knowledge to maximize their outreach. This entailed establishing professional-grade film production and social media content management to produce content specifically tailored to engage and proliferate effectively through the algorithms used by the defendants, a strategy that not only helped broaden their base of influence but also opened up new streams of revenue.[62] Indeed, they were utilizing the very services that these platforms exist to provide in a bid to achieve a broader reach and foster greater engagement, objectives intrinsically aligned with the operational purposes of these algorithms. In this light, the defendants can be seen as providing a service that directly augmented ISIS's ideological messaging, recruitment, and revenue through the functionality of their algorithms, thereby raising questions regarding the substantial assistance provided to ISIS, and possibly leading to a different legal conclusion grounded in a more precise understanding of the technology at play.

In addition to the mischaracterization centered around the way recommendation algorithms treat content, the court's depiction of online platforms as "passive"[63] due to their use of these algorithms presents another significant error in the Court's understanding. This characterization seems to arise from the mistaken belief that the platforms do not actively direct and supervise the individual actions executed by these algorithms. In actuality, these algorithms are actively designed and continuously honed by platforms to curate user experiences with pinpoint accuracy, driven by clearly prescribed objectives set by the platforms and utilizing vast data pools to make decisions on content promotion on behalf of the defendants. These capabilities demonstrate a level of hyperactivity rather than passivity, constantly updating what content is seen or not seen via big-data-driven algorithms that greatly surpass human performance.[64] This mischaracterization equating algorithm use with passivity risks shielding organizations from liability on the grounds that they deployed algorithms instead of human intervention for content moderation, fundamentally skewing legal analyses by calling this algorithmic approach "passive."[65] It is thus legally imperative to more accurately state the proactive and dynamic nature of these algorithms in shaping what content is seen by what users, a critical nuance missed in the court's current evaluation. A comprehensive understanding of the intricate operations and the active role of content-serving algorithms—created and continually optimized by the defendants—should, therefore, stand central in legal analyses, influencing liability determinations in substantial ways—something that could be examined more thoroughly at trial.

To further demonstrate this confusion: the Court's contention that online platforms are similar to "mostly passive actors like banks" who should not "become liable for all of their customers' crimes by virtue of carrying out routine transactions" is examined more closely.[66] The legal obligations of banks provide a stark contrast that are not comparable to the defendant's obligations, despite the court's comparison. For instance, if an American bank treated ISIS's funds and transactions like any other customer's, as the Court suggests the defendants should treat content, it would certainly be guilty of violating anti-money laundering laws such as the Bank Secrecy Act and the USA PATRIOT Act. In *United States v HSBC Holdings PLC.*, HSBC was fined $1.8 billion for precisely such negligence. While these banking regulations do not apply directly to online platforms, they underscore the fallacy of the Court's analogy. Banks, regardless of whether one considers them passive or not, are held accountable for monitoring, blocking, and reporting criminal transactions. This legal precedent challenges the notion that mere passivity or equal treatment of all content or transactions must support a shield against culpable liability, a principle that, if applied to the defendant's platforms, could bring a different legal conclusion.

A final mischaracterization emerges from the Court's comparison of online platforms to traditional communication services like phone or postal mail:

> But, again, if aiding-and-abetting liability were taken too far, then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer. *And those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein*.[67] (emphasis added)

And later:

> In this case, it is enough that there is no allegation that the platforms here do more than transmit information by billions of people, most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas.[68]

This recurring analogy by the court fails to grasp the exceptional capabilities of the defendants' content-serving algorithms and the profound differences this creates between these services. The court overlooks the explicit disparities in the nature of the intended audience and reach of these communication forms. Traditionally, one would never place a phone call or dispatch a piece of mail with the anticipation that its content would be broadcasted publicly, reaching both acquaintances and unknown individuals globally, all the while remaining unaware of its audience or the criteria determining its recipients. This stark difference renders the court's comparison fundamentally flawed. Let's delve deeper into why this is the case. These platforms and their algorithms absolutely do more than "transmit information by billions of people,"[69] and neither the postal service nor phone service providers ever employed content-serving algorithms to match users not specifically looking for a particular letter or call not directed to them. In these analog-world services, the user directs communication to specific recipients and the content of the communication is not used to identify and communicate to users the sender never intended, such as how content is examined by the defendant's algorithms to match it with users. That is, not the US Postal Service, email, or phone are social broadcasting platforms. Unlike these personal communication services, which operate on a one-to-one or one-to-few basis, content-serving platforms actively spread content to strangers and provide a forum for its broad, international, and publicly available dissemination. Content-serving algorithms continuously take in and analyze vast information about users and content, actively identifying those who might be interested in particular messages. To liken them to the postal service, for example, overlooks the very nature of these algorithms, which do more than merely transport information to specific,

intended recipients. They determine what every individual user sees or does not, replicating content to thousands of people around the world if so determined. The comparison erroneously equates a platform that employs sophisticated AI capabilities to automate and optimize who is exposed to what content with services whose knowledge of their customers and the communication being transported has no effect on its destination, like phone and mail. Frankly, the Court failed to make the basic distinction between mass media and personal communication services. This mischaracterization is not only technically flawed but also legally problematic, as it suggests a parity in liability between two fundamentally different types of service providers.

With this analysis demonstrating the imprecise understanding of the defendant's technology by the courts, how could the correction of these mischaracterizations of the content-serving algorithm technology potentially change the legal analysis and decision? The best way to examine this question is to the Court's reliance on *Halberstam*[70], the leading source of precedent defining the framework for secondary liability from aiding and abetting.[71] This case invites a comparison between the roles of Hamilton and the defendants. Once we correct the Court's mischaracterizations of the recommendation algorithms used by the defendants, a different dynamic between the defendants and ISIS begins to appear. For comparison, Hamilton was aware of Welch's illicit burglaries and actively helped him profit from them as a sort of business manager, though did not help perform the burglaries herself. This is comparable to the defendant's admittedly being aware of illegal ISIS content and their illegal activities as an explicitly designated foreign terrorist organization. However, Hamilton was not aware of or involved in the tortious act by Welch: murdering his victim during a burglary.[72] This is comparable (and suggests a parallel recognized by the Ninth Circuit in this case but not by the Supreme Court), to defendants not being aware of or directly involved in the Reina attack. Yet, Hamilton was found secondarily liable, and Taamneh's complaint wasn't even allowed to be considered at trial. A trial would have created space for comprehensive expert testimony, meticulously examined by attorneys from both sides. This would improve the court's comprehension of the defendant's algorithmic technology and facilitate the application of law to more precise facts. By accurately capturing the role these algorithms play, along with the defendants' oversight, it becomes more evident that the defendants provide a fertile environment for ISIS to effectively spread its ideological propaganda, recruit members, and raise funds. Like Linda Hamilton in *Halberstam*[73], the defendants here were not directly involved in said illegal activities; they *were* aware of the illegal activity and content, and, contrary to the Court's opinion, the defendant's, via their advanced content-matching algorithms, actively helped facilitate ongoing illegal activity as their platforms were used for recruitment, messaging, and fundraising–key operations of a terrorist organization. Further, these activities were made more efficient through the use of the defendants' platforms and their content-serving algorithms. Unlike "mere bystanders,"[74] these algorithms, which are created and governed by the defendants, can be predisposed to prioritize extremist content. This inclination arises from patterns of user interactions that the algorithms are trained on, coupled with the design decisions made during their development. As ISIS tailors its content to leverage these algorithmic tendencies, it's clear that they've exploited the unique advantages these platforms provide. The persistent and adaptive nature of these algorithms, even if unintended by the defendants, does aid the amplification of extremist messages.

Simultaneously, these algorithms serve to boost the defendants' key profitability metrics like user retention and session duration, aligning platform profitability with increased user

engagement. This amplification by the platform's algorithms, while perhaps not a direct endorsement, provides a louder voice and reach for ISIS messaging.

Lastly, the analysis of these three recurring and prominent misapprehensions found in the opinion elucidates why the Ninth Circuit determined that, as we also argue, these characterizations should be examined by a finder of fact at trial—when they reversed the dismissal of the district court. To put it as succinctly as possible and capture the underlying point made by correcting each of these misstated characterizations: automating actions with sophisticated AI does not absolve its owners and developers from the culpability of having performed those actions, illustrating once more why an accurate understanding of the function and purpose (that is to say, what they actually do and are designed to do) of the content-serving algorithm technology is paramount in legal determinations.

In the digital era where more and more products and services are provided by algorithms rather than humans, the fact that the court system is unable to accurately analyze how advanced technology is used nor swiftly adapt to technological advancements suggests the need for some institutional solution that can account for the technological expertise to make accurate judgments. A legal framework that would ensure that justice is appropriately administered in cases involving complex technologies, rather than risking mischaracterization and misunderstanding that could inadvertently provide extensive and inappropriate shielding from liability.

Proposal for New Framework Surrounding Content-Serving Algorithms

Truly appreciating the power of online platforms in serving content to consumers necessitates two major changes to the status quo offered by *Gonzalez* and *Twitter*. First, as the previous section argues, the cases that might determine platforms' liability under statutes like the Anti-Terrorism Act ought to go to trial and receive the standards of fact-finding required of their analog counterparts. However, this will only partially solve the challenge of understanding how online platforms fit in a non-technical regulatory landscape. Research on tax law cases has shown that juror knowledge about aspects of the law can affect how damages are awarded, clearly evidencing the importance of cultivating a judicial system with appropriate subject knowledge to decide cases fairly.[75] In oral argument, Justice Kagan conceded that the Supreme Court justices are not "the nine greatest experts on the internet," a potential indicator of the justices' reluctance to chart a new path on platform liability.[76] In order to ensure a fair adjudication of this issue, standardized frameworks, and specialized institutional knowledge must be developed so that petitioners and platforms are treated fairly in court. Fortunately, the United States has a long history of creating specialized judicial systems through the Article I tribunals framework.

The role of tribunals was first rigorously defined in the 1932 Supreme Court case *Crowell v Benson*, which advanced a framework for the use of tribunals created under Article I of the Constitution. In *Crowell*, one of Benson's employees (Knudsen) was injured and awarded a payment by Crowell (a deputy commissioner of the US Employees' Compensation Commission) under the Longshoremen's and Harbor Workers' Compensation Act. Benson sued Crowell, seeking to enjoin enforcement of the payment on the grounds that there had been no employment relationship at the time that Knudsen was hurt. After reviewing the facts de novo (through a new fact-finding trial), a federal court agreed and issued an order restraining the award. Crowell appealed to the Supreme Court, which ruled that while Congress had delegated judicial authority to the deputy commissioner, the lack of an employment relationship meant that the

Compensation Act would not apply and the case would exist outside the deputy commissioner's authority.[77]

The Supreme Court's decision in *Crowell* forms the basis for the creation of Article I tribunals by the US Congress. The deputy commissioner's role is an example of one of these – his role as an adjudicator with original jurisdiction over the case was created by the Longshoremen's and Harbor Workers' Compensation Act. This was done under the authority granted to Congress under Article I of the Constitution, rather than the Constitution's specific instructions in Article III on the organization of the federal judiciary. This eliminates the need for life terms and Senate confirmation for Article I judges. The Supreme court clarified that these tribunals are subordinate to the federal court system created under Article III and can help execute many of the responsibilities of the federal judiciary. The *Crowell* model was used to expand the modern administrative state, with the New Deal leading to the creation of a variety of regulatory agencies that took on a judicial role within the executive branch.[78]

The most useful type of Article I tribunal for the regulation of online platforms, however, is the framework offered by the magistrate judge system. Initially created by the Federal Magistrates Act of 1968, with their role expanded upon by the Federal Magistrate Act of 1979, magistrates have taken on an enormous role within the federal judiciary since the inception of the role.[79] Magistrates are selected by district court judges and do not enjoy life terms or salary protections like federal judges do.[80] In addition to handling many pretrial matters, magistrates are allowed to conduct both civil and criminal trials (excluding felony trials), findings of fact, and other court business.[81] This wide range of duties means that "in misdemeanor matters and in civil cases, it is often the Magistrate Judge -- and, sometimes, only the Magistrate Judge -- with whom the litigants and their counsel will meet and interact as their case is litigated in the federal trial court."[82]

With these powers, magistrate judges are an effective tool for improving the process for evaluating the liability of online platforms. Magistrate judges with technical expertise could be appointed to conduct court business for platform regulation. They would thereby be able to hear civil trials like the ones that ought to have taken place in *Gonzalez v Google* and *Twitter v Taamneh* or conduct the fact-finding required for an adequately informed trial. Even if a case must go to a jury trial or is appealed, the findings of fact and opinion issued by an expert magistrate judge will be indispensable to the further consideration of legal questions surrounding online platforms.

There is historical precedent for developing a system of specialist magistrate judges to handle specific case types. In a 1985 study on the role of Magistrate Judges in the federal judiciary, the Federal Judicial Center identified a number of district courts that had instituted the "specialist" model for magistrate judge work. Often, these "specialist" magistrate judges were designated to adjudicate social security and/or prisoner cases, and had specific expertise to handle these types of cases.[83] For example, in the Northern District of Georgia, "magistrates receive all Social Security and prisoner cases and write a report and recommendation for a judge. The judges feel that it is not effective to have a judge review the matter before it is assigned to a magistrate."[84] The same type of model could be employed for cases pertaining to the digital world – a new class of "digital specialist" magistrate judges could be appointed by a district court, with their limited terms providing opportunities to reevaluate the currency of their knowledge.

There are multiple paths for the implementation of a magistrate system equipped to handle the legal questions presented by an increasingly online citizenry. District courts can begin

almost immediately, appointing magistrate judges with technical expertise and assigning them to adjudicate cases concerning online platforms, instituting the specialist model proposed above at the district level as is done now. The Northern District of California, whose jurisdiction includes Silicon Valley, has already begun to do this; several district magistrate judges have backgrounds in patent law and other legal fields with significant technical knowledge requirements.[85,86,87] Unfortunately, the discretion of individual districts is insufficient to ensure that cases in all districts are treated with this level of expertise. A combination of legislation and judicial rulemaking are required to codify these procedures across the country. Congress ought to compel the appointment of magistrate judges with technical expertise, and a combination of laws and judicial regulations should be created to ensure that any case involving online platforms' technology is subjected to rigorous fact-finding by a qualified magistrate judge.

Content-serving algorithms are incredibly sophisticated. Current law expects these platforms to suppress copyrighted and sex-trafficking-related content, demonstrating their ability to intelligently regulate content. Google and Twitter may still have won even if they had faced rigorous fact-finding in civil court before an Article I or Article III judge. But like with any other case, that doesn't waive petitioners' rights to a fair trial. The court system is complicated; the creation of new systems is a lengthy process and will take time to get right. Even so, rethinking how our judiciary considers cases in the digital world is necessary to ensure that the civil liberties we have come to expect in the real world extend into the internet. It's worth the effort, and the time to start was yesterday. Only time will tell if the Supreme Court uses the door left to them in Justice Jackson's concurring opinion[88] to allow this to happen.

[1] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 2, (2023).
[2] *Twitter, Inc. v Taamneh et al.*, 598 US ___ (2023).
[3] Ibid, 2-3.
[4] Ibid, 1.
[5] Antiterrorism Act ("ATA"), 101-519, § 132, 104 Stat. 2240, 2250 (1990).
[6] Ibid.
[7] Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016).
[8] *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005).
[9] *A&M Records, Inc. v Napster, Inc*., 239 F.3d 1004, 1022 (9th Cir. 2001).
[10] Digital Media Law Project, "Publishing the Statements and Content of Others" (Digital Media Law Project 2023), online at https://www.dmlp.org/legal-guide/publishing-statements-and-content-others (visited October 2, 2023).
[11] *Viacom Int'l Inc. v Youtube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).
[12] Ibid.
[13] Ibid.
[14] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 4, 8, (2023).
[15] Ibid, 5.
[16] The Pittsburgh Statement, *The Impact of Artificial Intelligence on the Future of Workforces in the European Union and the United States of America* (The White House 2022), online at https://www.whitehouse.gov/cea/written- materials/2022/12/05/the-impact-of-artificial-intelligence/ (visited September 23, 2023).
[17] Ibid.
[18] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 5, (2023).
[19] Ibid, 6.
[20] Ibid, 8.
[21] Ibid, 17.
[22] Ibid, 10.
[23] Ibid, 27-29.
[24] Ibid, 27-28.
[25] Ibid, 6.
[26] Ibid, 21.
[27] Ibid, 25.
[28] Ibid, 22.
[29] Ibid, 23.
[30] Ibid, 31.
[31] Valerie C. Brannon and Eric N. Holmes, *Section 230: An Overview* (Congressional Research Service 2021), online at https://crsreports.congress.gov/product/pdf/R/R46751 (visited September 23, 2023).
[32] Communications Decency Act 47 U.S.C. §230 (1996).
[33] Valerie C. Brannon and Eric N. Holmes, *Section 230: An Overview* (Congressional Research Service 2021), online at https://crsreports.congress.gov/product/pdf/R/R46751 (visited September 23, 2023).
[34] Ibid.
[35] Ibid.
[36] Valerie C. Brannon and Eric N. Holmes, *Section 230: An Overview* (Congressional Research Service 2021), online at https://crsreports.congress.gov/product/pdf/R/R46751 (visited September 23, 2023).
[37] *Gonzalez v Google LLC*, 598 US 617, 3, (2023).
[38] Ibid, 1.
[39] Ibid, 1-2.
[40] Oyez, *Gonzalez v Google LLC* (Oyez 2023), online at https://www.oyez.org/cases/2022/21-1333 (visited September 23, 2023).
[41] Yue Wu and Wentao Yang, "Gonzalez v Google LLC" Cornell Legal Information Institute (Cornell Law School 2023), online at https://www.law.cornell.edu/supct/cert/21-1333#:~:text=Based%20on%20the%20 aforementioned%20acts,complaint%20pursuant%20to%2047%20U.S.C (visited September 23, 2023).
[42] Ibid.
[43] *Gonzalez v Google LLC*, 598 US 617, 3 (2023).
[44] *Force v Facebook, Inc.*, No. 18-397 (2d Cir. 2019).

[45] Ibid.
[46] Ibid.
[47] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 4-5, 19, 23-24, 28 (2023).
[48] Ibid, 26.
[49] Ibid, 22-23
[50] Ibid, 5, 15, 23-24
[51] Ibid, 13, 23, 26-27
[52] Ibid, 22
[53] Dennis Anon, "How to Stop Cookies from Tracking You" (Privacy.net 2018), online at https://privacy.net/stop-cookies-tracking/ (visited September 12, 2023).
[54] Sam Schechner and Mark Secada, "You Give Apps Sensitive Personal Information. Then They Tell Facebook." (The Wall Street Journal 2019), online at https://www.wsj.com/articles/you-give-apps-sensitive-personal-information-then- they-tell-facebook-11550851636 (visited September 12, 2023).
[55] Meserole, Chris. "How do recommender systems work on digital platforms?" (Brookings Institution 2022), online at https://www.brookings.edu/articles/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms/ (visited October 1, 2023).
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Sydell, Laura. "Pro-ISIS Messages Create Dilemma For Social Media Companies" (NPR 2015), online at https://www.npr.org/sections/alltechconsidered/2015/01/29/382435536/pro-isis-messages-create-dilemma-for-social-media-companies (visited September 12, 2023).
[61] Meserole, Chris. "How do recommender systems work on digital platforms?" (Brookings Institution 2022), online at https://www.brookings.edu/articles/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms/ (visited October 1, 2023).
[62] Irshaid, Faisal. "How Isis is spreading its message online" (BBC News 2014), online at https://www.bbc.com/news/world-middle-east-27912569 (visited September 12, 2023).
[63] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 5, 15, 23-24 (2023).
[64] Meserole, Chris. "How do recommender systems work on digital platforms?" (Brookings Institution 2022), online at https://www.brookings.edu/articles/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms/ (visited October 1, 2023).
[65] *Twitter, Inc. v Taamneh et al.*, 598 US ___, 15, 23-24 (2023).
[66] Ibid, 15.
[67] Ibid, 13.
[68] Ibid, 26.
[69] Ibid, 26-27.
[70] Ibid, 8-12.
[71] Ibid, 21.
[72] Ibid, 9.
[73] Ibid, 9.
[74] Ibid, 3, 24.
[75] Church, Bryan K., et al. "The Impact of Juror Knowledge of Deductibility and Defendants' Tax Rates on Punitive Damages Awards: Experimental Evidence." vol. 44 no. 1 Journal of the American Taxation Association, 7 (Spring 2022).
[76] Oral Argument, *Gonzalez v Google*, 598 US ___, Dkt. No 21-1333, at *43:13, available at https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333.
[77] *Crowell v Benson* 285 US 22 (1932).
[78] Fallon, Richard H. "Of Legislative Courts, Administrative Agencies, and Article III." vol. 101, no. 5 Harvard Law Review 915, 925 (1988).
[79] *Article I Adjuncts to Article III Courts*, Constitution Annotated (Library of Congress 2022), online at https://constitution.congress.gov/browse/essay/artIII-S1-9-7/ALDE_00013610/ (visited 31 July 2023).
[80] 28 USC § 631
[81] 28 USC § 636

[82] McCabe, Peter G., "A Guide to the Federal Magistrate Judges System," *Federal Bar Association*, i (2016).
[83] Seron, Carroll. "The Roles of Magistrates – Nine Case Studies" *Federal Judicial Center*, 35–46 (1985).
[84] Ibid, 38.
[85] "DeMarchi, Virginia." *United States District Court, Northern District of California*, online at https://www.cand.uscourts.gov/judges/demarchi-virginia-vkd/ (visited July 31, 2023).
[86] "Hixson, Thomas S." *United States District Court, Northern District of California*, online at https://www.cand.uscourts.gov/judges/hixson-thomas-s-tsh/ (visited July 31, 2023).
[87] "Kang, Peter H." *United States District Court, Northern District of California*, online at https://www.cand.uscourts.gov/judges/peter-h-kang-phk/ (visited July 31, 2023).
[88] Twitter, Inc. v Taamneh, 598 U.S. ___ 2023 (Jackson, J., concurring).

Works Cited

28 USC § 631.

28 USC § 636.

A&M Records, Inc. v Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001).

Antiterrorism Act ("ATA"), 101-519, § 132, 104 Stat. 2240, 2250 (1990).

Anon, Dennis. "How cookies track you online and how to stop them" (Privacy.net 2018), online at https://privacy.net/stop-cookies-tracking/ (visited September 12, 2023).

Article I Adjuncts to Article III Courts, Constitution Annotated (Library of Congress 2022), online at https://constitution.congress.gov/browse/essay/artIII-S1-9-7/ALDE_00013610/ (visited 31 July 2023).

Brannon, Valerie C. et al., *Section 230: An Overview* (Congressional Research Service 2021), https://crsreports.congress.gov/product/pdf/R/R46751 (visited September 23, 2023).

Church, Bryan K., et al. "The Impact of Juror Knowledge of Deductibility and Defendants' Tax Rates on Punitive Damages Awards: Experimental Evidence." vol. 44 no. 1 Journal of the American Taxation Association, 7, 7 (Spring 2022).

Communications Decency Act 47 U.S.C. §230 (1996).

Crowell v Benson 285 US 22 (1932).

"DeMarchi, Virginia." United States District Court, Northern District of California, online at https://www.cand.uscourts.gov/judges/demarchi-virginia-vkd/ (visited July 31, 2023).

Digital Media Law Project, "Publishing the Statements and Content of Others" (Digital Media Law Project 2023), online at https://www.dmlp.org/legal-guide/publishing-statements-and-content-others (visited October 2, 2023).

Fallon, Richard H. "Of Legislative Courts, Administrative Agencies, and Article III." vol. 101, no. 5 Harvard Law Review 915, 925 (1988).

Force v Facebook, Inc., No. 18-397 (2d Cir. 2019).

Gonzalez v Google LLC, 598 US 617, (2023).

Oral Argument, *Gonzalez v Google*, 598 US ___, Dkt. No 21-1333, at *43:13, available at https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333.

"Hixson, Thomas S." United States District Court, Northern District of California, online at https://www.cand.uscourts.gov/judges/hixson-thomas-s-tsh/ (visited July 31, 2023).

Irshaid, Faisal. "How Isis is spreading its message online." (BBC 2014), online at https://www.bbc.com/news/world-middle-east-27912569 (visited September 12, 2023).

Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016).

"Kang, Peter H." United States District Court, Northern District of California, online at https://www.cand.uscourts.gov/judges/peter-h-kang-phk/ (visited July 31, 2023).

McCabe, Peter G., "A Guide to the Federal Magistrate Judges System," *Federal Bar Association*, i (2016).

Meserole, Chris. "How do recommender systems work on digital platforms?" (Brookings Institution 2022), https://www.brookings.edu/articles/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms/ (visited October 1, 2023).

Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd., 545 U.S. 913, 930 n.9 (2005).

Schechner, Sam, and Mark Secada. "You Give Apps Sensitive Personal Information. Then They Tell Facebook." (The Wall Street Journal 2019), online at https://www.wsj.com/articles/you-give-apps-sensitive-personal-information-then-they-tell-facebook-11550851636 (visited September 12, 2023).

Seron, Carroll. "The Roles of Magistrates – Nine Case Studies," Federal Judicial Center, 35–46 (1985).

Sydell, Laura. "Pro-ISIS Messages Create Dilemma For Social Media Companies" (NPR 2015), https://www.npr.org/sections/alltechconsidered/2015/01/29/382435536/pro-isis-messages-create-dilemma-for-social-media-companies.

The Pittsburgh Statement, *The Impact of Artificial Intelligence on the Future of Workforces in the European Union and the United States of America* (The White House 2022), https://www.whitehouse.gov/cea/written-materials/2022/12/05

Twitter, Inc. v Taamneh et al., 598 US ___, 2023.

Twitter, Inc. v Taamneh et al., 598 U.S. ___, 2023 (Jackson, J., concurring).

Viacom Int'l Inc. v Youtube, Inc., 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

Wu, Yue et. al, "Gonzalez v Google LLC," Cornell Legal Information Institute (Cornell Law School 2023)