

Dedicated to Judah Marans '11

We are incredibly grateful to the Brandeis Law Journal's founder, Judah, for creating this forum for discussion and learning in and around the legal field. His creation of the Journal enables and empowers us to do our work and learn today. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. Judah's contribution to the Brandeis community will forever be remembered and greatly appreciated. We are honored to continue this legacy and maintain this incredible and vibrant forum for legal discussion and debate. We extend our deepest sympathies to his family and friends throughout the Brandeis community. May his memory be a blessing.

Mission Statement

The *Brandeis University Law Journal* aims to provide Brandeis University with the opportunity to contribute to discussions of law and law-related topics with the publication of undergraduate scholarship. We hope to aid in the furtherance of Brandeis University's motto of "truth even unto its innermost parts" through publishing rigorously researched articles and engaging in respectful, thoughtful, and insightful debates. This journal is both a publication and a constant work in progress as we are grounded in an undergraduate academic environment and constantly trying to learn, grow and improve. Our journal provides a platform for intellectual growth and debate where academic scholarship can flourish. We focus on academic excellence, encouraging expressions of scholarship, and encouragement of educational purposes.

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Brandeis University Law Journal ©2023

ISSN: 22154-4468

e-ISSN: 2836-7251



Brandeis University Law Journal

Spring 2023 VOLUME 10 ISSUE/NO. 2

Brandeis University Law Journal ©2023

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Editor-in-Chief's Letter

Dear Reader,

Your Executive Board is proud to present the Spring 2023 issue of the Brandeis University Law Journal. In line with our journal's mission, this issue features five undergraduate-penned articles exploring important legal questions. These articles reckon with issues from the international community's capacity to hold nations accountable for potential war crimes to a historical review of New York state's conspicuous service laws, and an op-ed advancing an original super-statute that restores voting rights to the formerly incarcerated.

The Brandeis University Law Journal is unique in two respects. It is the first, and remains among the only, law journals in the country that is unaffiliated with a law school; and it is written, edited, and published by undergraduate students. As I often find myself repeating to new readers: this is a local operation. This journal is produced by a body of dedicated undergraduates who voluntarily contribute their scarce time to advance Brandeisian undergraduate scholarship in national discussions concerning the law.

The production of this issue would not have been possible without the contributions of our authors. Their hard work in writing these five articles and their willingness to routinely revisit their work over the course of our rigorous editing process is deserving of utmost praise. Additionally, our dedicated team of editors, who have so generously lent their time and skill to edit these articles is vital to maintaining the quality of writing presented in the following pages. Their contributions are invaluable, and the Executive Board is indebted to their hard work.

The current members of the Executive Board are worthy of many thanks, as their work in making the operations of the Journal run smoothly have made this transitional semester much easier than it may have otherwise been. Subsequently, we wish to thank the former members of the Executive Board, especially our former Editor-in-Chief and Copy Chief, Sophia Reiss and Lauren Davis. We will miss your guiding hands and are ever aware that were it not for Sophia's determination, this journal may have never been revived.

The Executive Board would also like to thank our faculty advisors, Professors Breen and Kabrhel, whose expertise has been essential to keeping the journal faithful to its original mission established by Judah Marans. Furthermore, we thank the Student Union's Allocation Board for contributing the funds needed to publish our Journal.

Lastly, on a personal note, I would like to thank my Copy Chief, Emanuel Glinisky. Manny, you are my editorial-rock. I could not do this job without you. Your dedication to our work, trust in my leadership, and willingness to always be candid have made me a better leader. Thank you.

Sincerely yours,

Gonny D. Nir
Editor-in-Chief



**Antitrust: What is it Good For? The Story of a Failed
Merger Between Penguin Random House and Simon &
Schuster and its Implications for the Labor Market**

Gonny D. Nir¹

For the last forty years, antitrust cases have largely been argued on the basis of consumer welfare. This basis has enabled firms to excuse practices—no matter how pernicious—if they can show that such practices reduce prices or increase the value of the goods and services they offer to consumers. In the fall of 2021, the Department of Justice filed a complaint which alleged that a proposed merger between Penguin Random House LLC and Simon & Schuster Inc. improperly stifled competition in the market for best-selling books and reduced author advancements within the same market. In December of 2022, the United States District Court for the District of Columbia enjoined the DOJ's complaint. This article examines the threat that monopsonies present in labor markets; it argues that a shift in antitrust enforcers' focus from the sell side of a market to its buy side can bolster economic output and empower the labor force.

I. The Details Behind the Proposed \$2.2 Billion Deal

In November of 2020, Penguin Random House (PRH), a wholly-owned subsidiary of the German media mogul Bertelsmann SE & Co., announced its bid to acquire Simon &

¹ Brandeis University Undergraduate, Class of 2025, Editor-in-Chief of the Brandeis University Law Journal.



Schuster Inc. (S&S) from its parent company ViacomCBS Inc.² PRH proposed to buy S&S for \$2.175 billion, a reported “premium” against other bidders looking to purchase the prestigious publishing house.³ At the time of the acquisition’s announcement, PRH—itsself a product of a 2013 merger between Penguin and Random House—was, and remains to be, the largest book publisher in the United States.⁴ In its complaint filed in the District of Columbia in November of 2021, the Antitrust Division of the Department of Justice recounted PRH’s staggering extent of market share in US markets for best-selling books. The complaint uncovered that in the fiscal year of 2020, PRH, through its ownership of 90 *imprints*,⁵ published over 2,000 new titles, amassing over \$2.4

² Viacom CBS has, as of February 2022, merged with Paramount Inc., creating Paramount Global which is a subsidiary of National Amusements Inc.; Benjamin Mullin & Jeffrey A. Trachtenberg, “Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS,” *The Wall Street Journal*, November 25, 2020.

https://www.wsj.com/articles/penguin-random-house-parent-near-deal-to-buy-simon-schuster-from-viacomcbs-11606268232?mod=article_inline (accessed December 27, 2022).

³ Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House’s Acquisition of Simon & Schuster,” *The Wall Street Journal*, November 2, 2021.

https://www.wsj.com/articles/justice-department-sues-to-block-penguin-random-houses-acquisition-of-simon-schuster-11635866422?mod=article_inline (accessed December 28, 2022).

⁴ Julie Bosman, “Penguin and Random House Merge, Saying Change Will Come Slowly,” *The New York Times*, July 1, 2013.

<https://www.nytimes.com/2013/07/02/business/media/merger-of-penguin-and-random-house-is-completed.html> (accessed January 4, 2023).

⁵ In the publishing industry, an imprint is a trade name of a smaller press that is owned by a larger publisher. Imprints enable large publishers to create smaller “in-house” publishers that focus on specific genres or readership. For instance, Penguin Classics is an imprint of PRH that specializes in printing classic works of literature.



billion in total revenue in the US market.⁶ Consequently, as a report by *The Wall Street Journal* found,⁷ between January and October of the same year, PRH dominated sales in the market for printed books, accounting for 25 percent of all printed books sold in the US market.⁸

S&S, being the third-largest publisher in the United States,⁹ operates over 30 imprints in the US market. The company publishes over 1,000 new titles annually, leading it to amass over \$760 million in revenues in 2020.¹⁰ From January to October of the same year, S&S accounted for 9.1 percent of printed book sales in the US market, with its sellers including some of the best-selling books of the year, such as Mary L. Trump's memoir *Too Much and Never Enough* and John Bolton's *The Room Where it Happened: A Whitehouse Memoir*.¹¹ Although the publishing house has enjoyed industry prestige for decades, it has recently garnered particular praise for its publishing streak of critically acclaimed political

⁶ United States Department of Justice, [United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., Case 1:21-cv-02886](#), United States District Court in for the District of Columbia: filed 11/02/2021, <https://s.wsj.net/public/resources/documents/dojlawsuit1102.pdf> (accessed December 27, 2022), 8.

⁷ *The Journal* is a wholly-owned subsidiary of News Corp.

⁸ In addition to its US presence, PRH also operates 325 imprints in 22 countries; Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."

⁹ The second-largest publisher in the United States market is HarperCollins, a subsidiary of News Corp since 1987. HarperCollins accounted for 11 percent of printed books sold in the US market in the fiscal year of 2020; Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."

¹⁰ United States Department of Justice, [United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.](#), 8.

¹¹ Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."



memoirs, award-winning biographies, and other best-selling works of non-fiction.¹²

Subsequently, when the deal between two of the industry's most influential publishing houses was announced, the Antitrust Division of the Justice Department (DOJ) quickly moved to block the merger. Although the government's swift action was not entirely surprising given the size of the proposed merger, the theories which the government deployed to block the deal did indeed come as a surprise to many.¹³

II. The Legal Theories Behind the Case

A. *The Consumer Welfare Standard*

The theories which the government deployed to argue against this merger notably depart from traditional antitrust arguments used before courts. For the last forty years, the use of the Consumer Welfare Standard (CWS) in the practices of law and economics has dominated, and therefore framed, debates over lawful mergers and acquisitions in courtrooms around the country. The CWS is a measurement derived from market analyses which assesses whether actions that a firm(s) is apt to take within a given market—such as merging with a competitor—will raise prices, decrease economic output, or

¹² United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 49.

¹³ In March of 2020, after ViacomCBS announced its wish to sell S&S to another media company, S&S CEO Jonathan Karp, wrote to one of the publishing house's best-selling authors, "I'm pretty sure that the Department of Justice wouldn't allow Penguin Random House to buy us, but that's assuming we still have a Department of Justice." Needless to say, as Karp very quickly found out, we definitely still do have a Department of Justice and it was not pleased about the proposed merger; United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC. 6.



suppress innovation within that market. The standard was developed by a group of economists and law professors at the University of Chicago in the 1970s; it remains the dominant standard by which economists and antitrust lawyers assess whether the economic consequences incurred by consumers from a firm's practices warrant government action.¹⁴

The CWS is anchored by two premises: that buyers benefit from the lowering in cost of the goods or services they consume, and that buyers benefit from an increase in the value or quality of the products or services firms offer to them.¹⁵ The standard effectively illustrates where inefficiencies in a market may precipitate given a firm's actions, but as former Federal Trade Commissioner Christine S. Wilson wrote in a 2019 paper, "...if consumers are not harmed... antitrust agencies do not act."¹⁶ Under the CWS, so long as the difference between what each consumer actually pays and their willingness to pay for a product or service is maximized, any actions that a firm may take, regardless of if those actions amount to the hyper consolidation of an industry or the loss of political autonomy among the populace, are excusable in court.¹⁷

Under the CWS, a challenged practice can only be defeated before a court were it to either raise the price that

¹⁴ The group most prominently consists of Professors Robert Bork and Richard Posner from UChicago Law and Professor Milton Freedman of the Stigler Center at UChicago School of Economics.

¹⁵ Robert Bork. *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978).

¹⁶ Wilson, Christine S., "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get," *Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?* (Arlington, VA: United States of America Federal Trade Commission, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf, 2.

¹⁷ Wilson, "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get," 5.



consumers would ordinarily pay for a good or service, or depress market-wide outputs for the products or services a market would otherwise provide to its consumers. However, in this case, the government's theories to block PRH and S&S's merger did not rely on the CWS.

B. The Government's Theory

The DOJ argued that the proposed merger between PRH and S&S would, in the market for best-selling books,

- i) Disincentive publishers to offer superior editorial and marketing services to prospective best-selling authors whose publishing rights they hope to secure and,¹⁸
- ii) Depress the sum of advancements authors would receive for selling the rights to their books to a publisher¹⁹
 - a. Therefore, reducing the number (and variety) of books published.²⁰

Notice that the real crux behind these arguments *does not* lie in a concern for the *consumers* of best-selling books, rather, the concern is primarily for the *writers* of best-selling books. These arguments are concerned with the laborers (i.e., the authors) in the market for best-selling books, notably, not the buyers of best-sellers. The sub-argument for the second major argument does account for the lessened volume and variety of materials buyers (i.e., readers) will encounter, but the subargument exists only *in relation to* the broader argument regarding author advances. Advances are negotiated, up-front,

¹⁸ This is how publishers compete against each other.

¹⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

²⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 1.



quarterly²¹ payments that authors receive from a publisher upon waiving the publishing rights to a work and are an author's primary source of revenue for a written work.²² Hence, the sub-argument concerning a lessened quantity and variety of published material exists only in relation to the lessened *wage* authors would earn were this merger granted by the court.

The arguments the DOJ made in its complaint were claims for the protection of a labor force, rather than a consumer block. In an ordinary antitrust case, the government is chiefly concerned with harms enacted upon a market when one firm gains substantial seller *market power*.²³ In analyzing seller market power, the government's chief suspicion lies with *monopolies*, and whether a merger of the proposed size of PRH and S&S would *monopolize an industry*.²⁴ However, in this case, the government was chiefly concerned with the status of a *monopsony* firm and its *labor market power*.²⁵ Arguments

²¹ Authors used to receive advancements in two payments. However, due to the consolidation of the publishing industry, publishers have been able to strike this schedule for payments because of increased leverage of authors' literary agents. Instead, because of their preference to pay less upfront, publishers prefer to spread the sum of an advancement over a series of quarterly payments made to authors for their work; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

²² In the DOJ's complaint, advancements were described as how authors "fund their writing and pay their bills." United States Department of Justice, United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

²³ *Market power* refers to the ability of a single firm to raise the prices of its goods or services without losing sizable sales to its competitors; Stevenson, Betsey & Wolfers, Justin, *Principles of Microeconomics* 1st ed., (New York: Worth Publishers, 2021), Chapter 14, Section 14.

²⁴ It should be noted here, that—in what is perhaps the most smirk-worthy distinction in law—it is *not* illegal for a firm *to be a monopoly* under the Sherman Act of 1890 (one of the two chief antitrust laws), but it *is* illegal for one firm to *monopolize* an industry.

²⁵ Benjamin Mullin & Jeffrey A. Trachtenberg, "Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS."



against monopolies are concerned with markets that are dominated by a single seller of a good(s) or service(s), whereas arguments against monopsonies are concerned with markets dominated by a single buyer of a good(s) or service(s). Hence, the peculiarity of the government's argument in this case is that its theory is concerned with *a single buyer of labor* in a market, rather than *a single buyer of goods* within that market.²⁶

For the past half-century, the publishing industry has been subject to hyper-consolidation by five publishing houses (the Big Five): PRH, HarperCollins, S&S, Hachette Book Group, and Macmillan (named in descending order of market share).²⁷ According to Alexandra Alter, a reporter for *The New York Times*, such consolidation has “completely transformed the industry.”²⁸ If one accepts the government's argument, such consolidation enables the Big Five to adversely manipulate the conditions upon which they purchase their labor. This argument equates monopsonist harms to monopolist harms, looking to the labor rather than seller market to assess the damages of a merger. The argument advances that a firm the size of a consolidated PRH and S&S can purchase its labor at a reduced cost without facing the risk of losing that labor to its competitors. The government argued that a firm with this extent of buying power in a given market is too big.

This argument is only reached because of the argument that precedes it, one that is a more-traditional, pro-competition argument. The government's first major argument, that the proposed merger would stifle competition between publishers

²⁶ Rittenberg, Libby & Tregarthen, Timothy. *Principles of Microeconomics* 2nd ed., (New York: Flat World Knowledge, 2008), Ch. 14, Section 14.1.

²⁷ Lauren Hodges, Christopher Intagliata, & Mary Louise Kelly, “Federal Judge Blocks Penguin Random House from Buying Simon & Schuster,” *NPR*, November 1, 2022, <https://www.npr.org/2022/11/01/1133375227/federal-judge-blocks-penguin-random-house-from-buying-simon-schuster>, (accessed December 28, 2022).

²⁸ Lauren Hodges, Christopher Intagliata, & Mary Louise Kelly, “Federal Judge Blocks Penguin Random House from Buying Simon & Schuster.”



to secure rights to a prospective best-seller, is much more in-line with traditional anti-merger arguments.²⁹ This argument holds that a merger which would create a firm whose market share is nearly twice the size of its strongest competitor gives too much influence and control over the industry to one firm in a given market.³⁰ Such a firm, the government argues, could unfairly guide the trajectory of industry practices in their favor, reinforcing already high barriers of entry for new firms and choking existing competition among even the most prominent industry players.³¹

C. PRH and S&S's Theoretical Response

In response to the government's allegations, in their briefs to the Court, PRH and S&S reasoned that,

- i) a consolidated publishing house could have more leverage with associated retailers such as Amazon and other large book distributors,
- ii) which would enable both authors and publishing houses to write and publish riskier material, print a greater quantity of content, and enlarge the house's distributing capacity.³²

In a statement for *The Journal*, Lorraine Shanley, the president of Market Partners International, a consulting firm in the publishing industry, shared that the theory conveys that

²⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11-17.

³⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 2.

³¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 5-6.

³² Brent Kendall & Jeffrey A. Trachtenberg, "Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster."



through its acquisition of S&S, PRH could make S&S's existing catalog more widely accessible for domestic and international markets,³³ leading to higher sales for the “book behemoth.”³⁴

The defendants argued that leverage against “the behemoth that has actually dominated the publishing industry for the past three decades [is] (and that dwarfs Penguin Random House—or PRH/S&S, for that matter): Amazon,”³⁵ which enables publishers to take greater risks regarding what they publish. Securing rights to a book, especially a prospective best-seller, is a risky and expensive process involving two traditional avenues: auctions or private negotiations.³⁶ An author's literary agent will hold an auction for the rights to a work, where publishers gather and place their bets for a book, hoping to out-bet their competitors by offering

³³ Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster.”

³⁴ Chief Executive of News Corp, Robert Thomson's words for the merger between PRH and S&S. As was aforementioned, News Corp owns HarperCollins, which has since shown reinterest in acquiring S&S from ViacomCBS following the failure of its merger with PRH. Such a merger would allot HarperCollins and S&S an estimated 20 percent of market share in the US market for best-selling books. So, no self-interested irony on Thompson's end here; Benjamin Mullin & Jeffrey A. Trachtenberg, “Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS.”

³⁵ Alex Shephard, “The Penguin Random House-Simon & Schuster Merger Has Been Blocked. What Now?” *The New Republic*, November 3, 202, <https://newrepublic.com/article/168444/penguin-random-house-merger-blocked>, (accessed December 28, 2022).

³⁶ Initial bids at book-auctions among the Big Five can start from anywhere between \$150,000 to \$400,000, and catapult to well over \$700,000. As publishers experience what is coined as “auction fever,” when their peers essentially validate their own senses regarding how much a book is worth. Auction fever drives up the amount a book's publishing rights are sold for, benefiting the author and their agent; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11-14.



a higher bid backed by superior marketing services such as book tours, day-time talk show appearances by the author, and other editorial perks that build public anticipation. These auctions are scenes of intense competition between rival publishing houses, making them crucial to authors looking to make a living off of their writing. Because publishers know that it “[only] takes one passionate editor at another imprint to win that book away,”³⁷ they are driven to offer more in advancements and perks to the author for publishing rights of the auctioned work.

Stephen King, the beloved fiction writer who publishes through S&S, testified at trial that under his understanding of the publishing industry, “consolidation makes it tougher and tougher for writers to find enough money to live on.”³⁸ The average writer makes an estimated \$20,000 annually from publishing their work, which, as Mr. King rightly underscores, is “well below the poverty line.”³⁹ Literary agents also hold private, one-on-one negotiations with prospective publishers. Even in these private sessions, however, publishers are cognizant of the fact that “I am negotiating exclusively, but I always have my competition in my rearview mirror,”⁴⁰ as an agent’s foremost task is to secure the highest advancement with the best perks for their author. Although there are “no other

³⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 11.

³⁸ Jan Wolfe and Jeffrey A. Trachtenberg, “Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger,” *The Wall Street Journal*, August 19, 2022, https://www.wsj.com/articles/trial-ends-in-government-challenge-to-penguin-random-house-and-simon-schuster-merger-11660932615?mod=article_inline (accessed December 27, 2022).

³⁹ Jan Wolfe and Jeffrey A. Trachtenberg, “Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger.”

⁴⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13.



market inputs,⁴¹ publishers will often preemptively offer agents a high advancement to entice them into doubting whether another publisher could match or exceed their offer.⁴²

PRH and S&S argued that the challenged merger would create a firm whose size can adequately ensure that authors are at liberty to write unconventional material which would otherwise not garner high advancements in an auction or private negotiation, thus increasing the quantity and variety of books which get published.⁴³ This argument rests on the premise that backlists, which are books formerly purchased by a publisher that still earn a profit for every print, are profitable enough to negate any losses a publisher assumes by overpaying for a book's publishing rights.⁴⁴ Although it should be noted here that a book "need not earn out its entire advance for a publisher to profit; publishers begin to profit at around 70 percent of earnout for most books."⁴⁵ PRH, for example, has the largest backlist in the publishing industry, which is the "most significant"⁴⁶ portion of its annual revenue.

⁴¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13.

⁴² In these ways the market system, in publishing, is working exactly as it should. Every good capitalist dreams of a market whose conditions are such that firms (publishers) must compete (via advancements) and innovate (through fashioning new editorial systems or offering more effective marketing strategies) to offer the best goods and services to its consumers (literary agents and their clientele) to gain customer loyalty and market share. Perhaps there *is* hope for the market system, after all; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 13-16.

⁴³ Jan Wolfe and Jeffrey A. Trachtenberg, "Trial Ends in Government Challenge to Penguin Random House and Simon & Schuster Merger."

⁴⁴ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16.

⁴⁵ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16 footnote 8.

⁴⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 16.



Midsized competitors confirm that publishers of the Big Five's scale can take on riskier books or overpay for best-sellers because of this existing source of continual revenue.⁴⁷ Hence, the capital that the Big Five have enables them to entice authors to publish under their imprints, whilst covering any losses they may incur from a disappointing deal.⁴⁸ If one accepts the defendants' arguments, a firm the size of the proposed merger could empower authors to write more avant-garde material without fear that a publisher would decline to bid for the work due to the publisher's doubts regarding whether the investment could be recouped. A consolidated firm has a larger distributive capacity which enables more books with unconventional themes or plots to circulate across markets.

III. The Opinion of the Court

The case, which was heard before circuit judge Florence Y. Pan in the United States District Court for the District of Columbia (D.C.),⁴⁹ ultimately sided with the government. In an economic Memorandum Opinion, Judge Pan deduced that the merger between the defendants under Section 7 of the Clayton Act, which in relevant part reads, "[that mergers and acquisitions whose effect] may be substantially to

⁴⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 17-20.

⁴⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, 16.

⁴⁹ Judge Pan assumed the former seat of now-Justice Ketanji Brown Jackson in the United States Court of Appeals for the District of Columbia Circuit on September 26, 2022; "Florence Y. Pan," *District of Columbia Circuit*, United States Court of Appeals, accessed January 11, 2022.

<https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+FYP>.



lessen competition, or to tend to create a monopoly,”⁵⁰ would likely “substantially lessen competition in the market for the publishing rights to anticipated top-selling books.”⁵¹ The opinion deployed two primary modes of analysis to reach its final judgment: the *Baker Hughes Burden Test* (1990) and the Herfindahl-Hirschman Index (HHI).

A. *The Baker Hughes Burden Test*

The *Baker Hughes Burden Test* (or *Baker Hughes* as it will be referred to henceforth) is derived from the 1990 D.C. Circuit Court decision, *United States v. Baker Hughes Inc.*⁵² The test is used to analyze whether a merger or acquisition between defendants would, in all likelihood, raise prices or produce anticompetitive effects in an affected market.⁵³

Baker Hughes has a preliminary requirement that the government must fulfill as well as three subsequent steps:⁵⁴

⁵⁰ “The Antitrust Laws,” *Federal Trade Commission*, accessed January 11, 2022.

<https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>.

⁵¹ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 80.

⁵² *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. 1990).

⁵³ Ordinarily, *Baker Hughes* is deployed to stop mergers or acquisitions on the sell-side of a given market. Hence, its utility in mitigating the monopolization of industries. However, the government’s theory in this case is that “the combined defendants would exercise market power on the buy side of the publishing market, i.e., monopsony.... [but] the kinship between monopoly and monopsony suggest similar legal standards should apply to claims of monopolization and to claims of monopsonization”; *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 21 footnote 13.

⁵⁴ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 22.



- i) At the outset, the government must point to the existence of a relevant market—followed by the three accompanying steps:
 - a. By demonstrating excessive concentration within the relevant market, the test permits the government to “establish a *prima facie*⁵⁵ case and a presumption of anticompetitive effects.”⁵⁶
 - b. The burden then shifts to the defendants to show why non-ideal circumstances demonstrate that merely pointing to market concentration alone is not reliably indicative of the merger’s supposed anticompetitive effects.
 - c. Finally, if the defendants succeed in rebuttal, the burden shifts back to the government to ultimately persuade the Court of the merger’s undesirable effects.⁵⁷

The Court found the government’s identification of the market for anticipated best-selling books in the US satisfactory in fulfilling the preliminary requirement for the *Baker Hughes* test. Further, the Court affirmed the government’s reasoning that hyper-consolidation within this market would result in “lower advances for authors of such books and less favorable contract terms”⁵⁸ for the authors of best-sellers. At trial, the defendants confirmed the merger would result in “fewer books being published, less variety in the marketplace of ideas, and

⁵⁵ Meaning, on its face.

⁵⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22.

⁵⁷ This so-called *burden of persuasion* remains with the government throughout the duration of the case; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 22.

⁵⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 23.



an inevitable loss of intellectual and creative output.”⁵⁹ Yet, the defendants contest that advancement sums would decrease following the merger. They argue that competition among existing publishers would go unaffected and that eventually, author advancements would actually rise because of the merged house’s increased access to capital and continuous revenue.⁶⁰

Defining a relevant market has two components: the government must identify the geographic market and the product market. In this case, both parties agreed that the relevant geographic market is that of publishing rights in the United States. However, the parties contested the boundaries of the product market.⁶¹ The government argued that the relevant product market at stake was that of publishing rights to anticipated best-selling books, being those that are expected to generate high revenue and produce a higher advancement for authors. Following the government’s theory, the “targeted sellers against whom the merged defendants might lower the prices paid”⁶² are authors looking to sell rights to their works.⁶³

⁵⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 23.

⁶⁰ Refer to sub-section C of the second section in this article, pp. 7-10, for a detailed analysis of this rebuttal.

⁶¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 24.

⁶² United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 25.

⁶³ It helps to understand that in the monopsony context, “[a] submarket exists when [buyers] can profitably [cut] prices to certain targeted [sellers] but not to others.” Applied in this case, the submarket for best-selling authors could reasonably exist as—if one buys the government’s position—the consolidated parties could profitably cut the wages (i.e., the amount paid to authors in advancements) they pay to best-selling authors, but refrain to cut the wages of non-best-selling authors. United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 25.



The Court primarily relied on qualitative *practical indicia*⁶⁴ to outline the relevant product market.⁶⁵

To draw the boundaries of the relevant product market, the Court utilized the government's threshold of a minimum of \$250,000 (being the sum publishers pay in advances to prospective best-selling authors).⁶⁶ The Court found that books which meet this threshold, though only making up two percent of all book acquisitions in the US, account for 70 percent of advance spending by publishers.⁶⁷ In the market for books which earn a minimum of \$250,000 in advancements, the Big Five comprise 91 percent of the market share, while mid-to-small publishing houses make up the remaining nine percent. Yet, in the market for books whose advancements are below the \$250,000 threshold, the Big Five only hold 45 percent of the market share.⁶⁸ Such a difference between market share among the Big Five and mid-to-small sized publishing houses, alongside the common practice among publishers, that books which do receive advances at or above the threshold require the approval from senior members of the house, signal the probable existence of a submarket.⁶⁹

In rebuttal, the defendants argued that defining a submarket by the price certain books garner for advances is

⁶⁴ A term derived from the Supreme Court's 1962 case, *Brown Shoe Co. v. United States*, 370 US 294, 325 (1962), used to describe signs or situations which render a hypothetical scenario likely.

⁶⁵ The Court also engages with the "hypothetical monopsonist test" on pp. 40-43 of the Memorandum Opinion. Although this discussion is worthy of further mention, it is beyond the reach of this article's scope and page count.

⁶⁶ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 26-33.

⁶⁷ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 26.

⁶⁸ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 27.

⁶⁹ *United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC.*, 28.



insufficient to firmly establish the existence of a submarket of best-selling books. The defendants argued that “any correlation between advance level and expected sales shows only that books are ‘valued along a *continuum*.’”⁷⁰ The Court was unpersuaded by the rebuttal, underscoring that the \$250,000 threshold serves as a necessary starting benchmark, which “support[s] the appropriateness of regarding’ anticipated top-selling authors as a ‘distinct [seller] group’ that buyers can target.”⁷¹ The Court added that, in addition to the \$250,000 threshold top-sellers typically meet, authors within this submarket have unique demands regarding the reputation of the publishers who distribute their books, the contract terms authors receive for working with particular houses, and the different competitive conditions these authors face due to the substantial share the Big Five control in the market for best-sellers.⁷²

B. Market Concentration and HHI

Courts turn to analyses of market concentration to determine whether the effects of a merger or acquisition would substantially increase concentration within a given market. Typically, markets comprised of many buyers and sellers—all

⁷⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 32.

⁷¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 32.

⁷² “It is precisely those specialized needs that make the authors of anticipated best-selling books vulnerable to targeting for price reductions. Publishers of anticipated top-selling books know that such authors are not able to find adequate substitutes for publishing their books because of their unique needs and preferences. Those publishers therefore can target authors of anticipated top-selling books for a decrease in advances (prices) because it is not as likely that such a price decrease will cause the publishers to lose a book”; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 36 and 33-34.



of which hold little to no market share or power—enjoy the greatest degree of competition. When there are relatively few firms competing amongst each other in a given market, coordinated behavior aimed at reducing output and raising profits above those of competitive thresholds is more common.⁷³ In the 1963 decision *United States v. Philadelphia Nat'l Bank*, the Supreme Court ruled that any merger or acquisition which results in a combined market share of at least 30 percent establishes a legal presumption that the merger likely violates Section 7 of the Clayton Act.⁷⁴

The Court found that in the market for books at or exceeding the \$250,000 threshold, PRH holds 37 percent of the market share and S&S maintains 12 percent. Conversely, in the market for books below the \$250,000 threshold, that of non-best sellers, PRH holds 16 percent, while S&S only hold 9 percent. Consolidated, the two houses would hold a staggering 49 percent of the market for best-selling books, which is just over double the 24 percent market share that HarperCollins, their direct competitor, would control.⁷⁵ Considering these statistics, it is important to note that rights to a book are sold to the highest bidder 93 percent of the time, while 60 percent of anticipated best-sellers (books that meet or exceed the \$250,000 threshold) include a negotiated advancement sum.⁷⁶ This means that not only do the rights to a best-seller often hinge on how much a publisher is willing to pay for them, but also that authors use this opportunity to amass the highest possible wage for their work. Hence, the remaining

⁷³ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 43.

⁷⁴ *United States v. Philadelphia Nat'l Bank*, 374 US 321 (1963).

⁷⁵ Hachette would own 10 percent, while Macmillan would hold nine percent; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 44.

⁷⁶ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 9.



small-to-medium independent publishers would only hold a 9 percent share of the submarket following such a merger. The Court referred to the already “undeniable trend in consolidation”⁷⁷ within the publishing industry, along with the substantial raise in market share the combined defendants would hold, to justify its presumption that anticompetitive effects would follow from a merger.

To ground its final judgment on the post-merger effects of the market’s concentration, the Court used the Herfindahl-Hirschman Index (HHI), a measuring tool used by economists to evaluate the competitiveness of a market based on the number of firms and their size in a market. By summing the squared share of the market every firm holds within the market, the index provides an insightful analysis regarding the conditions of the market post-merger.⁷⁸ In an HHI analysis, the figures of the post-merger HHI and the increase in the HHI from pre-and-post-merger indicate whether a merge or acquisition is detrimental to competition in a given market.

Any merger that increases the HHI of a given market by more than 200 points, with a post-merger HHI of over 2,500 is “presumptively anticompetitive.”⁷⁹ In this case, the post-merger HHI would amount to 3,111 with an increase of 891 points.⁸⁰ As the Court noted, this is “well above the threshold required to trigger the [anticompetitive] presumption.”⁸¹ The Court added that in addition to this high market concentration, the merger would also likely harm authors by eliminating the

⁷⁷ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

⁷⁸ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 45.

⁷⁹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.

⁸⁰ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.

⁸¹ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 46.



yields⁸² of the direct competition between two of the most powerful publishers⁸³ and increase the risk of coordinated anticompetitive conduct between the post-merger Big Four publishing houses.⁸⁴ In settling its determinations regarding the detrimental effects to the best-seller submarket, the Court concluded that a merger between PRH and S&S would “distill the Big Five to a Big Four, with an overwhelmingly dominant top firm ... controlling 49 percent of the market and dwarfing its nearest competitor. In the newly configured market, the top two firms ... would have 74 percent market share,”⁸⁵ making price leadership and coordination between firms a serious threat in an already highly consolidated market.

IV. Case Conclusions & the Decision’s Implications

A. The Labor Market

The government’s victory in this case is not merely a win for the authors of best-selling books or small-to-medium sized publishing houses who compete with the Big Five. This victory could represent a pathway to strengthening labor protections through existing antitrust law. While the general public may not think of authors as traditional laborers for a slate of sociocultural reasons, writers are ultimately laborers.

⁸² Editorial offerings and marketing techniques.

⁸³ The government’s expert found that “PRH is S&S’s closest competitor, and that S&S is a significant competitor to PRH... if PRH lowered advances, between 19 and 27 percent of its authors would divert to S&S; and that if S&S lowered advances, between 45 and 59 percent of its authors would divert to PRH”; United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 50.

⁸⁴ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 48.

⁸⁵ United States v. Bertelsmann SE & CO. KGaA, Penguin Random House, LLC, ViacomCBS, INC., and Simon & Schuster, INC., 61.



They participate in the labor market in the same capacity as every other worker in the greater labor force, and this case came down in their as well as the greater labor force's favor. As former DOJ antitrust lawyer Taylor Owings told *The Journal*, the case "demonstrates that the DOJ is going to test new theories in cases that focus on older industries . . . [this case is] an important one for setting an agenda in the labor space."⁸⁶

Cases which advance enforcement actions against agreements between firms that restrain competition in labor markets is a significant drift away from the traditional consumer welfare notions of how antitrust law ought to be applied.⁸⁷ The high-risk strategy is emerging as influential enforcers and scholars across the country are increasingly concluding that practices by firms which encroach upon workers' ability to secure higher pay and better working conditions are, in fact, enforceable antitrust issues.⁸⁸ A panel, hosted by New York University's (NYU) School of Law in May of 2022, saw scholars and enforcers discuss the challenges and prospects of bringing these kinds of cases before courts. Professor Steven C. Salop of Georgetown University Law argued that the *Philadelphia National Bank* approach to labor

⁸⁶ Brent Kendall & Jeffrey A. Trachtenberg, "Justice Department Sues to Block Penguin Random House's Acquisition of Simon & Schuster."

⁸⁷ Geoffrey A. Manne, the president of the Center for Law and Economics, told *The Journal* in the response to the peculiar nature of the PRH and S&S merger that, "labor markets just have not been the subject of much [antitrust] litigation"; Jan Wolfe, "Key Tests Loom in 2023 for US Antitrust Enforcers," *The Wall Street Journal*, December 28, 2022.

https://www.wsj.com/articles/key-tests-loom-in-2023-for-u-s-antitrust-enforcers-11672234668?cx_testId=3&cx_testVariant=cx_168&cx_artPos=1&mod=WTRN#cxrecs_s (accessed December 28, 2022).

⁸⁸ Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," *New York Law Journal*, Vol. 267, No. 89 (2022).

https://www.skadden.com/-/media/files/publications/2022/05/expect_aggressive_antitrust_enforcement_and_novel_theories.pdf. 1.



restraints, which regards laborers as consumer-equivalences, blocks courts from balancing consumer benefits, such as lower prices, against labor harms, such as decreases in wages.⁸⁹

Such tactics appear viable even in the Supreme Court. In Justice Brett Kavanaugh's concurrence in *NCAA v. Alston* (2021), he argued that defendants in antitrust suits ought not to be able to balance anticompetitive harms in one relevant market against the benefits deductible from another relevant market.⁹⁰ Kavanaugh wrote that "price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."⁹¹ Evidently, there are Justices, even in the highest Court, that may be receptive to these arguments. Diana Moss, president of the American Antitrust Institute, underscored at the NYU's Spring panel, that regulators' "historic neglect"⁹² of the effect of firms' anticompetitive practices in the labor market is a serious issue which requires immediate attention. Moss advanced that this neglect has had depressive implications on the quantity of economic output and the liberty of workers within the labor force.⁹³

In his most-recent book, *How Antitrust Failed Workers*, Professor Eric Posner⁹⁴ of the University of Chicago School of

⁸⁹ Professor Salop's areas of expertise include trade and regulation in the antitrust realm as well as law and economics, more broadly; Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹⁰ *National Collegiate Athletic Association v. Alston et al.*, 594 US (2021).

⁹¹ *National Collegiate Athletic Association v. Alston et al.*, (2021), 43.

⁹² Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹³ Karen Hoffman Lent & Kenneth Schwartz, "Expect Aggressive Antitrust Enforcement and Novel Theories," 3.

⁹⁴ In a simple twist of scholastic-fate, Professor Posner is the son of former-professor and judge of the Ninth Circuit, Richard Posner, who was



Law, argues that firms who are permitted to engage in monopsony behavior on the buy-side of markets, leading to an excessive increase in market concentration, create a loss in output and equity among workers within a given market.⁹⁵ Posner concludes that, contrary to the CWS model, the savings in labor costs does not translate to lower prices for consumers. Instead, these savings enrich employers and shareholders because the prices consumers pay are determined by frameworks of the product market, not the labor market.⁹⁶ By exercising market power on the buy-side through purchasing inputs, such as goods & services and labor, at a reduced cost, employers are able to concentrate a market to maximize profits and cut wages without suffering losses. Posner explains that market concentration enables a monopsony firm to pay workers wages between competitive and monopsony wages without losing this labor to other competitors because of its large holdings in the market. Hence, workers must either accept the lessened wage, undergo expensive retraining, or retire.⁹⁷

The options (or lack thereof) that workers in monopsony markets face ultimately hurt consumers and the economy as a whole because monopsony power enables firms to raise the prices of goods or services by reducing output or wages, just as in product markets. Moreover, employers within a monopsonied market can more easily engage in explicit or implicit collusion to decrease output by further suppressing wages.⁹⁸ By reducing labor costs through hiring fewer workers, and paying them less-than-competitive wages, consumers end up paying higher prices because of a decline in the production

among the leading figures in the Chicago School, and a voiceful advocate of the Consumer Welfare Standard.

⁹⁵ Eric Posner, *How Antitrust Failed Workers* (Oxford University Press: Cambridge, UK, 2021). 23

⁹⁶ Posner, *How Antitrust Failed Workers*, 23.

⁹⁷ Posner, *How Antitrust Failed Workers*, 16-18.

⁹⁸ Posner, *How Antitrust Failed Workers*, p. 77.



of goods and services labor monopsonists output. Such actions not only reduce the number of workers willing and able to work for firms, but also reduce the quantity of economic output firms annually contribute to the American economy.⁹⁹

*B. Antitrust as More than Competition and Lower Prices
for Consumers*

On their podcast, *Capitalism 't*, from UChicago's Stigler Center & Booth School of Business, economist Luigi Zingales and journalist Bethany McLean discussed why we, as consumers, laborers, and citizens, should support robust antitrust enforcement. In an episode discussing the case, *United States v. Microsoft Corp.*,¹⁰⁰ Zingales and McLean advanced the following thesis: we should support antitrust regulation not necessarily because it benefits us economically. As in many cases, especially in the age of the Information Economy, antitrust regulations will not economically benefit citizens; but we should want these regulations because they are fundamental to securing our ideals of self-determination.¹⁰¹ Cases such as the failed merger between PRH and S&S show us that corporations which are permitted to grow, and then capture such an enormous share of a given market, pose a threat to the welfare of workers, the health of an economy, and, especially in this case, the liberty of citizens to think for themselves.

⁹⁹ Eric Posner, "The Rise of the Labor-Antitrust Movement," *Competition Policy International*, November 29, 2021. <https://www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement/> (accessed December 29, 2022).

¹⁰⁰ *US v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁰¹ Luigi Zingales and Bethany McLean, *Capitalism 't*, podcast audio January 14, 2021, <https://www.capitalisnt.com/episodes/microsoft-1998-vs-google-2020-antitrust-and-big-tech>.



The defendants in this case are two publishing houses who publish some of the most widely read and influential authors in the industry. PRH publishes the Obamas, John Brown, and Danielle Steel, while S&S has published F. Scott Fitzgerald, Bob Woodward, and Ernest Hemingway. These are among the most influential writers and thinkers of modern thought. Had publishers not provided the “venture capital”¹⁰² for these authors to write their ideas and circulate them through the public sphere, the country may have never been exposed to such critical material.¹⁰³ To consumers, who are ultimately citizens, such a threat should not be dismissed.

The power monopolists wield in labor markets have real consequences for the economic and intellectual autonomy of workers and ordinary citizens alike. The threat of a select few persons in private board rooms deciding who gets to circulate their ideas in the public sphere and under what conditions they may do so is not to be dismissed frivolously. Who controls the basis upon which political, economic, and cultural issues are debated determines the trajectory of how those issues are settled in the public arena.¹⁰⁴ If we claim to have deliberative, democratic ideals, then every citizen should have the opportunity to influence how these issues are presented and ultimately settled in the public sphere.

The case between the government and PRH and S&S demonstrates that we, as both consumers and citizens, must

¹⁰² Alex Shephard, “The Penguin Random House-Simon & Schuster Merger Has Been Blocked. What Now?”

¹⁰³ Hence, diminishing the “breadth, depth, and diversity of our stories and ideas,” the remarks of Assistant Attorney General of the DOJ, Jonathan Kanter regarding the block of the merger between PRH and S&S; Brent Kendall & Jeffrey A. Trachtenberg, “Justice Department Sues to Block Penguin Random House’s Acquisition of Simon & Schuster.”

¹⁰⁴ À la Foucault’s concept that it is not knowledge that is power, but rather, that power is knowledge; Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, ed. by Colin Gordon (New York: Pantheon, Books, 1980).



come to think of antitrust as more than some brainy-economic area of law which only focuses on advancing consumer welfare. Rather, we must come to conceive of it as a critical tool to bolster the strength of the broader economy and the health of our civic society. Subsequently, antitrust enforcers must continue to ground their arguments in equating monopsony harms to monopoly harms to ensure that labor markets are competitive, productive, and ethical.



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ViacomCBS, INC., and Simon & Schuster, INC., F.2^d Case 1:21-cv-02886 (D.C. Cir. 2021).

United States v. Microsoft Corp., 253 F.3^d 34 (D.C. Cir. 2001).

United States v. Philadelphia Nat'l Bank, 374 US 321 (1963).



The Russia-Ukraine Conflict: Obstacles to Accountability

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The Russia-Ukraine conflict has left much of the international community increasingly concerned about violations of international law and the strength of the international legal system's ability to end impunity. With such a young international legal system, having yet to reach its 100th birthday, precedents are still fresh and being set with each new case. Each investigation opened by the International Criminal Court (ICC) encounters new uncharted territory. Using legislation foundational to the modern international system, this article seeks to analyze and understand the unique impact of Russian aggression against Ukraine on the present-day system of international law. This evaluation provides a quasi-directive on how the international system can move forward in the fight against international impunity.

I. Introduction

On February 24, 2022, Russian armed forces invaded Ukraine from multiple positions along the Russian and Belarusian borders.¹⁰⁶ The invasion initiated over a year of hostilities between the two nations, with no end in sight as of this writing.¹⁰⁷ The motivations of such an aggressive, extensive attack have been puzzling to many in the international community. The commitment of war crimes, as well as violations of international law, is of increasing concern

¹⁰⁵ Brandeis University Undergraduate, Class of 2025.

¹⁰⁶ Zinets, Natalia, and Aleksandra Vasovic. "Missiles Rain Down Around Ukraine." *Reuters*, February 24, 2022. <https://www.reuters.com/world/europe/putin-orders-military-operations-ukraine-demands-kyiv-forces-surrender-2022-02-24/>

¹⁰⁷ Article was composed between February and March of 2023.



as the war wages on. President Vladimir Putin's continued reign over Russia further exacerbates this concern, given the volatility he brings to the region and its impact on the international legal system of human rights and criminal prosecution.

Ultimately, the recent conduct of the Russian Federation continues to perplex the legal international community. Though an "impulse for imperialism" emerging from Russia is not necessarily unpredicted, scholars worldwide have deemed the invasion of Ukraine "nonsensical," thus, leading many in the international community to question its motivations.¹⁰⁸ Questions regarding why Russian officials responsible for potential breaches of international law continue to hold positions of power remain unanswered. Scholars are still attempting to understand the obstacles that have thus far prevented foreign entities from holding the Russian government accountable. This article seeks to respond to these questions and provide a comprehensive understanding of the issues surrounding Russian officials accountability under international law.

II. Justification of the Invasion

With substantial Russian aggression against Ukraine beginning with the annexation of Crimea, finalized in March

¹⁰⁸ Rieber, Alfred. "Russian Imperialism: Popular, Emblematic, Ambiguous." *The Russian Review* 53, no. 3 (July 1994): 331–35, 332; Guterres, Antonio. "Secretary-General's Remarks to Press on the War in Ukraine." United Nations, March 2022. https://www.un.org/sg/en/content/sg/press-encounter/2022-03-22/secretary-generals-remarks-press-the-war-ukraine?_gl=1%2A1rdjibfo%2A_ga%2AMTYxMDgzNDk4Mi4xNjY4NjI5ODg2%2A_ga_TK9BQL5X7Z%2AMTY3Nzc4OTI2My41LjEuMTY3Nzc4OTI5NC4wLjAuMA.



2014, understanding the Russian regime's motivations is necessary to contextualize the 2022 invasion.¹⁰⁹

Prompted by Euromaidan (also referred to as the Ukrainian Revolution of Dignity), a collection of non-violent demonstrations in Ukraine expressing pro-Western sentiment, the annexation of the Crimean Peninsula was utilized as a means to shield Russian Separatists from alleged Ukrainian aggression. When acting Ukrainian president Viktor Yanukovich paused the signing of the European Union (EU) Association Agreement to closer align Ukraine with the EU, demonstrations across the territory emerged. These demonstrations protested the pause's implications: hesitance to ally with Europe coupled with the potential strengthening of relations with the neighboring Russian Federation.¹¹⁰

These protests, favoring stronger ties to the EU, initiated Russian aggression and continue to contextualize the ongoing conflict between Russia and Ukraine. Through Euromaidan, Vladimir Putin and his inner circle of Russian officials were able to exploit domestic nationalism and launch their moral justification campaign against Ukraine. With cultural ties to World War II so deeply ingrained in Russian society, the Kremlin effectively utilized the pro-Western sentiment first expressed in Ukraine during the Revolution to pit Russian citizens against their neighbors.¹¹¹ Utilizing the

¹⁰⁹ President of Russia. "Agreement on the Accession of the Republic of Crimea to the Russian Federation Is Signed," n.d. <http://en.kremlin.ru/events/president/news/20604>.

¹¹⁰ Zelinska, Olga. "Ukrainian Euromaidan Protest: Dynamics, Causes, and Aftermath." *Sociology Compass* 11, no. 9 (2017).

¹¹¹ Often forgotten in the west is Russia's role in the conclusion of WWII and victory against the Nazi Party. However, domestically, Russia's efforts in the war have remained an incredibly strong point of pride. This has been fully integrated into Russian society and strongly influences Russian views of strength and bravery. Veterans of the war are understood as the pinnacle of who a Russian should strive to be. The Nazi party is also considered a piece of Western history considering the geographical positions of Russia



legacy left by WWII, the Kremlin effectively propagandized Ukraine as a Nazi puppet state under the control of the West, a strategy still applied today in the effort to justify the invasion.¹¹² Citing the Western influence under which Nazism developed and the colonial history of much of the Western world, Vladimir Putin argues that the motions to align closer with Europe, and thus, the West, invalidates the Russian history and roots of many modern Ukrainians. Russian justification and propaganda have embellished the invasion as a second Great Patriotic War and redefined the nation of Ukraine as a victim to Nazism.¹¹³ Taken together, the Kremlin actively portrays the invasion of Ukraine as a liberation rather than an intervention.

III. Relevant Legislation

Despite the ever-evolving state of International Humanitarian Law (IHL) and the innumerable list of treaties and statutes viable as a lens for investigation into Russia, the scope of this article's evaluation will focus on three integral pieces of international legislation: *The Charter of the United Nations*, *The Geneva Conventions of 12 August 1949*, and *The Rome Statute*. *The Charter of the United Nations* (UN) forms the foundation of the international system, housing many of the rules and customs by which the international order operates.

and the remainder of Europe. With Ukrainians advocating for much stronger allyship with Europe, The Kremlin began propagandizing Ukraine as falling victim to Western Nazism.

¹¹² The Kremlin complex is located in Moscow, Russia and holds the president's main office and official residence. It is the central working venue of the presidential administration. However, it also operates as an international symbol of Russian power and authority; Kumankov, Arseniy. "Nazism, Genocide, and the Threat of the Global West: Russian Moral Justification of War in Ukraine." *Etikk I Praksis--Nordic Journal of Applied Ethics*, n.d.

¹¹³ Arseniy, "Nazism."



The Geneva Conventions are a cornerstone in the institution of *jus in bello*, the permitted conduct of parties engaged in conflict.¹¹⁴ *The Conventions* establish explicit regulations on permissible methods of warfare and the treatment of civilians, combatants, and prisoners. *The Rome Statute* is the founding document of the International Criminal Court (ICC), the permanent international judiciary tasked with the criminal prosecution of those found in violation of international law. These three pieces of legislation establish a strong guide of possible violations committed in Ukraine, as well as abridge what would otherwise be a complex nexus of international laws and regulations.

A. *The Charter of the United Nations*

Signed in June of 1945, the *UN Charter* is fundamental to a contemporary understanding of international law and politics. Establishing the basis for countless treaties, the Charter instructs member countries on how to interact with one another and establishes the preliminary mechanics that the international organization uses to operate. In Article 2, the *UN Charter* demands the recognition of all member states by member states.¹¹⁵ Additionally, it obligates members to use “*peaceful means*” in dispute settlement and prohibits the use of threat or force against the “*territorial integrity or political independence of any state.*”¹¹⁶

In addition to founding the United Nations, the charter establishes the United Nations Security Council (UNSC), one of its several principal organs of which Russia is a permanent

¹¹⁴ “International Humanitarian Law: Answers to Your Questions.” International Committee of the Red Cross, June 2020.

¹¹⁵ “Charter of the United Nations and Statute of the International Court of Justice.” United Nations, June 26, 1945.

¹¹⁶ “Charter of the United Nations.”



member and possesses subjective veto power.¹¹⁷ Having currently cast nearly half of all vetoes in the UNSC, Russia has a strong precedent of unbridled veto usage, particularly in cases of genocide or war crimes; after several decades of relative silence, the Russian Federation reemerged as a central proponent of veto power when met with several UNSC resolutions regarding Syria.¹¹⁸ Bound by their signature to the Charter, members consent to the quasi-judicial status of the UNSC and agree to execute, to the best of their ability, decisions and resolutions handed down by the Council. The Council is tasked with the maintenance of international peace and, due to their capability to refer international concerns to the ICC, it is the primary vehicle through which the UN and the Court interact.

The UNSC is the most powerful of the principal organs, being the only one capable of creating legally binding orders to member countries. The presence of permanent members and their power to veto resolutions as they see fit further exemplifies the power of the Council, isolating it from the General Assembly and other organs with less cumulative power.

¹¹⁷ “Charter of the United Nations,” 18; It should be noted that the permanent members of the Security Council, and thus those given veto power were not selected arbitrarily. The UN was designed just following WWII and deliberately granted greater influence to the Allied powers, the victors of the war. However, the use of this veto power when reviewing potential resolutions to be adopted by the UNSC is capricious. Any of the five countries can veto a resolution for any number of reasons and they are not subjected to even a preliminary of justification for their choice.

¹¹⁸ Security Council Report. “UN Security Council Working Methods: The Veto,” December 2022.

<https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php>.



B. The Geneva Conventions of August 12th, 1949

The Geneva Conventions set the standard definition for war crimes as they are understood in IHL. With protections for wounded combatants, prisoners of war, and civilians caught in the crossfire of international conflict, *The Conventions* codify several guidelines on the treatment of human beings during war time. *The Conventions* consist of seven main bodies: four individual conventions and three additional protocols.

Considering both brevity and relevance, this analysis will exclusively address Convention IV and Protocol I. Codifying the protections for civilians during war, Convention IV addresses a multitude of civilian types in conflict and the protections guaranteed to them by the treaty. Most notably, the protection of civilian hospitals and medical personnel, all children under the age of 15, women—specifically against any forms of sexual violence—, and the prohibitions of direct harm to any “protected persons” are listed in Articles 18(a), 24, 27, and 32 respectively.¹¹⁹

Protocol 1, “relating to the protection of victims of international armed conflicts,” further extrapolates on several ideas presented in Convention IV and supplements areas the fourth convention may have missed, most prevalent being Articles 48, 35, and 51.¹²⁰ Expanding on ideas presented in Convention IV, Article 35(b) prevents the deployment of weapons known to cause “superfluous injury and unnecessary suffering.”¹²¹ Article 35(c) prohibits the use of warfare intended to cause widespread or severe damage to the natural environment.¹²² Aiming to provide ample protections to

¹¹⁹ “The Geneva Conventions of 12 August 1949.” International Committee of the Red Cross, August 12, 1949.

¹²⁰ “Protocols Additional to The Geneva Conventions of 12 August 1949.” International Committee of the Red Cross, August 12, 1949, 1.

¹²¹ “Protocols Additional,” 30.

¹²² “Protocols Additional,” 30.



civilians, Article 48 prevents combatants from directing any operations against individuals or objects not-yet-distinguished as military.¹²³ Combatants are to assume civilian status until proven otherwise. Arguably the most significant is Article 51, which aims to provide complete and undeniable protections to civilians. 51(1) grants “general protection against dangers arising from military operations,” 51(2) prevents civilian populations or individuals from being the object of military attacks, 51(3) guarantees all protections to all civilians unless they join the military, and 51(4) entirely outlaws “indiscriminate attacks.”¹²⁴

C. *The Rome Statute*

Establishing one of the several avenues for accountability to be evaluated, *The Rome Statute* is the founding document of the ICC. Tasked with the prosecution of individuals who have committed war crimes, crimes against humanity, the crime of genocide, and the crime of aggression, the ICC is the only permanent international judicial body in the world with capacity to try world leaders for their atrocities.

Importantly, the Statute establishes the standards for each of the crimes within the Court’s jurisdiction. Article 6 defines genocide as

acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to

¹²³ “Protocols Additional,” 36.

¹²⁴ “Protocols Additional,” 37.



prevent births within the group; (e) Forcibly transferring children of the group to another group.¹²⁵

Article 7 outlines crimes against humanity as “any of the following acts when committed as a systematic attack directed against any civilian population: murder, forcible transfer, imprisonment, torture, sexual violence, or other inhumane acts of a similar character.”¹²⁶ Lastly, Article 8 establishes war crimes as any grave breaches of the *Geneva Conventions* or “other serious violations of the laws and customs applicable in international armed conflict.”¹²⁷ Despite confusion surrounding the jurisdiction of the ICC in the Russia-Ukraine conflict, Article 12 outlines that with Ukraine’s acceptance of ICC jurisdiction in 2015, the Court has the ability to prosecute any Russian nationals convicted of statute violations committed on Ukrainian territory.¹²⁸ However, under Article 15(5), the Court is unable to charge individuals for crimes of aggression when these individuals are nationals of a non-member state.¹²⁹ With respect to the crimes of genocide, crimes against humanity, and war crimes, any Russian national found responsible for their commitment in Ukraine since the 2015 declaration are eligible to be charged and tried by the ICC. Considering the role the Court plays in IHL and criminal prosecution, jurisdiction is absolutely vital in overcoming obstacles to Russian accountability.

¹²⁵ “The Rome Statute,” 3.

¹²⁶ “The Rome Statute,” 3-4.

¹²⁷ “The Rome Statute,” 4-8.

¹²⁸ Klimkin, Pavlo. “Declaration of the Verkhovna Rada of Ukraine,” September 8, 2015; “The Rome Statute.” International Criminal Court, July 1, 2022. <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹²⁹ “The Rome Statute,” 10.



IV. International Law Violations

In accordance with each of the preceding treaties, with evidence presented by various respected news outlets and the International Independent Commission of Inquiry on Ukraine (COI), and corroborated by a March 2023 ICC arrest warrant for Russian officials, it is evident that violations of international law are no longer speculative. It should be noted that many of the crimes are outlawed by more than one treaty, subsequently leading to overlap, and specific criminal incidents will not be examined. The confirmation of violations of international law are vital, as accountability cannot be considered without a crime having been committed.

A. COI on Ukraine

Established by the United Nations Human Rights Council (UNHRC), the COI issued its first report on war crimes in Ukraine on October 12th, 2022. Among offenses mentioned in the report, “war crimes, violations of human rights, and violations of [IHL],” were all found in Ukraine.¹³⁰

Violations of Protocol I of the *Geneva Conventions* include threats to use nuclear weapons, the launching of explosives far from the frontlines causing considerable civilian damage, the use of explosive weapons in civilian areas, indiscriminate attacks using explosives, frivolous attacks on civilians, and summary executions.¹³¹ Breaching Article 8(2) of *The Rome Statute*, the definition of war crimes, were the deployment of explosive weapons across civilian areas,

¹³⁰ Independent International Commission of Inquiry on Ukraine. “Report of the Independent International Commission of Inquiry on Ukraine.” The United Nations, October 18, 2022.
<https://www.ohchr.org/sites/default/files/2022-10/A-77-533-AUV-EN.pdf>.

¹³¹ Independent International, “Report,” 6, 7, 8, 10.



forcible transfers, unlawful confinement, and inhumane treatment.¹³² Violations of Convention IV of the *Geneva Conventions* include the torture, ill treatment, and deliberate wounding of protected persons; the use of explosives in civilian areas; the deliberate endangerment of civilians; multiple commitments of sexual violence; and the lack of respect for the life of children.¹³³ Fundamentally, the grounds upon which Russia waged war on Ukraine lead to the violation of Article 2 of the *UN Charter*. The annexation of Crimea in 2014, the violent invasion of Ukraine in February 2022, and the disingenuous referenda held in the Kherson, Zaporizhzhia, Luhansk, and Donetsk regions in September 2022 each violate the Charter.¹³⁴ They disregarded the obligation to pacific settlement, the mandated recognition of sovereignty, and the prohibition of threats or uses of force against territorial integrity or political independence of other states.

B. War Crimes

Regarding the war crimes, the first of several potential arrest warrants were issued by the ICC in March 2023. The Court officially issued an arrest warrant for President Vladimir Vladimirovich Putin and Russian Commissioner for Children's Rights, Maria Alekseyevna Lvova-Belova. Putin and Lvova-Belova have both been charged with committing war

¹³² Independent International, "Report," 6, 13, 13.

¹³³ Independent International, "Report," 13, 14, 15, 16.

¹³⁴ Myers, Steven, and Ellen Barry. "Putin Reclaims Crimea for Russia and Bitterly Denounces the West." *New York Times*, March 18, 2014.

<https://www.nytimes.com/2014/03/19/world/europe/ukraine.html>; Ellyatt, Holly. "Russian Forces Invade Ukraine." *CNBC*, February 24, 2022.

<https://www.cnn.com/2022/02/24/russian-forces-invade-ukraine.html>; Ellyatt, Holly. "Fake Referendums in Occupied Ukraine Set the Stage for Annexation — and Immense Danger for Ukraine." *CNBC*, September 28, 2022.



crimes, specifically the abduction, deportation, and forced transfer of children from occupied areas of Ukraine. With Ukrainian officials reporting as many as 8,000 children missing and transported to Russia, the Court asserts that both Putin and Lvova-Belova had intimate knowledge of the alleged violation and bear individual responsibility.¹³⁵

Furthermore, the Russian Federation has been accused of forcibly deporting children to Russia, implementing simple and rapid avenues to “citizenship,” and placing Ukrainian children up for Russian adoption.¹³⁶ As this measure works to strip Ukrainian children of their national and ethnic identities, the primary concern is its role as a potential step towards the ethnic cleansing and genocide of the Ukrainian people.

C. Concluding Notes

To conclude this segment of the evaluation, it is vital to comprehend the meaning of these blatant violations. Between the work of journalists and international investigations, it is undeniable that an array of war crimes and violations of IHL have been committed on Ukrainian territory. Even more so, the impact of these breaches on the Ukrainian people have been unfathomable. The blood of thousands is on the hands of the Russian government, critical infrastructure has been decimated,

¹³⁵ Deeb, Sarah, Anastasiia Shvets, and Elizaveta Tilna. “How Moscow Grabs Ukrainian Kids and Makes Them Russians.” *AP News*, March 17, 2023. <https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6>; International Criminal Court. “Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,” n.d. <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova>.

¹³⁶ Deeb, Shvets, and Tilna, “How Moscow.”



and millions have been displaced.¹³⁷ Regardless of whether Vladimir Putin and other Russian officials are held accountable, Ukraine will spend years, if not decades, recovering from the devastation left by Putin's Regime.

V. Obstacles to Accountability

Contextually evaluating legal accountability pertaining to the Russia-Ukraine conflict implies three primary avenues, and subsequently, the obstacles within each: The UNSC, the ICC, and the role of free will within an anarchical system. The UNSC's ultimate purpose is the maintenance of international peace, while the ICC's is criminal prosecution; free will and its relationship with anarchy is integral to the most preliminary of understandings on international law and politics. A thorough evaluation of each within the context of the Russia-Ukraine conflict provides for a nuanced understanding of obstacles to accountability.

A. The UNSC

Russia holds one of the five permanent seats on the UNSC and, as such, possesses veto power over any potential resolutions that come before the Council.¹³⁸ Ultimately, this grants a great deal of freedom and impunity not only to Russia, but to essentially any of the permanent members.

Prima facie, a step similar to that taken by the UNHRC, the suspension of the Russian Federation seems to be in order. However, a suspension is neither judicially effective for

¹³⁷ Cooper, Helene, Eric Schmitt, and Thomas Gibbons-Neff. "Soaring Death Toll Gives Grim Insight Into Russian Tactics." *New York Times*, February 2, 2023. <https://www.nytimes.com/2023/02/02/us/politics/ukraine-russia-casualties.html>.

¹³⁸ "Charter of the United Nations," 18.



Ukraine nor exactly plausible. A suspension would result in removal from the UNSC, while an expulsion indicates the state's removal from the entirety of the UN. Russia holding one of the five permanent seats on the security council makes both of these options virtually impossible due to any suspension or expulsion requiring all five security council seat sign offs, requiring Russia to approve of their own ramifications.

Due to the impossibility of Russian suspension or expulsion, it is clear that the *UN Charter* failed to consider the potentially dangerous ramifications of establishing the UNSC in this way. Ultimately, suspension of a member state from the Council is not mentioned anywhere in the Charter. However, the UNSC and its permanent members are explicitly established by Article 23(1).¹³⁹ This indicates the necessity of an amendment to alter the permanent seats of the UNSC in any way, shape, or form; which leads to Article 108, mandating the approval of all five permanent council members to bring a proposed amendment into force.¹⁴⁰ Given that this requires Russia to sign their own death certificate, removal from the UNSC is not a presently viable option. Regarding expulsion from the UN altogether, it is a similarly grim situation. As stated in Article 6, “a member of the United Nations...may be expelled...upon the recommendation of the security council.”¹⁴¹ Consistent with a potential suspension from the UNSC, a complete expulsion would require Russian approval.

Additionally, there is an argument to be made about the efficacy of an expulsion or suspension from UN activities in bringing the Russian Federation to justice. Due to the anarchical nature of the international order, and widely respected foundational principles like “consent of the governed,” a given nation can only be held responsible for violations of a treaty they have signed. Russia cannot be held to

¹³⁹ “Charter of the United Nations.”

¹⁴⁰ “Charter of the United Nations,” 69.

¹⁴¹ “Charter of the United Nations,” 8.



UN standards, penalized for violations of the organization's charter, or legally bound by its mandates if it is no longer a member state. Suspension from the UNSC could very well lead to a voluntary exit from the organization, while an assembly-led expulsion would make accountability even more challenging.

To fully evaluate the Security Council, it is crucial to consider the potential outcome had Russia not vetoed the UNSC resolution regarding their troops in Ukraine, despite the situation's hypothetical nature. Corroborated by the realist paradigm of international relations, a veto is merely a formal process of informing the other permanent members that a state does not intend to abide by a given resolution.¹⁴² In turn, Russia's veto of the February mandate, calling for Moscow to remove all troops from Ukraine, simply informs council members that it has every intention of keeping its troops in place.

However, what if Russia did not possess veto power? What if such a resolution was passed? Realism asserts that hard power (i.e. military strength) is foundational to legitimacy. States act according to their own self-interest. Hence, only military strength or threats can change such behavior. Considering the atrocities committed in Ukraine since then, it is fair to say that it would have taken enemy boots on the ground, actively pushing the Russians out of Ukrainian territory, to change the Kremlin's position.

The UN does not have enough coercive capacity on its own to enforce mandates by the UNSC; it relies on the

¹⁴² One of the three paradigms of international relations, the realist paradigm stresses the importance of anarchy and hard power in the international order. Anarchy refers not to chaos but to the lack of a universal, international governing body, and hard power refers to tangible resources, most often the economy and military strength. Due to the size and strength of both the Russian military and economy, the realist paradigm asserts that there is no force capable of coercing The Kremlin to behave in a specific way.



manpower of its largest member states to keep the rest in line. The Security Council, an institution designed for the preservation of international peace, inherently awards impunity to the Allied Powers of WWII. The lack of checks on the power of permanent members breeds a power dynamic in which there is no method of enforcing punishment on the largest, and subsequently most powerful member states. The Security Council's necessity to the functionality of the UN elevates the status of the council. Furthermore, the lack of independent UN coercive capabilities only reinforces the idea first proposed in the Peloponnesian war, that "the strong will do what they can and the weak suffer what they must."¹⁴³

B. *The ICC*

The ICC is responsible for prosecuting individuals found in violation of international law. However, bureaucracy, enforcement mechanisms, and dwindling legitimacy hinder the abilities of the Court to do so.

Bureaucracy generally slows various processes and those of the ICC are no exception. Despite not necessarily minimizing the courts physical capabilities to charge guilty Russian officials, the bureaucratic processes by which the court operates can take years, if not decades. The International Criminal Tribunal for the Former Yugoslavia (ICTY) closed over ten years following their issuance of the final indictments.¹⁴⁴ The ICTY was open for a total of twenty-four

¹⁴³ Art, Robert, and Robert Jervis. "Anarchy and Its Consequences." In *International Politics: Enduring Concepts and Contemporary Issues*, 13th ed. Pearson Education, Inc., 2016.

¹⁴⁴ Zhou, Han-Ru. "The Enforcement of Arrest Warrants by International Forces." *Journal of International Criminal Justice* 4, no. 2 (2006): 202–18; Legacy Website of the ICTY. "ICTY Marks Official Closure with Moving Ceremony in The Hague." Archive. Accessed November 29, 2022.



years and delivered a total of 161 sentences.¹⁴⁵ There is no reason to presume an ICC prosecution of Putin and other responsible officials would take any less time. The pace at which these trials move guarantees that thousands of Ukrainians would likely die before seeing any justice or reparations for all they have endured at the hands of Russian officials. Additionally, Article 63(1) poses a large enforcement barrier to the ICC because it obligates the Court to have the suspect in custody prior to conducting the trial.¹⁴⁶ It should be clarified that the following analysis in no way intends to make a statement on the rights awarded to individuals accused of a crime or assert that due process should be removed from the protocols by which the ICC abides. However, lacking an independent law enforcement agency, this mandate objectively disrupts the Court's ability to bring those guilty of international atrocities to justice, and brings the legitimacy of the Court into question. As seen with the ICTY, if the ICC is forced to rely on multinational forces, the legitimacy of the court as an independent entity is questionable.¹⁴⁷

With the ICTY, and the ICC trial regarding Darfur, Sudan, the international community has illustrated hesitance to enforce arrest warrants issued by the Court.¹⁴⁸ In multiple cases,

<https://www.icty.org/en/press/icty-marks-official-closure-with-moving-ceremony-in-the-hague>.

¹⁴⁵ Legacy Website of the ICTY. "About the ICTY." Accessed November 29, 2022. <https://www.icty.org/en/about>.

¹⁴⁶ "The Rome Statute," 31.

¹⁴⁷ Zhou, "The Enforcement of Arrest Warrants," 202–18.

¹⁴⁸ Sharp, Walter. "International Obligations to Search For and Arrest War Criminals: Government Failure in the Former Yugoslavia." *Duke Journal of Comparative and International Law*, 1997, 411–60; Chazal, Nerida. *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*. Routledge, n.d. Accessed September 21, 2022; Beginning in 2003, rebels in Darfur, a western region of Sudan, staged an insurrection against the Sudanese government. They claimed the current regime disregarded the needs of the large non-Arab population in Darfur. Over the course of several years the situation between the Sudanese



including those of Yugoslavia and Darfur, arrest warrants have gone unenforced by countries in which suspects were found.¹⁴⁹ Currently, a precedent has been established of nations' complicity in the behavior of war criminals and reluctance to enforce arrest warrants.

C. Free Will and Anarchy

The International system is fundamentally anarchic. Both state and non-state actors operate within the law as they see fit. This seemingly lawlessness is in the absence of “will at national and/or international levels.”¹⁵⁰ Unfortunately, there is no global enforcement agency to ensure the cooperation of other nations. As such, within the context of the Russia-Ukraine conflict, little to no coercive action has been taken against Russia. Though sanctions have been employed, the lack of more aggressive coercive efforts (stronger military opposition) only reinforces the notion that the Russian Federation, as a relatively strong world power, enjoys impunity from the coercive capacity of other states and international forces.

Referencing the ICC as understood in the previous section, an arrest warrant can, and likely will, go unfulfilled for years. With a precedent of international complicity, the responsibility to execute such a warrant now falls on the Russian Federation and its allies. The Kremlin has already

military and the rebels escalated and was eventually referred to the ICC by the UNSC. This led to the issuance of an arrest warrant for Omar al-Bashir, the sitting president of Sudan, for genocide, war crimes, and crimes against humanity.

¹⁴⁹ Sharp, “International Obligations,” 411-460; Chazal, “International Court and Social Control”

¹⁵⁰ Morris, Madeline. “International Guidelines Against Impunity: Facilitating Accountability.” *Law and Contemporary Problems* 59, no. 4 (1996): 29–39.



dismissed the ICC warrant for Putin and Lvova-Belova, indicating its more than expected refusal to enforce it.¹⁵¹ However, the recent arrest warrant issued by the Court certainly shrunk the world of Vladimir Putin; it prevents him from traveling to any major countries in the West as well as attending any summits of major world leaders. Though Putin will likely attend the 2023 G20 summit in India (as of the writing of this article), the presence of a Russian delegation at important meetings going forward will likely hinge on the host country, and its status of allyship with the Russian Federation. The degree to which Putin can interact with the rest of the international order will likely be inconsistent. Though such irregular involvement in the international system will certainly reduce Russia's role on the world stage and drain its ability to weigh in on policy, it will take time for these hindrances to show their full impact.

When evaluating the known reasons for why Russia has violated international law in such egregious ways, there are three primary factors to assess regarding why an international actor abides by a given rule or acts in accordance with an organization: (1) they fear the punishment of the enforcers, (2) the actor views the rule or mandate as within their own self-interest, or (3) the actor feels as though the rule or mandate is legitimate and ought to be obeyed.¹⁵² Conversely, each one of these can be inverted to signify reasons as to why a given rule or organization is not obeyed by international actors. Either (1) there is not a large enough coercive threat to force the actor into submission, (2) the rule is not within the actor's own

¹⁵¹ Reuters. "Kremlin: ICC Warrants Outrageous and Unacceptable, but Null and Void for Us," March 17, 2023.

<https://www.reuters.com/world/europe/russia-warrant-against-putin-meaningless-russia-does-not-belong-icc-2023-03-17/>.

¹⁵² Hurd, Ian. "Legitimacy and Authority in International Politics." *International Organization* 53, no. 2 (1999): 379–408, 379.



self-interest, or (3) the actor does not view the given mandate or body as legitimate and deserving of obedience. Situations like the Russia-Ukraine conflict, or general international disobedience, occur when neither one, two, nor three are met. Though a given international organization or mandate does not necessarily need all three, it is certainly clear that at least two of the three factors are necessary to guarantee the cooperation of actors. Though the UN has widespread legitimacy, its lack of coercive capacity alongside its clear opposition to Russian interests has left the international body paralyzed.

When viewing the reasons for international conflict specifically through the lens of the situation in Ukraine, each tenet necessary for cooperation can be evaluated individually. It is evident that neither the UN nor the ICC independently possess an adequately strong coercive apparatus to either halt Russia's behavior or force a surrender to the Court. The violations prohibiting the very conduct performed in Ukraine clearly competes with the self-interest of the Russian Federation. Further, none of the international bodies capable of holding Russia accountable are viewed as legitimate by the Russian Federation to actively prevent atrocities from being committed. As mentioned previously, at least two of the three factors must be met for cooperation. However, there is an argument to be made that the regularity and magnitude of international disobedience comes from the lack of all three. No single international mandate or organization possesses coercive capacity, legitimacy, and self interest and it is possible that the lack of such an international institution is to blame for the frequency and scale at which international conflict occurs.

Increasing coercive efforts and capability seems to be the most efficient solution to improve the UN's capacity for resolution in the Russia-Ukraine conflict. However, it should be noted that coercion as a method of guaranteed cooperation is the least sustainable. Coercion to motivate compliance requires excessive resources dedicated to surveillance and enforcement



and increases the likelihood of disobedience upon the halting of enforcement measures.¹⁵³ Due to the vast nature of the Russia-Ukraine conflict and the reduction in the likelihood of compliance without coercion in the future, increasing the coercive capacity is not a permanent solution to the problems offered by the situation in Ukraine.¹⁵⁴ Fundamentally, the very nature of the international system is one of the greatest obstacles in ending impunity held by officials of world powers. The anarchy inherent to the international order only decreases the likelihood that Russia, and other nations like it, can or will be held accountable for the atrocities they have committed.

VI. Concluding Thoughts

The preceding analysis aimed to synthesize a large portion of the existing information on the Russia-Ukraine conflict, specifically regarding the international law in question, the validity of claims that said international law has been violated since the February invasion, and the obstacles to bringing Russian officials to justice. The ICC, with the potential to hold Russian officials accountable for their crimes, has opened an investigation. However, with limited resources and the lack of cooperation from the UNSC, bound by Russia's veto power, the Court will continue to face challenges and it is unclear if or when a trial will ever commence. Just over a year into hostilities and the impact of the ongoing war has been insurmountable. With millions from the region displaced, an estimated 280,000 casualties, and over 30,000 civilian deaths, Eastern Europe will be recovering from the wreckage left by

¹⁵³ Hurd, "Legitimacy and Authority," 384.

¹⁵⁴ Hurd, "Legitimacy and Authority," 385.



this war for years.¹⁵⁵ With each new case opened by the ICC, new precedents are set; it is of the utmost importance that the international order commits to an agenda rooted in justice and ending impunity held by many world leaders. Let the foregoing assessment serve as a directive not only on the recent conduct of the Russian Federation, but the obstacles in place hindering international heroes from bringing the nation to justice.

¹⁵⁵ Cooper, Helene, Eric Schmitt, and Thomas Gibbons-Neff. "Soaring Death Toll Gives Grim Insight Into Russian Tactics." *New York Times*, February 2, 2023. <https://www.nytimes.com/2023/02/02/us/politics/ukraine-russia-casualties.html>.



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A Game of Telephone: The Evolution of Conspicuous Service in New York State

Zachary Miller¹⁵⁶

This article discusses the evolution of how conspicuous service is regarded by trial courts in New York state. Conspicuous service or “nail and mail service” is the process of nailing notice of an upcoming court hearing to a visible place on the property of a defendant. This article examines the legitimacy of this method of service as it pertains to money judgments in summary proceeding cases.

I. Explanation of New York State Court System

Unlike in most states, the Supreme Court of New York State is the court, where most cases are first heard, with original jurisdiction. When cases are appealed from the state Supreme Court, they reach a level known as the Appellate Division. The Appellate Division is a system of four appellate courts, known as Departments, which each preside over a separate section of the state. New York City is broken up between the First and Second Departments.¹⁵⁷

The highest court in the State of New York is the Court of Appeals. New York State courts are currently bound by the Civil Practice Laws and Rules (CPLR) and the Real Property Actions and Proceedings Law (RPAPL). Prior to the adoption of the CPLR, the courts were governed by the Civil Practice

¹⁵⁶ Brandeis University Undergraduate, Class of 2025.

¹⁵⁷ Lawrence K Marks and Janet DiFiore, *New York State Unified Court System New York State Courts An Introductory Guide*, n.d..



Act (CPA). All of these statutes were ratified by the New York State Legislature.¹⁵⁸

II. Explanation of The Process for Affecting Service

When a plaintiff seeks to sue a defendant in a state court, the state court must acquire jurisdiction over the defendant. A petitioning party must hire a process server to deliver a respondent with notice of the actions the petitioning party is bringing.¹⁵⁹ There are three major types of service a process server can provide. Firstly, there is *in-hand* which directly serves the individual named in an action.¹⁶⁰ Secondly, a *substituted service* refers to notices that are served upon an individual, of the proper age and discretion, substituted to receive notice on behalf of the individual named in the action.¹⁶¹ Substituted and in-hand services are sometimes jointly referred to as *personal services*. *Conspicuous service* or “nail and mail” service are the final type of service. Conspicuous service entails a process server affixing notice upon a conspicuous part of the respondent’s property and mailing a copy of the notice to the respondent’s last known residence.¹⁶²

During the late nineteenth century and early twentieth century, all services, excluding in-hand service, were unconstitutional.¹⁶³ In 1877, the United States Supreme Court heard the case of *Pennoyer v. Neff*. *Pennoyer*, which was decided in the aftermath of the ratification of the Fourteenth Amendment. *Pennoyer* held that the only way for a state court

¹⁵⁸ “The CPLR at Fifty: Its Past, Present, and Future,” *N.Y.U Journal of Legislation & Public Policy* 16, no. 3 (2013).

¹⁵⁹ A process server is a third party licensed to serve a defendant with the notice.

¹⁶⁰ *Dolan v. Linnen* (2003)

¹⁶¹ *Dolan v. Linnen*.

¹⁶² *Dolan v. Linnen*.

¹⁶³ *Dolan v. Linnen*.



to gain jurisdiction over an individual without violating their due process rights was to serve them while they were physically present.¹⁶⁴ The evolution of methods of service has had a wide range of implications for American jurisprudence. For a court to take any action directly impacting an individual, the court must first be granted jurisdiction over that individual. This process ensures that individuals have notice of their involvement in legal matters and can adequately prepare for legal proceedings. Therefore, issues regarding the legitimacy of various methods of service have the capacity to affect all civil actions. This compendium specifically chronicles the evolution of statutory and common law regarding the role these forms of service play in summary proceeding cases in New York state.

III. Explanation of a Summary Proceeding

In 1820, the New York State Legislature created *summary proceedings*, an expedited process that provided landlords with an easy means to retrieve possession of a property from tenants.¹⁶⁵ Prior to the implementation of this policy, a tenant's decision to stop paying rent was insufficient for a landlord to terminate a lease. This deficiency would prompt landlords to insert clauses into their leases which allowed them to reenter the property if rent payments ceased.¹⁶⁶

In 1924, an amendment to the Civil Practice Act (CPA) sought to allow courts to award rent during summary proceedings. Previously, landlords would have to commence a separate and costly action to collect rent. Additionally, these separate proceedings were antithetical to the nature of

¹⁶⁴ *Pennoyer v. Neff* (Supreme Court of the United States 1877).

¹⁶⁵ *Dolan v. Linnen*.

¹⁶⁶ Stephen Ross, "Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent," *Fordham Urban Law Journal* 15, no. 2 (1987): 48.



summary proceedings, which were expedited hearings. These judgments, which award a landlord rent, are known as *money judgments*.¹⁶⁷

IV. *McDonald* and the Conflict of Law

In the 1927 case of the *Matter of McDonald v. Hutter*, the process server unsuccessfully searched for the tenants at their respective residences for in-hand service. The process server also unsuccessfully searched for another individual for substituted service. Hence, the process server resorted to conspicuous service to serve the tenants.¹⁶⁸ The lower court found that the language of the CPA amendment, its plain meaning and the typical definitions of the words, could not be construed to limit money judgments to in-hand service.¹⁶⁹ The amendment did not specify any permissible or impermissible methods of service. Therefore, conspicuous service could permissibly be used for a landlord to receive a money judgment.¹⁷⁰

The case was appealed to the Fourth Department in 1929; the diligence of the server was undisputed when the case was appealed to the Fourth Department. The sole contention of the appellant was that the CPA only permitted a money judgment for in-hand service.¹⁷¹ The Fourth Department conceded that the language of the CPA was broad enough to encompass the interpretation of the lower court, but the court decided that the broadness of the statute's language required it to assess legislative intent. The court believed that the Legislature had only intended to allow money judgments for in-hand service based on the tradition of summons being

¹⁶⁷ *Ressa Family, LLC v. Dorfman*, (2002).

¹⁶⁸ *Matter of McDonald* (4th Dep't 1929).

¹⁶⁹ *Matter of McDonald v. Hutter*, (County Court Niagara County 1927).

¹⁷⁰ *Matter of McDonald v. Hutter*.

¹⁷¹ *Matter of McDonald*, 405.



delivered through in-hand service and from the precedent set in *Pennoyer*.¹⁷² The major issue embedded in the Fourth Department's opinion in *McDonald* was balancing the intentions of the Legislature in their 1924 amendment with the boundaries of constitutionality framed by *Pennoyer*. These efforts to reconcile the perceived contradiction led the Fourth Department to reverse the lower court's ruling, despite the Department's concession that the language was broad enough to convey the lower court's interpretation.¹⁷³

McDonald was largely unchanged until 1945 when *Pennoyer* was overturned by the case *International Shoe Company v. Washington*. In *International Shoe*, the Supreme Court upheld substituted service as a form of service in compliance with due process. This effectively reversed the *Pennoyer* rule, which only permitted in-hand service.¹⁷⁴

After *International Shoe*, the opinion in *McDonald* should have been rendered moot. The constitutional concerns which formed the basis for the *McDonald* ceased to exist under *International Shoe*.¹⁷⁵ Additionally, in 1954, the CPA was amended to eliminate the requirement that due diligence be shown in attempting in-hand service before resorting to conspicuous service.¹⁷⁶ The prerequisite standard became one of *reasonable application*, a more flexible threshold than due diligence. If a reasonable application proved fruitless, conspicuous service was permitted.

The CPA amendment indicated a legislative intention to make conspicuous service a more readily available option to landlords and their process servers.¹⁷⁷ These sentiments that the

¹⁷² *Matter of McDonald*, 406.

¹⁷³ *Matter of McDonald*, 406.

¹⁷⁴ *International Shoe Co. v. Washington*, (Supreme Court of the United States, 1945).

¹⁷⁵ *Dolan v. Linnen*.

¹⁷⁶ *Matter of Seagram Sons v. Rossi* (1965).

¹⁷⁷ *Dolan v. Linnen*.



Legislature appeared to harbor are noteworthy as they pertain to subsequent judicial developments.

V. *McDonald* in the Wake of *International Shoe*

The 1961 case of *Matter of Raymond v. Grotz* is a noteworthy decision because it was decided in the aftermath of *International Shoe* and the 1954 CPA amendment. In *Raymond*, a process server was unable to find the tenants and resorted to conspicuous service.¹⁷⁸ *Raymond* found that service was consistent with the amended CPA, but the court maintained that personal service was vital for a money judgment. The court argued that *McDonald's* precedent was that money judgments could only be awarded for conspicuous service if a court order authorized it once it was shown that personal service was impossible. *Raymond* chose to uphold *McDonald* as a binding precedent.¹⁷⁹ *McDonald* was cited despite the constitutional restraints of *Pennoyer* no longer binding the court in *Raymond*. Additionally, the due diligence prerequisite for conspicuous service had already eased the process during this time.

Raymond is notable because it was decided between the 1954 CPA amendment and the 1963 repeal of the CPA. During this formative period, *Raymond* upheld *McDonald* as binding and persuasive precedent. *Raymond* deferred to *McDonald* despite the *Pennoyer* case, the basis of *McDonald*, no longer being applicable.¹⁸⁰ On September 1, 1963, the New York State Legislature repealed and replaced the CPA with the New York Civil Practice Laws and Rules (CPLR) and the Real Property Actions and Proceedings Law (RPAPL).¹⁸¹ When the CPA was

¹⁷⁸ *Matter of Raymond v. Grotz*, 926.

¹⁷⁹ *Raymond*, 926.

¹⁸⁰ *Raymond*, 926.

¹⁸¹ *Dolan v. Linnen*.



repealed, the statute interpreted by the Fourth Department in *McDonald* ceased to be binding law.

VI. *McDonald* in the Wake of the CPLR

The CPLR permitted substituted service and conspicuous service when in-hand service could not be performed with due diligence, while the RPAPL carried over the reasonable application standard from the 1954 amendment.¹⁸² Two months after the repeal of the CPA, *Wayside Homes v. Upton* was heard on November 26, 1963.¹⁸³ *Wayside* interpreted the RPAPL as delegating the details of service for a money judgment to the CPLR. *Wayside* derived this from a provision in the RPAPL which stated that, “service of the notice of petition and petition shall be made *in the same manner as personal service of a summons*.”¹⁸⁴ In *Wayside*, the process server engaged in substituted service.¹⁸⁵ A notice of petition is the document a tenant is presented with to acquire jurisdiction in a summary proceeding.

The court in *Wayside* used this language to surmise that process servers delivering summary proceeding papers ought to be held to the same standard as one delivering a summons.¹⁸⁶ Thus, *Wayside* adopted the CPLR and decided that the RPAPL was not the governing statute. At the time, the CPLR’s standard for affecting substituted service or conspicuous service in a summons was due diligence. The court acknowledged that the server had complied with the RPAPL, but that the server failed

¹⁸² *Dolan v. Linnen*.

¹⁸³ Interestingly, the case was initially supposed to be heard on Monday November 25, 1963. But, courts were closed that day in commemoration of the assassination of President John F. Kennedy on Friday, November 22. So, the case was heard on November 26.

¹⁸⁴ *Wayside Homes v. Upton* (1963).

¹⁸⁵ *Wayside*, 1087.

¹⁸⁶ *Wayside*, 1087.



to comply with the due diligence required by the CPLR.¹⁸⁷ The landlord's compliance with the RPAPL was not enough to award a landlord a money judgment. This case is notable for its ruling that the principles in *McDonald* remained binding and that a similar legislative intent undergirded all of these statutes.

The legislative intent described by the court in *Wayside* makes no mention of the 1954 CPA amendment which replaced the due diligence standard with one of reasonable application.¹⁸⁸ In this amendment, the Legislature indicated a desire to loosen the standard a server needed to meet to affect service. Additionally, this understanding of the intent of the Legislature fails to account for a section of the CPLR which states that “[e]xcept where otherwise prescribed by law, procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings.”¹⁸⁹ The RPAPL is a statute intended to govern summary proceedings. Since 1924, the intent of the Legislature had been to merge actions for rent into summary proceedings to expedite the process on all fronts.¹⁹⁰ Even if the language equating summary proceedings and summons kept the process bound by the CPLR, the Legislature removed that language from the RPAPL in 1965.¹⁹¹

This was significant because *Wayside*'s ruling was predicated on the idea that these proceedings ought to mirror a summons.¹⁹² *Wayside* incorporated the CPLR because the court believed that this language removed money judgments from the

¹⁸⁷ *Wayside*, 1088.

¹⁸⁸ *Wayside*.

¹⁸⁹ *Dolan v. Linnen*, 324.

¹⁹⁰ *Matter of McDonald*.

¹⁹¹ *Arnold v. Lyons*, (March 2003).

¹⁹² “Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR,” *St. John's Law Review* 38 (May 1964).



purview of the RPAPL's language.¹⁹³ But, the omission of this language indicated an intent to insulate summary proceedings from the regiment of the CPLR. That same year, *Matter of Seagram Sons v. Rossi* was decided.¹⁹⁴ In *Seagram*, conspicuous service and substituted service were used.¹⁹⁵ In each instance, the process server made only one attempt at in-hand service. The court ruled that it is not necessary to show due diligence for in-hand service before resorting to conspicuous service or substituted service for a summary proceeding based on the RPAPL.¹⁹⁶ The court in *Seagram* believed that the RPAPL's flexible requirements were an intentional attempt by the Legislature to maintain a speedy process for landlords who sought to effectuate summary proceedings.

Conversely, the court in *Seagram* pointed out that the CPLR permitted the service of a summons through substituted service or conspicuous service only when due and diligent efforts to serve in-hand had failed.¹⁹⁷ So, if a landlord does affect conspicuous service or substituted service without meeting the due diligence requirement, they are not entitled to a money judgment. *Seagram* ruled that both substituted and conspicuous services required a preemptive exercising of due diligence in a server's attempts to execute an in-hand service.¹⁹⁸ *Seagram* cited *Wayside* and *Raymond* as precedent for not awarding a money judgment for conspicuous service without the due diligence required by the CPLR.¹⁹⁹

Seagram's ruling is notable for its preservation of *Wayside's* due diligence prerequisite and its affirmation of the

¹⁹³ *Wayside*, 1089.

¹⁹⁴ *Matter of Seagram Sons v. Rossi*, (1965).

¹⁹⁵ *Seagram*, 428.

¹⁹⁶ *Seagram*, 428.

¹⁹⁷ *Seagram*, 428.

¹⁹⁸ *Seagram*, 428.

¹⁹⁹ *Seagram*.



adoption of the CPLR for assessing these kinds of cases. *Wayside's* adoption of the CPLR had been rooted in language found in the RPAPL which analogized notice of petitions and summons.²⁰⁰ The redaction of this language in 1965 no longer mandated that the service in summary proceedings mirror the service of a summons. Therefore, it was no longer necessary to apply the standard of the CPLR; instead courts should have subjected summary proceedings to the RPAPL entirely.²⁰¹ As a result, the Legislature nullified the precedent set in *Wayside* because *Wayside's* precedent was grounded in this language justifying the adoption of the CPLR. However, *Seagram's* vindication of *Wayside* was instrumental in maintaining an adherence to the CPLR when assessing the viability of money judgments.

In 1971, *1405 Realty Corp v. Napier* denied a money judgment as a result of a process server's perceived lack of compliance with the CPLR.²⁰² In *Napier*, there were two visits to the tenant's home to affect personal service before resorting to conspicuous service. *Napier* cites *Wayside* and *Seagram* as precedent for requiring a prerequisite showing of due diligence.²⁰³ *Napier* cites *McDonald* as precedent for how the method of service affects a landlord's ability to win a money judgment.²⁰⁴ In *Napier*, the court acknowledged that the process server complied with the RPAPL's mandates for the service of process, specifically conceding that these guidelines are easier to meet because of the nature of summary proceedings as expedited relief.²⁰⁵ Yet, the court found that the process server had not complied with the CPLR and so denied the money judgment. The court in *Napier* should not have been applying

²⁰⁰ *Wayside*.

²⁰¹ *New York City v. Wall Street Racquet Club* (1987).

²⁰² *1405 Realty Corp. v. Napier*, 795 (1971).

²⁰³ *Napier*, 795.

²⁰⁴ *Napier*, 794.

²⁰⁵ *Napier*, 794.



the CPLR in the first place. By this point, *Seagram* and *Wayside* had been overturned by the Legislature's omission of the language equating summary proceeding notice with that of a summons.²⁰⁶ There is no further evidence to indicate that *Napier* was appealed.

The due diligence prerequisite for substituted services was removed from Section 308 of the CPLR in 1970. As a result of this amendment, in-hand service and substituted service were equated under one category of *personal service*.²⁰⁷ In the 1972 case *Fairhaven Apartments v. Dolan*, a process server affected substituted service upon a tenant. The court ruled that this complied with the RPAPL and the CPLR. The court in *Fairhaven* distinguished itself from the court in *Wayside* based on the absence of a due diligence prerequisite for affecting substituted service.²⁰⁸

VII. *Ressa* and *Dolan*: Taking Judicial Notice of the Problem

In the case *Ressa Family LLC v. Dorfman*, personal service was not used. *Ressa* contended that the Legislature never made any indication that the amalgamation of RPAPL and CPLR for summary proceedings was necessary.²⁰⁹ Instead, the court in *Ressa* argued that efforts to combine these two statutes is the result of a misunderstanding of the *McDonald* rule. *Ressa* found that the RPAPL offers sufficient constitutional protections to tenants.²¹⁰ *Ressa* reasoned that the purpose of a summary proceeding is to provide expedited relief. Therefore, it would be logical to ease the burden of

²⁰⁶ *Dolan v. Linnen*.

²⁰⁷ *Dolan v. Linnen*.

²⁰⁸ *Fairhaven Apts. No. 6 v. Dolan*, (1972).

²⁰⁹ *Ressa*, 320.

²¹⁰ *Ressa*, 321.



serving notice. *Ressa* ultimately petitioned the Legislature or another appellate court to overrule *McDonald*. But, *Ressa's* ruling upheld *McDonald* and decided that money judgments may only be awarded in the event of personal service. The court in *Ressa* was a trial-level court and did not believe it had the ability to tamper with *McDonald* without appellate jurisdiction or legislative prerogatives.²¹¹

Ressa was decided in 2002 and shortly after, in January of 2003, *Dolan v. Linnen* was decided. In *Dolan*, a process server made four attempts to serve the tenant in-hand. After these four attempts, the process server engaged in conspicuous service.²¹² *Dolan* asserted that the legislative intent surmised in *McDonald* had been abrogated by the Legislature through subsequent statutory amendments. *Dolan* advocated utilizing the CPLR for assessing the legitimacy of conspicuous service. *Dolan* advised awarding money judgments when conspicuous service met the due diligence standard in the CPLR.²¹³

Following the decision of *Dolan* in January 2003, in March of the same year, Judge Kenneth Gartner, who presided over the *Ressa* case, authored the decision in *Arnold v. Lyons*. *Arnold* further elucidated *Ressa* and responded to *Dolan*. In *Arnold*, tenants were served by conspicuous service. *Arnold* awarded possession but denied the money judgment, citing *Ressa*. *Arnold* affirmed *Ressa's* assertion that the courts which sought to award money judgments for methods of service other than personal service misunderstood *McDonald*. *Arnold* described *Dolan* as an opinion which adopts *Ressa's* historical analysis but which arrived at a diametrically opposed conclusion based on a narrow but crucial area of difference.²¹⁴

Arnold stated that *Ressa* and *Dolan* agree that the CPA, under which *McDonald* was decided, has largely been adopted

²¹¹ *Ressa*, 323.

²¹² *Dolan v. Linnen*, 303.

²¹³ *Dolan v. Linnen*.

²¹⁴ *Arnold v. Lyons*, (March 2003).



into the RPAPL. Both agree that *McDonald* construed the Legislature to have sought to limit delivery to personal service. *Arnold* contended that *Ressa* and *Dolan* agreed that the decision in *McDonald* stemmed from a desire to avoid a novel practice and avoid conflicting with *Pennoyer*. *Arnold* posited that *Ressa* and *Dolan* are in agreement that *McDonald*'s methodology was flawed and that the court in *McDonald* attempted to incorporate an unexpressed intent contrary to the plain meaning of the text. *Arnold* affirmed that both *Ressa* and *Dolan* believe that *McDonald* is no longer defensible on its original grounds.²¹⁵

Arnold concluded that the fundamental disagreement between *Ressa* and *Dolan* stems from their differing view of *stare decisis*, the legal principle that judges should adhere to precedent. *Ressa* believed the courts must follow *McDonald*, while *Dolan* did not. *Arnold* asserted that precedents involving statutory interpretation are entitled to a greater degree of stability. The judge in *Arnold* argued that it is the Legislature's job to correct any misinterpretation of legislative intent. But, that courts with original jurisdiction do not have the capacity to influence these kinds of issues.²¹⁶

Arnold submitted that the Legislature could have easily revised the RPAPL to permit all forms of service for all benefits. The fact that the Legislature still has not done that shows that *McDonald*'s understanding of the Legislature's intentions remains. *Arnold* contends that applying the RPAPL as written might effectuate the intent of the Legislature in 1924 but would fail to uphold the intent of the current Legislature.²¹⁷ Since the *Arnold* ruling, most courts have adopted the *Dolan* rule.

²¹⁵ *Arnold*, 6.

²¹⁶ *Arnold*, 15.

²¹⁷ *Arnold*.



VIII. Adoption of the *Dolan* Rule: “Evisceration” of

McDonald

In the case of *Avgush v. Berrahu*, from October 2007, a process server attempted in-hand service on five separate occasions before resorting to conspicuous service.²¹⁸ In the lower court, after the tenants failed to appear, the landlord was only granted possession. *Avgush* found that the conduct of the process server met the reasonable application standard found in RPAPL section 735.²¹⁹ *Avgush* also found that it would have satisfied the due diligence standard found in subsection 4 of section 308 of the CPLR. This case cites *Dolan v. Linnen* as a precedent for awarding a money judgment after satisfying the due diligence standard necessary for conspicuous service under section 308 of the CPLR.²²⁰ *Avgush* acknowledges that the constitutional landscape has changed substantially since the ruling in *McDonald*. The court ultimately awarded a money judgment.

In December 2009, *Expressway Village v. Denman* was decided. The lower court awarded possession but not a money judgment because the process server resorted to conspicuous service. The appeal raised the sole issue of whether a trial court in a summary proceeding can enter a money judgment when notice is served through conspicuous service.²²¹ *Expressway* states that the rule in *McDonald* appears to be incorrect and speculates that the Fourth Department would no longer apply it. *Expressway* cites *Avgush* to show that an appellate court has rejected *McDonald* and adopted the reasoning of cases like *Dolan*.²²² *Expressway* posits that the absence of a similar ruling

²¹⁸ *Avgush v. Berrahu*, 86 (2007).

²¹⁹ *Avgush*, 86.

²²⁰ *Avgush*, 90.

²²¹ *Expressway Village, v. Denman*, 956 (2009).

²²² *Expressway*, 957.



in any other higher court allows the First and Third Departments to adopt *Avgush*. *Expressway* contends that if the Fourth Department wishes to preserve *McDonald*, they can always reverse this decision.²²³

Subsequent courts have denied that *Expressway* overturned *McDonald* because the County Court of Niagara County is a lower court than the Fourth Department.²²⁴ Regardless, the *Dolan* rule is the one that *Expressway* adopted. The *Dolan* rule adopted the policy of melding the RPAPL and CPLR and determining the viability of a money judgment based on whether conspicuous service was performed after a process server used due diligence to attempt personal service.²²⁵ But, with the *Dolan* rule in place, the correct standard for these cases is still not being applied by judges.

A contemporary example comes from the 2022 case *Li-Seabrooks v. Pimento* where two attempts were made at personal service before the process server resorted to conspicuous service. The respondent argued that the process server did not exercise due diligence before resorting to conspicuous service. *Pimento* holds the petitioner to the standard of due diligence and distinguishes this standard from the reasonable application standard under the RPAPL. *Pimento* states that one attempt inside normal working hours and one attempt outside normal working hours satisfies reasonable application, but no rigid standard can be prescribed for due diligence. The opinion cites *Dolan v. Linnen*'s finding that two attempts at personal service satisfy reasonable application but not due diligence. Ultimately, the court ruled in the respondent's favor and denied a money judgment.²²⁶

²²³ *Expressway*.

²²⁴ *Cornhill LLC v. Sposato* (2017)

²²⁵ *Dolan v. Linnen*.

²²⁶ *Li-Seabrooks v. Pimento* (2022).



IX. Significance and Implications

American society is rooted in contracts, both implicit and explicit. These contracts are agreements predicated in conditions which compel each party to keep their word when a sensitive deal is made. When these contracts are breached, people ought to be able to look to the judicial system, and the due process rights enshrined within it, for an opportunity to defend their rights.²²⁷ In the case of landlord-tenant agreements, the tenant is offered the benefit of shelter by the landlord and the landlord is offered the benefit of rent by the tenant.²²⁸ The New York State Legislature conceived the summary proceeding as a mechanism for affording landlords an expedited hearing when their rights under this contract were denied. Through subsequent legislative amendments, these hearings became a forum for landlords to redress the loss of their contractual benefit because they could petition for a money judgment.²²⁹

At the root of this issue is the importance of allowing individuals to be compensated for situations where they are taken advantage of. While it is necessary to safeguard the liberties of tenants and ensure they can peacefully enjoy shelter, it is also important to safeguard the rights of a landlord when their property is occupied without their consent while they are not being duly compensated. The purpose of a summary proceeding is to right these wrongs when they occur and award landlords the money they are owed.²³⁰ However,

²²⁷Ross, “Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent.”

²²⁸ Ross.

²²⁹ *Matter of McDonald v. Hutter*.

²³⁰Ross, “Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent.”



New York State courts continue to deny this restitution to landlords on the basis of obsolete legal analysis.

An analogy for this situation is a game of telephone.²³¹ Imagine a straight line of players in a game of telephone, the cases which deal with this issue in chronological order. The player tasked with formulating the message is the Legislature. The Legislature releases the message in the form of statutes. By passing a statute, the Legislature passes along their message for courts to interpret. Along the way, courts have misinterpreted and mistranslated the original message leading to confusion. A distinction between the legislative process and a game of telephone, however, is that higher courts impact how legislation is enacted and how courts rule on issues.

The Fourth Department was faced with a difficult decision when the *McDonald* case was appealed to them. Summary proceedings were intended to be an expedited process for securing control of one's property when a tenant ceased to pay rent. The 1924 CPA statute was intended to enjoin money judgments in this process to further expedite it.²³² The Fourth Department recognized that the statute contained no enumeration of limitations contingent upon the method of service. Simultaneously, *Pennoyer* was a binding precedent which declared anything other than in-hand service unconstitutional. Thus, the Fourth Department fabricated a legislative intent to avoid disrupting a tradition of recognizing in-hand service as the only legitimate form of service, as enforced by *Pennoyer*.²³³ The *McDonald* decision was rendered moot when *Pennoyer* was overturned by *International Shoe*. At this point, any constitutional qualms surrounding methods of service other than in-hand service were eviscerated.²³⁴

²³¹ *Ressa*.

²³² *Matter of McDonald v. Hutter*.

²³³ *Matter of McDonald*.

²³⁴ *Ressa*.



Furthermore, the CPA, which governed the *McDonald* case, was repealed in 1963, yet *Wayside* chose to cite *McDonald* as a binding precedent for adjudicating cases pertaining to the RPAPL.²³⁵ Additionally, *Wayside* opted not to submit to the RPAPL as the governing statute and instead subjected summary proceedings to the more scrutinous CPLR to award money judgments.²³⁶ Ultimately, this subjected summary proceedings to a statute the Legislature likely did not intend for them. *Wayside* justified this by pointing to a sentence in the RPAPL seeking to equate summary proceedings with summons, a process governed by the CPLR. The court in *Wayside* believed this was an indication the Legislature intended for courts to adjudicate these cases, using the CPLR.²³⁷

Even if this was their initial intention, the Legislature revised the RPAPL in 1965 to omit this language.²³⁸ This action indicated a desire to keep summary proceedings within the parameters of the RPAPL, yet courts continued to wrongfully assess these cases under the CPLR.²³⁹ Even *Ressa* and *Arnold*, which acknowledged this method of jurisprudence was incorrect, applied *McDonald* and denied a money judgment for a case which did not involve personal service. The rationale was a desire to comport with the intentions of the current Legislature. Since the Legislature could amend the RPAPL to explicitly enumerate the permissible methods of service and did not, Judge Gartner believed that trial courts were still forced to uphold this ingrained practice.²⁴⁰

²³⁵ “Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR.”

²³⁶ “Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR.”

²³⁷ *Wayside*.

²³⁸ “McManus v. Condren,” *All Decisions*, October 27, 2022, https://ir.lawnet.fordham.edu/housing_court_all/676.

²³⁹ *Napier*.

²⁴⁰ *Arnold*.



Returning to the analogy of a game of telephone, a noteworthy distinction between the legislative process and a game of telephone is that the Legislature can amend their statutes. This would be like a player sending new messages down the telephone line while other players are still trying to decipher the first message. In this way, courts are not bound by the Legislature's initial statute and should take subsequent revisions into consideration. Even though Judge Gartner's understanding of the RPAPL is valid, he chose not to rule in accordance with this philosophy because he believed that the Legislature did not convey any intention of ameliorating how courts adjudicated this matter.²⁴¹ Judge Gartner argued that if he did not comport with *McDonald*, he would be upholding the intent of the Legislature in 1924, but not necessarily the contemporary legislative intent on this issue.²⁴²

Judge Gartner's belief, however, discards all of the subsequent legislative developments between 1924 and the present day which indicated a desire to reform the process.²⁴³ Throughout this time, it was courts that remained stagnant, not the Legislature. The Legislature engaged in periodic revisions designed to steer courts towards enforcing less stringent service requirements for summary proceedings. For example, after *Pennoyer*, the CPA eliminated the due diligence prerequisite for a process server's attempts to affect personal service before resorting to substituted service or conspicuous service.²⁴⁴ This development was ignored by *Raymond*, which chose to defer to *McDonald*.²⁴⁵ The Legislature then repealed the CPA and overhauled the statutory framework with the CPLR and the RPAPL. In *Wayside*, these developments were ignored and the case held that the same intent surmised by *McDonald*

²⁴¹ *Arnold*.

²⁴² *Arnold*.

²⁴³ *Dolan v. Linnen*.

²⁴⁴ *Dolan v. Linnen*.

²⁴⁵ *Raymond*.



undergirded these statutes.²⁴⁶ *Wayside* pointed to the provision equating summons and summary proceedings in the RPAPL to come to this conclusion.²⁴⁷ Thus, the Legislature removed this language from the statute entirely.²⁴⁸ Yet, *Napier* chose to follow *Wayside* and maintained a framework which ignored subsequent legislative developments.²⁴⁹

Ressa recognized the contradictions embedded in this saga, yet Judge Gartner believed that it was necessary to adhere to *stare decisis*.²⁵⁰ Even after Judge Gartner witnessed *Dolan* perpetuating the architecture of *Wayside*, he refused to carve out a better path in *Arnold* because he did not believe the Legislature expressed a desire to see the RPAPL govern summary proceedings.²⁵¹ As a result of this series of mistranslations and misinterpretations of legislative intent, individuals have been robbed of their ability to be justly compensated for wrongs they faced at the hands of those who unjustly occupied their property. As evidenced by *Pimento*, this mistake continues to occur in contemporary jurisprudence. This is antithetical to the legislative intent which undergirds summary proceedings.²⁵² Additionally, this fails to heed to the legislative intent to have summary proceedings be governed by the RPAPL's standard of reasonable application.²⁵³ Yet, this practice has endured for over a century. In the time since this issue first emerged, there have been a variety of technological and social developments that have altered one's capacity to

²⁴⁶ "Substituted Service--Section 735 of the RPAPL and Section 308(3) of the CPLR."

²⁴⁷ *Wayside*.

²⁴⁸ *Ressa*.

²⁴⁹ *Napier*.

²⁵⁰ *Arnold*.

²⁵¹ *Arnold*.

²⁵² Ross, "Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based Upon Nonpayment of Rent."

²⁵³ *Arnold*.



gain information. Despite these developments, the process for delivering notice of one's involvement in legal proceedings has not evolved.



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A Restoration of Voting Rights & Humanity

Brandon Samuels²⁵⁴

As a nation that has always touted its democratic principles, the United States of America restricts citizens' right to vote. Voter disenfranchisement laws particularly silence the voices of formerly incarcerated individuals. These laws often restrict or make it harder for formerly incarcerated Americans to vote in federal and state elections. Individuals who have fully completed their sentence continue to face voting obstacles beyond prison that non-incarcerated Americans do not encounter. These laws hamper individuals who have completed their sentences and discriminate against the rights of formerly incarcerated people. This article questions why formerly incarcerated individuals are not eligible to enjoy the same voting rights as their fellow Americans. To combat this unjust treatment, this article proposes an original super-statute: The Voting Rights Restoration Act. This novel proposal ensures that formerly incarcerated individuals will be respected under the law as equal citizens of the United States.

I. A Proposed Statute: *The Voting Rights Restoration Act*

A fundamental right that all Americans are entitled to is the ability to participate in our nation's democratic processes. However, there are numerous state laws that exclude millions of Americans with past criminal convictions from voting in both state and federal elections.²⁵⁵ The Voting Rights Restoration Act seeks to address this anti-democratic injustice.

²⁵⁴ Brandeis University Undergraduate, Class of 2025.

²⁵⁵ Chung, Jean, and Amy Fettig. "Voting Rights in the Era of Mass Incarceration: A Primer." *The Sentencing Project*, 3 Sept. 2021, <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.



This proposed statute is a *super-statute* because it addresses a fundamental aspect of national life: the ability for all Americans to participate in democracy.²⁵⁶ Super-statutes, such as the Civil Rights Act of 1964 or the Voting Rights Act of 1965, provide a broad pathway for citizens to exercise their fundamental rights that are enshrined in the Constitution of the United States.²⁵⁷

The fundamental right to participate in our democracy is directly addressed under Section 1 of the 14th Amendment of the Constitution which states, “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁵⁸ This amendment is particularly significant because it states that the laws of the United States, including voting laws, must be applied equally to all citizens.²⁵⁹ The Voting Rights Restoration Act reinforces the Equal Protection Clause because it promotes the constitutional principle that every American citizen is entitled to vote in elections and that no state shall abridge this right.

Finally, the Voting Rights Restoration Act is a super statute because it would be a “landmark” of our law.²⁶⁰ Not only does this proposed piece of legislation give practical

²⁵⁶ Scholars William N. Eskridge, Jr. and John Ferejohn define a super-statute as, “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute” (1216); Eskridge, William N., and John Ferejohn. *Super-Statutes*, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1108&context=dli>

²⁵⁷ Breen, Daniel. 221LGLS: Civil Rights and Civil Liberties: Legislative. 26 January. 2022, Brandeis University, Waltham. Class Lecture.

²⁵⁸ U.S. Const. amend. XIV, § 1.

²⁵⁹ U.S. Const. amend. XIV, § 1.

²⁶⁰ Breen, “Class Lecture.”



effect to the Equal Protection Clause, a core constitutional command, but it also restores the right to vote to every formerly incarcerated American. In summation, the Voting Rights Restoration Act pertains to the three criteria that define a super-statute; the legislation addresses a fundamental aspect of our national life, it gives effect to deeply held beliefs and aspirations, and it is a “landmark” in our law.²⁶¹

The Voting Rights Restoration Act would also allow any individual who has completed a sentence in prison or jail to be eligible to vote upon release. Further, the Act would allow individuals who are on parole or supervised probation to exercise their right to vote in elections. States such as Florida, Alabama, Arizona, and Tennessee have adopted laws that have made restoration of voting rights “conditional on an individual’s payment of all restitution, fines, and fees.”²⁶² Formerly incarcerated individuals who are required to make monetary payments in order to exercise their right to vote encounter hindrances in fulfilling their civic responsibilities that are not encountered by non-incarcerated individuals.

The Sentencing Project is a research and advocacy center that seeks to limit the decriminalization of youths and adults by undertaking an initiative to analyze laws related to voter disenfranchisement. The center estimates that almost 900,000 Floridians are barred from voting, despite a 2018 referendum which guaranteed their restoration of voting rights.²⁶³ The proposed Voting Rights Restoration Act abolishes any law that requires former imprisoned to pay any restitution, fine, or fee to vote. The act of voting or exercising one’s voice in democracy should not be dependent on a monetary contribution. Voting is an intangible mechanism that has no monetary function because it is both a freely guaranteed and not transferable right. Instead, voting ought to be regarded as a

²⁶¹ Eskridge, William N., and John Ferejohn. *Super-Statutes*.

²⁶² Chung et al., “Voting Rights.”

²⁶³ Uggen et al., “Locked out 2020.”



fundamental right that any citizen can freely exercise, regardless of income level or previous incarceration.

The Voting Rights Restoration Act seeks to restore the right to vote for formerly incarcerated individuals while also enforcing the rule of law in a rational manner. When an individual violates the laws of the United States, they are subject to incarceration. A convicted individual forfeits many freedoms, including the right to vote, while they are incarcerated. Therefore, The Voting Rights Restoration Act pertains to individuals who are no longer incarcerated as well as individuals who are in a period of parole.²⁶⁴ The application of this proposed statute depends on if the individual is imprisoned or has been released from incarceration. The proposed statute does not apply to individuals who are currently serving a prison sentence. While individuals relinquish their right to vote during their period of confinement and/or probation, this restriction should end upon the termination of a person's sentence. After an individual completes their sentence, they have served their time and ought to be reintegrated back into a society where voting is a regular practice. Lastly, the Voting Rights Restoration Act would be a federal law enacted by Congress, meaning it is applicable to all 50 states and territories of the United States.

II. Why The Voting Rights Restoration Act Is Needed

The Voting Rights Restoration Act is needed today because it reflects the current call to combat the oppression of minority groups disproportionately affected by the criminal justice system.²⁶⁵ As it stands, disenfranchisement of voting

²⁶⁴ A great debate exists regarding if currently incarcerated individuals should enjoy the right to vote. While this issue is worthy of discussion, its breadth is beyond the scope of The Voting Rights Restoration Act and this article.

²⁶⁵ Brennan Center For Justice, "Criminal Disenfranchisement Laws."



rights for formerly incarcerated individuals is widespread across the nation. The Brennan Center for Justice, a nonprofit law and policy institute which seeks to hold American political institutions to account, states that “twenty-seven states bar community members from voting, simply on the basis of convictions in their past.”²⁶⁶ Essentially, it does not matter the reason individuals have been incarcerated, the duration of their incarceration, or how they behaved while incarcerated; all that matters is that they were, for some time, and for some reason, incarcerated.²⁶⁷

The impact of these laws disenfranchising formerly incarcerated people has only intensified as “the number of people disenfranchised because of a felony conviction increased dramatically, rising from 1.17 million in 1976 to 6.1 million by 2016, just as mass incarceration and criminalization took hold in the U.S.”²⁶⁸ Moreover, incarcerated individuals' disenfranchisement laws have a disproportionate impact on communities of color. As of 2020, The Sentencing Project found that “in seven states—Alabama; Florida; Kentucky; Mississippi; Tennessee; Virginia; Wyoming—more than one in seven Black adults are disenfranchised. In total, 1.8 million Black citizens are banned from voting.”²⁶⁹ The significance of this statistic illustrates that voter disenfranchisement laws are specifically targeting Black individuals from pursuing their Constitutional right to participate in democracy. This is a pattern of social injustice that has plagued America since its founding. It is time to address voter disenfranchisement laws to ensure equality under the law for all American citizens.

²⁶⁶ Brennan Center For Justice, “Criminal Disenfranchisement Laws.”

²⁶⁷ Brennan Center For Justice, “Criminal Disenfranchisement Laws.”

²⁶⁸ Chung et al., “Voting Rights.”

²⁶⁹ Uggen et al., “Locked out 2020.”



III. A Lineage of Super Statutes

In general, the proposed super statute reflects a long history of fundamental American principles, which include democratic participation and equality under the law. At the core of American democracy is civic participation through regularly held elections.²⁷⁰ While the ability to vote is more accessible today than it was a century ago, there are clearly still limitations to voting rights for Americans with past criminal convictions. There is a long history of Americans fighting for more equal voting rights with the enactment of meaningful legislation.²⁷¹ The passage of the Voting Rights Act of 1965 represents the battle to make voting a more accessible and inclusive process.²⁷² At the time of enactment, this 1965 statute abolished poll taxes and literacy tests. Since its enactment, it has aimed to prevent any jurisdiction from abridging the right to vote on account of race and has required a preclearance requirement which bars specific jurisdictions from changing voting laws without approval from the United States Attorney General or District Court judgment.²⁷³

The Voting Rights Act of 1965 prevented discriminatory voter suppression tactics, thereby giving more Americans the chance to exercise their right to vote. Similarly, the proposed Voting Rights Restoration Act seeks to make voting more accessible for previously incarcerated individuals by eliminating the obstacles that are prevalent in our current laws. Congress tried to address racial discrimination in voting through the Voting Rights Act of 1965, but criminal disenfranchisement remains an apparatus of oppression in a criminal justice system that disproportionately affects people of

²⁷⁰ Breen, "Class Lecture."

²⁷¹ Breen, "Class Lecture."

²⁷² Breen, "Class Lecture."

²⁷³ Breen, "Class Lecture."



color.²⁷⁴ For this proposed Act to have a broad application to all previously incarcerated Americans, it should be a federal law enacted by the United States Congress. The hypothetical passage of the Voting Rights Restoration Act would illuminate America's precious norms of democratic participation and equality under the law.

Since there is no existing federal legislation and individual states are adopting radically different voting laws, there is a great disparity in the voting rights that formerly incarcerated Americans receive.²⁷⁵ Part of this inconsistent application of criminal disenfranchisement laws stems from the Supreme Court of the United States' decision in *Richardson v Ramirez* (1974). In this case, three men who had served time for felony convictions in California sued the state for the right to vote by alleging that the state's policies denied them the right to equal protection guaranteed under the U.S. Constitution's 14th amendment.²⁷⁶ The Court ruled in favor of California, stating that the Equal Protection Clause does not prohibit disenfranchisement policies and that Section 2 of the 14th Amendment allows for states to deny voting rights "for participation in rebellion, or other crime."²⁷⁷

However, the Court's interpretation of the Equal Protection Clause in *Richardson* is inconsistent with the court's previous decision in *Harper v. Virginia Board of Elections* (1966) where the Court found that "the Equal Protection Clause is not shackled to the political theory of a particular era."²⁷⁸ Rather, it "draws much of its substance from changing social norms and evolving conceptions of equality."²⁷⁹ The

²⁷⁴ Chung et al., "Voting Rights."

²⁷⁵ Chung et al., "Voting Rights."

²⁷⁶ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

²⁷⁷ *Richardson v. Ramirez*, 418 U.S. 42 (1974).

²⁷⁸ *Harper v. Virginia Bd. of Elections*, 383 U.S. 669 (1966).

²⁷⁹ Tribe, Laurence H. *American Constitutional Law*. (2nd ed.) ed., Foundation Press, 1988.



Court's inconsistent reasoning on criminal disenfranchisement laws places more authority in the hands of state legislatures who continue to limit the rights of formerly incarcerated Americans.²⁸⁰ This should be an incentive for a law that is nationally applicable by Congress' enactment as well as enforced by the Department of Justice. The proposed Voting Rights Restoration Act ought to be enacted federally so that every formerly incarcerated American can participate in the electoral process, regardless of the state in which they live.

IV. A Message to Lawmakers

While the hypothetical Voting Rights Restoration Act is a law for fundamental rights and equality, opponents of this legislation might label the statute as too "soft" on crime. Lawmakers could argue that felons ought to be restricted from voting as a means of punishment for the crime(s) they committed.²⁸¹ However, this article argues that it is redundant, cruel, and unjust to deprive formerly incarcerated persons of an essential right that all Americans are entitled to after they have already been punished. Additionally, if lawmakers want to prevent more crimes from occurring, they should endorse the Voting Rights Restoration Act. The proposed law reintegrates formerly incarcerated individuals back into their communities, preventing them from repeating their past mistakes.

A Sentencing Project study concluded that "among individuals who had been arrested previously, 27 percent of non-voters were rearrested, compared with 12 percent of voters."²⁸² Lawmakers should also support the proposed statute

²⁸⁰ Chung et al., "Voting Rights."

²⁸¹ Clegg, Roger. "There Are Good Reasons for Felons to Lose the Right to Vote." The Heritage Foundation. Accessed May 26, 2023.

<https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote>.

²⁸² Uggen et al., "Locked out 2020."



because “a clear majority of U.S. residents support voting rights for citizens who have completed their sentence.”²⁸³ Ultimately, the constituents of politicians are supportive of formerly incarcerated individuals exercising their democratic right to vote in elections, which should be an incentive for lawmakers to support this proposed super-statute.

A 2018 Pew Research Center survey titled “Re-enfranchisement for Those Convicted of Felonies” found that a majority of both Democrats and Republicans support re-enfranchisement.²⁸⁴ The survey demonstrates that there is a strong bipartisan sentiment regarding this issue, which is another reason why lawmakers ought to endorse the aforementioned act. Before voting against the suggested Voting Rights Restoration Act, opposing lawmakers should reconsider their decision based on the law’s fairness, the positive impacts of prisoner reintegration, and the bipartisan support amongst Americans for re-enfranchisement.

In closing, the Voting Rights Restoration Act illuminates the fundamental American principle that every citizen should be able to vote. The proposed super-statute would not only seek to stop the disenfranchisement of formerly incarcerated individuals, but would also specifically aid communities of color who are disproportionately affected by the criminal justice system.

The fight for expanding voting rights and criminal justice reform is not a new endeavor for lawmakers. In fact, the passages of the Voting Rights Act of 1965, the First Step Act, and many other laws have enforced the ideas of civic

²⁸³ Uggen et al., “Locked out 2020.”

²⁸⁴ Bialik, Kristen. “How Americans View Some of the Voting Policies Approved at the Ballot Box.” *Pew Research Center*, Pew Research Center, 2 Oct. 2020, <https://www.pewresearch.org/fact-tank/2018/11/15/how-americans-view-some-of-the-voting-policies-approved-at-the-ballot-box/>.



participation and voting equality under the law. The Voting Rights Restoration Act seeks to promote these precious norms by nationally permitting formerly incarcerated people to vote once they have completed their sentence, are on parole, or are serving probation. This proposed legislation reflects civic republicanism and positive liberty in its efforts to make the democratic system a more inclusive, consistent, and accessible space for previously incarcerated people. Now is the time for lawmakers to be brave and support a bill that will reinforce the United States' commitment to a more equal and ethical criminal justice system.²⁸⁵

²⁸⁵ This op-ed was authored in the Spring of 2022. As of 05/18/2023, Senator Benjamin L. Cardin (D-MD) introduced the [Democracy Restoration Act of 2023](#). Senator Cardin's Act would restore voting rights to [5.8 million](#) formerly-incarcerated Americans;

"S.1677 - 118th Congress (2023-2024): Democracy Restoration Act of 2023." Congress.gov, Library of Congress, 18 May 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/1677>;

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Regulation: Realities and Possibilities²⁸⁶

Sophia Reiss²⁸⁷

Modern communication technologies increasingly raise concern. This growing awareness prompts examination of the effectiveness of current regulation and consideration of possible changes. This article explores the possibility of using both previous American regulation and European regulation efforts as examples to frame improvements in communications governance. First, it evaluates the Fairness Doctrine and its role in regulation as part of the Federal Communications Commission (FCC) and the current Section 230 regulation. Next, the article reviews proposed amendments and alternative pathways for regulation before providing a recommendation based on these regulatory schemes.

I. Introduction

The Supreme Court heard two cases in early 2023 presenting questions of online speech regulation: *Gonzalez v. Google* and *Twitter v. Taamneh*.²⁸⁸ Both cases were brought by the families of American victims of the 2015 terrorist attacks in Paris. The families are suing the platforms for their role in allowing these terrorists to use their platforms in order to facilitate the attacks.²⁸⁹ These two cases reveal some of the

²⁸⁶ This article is adapted from an essay recognized for the 2023 Justice Louis D. Brandeis Essay Prize.

²⁸⁷ Brandeis University Graduate Class of 2023, Former *Editor-in-Chief* of the [Brandeis University Law Journal](#).

²⁸⁸ Brian Fung, “Two Supreme Court Cases This Week Could Upend the Entire Internet | CNN Business,” CNN, February 20, 2023, <https://www.cnn.com/2023/02/20/tech/supreme-court-tech-platforms/index.html>.

²⁸⁹ “Twitter, Inc. v. Taamneh,” Oyez, <https://www.oyez.org/cases/2022/21-1496>.



profound harms that social media can facilitate and challenges the status quo of current American regulation of online platforms.

These cases illustrate how online hate and disinformation influence offline hate, violence, and distrust. The proliferation of social media platforms, especially the specialized platforms that appeal to those trafficking in conspiracies, allow people to fall deeper into the alternative reality of conspiracy theories, confirm their own implicit biases, and breed hate. Since social media platforms are run by private companies, where users are private individuals operating within a relationship with these companies, regulation is limited. This is particularly challenging in the United States given that current communications governance limits legal liability and public regulation.

Current communications governance heavily depends on the initial expectations of technology and communications growth potential at the outset of these new technologies' arrival on the marketplace. When the internet first began being marketed to the public, the U.S. government, specifically Congress, understood that innovation should be encouraged and could have positive, far-reaching implications. The unimaginable possibilities and opportunities of the internet promised the longed-for progress and growth. The internet connects people, inspires innovation, broadens access, and provides information. The focus of early legislation was to encourage this growth.

In considering new regulation, several tensions need to be balanced by legislators and regulators. The power and opportunity for change, growth, understanding, and constructive debate are fiercely protected by freedom of speech. There is no question that freedom of speech is a core value protecting, most centrally, political dissent.²⁹⁰ On the

²⁹⁰ *Whitney v. California* (1927); *Tinker v. Des Moines Independent School*



other hand, speech has the power and potential to cause emotional pain, physical violence, social alienation, and conflict. These emotional, physical, and social harms must be considered and balanced against the value of freedom of speech. Other harms exist as well, as speech and dissent can disrupt and even threaten governmental institutions. This online environment allows for us to have digital personas, versions of ourselves which exist online and are created from our digital actions and behavior. Beyond the offline harms that online platforms enable, digital personas and one's personal digital footprint can also be harmed.

One definition of the verb “balance,” according to Merriam Webster, is “to bring into harmony or proportion” which speaks to a kind of equipoise and is the regulatory solution this article hopes to propose.²⁹¹ This is vital because the idea of balance helps to achieve “harmony.” Through careful weighing of the before-mentioned tensions, regulation of new technologies should enable creativity, innovation, and positive change, while mitigating the potential for harm.

This article will propose a regulatory solution based on elements present in the Fairness Doctrine, Section 230, proposed amendments, consumer protection laws, and regulatory strategies in Europe like the GDPR. To do so, the article will first provide a background and history of each to delineate the components and precedence that can address the harms of social media that abound in our current digital climate. Upon this background, an explanation of a few potential regulatory responses that are currently being debated and explored will be offered. Finally, the paper will draw from the aforementioned regulations and responses to propose a new governance response which combines the benefits and best

District (1969)

²⁹¹ “Definition of BALANCE,” February 22, 2023, <https://www.merriam-webster.com/dictionary/balance>.



techniques of each of the reviewed regulations and proposed approaches.

II. Background Regulations

A. Fairness Doctrine – Previous Regulation

First, the former regulation system of the Fairness Doctrine must be examined. The Fairness Doctrine was created by the Federal Communications Commission (FCC) in 1949 to regulate “the airwaves” as there was a “scarce supply” of stations that “were owned by the public, with TV and radio stations functioning as ‘public trustees.’”²⁹² The Fairness Doctrine lasted until its repeal by the FCC in 1987 and required broadcasters to present opposing views on important issues of public interest.²⁹³ The notion that broadcasting licenses serve the public interest derives from the existence of limited bandwidth and the FCC’s role in granting licenses with the public’s participation. The Fairness Doctrine’s requirement of a well-rounded and fair portrayal serves the public interest.²⁹⁴

²⁹² Tom Rosentiel, “Is the Fairness Doctrine Fair Game?,” *Pew Research Center* (blog), July 19, 2007, <https://www.pewresearch.org/2007/07/19/is-the-fairness-doctrine-fair-game>.

²⁹³ Dan MacGuill, “Did Ronald Reagan Pave the Way for Fox News?,” Snopes, January 26, 2018, <https://www.snopes.com/fact-check/ronald-reagan-fairness-doctrine/>; “Fairness Doctrine,” Ronald Reagan, <https://www.reaganlibrary.gov/archives/topic-guide/fairness-doctrine>; Dylan Matthews, “Everything You Need to Know about the Fairness Doctrine in One Post,” *Washington Post* (blog), August 23, 2011, https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gI0AN8CXZJ_blog.html; Kathleen Ann Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁴ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969),” Justia Law, <https://supreme.justia.com/cases/federal/us/395/367/>.



The Doctrine specifically required “that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance.”²⁹⁵

The second component of the Doctrine specified “that in doing so, [the broadcaster must be] fair – that is, [the broadcaster] must affirmatively endeavor to make . . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to controversial issues presented.”²⁹⁶ This required people on both sides not only to speak and express their opinions, but also to find the appropriate presenters to voice opposing viewpoints.²⁹⁷ While this may have enforced or enabled neutrality, or at least debate, it also could create false equivalencies, one of the concerns to be treated with caution for any discussions of reinstatement. The high efficacy appears clear throughout the Fairness Doctrine’s record and its continued support from the public and governmental institutions over the years until its removal. Regardless of its exact impact, the technique of incorporating fairness and balance into a doctrine where reasonable viewpoints must be presented provides a potential model for future regulation.

The Fairness Doctrine found support in Congress and the Supreme Court. The Supreme Court unanimously upheld the Fairness Doctrine due to its focus on the public interest in the 1969 case *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*.²⁹⁸ In its decision, “[t]he Court held that the FCC’s [F]airness [D]octrine regulations enhanced rather than infringed the freedoms of speech protected under

²⁹⁵ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁶ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁷ Ruane, “Fairness Doctrine: History and Constitutional Issues.”

²⁹⁸ Matthews, “Everything You Need to Know about the Fairness Doctrine in One Post”; “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”



the First Amendment.”²⁹⁹ Further, they wrote that “the ‘public interest’ in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public.”³⁰⁰

In 1987, however, the Fairness Doctrine met its demise. This came about after the FCC decided that “the Fairness Doctrine was no longer necessary given the changes that had taken place in the media environment” and had failed to prove its efficacy.³⁰¹ While this may seem like definitive proof of its flaws, closer examination shows that may not be true. Additionally, the FCC’s statement about the Doctrine’s necessity can be questioned and the efficacy evaluation may have been biased and not thoroughly researched. The “1985 Fairness Report,” which the FCC relied on, was the first “empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas” and included public comment from many as part of its review process.³⁰² The report met criticism, including that it “lacked any systematic statistical analysis and relied too heavily on anecdotal examples by broadcasters.”³⁰³ Subsequent to this report, governance changes were implemented to improve data-gathering practices and the accuracy of regulatory mechanisms.³⁰⁴

²⁹⁹ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”

³⁰⁰ “Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).”

³⁰¹ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select,” https://go.gale.com/ps/i.do?p=EAIM&u=mlln_m_brandeis&id=GALE%7CA191854511&v=2.1&it=r&ugroup=outside.

³⁰² “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”

³⁰³ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”

³⁰⁴ “Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation - Document - Gale Academic OneFile Select.”



B. Section 230 – Current Regulation

The next section of this paper centers on Section 230. First, this section will explore Section 230’s historical and legislative context. Second, the paper will examine the details of the law itself and Congress’ motivations for putting Section 230 in place. Third, the practical implications and impact of Section 230 will be evaluated in contrast to its development and textual priorities.

Section 230 came about through “[t]he Communications Decency Act of 1996 (CDA)” which “added Section 230 to the Communications Act of 1934, generally protecting online service providers from legal liability stemming from content created by the users of their services.”³⁰⁵ The law itself explains Congress’ original rationale for the law. Both its findings and policy objectives will be examined later in greater depth.³⁰⁶ Section 230 or “47 U.S.C. § 230” not only responded to the innovation of the internet, but attempted to resolve two prior conflicting cases.³⁰⁷

These cases, namely *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, both dealt with message board content and the question of whether platforms are “publishers” of this content.³⁰⁸ The first case, “*Cubby v. CompuServe* (1991),” featured the defendant, CompuServe, who maintained an information service which included special interest forms and found its way to court “[w]hen a columnist for one of the special-interest forums

³⁰⁵ Kathleen Ann Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act” (Congressional Research Service, February 21, 2018).

³⁰⁶ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material,” LII / Legal Information Institute, accessed March 25, 2023, <https://www.law.cornell.edu/uscode/text/47/230>.

³⁰⁷ “Section 230: Legislative History,” Electronic Frontier Foundation, September 18, 2012, <https://www.eff.org/issues/cda230/legislative-history>.

³⁰⁸ “Section 230.”



posted defamatory comments about a competitor, the competitor sued CompuServe for libel.”³⁰⁹ The U.S. District Court for the Southern District of New York, which heard the case, concluded that “CompuServe could not be held liable as the columnist’s distributor because CompuServe did not review any of the content on the forums before it was posted,” which meant they lacked “knowledge of the libel” and therefore “could not be held responsible for it.”³¹⁰

The Court wrote that “CompuServe’s CIS product is in essence an electronic, for profit library” which is “at the forefront of the information industry revolution,” and that allows individuals to have “instantaneous access to thousands of news publications across the world.”³¹¹ The Court continued that “CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.”³¹²

The second case, *Stratton Oakmont Inc. v. Prodigy Servs, Co.*, happened four years after *CompuServe*, in 1995, and featured the New York Supreme Court with a differing opinion on online platforms’ responsibility.³¹³ The case involved Prodigy, “a web services company” that “hosted online bulletin boards.”³¹⁴ This case centered around actions Prodigy took, namely when “Prodigy moderated its online

³⁰⁹ Ashley Johnson and Daniel Castro, “Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved,” February 22, 2021, <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/>; “Section 230.”

³¹⁰ “Section 230.”; Castro, “Overview of Section 230.”

³¹¹ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), accessed March 25, 2023.

³¹² *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

³¹³ “Section 230.”

³¹⁴ “Section 230.”



message boards and deleted some messages for ‘offensiveness and ‘bad taste,’” which the Court found made Prodigy “akin to a publisher with responsibility for defamatory postings that made it onto the site.”³¹⁵ Given the multitude of posts on this platform, specifically “60,000 postings a day,” review of these for defamatory content would be quite a challenge.³¹⁶

The first case, *CompuServe*, appears to be a clearer and stronger application of precedents to a new technology. The Court’s comparison between the information service at issue in the case and a library presents one type of interwoven relationships and control within the online sphere, which frames the information service provider as a very hands-off and structural type of internet operator. The second case, *Stratton v. Prodigy*, dealing with a platform that actively moderated its content while still maintaining a large amount of content typical of internet services, would be responsible despite no clear legal precedent providing a background for this conclusion. This led to a conflict where one platform, CompuServe, would *not* be classified as a publisher, therefore void of any liability for the content on its platform, while another similar platform, Prodigy, *would* be classified as a publisher, leading them to be held liable and responsible for the content on its platform.

As a result, “Section 230 had two purposes: the first was to ‘encourage the unfettered and unregulated development of free speech on the internet,’ as one judge put it; the other was to allow online services to implement their own standards for policing content and provide for child safety.”³¹⁷ Section 230 consists of six sections.³¹⁸ Section 230 starts with Congress’ findings and the legislators framing of the context

³¹⁵ “Section 230.”

³¹⁶ “Section 230.”

³¹⁷ “Section 230.”

³¹⁸ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”



which inspired the law's creation.³¹⁹ Congress explained the need for Section 230 as arising out of “[t]he rapidly developing array of Internet and other interactive computer services” which “represent an extraordinary advance in the availability of educational and informational resources to our citizens.”³²⁰ Congress explained that the goals of Section 230 were “to promote the continued development of the internet and other interactive computer services and interactive media... to preserve the vibrant and competitive free market... [and] to encourage the development of technologies that maximize user control over information.”³²¹

Through Section 230(c), Congress granted “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material,” meaning that anyone using the internet sphere would be treated automatically as being well-intentioned or as “Good Samaritans.”³²² Good Samaritan laws rely on the concept of good public policy as being that which “limit[s] liability for those who voluntarily perform care and rescue in emergency situations.”³²³ The utilization of this principle in Section 230 exemplifies its wider application, encompassing situations where limited liability is enforced. Section 230 and the protections under the “Good Samaritan” header include “[n]o provider or user of an interactive computer service shall be held liable” given their “good faith to restrict access” to content.³²⁴ Further, “the good Samaritan law provides protection from claims of negligence for those who provide

³¹⁹ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³²⁰ “47 U.S. Code § 230.”

³²¹ “47 U.S. Code § 230.”

³²² “47 U.S. Code § 230.”

³²³ Brian West and Matthew Varacallo, “Good Samaritan Laws,” in StatPearls (Treasure Island (FL): StatPearls Publishing, 2023), <http://www.ncbi.nlm.nih.gov/books/NBK542176/>.

³²⁴ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”



care without expectation of payment,” which provides an interesting contradiction when applied to Section 230’s focus on “interactive computer service” providers and “information content provider[s],” who are monetizing their roles and actions.³²⁵ These providers are not considered “Good Samaritans.” Despite this inherent contradiction, the liability shield within Section 230(c)(1) removes these companies from liability “as publisher or speaker.”³²⁶

Section 230 continues in (c)(2) to state that “[n]o provider or user of an interactive computer service shall be held liable on account of” their actions taken either, “to restrict access to...material... whether or not such material is constitutionally protected...[or]...to enable or make available to information content providers.”³²⁷ The first part “means online services are not liable for defamatory or otherwise unlawful content their users post.”³²⁸ In contrast, Section 230(c)(2) “protects online services from liability for engaging in content moderation and enforcing their online standards” specifically for actions “taken in good faith.”³²⁹

Section 230(d) explains that providers should “notify such customers that parental control protections... [exist and] provide the customer with access to information identifying current providers of such protections.”³³⁰ This appears to indicate the legislator’s awareness that limited liability would result in children being left vulnerable absent these extra controls. Section 230 has minimal effect on other laws.³³¹ The definitions provide insight into how much the internet has

³²⁵ West and Varacallo, “Good Samaritan Laws.”; “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³²⁶ “47 U.S. Code § 230.”

³²⁷ “47 U.S. Code § 230.”

³²⁸ Johnson and Castro, “Overview of Section 230.”

³²⁹ Johnson and Castro, “Overview of Section 230.”

³³⁰ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³³¹ “47 U.S. Code § 230.”



developed since Section 230 was implemented. Section 230(f) defines the “[i]nternet,” “interactive computer service,” “information content provider,” and “access software provider.”³³² The way the “interactive computer service” is defined is through a comparison to “services offered by libraries or educational institutions.”³³³ By continuing to uphold that image, serving in a similar way to libraries, allows these services to remain the subject of the limited liability that Section 230 provides.³³⁴

Section 230 also incorporates the way courts interpret and apply the law and its “[l]iability [s]hield.”³³⁵ Section 230 is applied broadly due to the interactive computer service definition and the information content provider definitions.³³⁶ Section 230 defines “interactive computer service” as “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server.”³³⁷ First, the interactive computer service definition allows for the most broad liability shield which “[r]evolving courts have interpreted [the liability shield] to cover many entities operating online, including broadband Internet access service providers (e.g., Verizon FIOS and Comcast Xfinity), Internet hosting companies (e.g., DreamHost and GoDaddy), search engines (e.g., Google and Yahoo!), online message boards, and many varieties of online platforms.”³³⁸

³³² “47 U.S. Code § 230.”

³³³ “47 U.S. Code § 230.”

³³⁴ “47 U.S. Code § 230.”

³³⁵ Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³³⁶ Ruane.

³³⁷ “47 U.S. Code § 230 - Protection for Private Blocking and Screening of Offensive Material.”

³³⁸ Ruane, “How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act.”



The second definition in its application covers “when [providers] disseminate others’ allegedly unlawful content, but not when they are wholly or partially responsible for the production of such content,” or when they are acting as an “information content provider.”³³⁹ As a result, it allowed business models to proliferate which all “rely on a wide variety of user generated content” including making possible “user reviews and comments” through “the liability protection offered by Section 230.”³⁴⁰ So far the courts presented with this question have decided that editing content does not change the content enough to remove the platforms’ protection under Section 230’s liability shield.³⁴¹ The court’s choice to interpret editing compared to other actions of the platforms helps frame how Section 230 categorizes these online services as distinct from publishers or speakers.³⁴² Section 230 provides a liability shield for “traditional publishing functions” and editorial choices including publishing content and withdrawing such content.³⁴³

This aspect of Section 230 protects platforms even when they remove content, which enables “those same websites to filter out violent, or graphic content, harassment, misinformation, hate speech, and other objectionable content, thereby creating a better user experience.”³⁴⁴ While this appears to obligate platforms or services to keep users safe, the other protection specifically from liability for the third-party content means that there is no obligation to filter content.³⁴⁵ The obligation does not necessarily create the protective

³³⁹ Ruane.

³⁴⁰ Johnson and Castro, “Overview of Section 230.”

³⁴¹ Ruane, “How Broad a Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³⁴² Ruane.

³⁴³ Ruane, “How Broad a Shield? A Brief Overview of Section 230 of the Communications Decency Act.”

³⁴⁴ Johnson and Castro, “Overview of Section 230.”

³⁴⁵ Johnson and Castro, “Overview of Section 230.”



environment it appears to and as a result, judicial interpretation makes clear Section 230's exact scope including the extent and limits of its protections. As applied, Section 230 does not protect online platforms if they develop or induce illegal content, selectively repost content, breach contracts, fail to act in good faith, or fail to warn users of illegal activity hosted on their platform.³⁴⁶

Further judicial interpretation has pointed to areas where Section 230 is unclear, particularly in the face of a vast and new technology environment.³⁴⁷ This includes cases where algorithmic sorting was examined by the courts as it appears to be an unclear issue of immunity where algorithmic filters content particularly on social media platforms and searches.³⁴⁸ A District of Columbia Circuit Court held that a "search engine's tools did 'not distinguish' between different types of user content" and instead simply "translated all types of information, both legitimate and scam information, in the same manner."³⁴⁹

Overall, the practical implications and Section 230's legal interpretations result in an unregulated online environment where platforms maintain user agreements that hint to filters and where most content can be shared without repercussions. This environment raises questions about objectionable content that remains on their site, algorithms that spread this content, and the general growth and control of Big Tech. These questions and investigations are complex because Section 230 assumes that online actors act in "good faith" and

³⁴⁶ Daniel Castro and Ashley Johnson, "The Exceptions to Section 230: How Have the Courts Interpreted Section 230?," February 22, 2021, <https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230/>.

³⁴⁷ Valerie C Brannon and Eric N Holmes, "Section 230: An Overview," April 7, 2021, 58.

³⁴⁸ Brannon and Holmes, "Section 230: An Overview."

³⁴⁹ Brannon and Holmes, "Section 230: An Overview."



fully place the obligation for filtering content on the companies with no examination of how they do it or what content leaves and what content remains on the platforms.

Further, algorithms which are central to many platforms' business models are not addressed by Section 230. Social media algorithms "can be defined as technical means of sorting posts based on relevancy" in which the content that the user sees is prioritized including, at times, based on usage of the platform.³⁵⁰ The way algorithms curate user experiences would most likely fall into "editorial decisions," which platforms are expected to make in "good faith," but the public often has limited information or awareness of how the algorithms work and change their experiences.

This leaves people to deal with the consequences of the curated content without recourse, as the algorithms are made and run by the platforms who can hide behind Section 230's "liability shield." Lastly, the way Big Tech, the largest companies dominating the technology marketplace, grew and gained control over the online space was encouraged and enabled by Section 230, but the consequences of their actions and algorithms and these companies' relative power compared to that of users, regulators, and lawmakers may have been unforeseen. Indeed, some even argue that the debate over Section 230 has become a substitute for larger debates around speech and discussions about how a free marketplace of ideas can really function.³⁵¹ Further, these questions relate to who should be the ones' deciding how this marketplace should

³⁵⁰ Maria Alessandra Golino, "Algorithms in Social Media Platforms," April 24, 2021,

<https://www.internetjustsociety.org/algorithms-in-social-media-platforms>.

³⁵¹ Ovide, Shira. "What's Behind the Fight Over Section 230." *The New York Times*, March 25, 2021, sec. Technology.

<https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html>.



work, what happens in response to any harms that ensue, and who should be responsible.³⁵²

III. Potential Responses

A. Proposed Changes to Section 230 – Potential Response 1

As a result of this unregulated technology and media environment, proposals abound for how to amend Section 230 to fix its flaws to achieve its policy objectives. Some proposed amendments make the liability protection conditional, others add “more exceptions” to the liability protection, in addition to more drastic proposals “to repeal Section 230 entirely,” or “more incremental rollbacks.”³⁵³ Internet companies joined the flurry of reform proposals with ideas of their own.³⁵⁴ The rationale for these reforms often goes along the lines of the need to regulate the vast power of big tech especially with regard to content removal and the impacts of algorithms on young people.³⁵⁵ These suggested reforms run counter to Section 230 proponents, who argue for the law’s preservation as “its myriad benefits outweigh its few flaws,” especially given the law’s major role in creating the online world.³⁵⁶

One proposal is the Platform Accountability and Consumer Transparency Act (PACT Act) which removes immunity for illegal content, and outlines procedures for

³⁵² Ovide, Shira. “What’s Behind the Fight Over Section 230.”

³⁵³ Ovide, “What’s Behind the Fight Over Section 230.”; Valerie C Brannon and Eric N Holmes, “Section 230: An Overview,” April 7, 2021, 58.

³⁵⁴ Ovide, “What’s Behind the Fight Over Section 230.”; Brannon and Holmes, “Section 230: An Overview.”

³⁵⁵ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁶ Ashley Johnson and Daniel Castro, “Proposals to Reform Section 230,” February 22, 2021,

<https://itif.org/publications/2021/02/22/proposals-reform-section-230/>.



content removal.³⁵⁷ This proposal faced problems as it conflicts with the Digital Millennium Copyright Act (DMCA) that addresses copyright law violations where the law “provides a ‘safe harbor’ to cover providers who remove content after being notified that the content may” be in violation.³⁵⁸ The PACT Act may also be changing since “both the DMCA and the e-Commerce Directive [(a similar EU law)] have also been subject to debate and proposals for reform.”³⁵⁹ Another proposal is the “Stopping Big Tech’s Censorship Act” in which “providers and users may only claim immunity under Section 230(c)(1) if a service ‘takes reasonable steps to prevent or address the unlawful use’ of the service’ or publication of such illegal content.”³⁶⁰

The CASE-IT Act also removes platform immunity, but opts for a different approach.³⁶¹ The CASE-IT Act has “providers and users lose Section 230(c)(1) immunity for a year if they engage in certain activities, including permitting harmful content to be distributed to minors, if the harmful content “‘is made readily accessible to minors’” without the existence or use of systems to prevent this from happening.³⁶² Another similar proposal is “the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) ACT,” which would not provide immunity for platforms’ “ads or paid content, civil rights law, stalking or harassment laws, wrongful death actions, or human rights violations abroad” and failures to take down content in response to a court order.³⁶³ This bipartisan proposal is supported by advocacy groups including the Anti-Defamation

³⁵⁷ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁸ Brannon and Holmes, “Section 230: An Overview.”

³⁵⁹ Brannon and Holmes, “Section 230: An Overview.”

³⁶⁰ Brannon and Holmes, “Section 230: An Overview.”

³⁶¹ Brannon and Holmes, “Section 230: An Overview.”

³⁶² Brannon and Holmes, “Section 230: An Overview.”

³⁶³ Johnson and Castro, “Proposals to Reform Section 230.”



League (ADL) and Muslim Advocates.³⁶⁴ Each of these content and activity carve-outs risk “over-enforcement” as they “require online services to determine what is legal or illegal,” and would likely lead them to remove grey area “to avoid liability.”³⁶⁵ This already took place in response to a similar carve-out for sex trafficking that passed in 2018.³⁶⁶ The over-enforcement resulted in a substantial share of material being removed that had no connection to sex trafficking harms.³⁶⁷ However, too many exceptions to Section 230 would, in effect, repeal the law entirely.³⁶⁸ Adding a multitude of exceptions to the liability shield would not only affect bad actors benefiting from illegal content, but platforms genuinely trying to prevent and remove illegal content.³⁶⁹

The Ending Support for Internet Censorship Act would require companies of a certain size, or with a particular level of revenue, “to prove to the Federal Trade Commission every two years that their algorithms and content moderation practices are politically neutral in order to receive Section 230 liability

³⁶⁴ Chris Riley and David Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate,” *Brookings* (blog), September 21, 2021, <https://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/>; “Muslim Advocates Applauds New Bill to Enact Reforms to Section 230,” Muslim Advocates, February 5, 2021, <https://muslimadvocates.org/2021/02/muslim-advocates-applauds-new-bill-adding-reforms-to-section-230/>; “ADL Supports Reforming Section 230 of the Communications Decency Act to Hold Tech Companies Accountable, Prioritize Users and Protect Civil Rights | ADL,” accessed April 6, 2023, <https://www.adl.org/resources/press-release/adl-supports-reforming-section-230-communications-decency-act-hold-tech>.

³⁶⁵ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁶ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁷ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁸ Johnson and Castro, “Proposals to Reform Section 230.”

³⁶⁹ Johnson and Castro, “Proposals to Reform Section 230.”



protection.”³⁷⁰ This is most clearly akin to the Fairness Doctrine given its emphasis on balanced presentation.³⁷¹ Another proposal focuses on algorithms by limiting federal immunity from liability for technology companies when their platform’s algorithms recommend third party content that “cause physical or emotional injury.”³⁷² Other proposals encourage the creation of “[b]ehavioral [s]tandards” for “sufficiently responsible behavior and establish enforcement mechanisms that evaluate compliance (while navigating First Amendment limits on government restriction of corporate speech).”³⁷³ This includes the Online Freedom and Viewpoint Diversity Act, the EARN IT Act, and a proposal by Mark Zuckerberg.³⁷⁴

Lastly, repeals of Section 230 are proposed to enforce accountability through liability and remove the protections of early innovations as it is no longer necessary to protect the early trial-and-error period of these companies. While there may be a concern that without Section 230 free speech and exchanges of ideas online would be restricted, government action and restrictions would still be limited by the First Amendment.³⁷⁵ Further, the First Amendment would provide background protections for speakers and publishers, like those offline, while there would be less consistent and vast immunity protections for the platforms.³⁷⁶

³⁷⁰ Johnson and Castro, “Proposals to Reform Section 230.”

³⁷¹ Johnson and Castro, “Proposals to Reform Section 230.”

³⁷² "H.R.5596 - 117th Congress (2021-2022): Justice Against Malicious Algorithms Act of 2021." *Congress.gov*, Library of Congress, 18 October 2021, <https://www.congress.gov/bill/117th-congress/house-bill/5596>.

³⁷³ Riley and Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate.”

³⁷⁴ Riley and Morar, “Legislative Efforts and Policy Frameworks within the Section 230 Debate.”

³⁷⁵ Brannon and Holmes, “Section 230: An Overview.”

³⁷⁶ Brannon and Holmes, “Section 230: An Overview.”



B. Consumer Protection Laws – Potential Response 2

Although Section 230 may appear as the only legal avenue through which platform regulation and the conversations around it is possible, there are other legal avenues through which online speech could be regulated to comply and fulfill the high expectations that these technology companies regularly set. For instance, these goals can be achieved through consumer protection laws; specifically, laws that prohibit Unfair, Deceptive Acts and Practices (UDAPS). Such laws particularly focus on upholding the public interest as the core expectation behind these companies actions and treatment of their users.

In addition to overseeing antitrust law, the Federal Trade Commission (FTC) monitors consumer protection violations.³⁷⁷ While “Section 5 does not define ‘unfair or deceptive acts or practices’” it does state that, “a practice is not ‘unfair’ unless it ‘causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.’”³⁷⁸ Beyond the federal law and its enforcement through federal agencies, “[s]tates have crafted their own consumer protection laws based on a handful of model acts (including the FTC Act)” which aim to protect consumers from unfair and deceptive acts and practices.³⁷⁹ These entities are all able to “bring similar lawsuits alleging

³⁷⁷ “Consumer Protection Laws,” LII / Legal Information Institute, accessed April 10, 2023,

https://www.law.cornell.edu/wex/consumer_protection_laws.

³⁷⁸ Eric N. Holmes, “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act” (Congressional Research Service, November 4, 2022),

<https://crsreports.congress.gov/product/pdf/IF/IF12244>.

³⁷⁹ Canzona, “I’ll Know It When I See It.”



UDAP-based violations” to act in the public interest, as well as consumers or advocacy groups.³⁸⁰

In relation to social media regulation, consumer protection laws like UDAP provide an avenue for the public interest to be protected, given the special role these technology companies hold within society. As Jack M Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, notes, “[s]ocial media companies and search engines have social and moral obligations to the public” that arise out of their role in society.³⁸¹ These companies often voluntarily categorize themselves as places “to promote public-spirited goals,” and therefore should “act according to public-regarding, professional norms.”³⁸² Given that their innovations often revolve around providing a space for positive developments like greater and stronger interconnection, access, and creativity; these companies, like other technology companies, provide a useful service to society.

When these companies choose to frame themselves in this way, act to provide such services, and take on such obligations as those Balkin discusses, they become legally obligated to hold themselves accountable to their own self-portrayal. The public should be able to expect that these companies are being honest with users and the public. The UDAPs do just that, holding the companies accountable to their public portrayal by prohibiting false promises and unfair and deceptive behavior. Social media companies illustrate this as they often declare in Congress how safe their platforms are and how they enforce their user agreements, while users and

³⁸⁰ Holmes, “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act.”

³⁸¹ Balkin, Jack M., *Free Speech is a Triangle* (May 28, 2018). Columbia Law Review, 2018, Forthcoming, Yale Law School, Public Law Research Paper No. 640, <https://ssrn.com/abstract=3186205>

³⁸² Balkin, “Free Speech Is a Triangle.”



advocacy groups find that they still face the same unsafe behavior banned by these user agreements.

The FTC and State Attorneys General enforce consumer protection laws with regard to privacy and “[r]especting [c]onsumer [c]hoice” with respect to “[d]o-not-track settings on browsers which prevent advertisers from tracking consumers’ online activities.”³⁸³ Consumer protection laws and UDAPs, in particular, already protect consumers from financial injury, but the vital question here is whether courts will see these laws as fit to protect consumers from online companies.

In 2021, Muslim Advocates, a Muslim civil rights advocacy group, sued Facebook and Facebook executives for deception over their actions relating to the content on the platform.³⁸⁴ The lawsuit, using the D.C. Consumer Protection Procedures Act, or the DC CPPA, “allege[d] that Facebook ha[d] exaggerated how aggressively it remove[d] hate speech” in violation of the law.³⁸⁵ Facebook’s actions specifically violated the DC CPPA, as it states that “it is illegal for a company to make material misrepresentations about a good or service in the District of Columbia.” Muslim Advocates asked for Facebook to either “[s]top lying, or have your actions conform to your statements.”³⁸⁶ Importantly, Muslim Advocates’ assertions centered on the statements of Facebook executives and the user agreement’s community standards that frame users’ expectations of safety on their platform. While

³⁸³ Danielle Keats Citron, “The Privacy Policymaking of State Attorneys General,” *Notre Dame Law Review* 92, no. 2 (December 2016), https://go.gale.com/ps/i.do?p=EAIM&u=mclin_m_brandeis&id=GALE%7CA484155772&v=2.1&it=r&ugroup=outside.

³⁸⁴ Bobby Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook,” *NPR*, April 8, 2021, sec. Religion, <https://www.npr.org/2021/04/08/985475645/muslim-advocates-has-filed-a-lawsuit-against-facebook>.

³⁸⁵ Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook.”

³⁸⁶ Allyn, “Muslim Advocates Has Filed A Lawsuit Against Facebook.”



this method of using consumer protection laws is still being tested, given its efficacy and broad application elsewhere, it could provide a model for accountability and necessary enforcement to counteract failures to uphold one's duty to serve the public interest.

C. European Union's Solutions – Potential Response 3

In this section, the paper turns to the European Union because it stands out as a model given the promise shown in their active regulation of Big Tech with far-ranging impacts and strong popularity among the public.³⁸⁷ These impacts are apparent since when those companies are fined, they often improve their behavior and apply the changes required by the EU's regulation worldwide for ease of operation.³⁸⁸ The popularity of these regulations, which will be explained in this paragraph, derives from how the regulatory laws themselves are written, which often give citizens more information and control with regard to their own data and experience.³⁸⁹

The European Union seeks to meet the needs that arise out of these new technologies through a focus on privacy and data protection. The laws and regulation of privacy online, specifically data privacy protections, is known as the General Data Protection Regulation (GDPR). The GDPR went into effect in 2018, after passing in 2016, in order to give companies and countries time to prepare for this robust legislation.³⁹⁰ The GDPR grew out of the right to privacy

³⁸⁷ Silvia Amaro, "How Europe Became the World's Top Tech Regulator," CNBC, March 25, 2021,

<https://www.cnbc.com/2021/03/25/big-tech-how-europe-became-the-worlds-top-regulator.html>.

³⁸⁸ Amaro, "How Europe Became the World's Top Tech Regulator."

³⁸⁹ Amaro, "How Europe Became the World's Top Tech Regulator."

³⁹⁰ "Data Protection in the EU," June 4, 2021,

<https://commission.europa.eu/law/topic/data-protection/data-protection->



codified in the 1950 European Convention on Human Rights which states, “Everyone has the right to respect for his private and family life, his home and his correspondence.”³⁹¹

The GDPR is one of a series of new technology governance laws in which the EU worked to protect one’s right to privacy within legislation.³⁹² The way the GDPR functions with its definitions, and specification of both the rights and requirements for companies, enables a clear and comprehensive application. The burden of proof is placed on the company fulfilling GDPR requirements.³⁹³ Further, both national institutions within the European Union member states and international institutions exist that help enforce the regulations of the GDPR.³⁹⁴ One example of these international institutions is the European Data Protection Board (EDPB) which is an independent regulatory body charged with maintaining “the consistent application of data protection rules throughout the European Union” established by the GDPR and that includes representatives of the national entities, an EU supervisor, and non-voting involvement of the European Commission.³⁹⁵

Since the GDPR, the European Union has continued to focus on technology and is creating “[t]he Digital Services

[eu_en](#); “Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA Relevance),” 119 OJ L § (2016),

<http://data.europa.eu/eli/reg/2016/679/oj/eng>; “What Is GDPR, the EU’s New Data Protection Law?,” GDPR.eu, November 7, 2018, <https://gdpr.eu/what-is-gdpr/>.

³⁹¹ “What Is GDPR, the EU’s New Data Protection Law?”

³⁹² “What Is GDPR, the EU’s New Data Protection Law?”

³⁹³ “What Is GDPR, the EU’s New Data Protection Law?”

³⁹⁴ “Data Protection in the EU,” June 4, 2021,

https://commission.europa.eu/law/law-topic/data-protection/data-protection-eu_en.

³⁹⁵ “Data Protection in the EU.”



package” which includes both the “Digital Services Act and Digital Markets Act.”³⁹⁶ In addition to this package, more regulation is being worked on to govern artificial intelligence.³⁹⁷ The European Commission states that “[t]he Digital Services Act and Digital Markets Act aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses.”³⁹⁸ It appears to focus on the same kinds of companies as Section 230, with a similar overarching goal.

This prompts the question: what, if anything, is really different between Section 230 and the EU’s efforts? Perhaps the European Union learned from the mistakes of Section 230. Their laws came later, allowing for a stronger understanding of the technologies at play.³⁹⁹ Following their adoption in July 2022, these EU laws began taking effect by 17 February 2023, when the regulatory authorities categorized services into a size and type category that will frame the requirements that they need to meet.⁴⁰⁰ These newest pieces of regulation will be fully in place by 2024 and also include several checkpoints that technology companies need to meet along the way to ensure full compliance and incorporate accountability mechanisms.⁴⁰¹

³⁹⁶ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023,

<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>; Amaro, “How Europe Became the World’s Top Tech Regulator.”

³⁹⁷ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023,

<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>; Amaro, “How Europe Became the World’s Top Tech Regulator.”

³⁹⁸ “The Digital Services Act Package | Shaping Europe’s Digital Future,” February 9, 2023,

<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

³⁹⁹ “The Digital Services Act Package | Shaping Europe’s Digital Future.”

⁴⁰⁰ “The Digital Services Act Package | Shaping Europe’s Digital Future.”

⁴⁰¹ “The Digital Services Act Package | Shaping Europe’s Digital Future.”



The Digital Services Act “proposed large fines for internet platforms like Facebook, Twitter [(now known as X)] and YouTube if they do not restrict the spread of certain illegal content like hate speech.”⁴⁰² This is similar to the GDPR’s large fines, which often make a big splash in the news.⁴⁰³ Widely, “GDPR fines are used to fund public services,” a model that would likely be replicated with these newer regulations.⁴⁰⁴ These fines, while quite substantial, are applied taking into account the companies’ size and offense so as to remain proportional.⁴⁰⁵ For the GDPR, “[t]here are two tiers of penalties which max out at \$20 million or 4% of global revenue (whichever is higher),” as well as enabling those harmed “to seek compensation for damages.”⁴⁰⁶ Further, composition, explanation, and implementation of these regulations takes into account all of the players involved: individuals, the technology companies, business users, and society.⁴⁰⁷ In these regulations, the EU often requires compliance to be built into the structure of companies. For example, the GDPR outlines implementation of data security training, specifies the responsibilities of data protection within

⁴⁰² Adam Satariano, “Big Fines and Strict Rules Unveiled Against ‘Big Tech’ in Europe,” *The New York Times*, December 15, 2020, sec. Technology, <https://www.nytimes.com/2020/12/15/technology/big-tech-regulation-europe.html>.

⁴⁰³ “Three Years of GDPR: The Biggest Fines so Far,” *BBC News*, May 24, 2021, sec. Technology, <https://www.bbc.com/news/technology-57011639>.

⁴⁰⁴ “Three Years of GDPR.”

⁴⁰⁵ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁶ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁷ “The Digital Services Act: Ensuring a Safe and Accountable Online Environment,” accessed April 13, 2023, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en.



teams, and details Data Protection Officer requirements for certain organizations.⁴⁰⁸

These regulations are met with what Dessislava Savova describes as “a real willingness and wide political support in the EU to set the highest global standards when it comes to tech regulations.”⁴⁰⁹ She further notes that the Digital Services “package will be a real game changer” as “[i]t will create a single regulatory framework and will set up a foundation of a strong cooperation and a new governance structure in the EU, with tangible enforcement mechanisms and important sanctions.”⁴¹⁰ Further, the New York Times notes that these regulations, along with some national ones, “helped reinforce Europe as home to some of the world’s toughest policies toward the technology industry.”⁴¹¹

IV. New Plan Inspired by This History – This Paper’s

Solution

This section will present the pros and cons of each of the previously discussed regulations and how they could be combined in such a way that improves upon these regulatory schemes. First, this section will outline the positives of each regulatory method; second, it will address their limitations; third, it will offer a multipronged recommendation.

⁴⁰⁸ “What Is GDPR, the EU’s New Data Protection Law?”

⁴⁰⁹ Amaro, “How Europe Became the World’s Top Tech Regulator.”

⁴¹⁰ Amaro, “How Europe Became the World’s Top Tech Regulator.”

⁴¹¹ Satariano, “Big Fines and Strict Rules Unveiled Against ‘Big Tech’ in Europe.”



A. Favorable Aspects of these Regulations

The Fairness Doctrine proved effective at instilling balance in regulatory schemes by encouraging technological innovation while safeguarding the public's interest in being informed on issues of public concern and safety. Broadcast stations developed within the Fairness Doctrine's regulatory realm introduced and popularized these new technologies. At the same time, the Supreme Court endorsed the Fairness Doctrine's role in promoting free speech and an informed public.

Section 230 attempted to balance and incorporate similar interests through a different mechanism. Section 230 used an almost absolute liability shield that enabled online platforms and services to develop and grow tremendously. This enabled technology companies to create different strategies and approaches to content on their platforms, including algorithms. The Section 230 reforms present promising solutions. Consumer protection laws prove effective in other markets as they prevent misrepresentation and unfair treatment of consumers. The European Union's solutions promote accountability through massive fines and illustrate a strong protection-based approach.

B. Limitations of These Regulations

The Fairness Doctrine lacked enough meaningful buy-in from broadcasters as well as clear methods to maintain accountability as a regulation long-term because it became difficult to evaluate or prove its efficacy. Section 230 failed at maintaining balance because the interpretation of the liability shield prevented technology companies from being held accountable. Both the Section 230 reforms and the consumer protection laws remain relatively untested within the online



environment and technology companies at large. There are many Section 230 reforms proposed and many, while framed similarly, promote vastly different approaches. Despite some gaining momentum recently, it is unclear when and how they would be applied.

The European Union's solutions build more regulatory structures and focus on privacy, which distinguishes it from American regulations. Further, the strict protection of freedom of speech existing in the United States is unparalleled elsewhere, including in the EU, so the EU's solutions may not fit with American free speech absolutism. Also, there may be concerns amongst United States legislators about stopping the growth of technology companies through strict regulation.

C. The Outlined Recommendation

From this background, the new proposal is one which welcomes regulation not as a hindrance to growth, innovation, and freedom, but as something that enables and protects it. An informed public's access to information is no longer confined solely to news media. Thus, regulations regarding who is informing the public and how they are being informed must expand its range to include the context of online platforms. The standard should be elevated from a basic level of protecting the ability to hear both sides of a matter to consumers being informed about their privacy, their safety, and the accountability of the platforms they are on.

Strong understandings of technology companies and how their products work must be incorporated into the background of the new proposed regulation. The Fairness Doctrine lacked this element as it failed to understand the practical approaches it encouraged broadcasters to take and the challenges that came with that approach. There must be a careful understanding of the interests, innerworkings, and



particular context of the technology companies to avoid pushback from the companies. Following the Fairness Doctrine's balanced approach to speech, new regulation should promote free speech through providing content-neutral regulation and not tell companies what to regulate, but how to regulate content: evenly and fairly.

Parts of the regulations mentioned above fit this proposed framework. For instance, one of Section 230's proposed reforms, the SAFE TECH Act, illustrates how comprehension of technology companies and true accountability can be built into an American framework. Simply copying the effective methods of the European Union's regulation would not be ideal as the American context is just that: American. This distinction requires understanding and incorporation of respect for American ideals, including a broader protection for freedom of speech and the promotion of innovation. The EU's privacy law, the GDPR, should be incorporated to a certain extent, as we generally lack privacy laws and data protection. This is already starting in California, but beyond incorporating the GDPR and other EU laws, our approaches could be inspired by theirs. Our regulations could be more effective following the multipronged approach found in the European Union's regulations where rights are defined, expectations are outlined, compliance is formalized, compliance guidelines are clear, and meaningful fines are incorporated.

Together, the history and potential future of technology regulation show promise. Regulation promoting both the public interest in tandem with encouraging innovation has existed previously and continues to exist. Understanding the public interest, policy concerns, new technology, historical regulation, business impact, and the innovation and online environments is crucial to a successful and balanced regulatory approach.



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