

2020

Section 230 and the Duty to Prevent Mass Atrocities

David Sloss

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

David Sloss, *Section 230 and the Duty to Prevent Mass Atrocities*, 52 Case W. Res. J. Int'l L. 199 (2020)
Available at: <https://scholarlycommons.law.case.edu/jil/vol52/iss1/11>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

SECTION 230 AND THE DUTY TO PREVENT MASS ATROCITIES

*David Sloss**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	199
I. INTRODUCTION	199
II. WHY CIVIL LIABILITY?.....	201
III. WHICH CRIMES?	204
IV. A MODEST PROPOSAL	207

I. INTRODUCTION

Between August and November, 2017, the Myanmar military carried out a series of brutal attacks against Rohingya Muslim communities in Rakhine State in Myanmar.¹ An international fact-finding mission appointed by the UN Human Rights Council recommended that “senior generals of the Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity, and war crimes.”² Myanmar’s military used Facebook as “a tool for ethnic cleansing.”³ “Members of

* David L. Sloss is the John A. and Elizabeth H. Sutro Professor of Law at Santa Clara University. He has published three books and several dozen book chapters and law review articles. His scholarship focuses on the relationship between domestic law and international affairs. His most recent book, published by Oxford University Press, won prestigious book awards from the American Society of International Law and from the Alpha Sigma Nu Jesuit Honor Society. Sloss received his B.A. from Hampshire College, his M.P.P. from Harvard University and his J.D. from Stanford Law School. He taught for nine years at Saint Louis University School of Law. Before he was a law professor, he clerked for Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit and worked as an associate for Wilson, Sonsini, Goodrich & Rosati. He also spent nine years in the federal government, where he worked on East-West arms control negotiations and nuclear proliferation issues.

1. *Myanmar: What Sparked the Latest Violence in Rakhine?*, BBC (Sept. 19, 2017), <https://www.bbc.com/news/world-asia-41082689> [<https://perma.cc/T7UH-REQC>].
2. Human Rights Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, at 1, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018).
3. Paul Mozur, *A Genocide Incited on Facebook with Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook->

the Myanmar military were the prime operatives behind a systematic campaign on Facebook . . . that targeted the country's mostly Muslim Rohingya minority group."⁴

In theory, Rohingya plaintiffs could bring a state tort law claim against Facebook alleging that Facebook was negligent (or worse) in permitting its social media platform to be utilized to spark mass violence against the Rohingya in Myanmar.⁵ Could Facebook be held liable in a civil suit in the United States for "complicity in genocide,"⁶ or for "aiding, abetting or otherwise assisting in or contributing to the commission" of a crime against humanity?⁷ Under current federal law, the answer is clearly "no." Section 230(c)(1) of Title 47 of the U.S. Code states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁸ Judicial decisions establish that Section 230 grants online service providers broad immunity for content posted by third parties.⁹ Thus, Section 230 provides Facebook a valid federal preemption defense to a state tort law claim.

Section 230(e)(5) creates two statutory exceptions from that broad immunity: one for online service providers that facilitate child sex trafficking,¹⁰ and another for any person who "owns, manages, or operates an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person."¹¹ Given the current statutory exceptions for child sex trafficking and prostitution, should

genocide.html?auth=login-email&login=email [https://perma.cc/NA47-L62V].

4. *Id.*
5. See generally Ingrid Burrington, *Could Facebook be Tried for Human-Rights Abuses? The Legal Path is Murky*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/12/could-facebook-be-tried-for-war-crimes/548639/> [https://perma.cc/Q9S6-Z4S3].
6. Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].
7. Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading, art. 6(2)(c), Int'l Law Comm'n. U.N. Doc. A/CN.4/L.935 (May 15, 2019) [hereinafter Draft Articles on Crimes Against Humanity].
8. 47 U.S.C. § 230(c)(1) (2018).
9. See Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity* 5 (Santa Clara Univ. Legal Studies Research Paper, Dec. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306737 [https://perma.cc/NLC8-PXYK].
10. See 47 U.S.C. § 230(e)(5) (2018); 18 U.S.C. §§ 1591, 1595 (2018).
11. 18 USC § 2421A(a) (2018).

there also be a statutory exception to permit civil suits against internet companies for complicity in genocide, war crimes, or crimes against humanity? One argument in favor of such an exception is that the United States has a clear duty under international law to prevent genocide.¹² One could also make a persuasive argument that the United States has a duty under customary international law to prevent crimes against humanity, although that proposition is debatable.¹³ To be clear, I am not suggesting that the United States is violating its international legal duty to prevent mass atrocities by granting immunity to internet companies. However, withdrawal of that immunity for content that contributes to commission of mass atrocity crimes would be a helpful step for the United States to implement its duty to prevent genocide and crimes against humanity.

Of course, any proposal to create a statutory exception to section 230 immunity raises a set of complex questions about the proper scope of such an exception. This article identifies the key issues that would need to be resolved if Congress decided to create an exception along these lines. The remainder of this article consists of three parts. The first part explains why removal of immunity from civil liability is an appropriate mechanism to help prevent use of social media to incite or induce commission of mass atrocity crimes. The second part contends that the exception to section 230 immunity should apply to genocide and crimes against humanity, but not to terrorism or war crimes. The final part discusses a series of other issues that Congress would need to address to determine the proper scope of any such exception.

II. WHY CIVIL LIABILITY?

As a party to the Genocide Convention, the United States has an international legal duty “to prevent and to punish” the crime of genocide.¹⁴ The U.S. has implemented its duty to punish genocide by enacting a federal criminal statute to punish individuals who commit genocide.¹⁵ In some circumstances, laws that criminalize conduct help prevent commission of crimes by deterring people from engaging in the

12. *See* Genocide Convention, *supra* note 6, art. 1.

13. *See generally* U.N. Special Rapporteur, Sean D. Murphy, *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725 ¶¶ 105–114 (18 Feb. 2019). States were generally supportive of the provision in the Draft Articles that establishes a duty to prevent crimes against humanity. However, the United Kingdom claimed that this obligation should be understood as “a proposal for the progressive development of the law,” not a codification of customary international law. *Id.* ¶ 106.

14. Genocide Convention, *supra* note 6, art. 1.

15. 18 U.S.C. § 1091 (2018).

prohibited conduct.¹⁶ As applied to Facebook and other social media companies, though, the criminalization of genocide has no value in either deterring or preventing genocide because there is no realistic prospect that prosecutors will apply the statute to impose criminal punishment on a social media company.¹⁷ Insofar as social media companies might be indirectly responsible for genocide, they would be guilty (at most) of aiding and abetting the crime.¹⁸ However, the federal genocide statute does not explicitly address liability for aiding and abetting genocide.¹⁹ Moreover, the statute requires proof of “specific intent,”²⁰ and it is very unlikely that any social media company has acted with the specific intent to promote or facilitate the crime of genocide. Since prosecutors cannot apply the federal genocide statute to punish social media companies, the statute does not provide a significant incentive for companies to modify their policies to prevent third parties from using their platforms to incite mass atrocities.

In contrast, an exception to section 230 that withdraws immunity from civil liability for internet companies that transmit genocidal messages could have a salutary preventative effect by providing a positive incentive for companies to block such messages. The *mens rea* for civil liability is typically a negligence standard, as opposed to specific intent. A negligence standard would incentivize companies to adopt reasonable measures to prevent third parties from using their platforms to incite or induce mass atrocities. Given the global reach of major social media platforms like YouTube and Facebook, the companies arguably have greater power to prevent mass atrocities than do many national governments. By creating an exception to immunity under section 230, the U.S. government could harness that corporate power to promote human rights.

One could argue that social media companies do not need additional incentives to block users from posting genocidal messages because they have already taken steps to address the problem. For example, after learning about violence in Myanmar, Facebook removed accounts

-
16. See BEN JOHNSON, DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY: A PRIMER (Minn. H. Research Dept. 2019).
17. See Isabella Banks, *International Criminal Liability in the Age of Social Media: Facebook's Role in Myanmar*, PUB. INT'L L. & POLICY GROUP (Feb. 13, 2019), <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2019/2/13/international-criminal-liability-in-the-age-of-social-media-facebooks-role-in-myanmar> [<https://perma.cc/X3R6-VM2J>].
18. See 47 U.S.C. § 230(c)(1) (2018) (stating that immunity is not granted from criminal liability).
19. *Id.*
20. 18 U.S.C. § 1091 (2018).

associated with the Myanmar military²¹ and hired Burmese language speakers to monitor content.²² However, the company did not take those actions until *after* users in Myanmar had already exploited the Facebook platform to incite genocidal violence.²³ A federal statute exposing companies to potential civil liability would incentivize companies to act proactively to prevent harms before they occur, rather than responding after the fact to violence that has already occurred. To avoid liability, companies would need, among other things, to spend money to hire employees to monitor content in foreign languages. The risk of civil liability provides a financial incentive for companies to incur that cost to avert future adverse judgments. Without that incentive, companies are likely to avoid incurring such costs until after it is too late.

Others may argue that the risk of civil liability would incentivize companies to restrict too much speech.²⁴ This problem becomes especially acute if the rules identifying prohibited speech are too vague. I address the vagueness problem below. For now, it suffices to note that Congress could draft an exception to section 230 immunity for speech that induces mass atrocity crimes with as much specificity as the current statutory exceptions for content related to sex trafficking and prostitution.²⁵ Thus, assuming the provision is carefully drafted, the potential threat to free speech would be no greater than the threat posed by current statutory exceptions. Moreover, without belittling the harms that result from sex trafficking and prostitution, most would agree that the harms resulting from genocide and crimes against humanity are far more serious. Therefore, the proposed exception from section 230 immunity for speech that induces mass atrocity crimes merits serious consideration.

-
21. See Hannah Ellis-Petersen, *Facebook Removes Accounts Associated with Myanmar Military*, THE GUARDIAN (Aug. 27, 2018), <https://www.theguardian.com/technology/2018/aug/27/facebook-removes-accounts-myanmar-military-un-report-genocide-rohingya> [https://perma.cc/N32D-R6RG].
 22. See Steve Steccklow, *Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> [https://perma.cc/4YNM-YY9E].
 23. See *id.*
 24. See, e.g., Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money 2* (June 13, 2018) (Hoover Inst. Aegis Paper Series, No. 1807); *Principles of Freedom of Expression and Privacy*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/gni-principles/> [https://perma.cc/R9MJ-KEXH].
 25. See 47 U.S.C. § 230(e)(5) (2018).

III. WHICH CRIMES?

I contend that Congress should create an exception to Section 230 immunity for genocide and crimes against humanity, but not for terrorism or war crimes. For both genocide and crimes against humanity: 1) there is a clear, agreed definition under international law; 2) the agreed definitions exclude small-scale violence; and 3) there is at least a plausible argument that the United States has an international legal duty to prevent the crime. The crime of terrorism does not satisfy any of these criteria; war crimes satisfies only the first criterion.

A terrorist attack on two mosques in Christchurch, New Zealand in March 2019 generated substantial public pressure to regulate online terrorist content.²⁶ In May 2019, a group of governments and online service providers adopted the Christchurch Call to Action “to eliminate terrorist and violent extremist content online.”²⁷ The United States government declined to join the call to action, citing concerns about “freedom of expression and freedom of the press.”²⁸ Although the call to action is a non-binding instrument, the United States’ concerns are valid. The term “terrorist and violent extremist content” appears throughout the document, but that term remains undefined.²⁹ Indeed, there is no single, agreed definition of “terrorism” or “terrorist content” in either domestic or international law.³⁰ If Congress tried to translate the Christchurch Call to Action into a statutory exemption from section 230 immunity, without a specific definition of terrorism or terrorist content, the statute would pose significant First Amendment problems because it would likely chill a good deal of legitimate speech.³¹ Although

-
26. See Megan Specia, *The New Zealand Shooting Victims Spanned Generations and Nationalities*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/world/asia/new-zealand-shooting-victims-names.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer> [https://perma.cc/E56A-LDCC].
27. Derek Cheng, *Christchurch Call to Action: Govts, Tech Companies Agree to Tackle Violent Online Content on Social Media*, N. Z. HERALD (May 16, 2019), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12231337 [https://perma.cc/73GD-P7NV].
28. See THE WHITE HOUSE: OFFICE OF SCIENCE AND TECHNOLOGY POLICY STATEMENT ON CHRISTCHURCH CALL FOR ACTION (May 15, 2019).
29. *Id.*
30. See generally Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM L. REV. 3 (2013).
31. See Evelyn Aswad, *Why the Christchurch Call to Remove Online Terror Content Triggers Free Speech Concerns*, JUST SECURITY (May 20, 2019), <https://www.justsecurity.org/64189/why-the-christchurch-call-to-remove-online-terror-content-triggers-free-speech-concerns/> [https://perma.cc/25JV-9R5G]; See also DAVID KAYNE, SPEECH POLICE:

government and private sector officials have a moral duty to prevent terrorist crimes, there is no international legal duty to prevent acts of terrorism.³² For these reasons, the proposed exception to section 230 immunity should not apply to terrorist acts.

A potential exception for war crimes presents a different problem. Section 2441 of Title 18 of the U.S. Code provides a detailed definition of “war crimes.”³³ The federal statutory definition is broadly consistent with the definition of war crimes under international law.³⁴ Therefore, in contrast to the rather amorphous concept of “terrorism,” the meaning of the term “war crimes” is widely agreed. However, in terms of the scale of harm, the agreed definition of war crimes applies to a very broad range of conduct, including non-lethal harm to a single individual³⁵ (at the low end of the scale) to mass murder of hundreds or thousands of people (at the high end).³⁶ Thus, some war crimes fit within the common-sense notion of “mass atrocities,” but others do not. More importantly, if Congress is going to authorize civil damages claims against internet companies by withdrawing immunity from civil liability, those claims should apply only to large-scale, widespread harms. There is a sound policy rationale for Section 230 immunity: internet companies should not be held liable for every harmful action that results from third party posts on their platforms. It would be unreasonable to expect Facebook to block every post that could potentially lead to a single violent act against a single victim. However, it is not unreasonable to expect Facebook to block posts that pose a significant risk of inducing mass violence against hundreds or thousands of victims. Therefore, a statutory exception to Section 230 immunity should not apply to war crimes because the term “war crimes” encompasses too much conduct that falls far short of mass atrocities.

THE GLOBAL STRUGGLE TO GOVERN THE INTERNET 79–83 (Columbia Glob. Reports 2019) (discussing regulation of terrorist speech).

32. See DAVID P. STEWART, *TERRORISM AND HUMAN RIGHTS THE PERSPECTIVE OF INTERNATIONAL LAW* 7–12 (Middle East Inst. 2018).
33. See 18 U.S.C. § 2441 (c)–(d) (2018).
34. See Rome Statute, 2187 U.N.T.S. 90, art. 8. The definition in the Rome Statute is somewhat broader than the federal statutory definition. However, any conduct that meets the definition in the U.S. Code would clearly constitute a war crime under international law. That point is relevant because an exception to section 230 immunity would potentially impose civil liability on U.S. companies for contributing to overseas conduct by individuals who are not U.S. nationals, and who are therefore not subject to criminal liability under 18 U.S.C. § 2441(b) (2006).
35. See, e.g., 18 U.S.C. § 2441(d)(1)(H) (defining the war crime of “sexual assault or abuse”).
36. 18 U.S.C. § 2441(c)–(d).

Compare war crimes to genocide. As with war crimes, a federal statute provides a clear definition of genocide³⁷ that closely tracks the internationally agreed definition.³⁸ In contrast to war crimes, though, the term “genocide” applies only to mass violence. Criminal conduct constitutes genocide only if the perpetrators act with “intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such.”³⁹ Genocide is often called “the crime of crimes”: it is the most serious crime known to international law.⁴⁰ There is no such thing as “small-scale genocide.” Moreover, the United States has an international legal duty under the Genocide Convention to prevent genocide.⁴¹ Therefore, Congress should establish an exception to section 230 immunity for third-party content that induces or incites genocide because the term “genocide” applies only to large-scale violence, it is well-defined under both domestic and international law, and the United States has an international legal duty to prevent genocide.

Consider, next, crimes against humanity. Like both genocide and war crimes—but unlike terrorism—the term “crimes against humanity” is clearly defined under international law.⁴² Like genocide, and unlike war crimes, the term “crimes against humanity” applies only to large-scale violence. Under international law, conduct constitutes a crime against humanity only if it is “committed as part of a widespread or systematic attack directed against any civilian population.”⁴³ Thus, the rationale for creating an exception to section 230 immunity for mass atrocity crimes—that internet companies should be held accountable for content that incites or induces large-scale violence—applies equally to both genocide and crimes against humanity. However, crimes against humanity differ from genocide in one important respect: the term “crimes against humanity” is not defined under federal criminal statutes.⁴⁴ Even so, the absence of a federal statutory definition should

37. See 18 U.S.C. § 1091 (2018).

38. See Genocide Convention, *supra* note 6, art. 2.

39. See 18 U.S.C. § 1091(a) (2018); *see also id.*

40. See William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes,’* 1 J. OF INT. CRIM. JUST. 39, 51 (2003).

41. See Genocide Convention, *supra* note 6.

42. See Rome Statute, *supra* note 34, art. 7(1); Draft Articles on Crimes Against Humanity, *supra* note 7, art. 2(1).

43. See Rome Statute, *supra* note 34, art. 7(1); *see also* Draft Articles on Crimes Against Humanity, *supra* note 7, art. 2(1).

44. Some conduct that constitutes a crime against humanity under international law would be subject to criminal punishment under one or more federal statutes that address genocide, war crimes and other offenses. See David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT’L HUM. RTS. 30, 33-35 (2009).

not prevent Congress from creating an exception to section 230 immunity for crimes against humanity. From a First Amendment perspective, an exception to section 230 immunity would not be problematic if a clear definition of “crimes against humanity” is incorporated into section 230. Moreover, Congress could satisfy the clear definition requirement by incorporating the internationally agreed definition into federal law.⁴⁵

IV. A MODEST PROPOSAL

Congress should create an exception to Section 230 immunity for cases where a company fails to prevent transmission of a message (whether by words or images) if that message: a) would be understood by ordinary listeners as incitement or inducement to commit genocide or crimes against humanity; and b) there is a significant risk that recipients of the message will commit such crimes. The statute should create a duty for companies to remove such content within 24 hours after it is posted. However, the statute should preserve immunity from civil liability for any company that makes a reasonable, good faith effort to comply with the content removal obligation, but is unable to do so. Finally, the statute should create a working group with representatives from government and industry to develop a set of best practices for implementing the duty to remove offending content. The statute should include a safe harbor provision for companies that comply with recommended best practices. The following paragraphs comment briefly on key elements of this proposal.

Which companies?: To implement this proposal, Congress would need to consider which companies are covered. There is a compelling argument for exempting small companies—perhaps those with fewer than ten million registered users—because compliance with the statutory duty to block offending content would create an excessive burden for smaller companies. Congress might wish to limit the exception to companies that operate social media platforms, but that would require a definition of the term “social media platform,” a term that is notoriously difficult to define.⁴⁶ On the other hand, the current

45. As noted above, it is debatable whether the United States has a duty under customary international law to prevent crimes against humanity, but the weight of authority supports the claim that the United States does have such a duty. At a minimum, the duty to prevent crimes against humanity is an emerging norm of customary international law. *See supra* note 13 and accompanying text.

46. *See generally* Eric Goldman, *The Spectacular Failure of Employee Social Media Privacy Laws*, TECH. & MARKETING L. BLOG (May 31, 2014) https://blog.ericgoldman.org/archives/2014/05/state_laws_to_p.h [<https://perma.cc/43RB-JX7E>].

statutory language, which refers to providers of “interactive computer service[s],”⁴⁷ arguably sweeps too broadly.

Understood by Ordinary Listeners: Legal tests for offensive or dangerous speech can be framed in terms of the intent of the speaker, or the likely consequences of the speech, or the actual content of the words or images conveyed.⁴⁸ For this proposal to be effective, companies must be able to implement the proposal through a combination of automated filters and human content moderation. It is difficult for filters to screen content based on the intent of the speaker. It is somewhat easier (although not a trivial task) to screen content based on the actual content of the words or images. The “understood by ordinary listeners” test effectively directs companies to focus on the actual content, rather than the intent of the speaker, to determine which messages should be blocked.

Incitement or inducement: The phrase “incitement or inducement” is similar to the classic First Amendment test from *Brandenburg v. Ohio*, which permits governments to “forbid or proscribe advocacy of the use of force . . . [that] is directed to *inciting or producing* imminent lawless action.”⁴⁹ Article 3(c) of the Genocide Convention prohibits “direct and public incitement to commit genocide.”⁵⁰ Thus, an exception to section 230 immunity for incitement finds support in both international treaty law and First Amendment doctrine. However, the draft Articles on Crimes Against Humanity would not make incitement a criminal offense. Instead, the draft Articles prohibit “ordering, soliciting, [or] inducing . . . the commission or attempted commission” of crimes against humanity.⁵¹ The word “inducing” in the draft Articles is similar to the word “producing” in the *Brandenburg* test, but “inducing” is more precise. The statutory exception to Section 230 immunity should cover both incitement and inducement because they are two different ways that people can use internet speech to spark mass violence.

Significant Risk: *Brandenburg* exempts from First Amendment protection speech that is “likely to incite or produce” lawless action.⁵² The question arises: how likely is “likely?” In this context—where we are concerned about inciting or inducing genocide or crimes against humanity—a “more likely than not” test is inappropriate because the

47. 47 U.S.C. § 230.

48. See generally Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine, Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

49. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

50. See Genocide Convention, *supra* note 6, art. 3(c).

51. Draft Articles on Crimes Against Humanity, *supra* note 7, art. 6(2)(c).

52. *Brandenburg*, 395 U.S. at 447.

gravity of the potential harm is so extreme. Chief Justice Vinson, writing for a plurality in *Dennis v. United States*,⁵³ quoted Judge Learned Hand approvingly as follows: “In each case (courts) must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”⁵⁴ In situations where there is a risk that speech transmitted over the internet may incite or induce people to commit genocide or crimes against humanity, the potential harm is sufficiently grave that restrictions on free speech are justified even if the probability that the harm will ensue is well below fifty percent. The “significant risk” formulation is intended to convey this idea.

Evaluating the risk that a particular message will incite or induce genocide or crimes against humanity necessarily depends on context. The U.S. Holocaust Museum’s “Early Warning Project” has developed a very helpful tool that ranks “all countries, in descending order, by estimated risk for onset of mass killing in 2018–19.”⁵⁵ Assuming that the ranking is updated periodically, social media companies could incorporate that ranking into their risk assessments. For example, companies could reasonably conclude that a particular message in Swedish directed towards an audience in Sweden (ranked 156 out of 162) poses a far less significant risk than a similar message in Arabic targeted towards an audience in Egypt (ranked 3 out of 162). Some may object that it would be unduly burdensome to require social media companies to perform that type of risk assessment. However, the proposed statute does not require perfection. Companies could avoid civil liability by making a reasonable, good faith effort to block messages that create a significant risk that recipients will commit mass atrocity crimes. Given the capacity of large social media companies to cause widespread harm by disseminating genocidal messages to millions of people, and given the vast resources at their disposal, it is not unduly burdensome to require them to make reasonable efforts. In actual civil litigation, factfinders could rely partly on industry experts to determine whether a particular company made a “reasonable, good faith effort” in a particular case.

Imminence: The *Brandenburg* formulation permits governments to forbid speech only if that speech tends to incite or produce “imminent

53. *Dennis v. United States*, 341 U.S. 494 (1951).

54. *Id.* at 510 (citing *United States v. Dennis*, 183 F.2d 201, 212 (2nd Cir. 1950)). The Court’s decision in *Dennis* has rightfully been criticized for other reasons, but those criticisms do not negate the wisdom of Chief Judge Hand’s formulation in the majority opinion.

55. *See Ranking of All Countries: 2019-20 Risk Assessment for Mass Killing*, EARLY WARNING PROJECT, <https://earlywarningproject.ushmm.org/ranking-of-all-countries> [<https://perma.cc/U6KV-R8ZA>].

lawless action.”⁵⁶ Although the imminence requirement is an important component of the *Brandenburg* test, the Supreme Court has relaxed the imminence requirement in two First Amendment cases where dangerous speech involved a potential threat of violence.⁵⁷ First, in *Virginia v. Black*, the Court held that a state may prohibit “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”⁵⁸ even if such statements do not present an imminent threat of violence. Then, in *Holder v. Humanitarian Law Project*,⁵⁹ the Court upheld the validity of the federal statute barring material support to terrorism, even though the statute criminalized speech that did not present an imminent threat of violence. The Court’s decisions in *Black* and *Humanitarian Law Project* support the likely validity of an exception to section 230 immunity that does not include an imminence requirement.

Moreover, from a policy standpoint, there are three reasons why a statutory exception to section 230 immunity should not include an imminence requirement. First, the “significant risk” element of the proposed statute already limits its reach. The inclusion of an imminence requirement in addition to the “significant risk” requirement would undermine the preventative goal of the statute. Second, the proposed exception to section 230 immunity addresses only genocide and crimes against humanity. As discussed previously, both crimes encompass only large-scale violence. In accordance with Judge Hand’s formulation, “the gravity of the ‘evil,’ . . . justifies such invasion of free speech as is necessary to avoid the danger.”⁶⁰ Here, the scale of potential violence justifies a relaxation of the imminence requirement. Professor Sunstein has made a similar argument with respect to ISIS and terrorist violence. He says: “If (and only if) people are explicitly inciting violence, perhaps their speech doesn’t deserve protection when (and only when) it produces a genuine risk to public safety, whether imminent or not.”⁶¹

Finally, section 230 addresses only civil liability, not criminal liability.⁶² In contrast, the Supreme Court developed the First

56. *Brandenburg*, 395 U.S. at 447.

57. See *Virginia v. Black*, 538 U.S. 343 (2003); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

58. *Black*, 538 U.S. at 359.

59. *Holder*, 561 U.S. at 40.

60. *Dennis*, 183 F.2d at 212.

61. Cass R. Sunstein, *Islamic State’s Challenge to Free Speech*, BLOOMBERG OPINION (Nov. 23, 2015), <https://www.bloomberg.com/opinion/articles/2020-02-14/trump-unrestrained-may-trap-himself> [<https://perma.cc/QHM3-A4Y6>].

62. 47 U.S.C. § 230(2) (2018).

Amendment test for incitement in a series of criminal cases.⁶³ The civil/criminal distinction is important for two reasons. First, the consequence of imposing criminal punishment on individuals (loss of liberty) is more severe than the consequence of imposing civil liability on companies (loss of money). Therefore, the government should be required to meet a higher burden for criminal punishment than for civil liability. Second, withdrawal of immunity under section 230 promotes a vitally important public safety function by helping to prevent mass violence. If the imminence requirement is not relaxed in this context, the statute will not be effective in promoting that public safety objective.

24-Hour Removal Provision: The proposed statute would require internet companies to make a reasonable, good faith effort to block or remove offending content within 24 hours after it is posted. This proposal is similar to a German law, the *Netzwerkdurchsetzungsgesetz* (“NetzDG”), which took effect in October 2017. Subject to certain exceptions, the NetzDG requires companies that operate internet platforms to remove or block “access to content that is manifestly unlawful within 24 hours of receiving the complaint.”⁶⁴ Leading internet companies have already taken substantial steps to enhance their technical capacity to comply with such 24-hour takedown requirements.⁶⁵ In June 2017, Facebook, Microsoft, Twitter, and YouTube announced the formation of the Global Internet Forum to Counter Terrorism (GIFCT).⁶⁶ A shared database “allows member companies to . . . identify and remove matching content — videos and images — that violate our respective policies or, in some cases, block

63. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (prosecuting under the Espionage Act); *Abrams v. United States*, 250 U.S. 616 (1919) (prosecuting under the Espionage Act); *Gitlow v. New York*, 268 U.S. 652 (1925) (prosecuting under a criminal anarchy statute); *Whitney v. California*, 274 U.S. 257 (1927) (prosecuting under the Criminal Syndicalism Act); *Dennis v. United States*, 341 U.S. 494 (1951) (prosecuting under the Smith Act); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (prosecuting under the Criminal Syndicalism Act)..

64. See *Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act]*, art. 1, § 3(2)(2) (Oct. 1, 2017), available at <https://germanlawarchive.iuscomp.org/?p=1245> [<https://perma.cc/QQH8-AUD4>] [hereinafter Network Enforcement Act]. For an analysis of the Network Enforcement Act, see Kaye, *supra* note 37, at 68–71.

65. See *Facebook, Microsoft, Twitter and YouTube Announce Formation of the Global Internet Forum to Counter Terrorism*, MICROSOFT CORPORATE BLOGS (July 26, 2017), <https://blogs.microsoft.com/on-the-issues/2017/06/26/facebook-microsoft-twitter-youtube-announce-formation-global-internet-forum-counter-terrorism/> [<https://perma.cc/YH8K-2PNX>].

66. See *id.*

terrorist content before it is even posted.”⁶⁷ The existing database could easily be adapted to screen content that constitutes incitement or inducement to commit genocide or crimes against humanity.

Of course, no screening mechanism is perfect. In March 2019, a gunman killed 51 people in Christchurch, New Zealand “and live streamed it on Facebook.”⁶⁸ “It took the company roughly an hour to remove the video from its site. By then, the bloody footage had spread across social media.”⁶⁹ In other words, despite Facebook’s best efforts to remove the video, thousands of individual social media users were able to disseminate the video more rapidly than the company could act to block transmission.⁷⁰ It is questionable whether companies will ever be able to block completely transmission of content that goes viral on the internet. Therefore, the proposed statutory provision simply requires companies to make reasonable, good faith efforts. Application of the reasonableness requirement will necessarily evolve over time as companies improve their capacities to address this type of problem.

Public/Private Partnership: Finally, the proposed statute would establish a public-private working group to develop improved technical solutions to the problem of screening and blocking content that constitutes incitement or inducement to commit genocide or crimes against humanity. The main goal of developing improved technical solutions would be to enhance the ability of companies to prevent individuals from using the internet to incite or induce mass atrocities. Assuming that the working group makes significant progress over time, one side effect would be to ratchet up the reasonableness standard that companies are required to satisfy to avoid civil liability. The statute should include a safe harbor provision so that any company that complies with the “best practice” recommendations of the working group would be presumptively immune from civil liability.

67. *Facebook, Microsoft, Twitter and YouTube Provide Update on Global Internet Forum to Counter Terrorism*, MICROSOFT CORPORATE BLOGS (Dec. 4, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/04/facebook-microsoft-twitter-and-youtube-provide-update-on-global-internet-forum-to-counter-terrorism/> [<https://perma.cc/HD58-LSUG>].

68. Cade Metz & Mike Isaac, *Facebook’s A.I. Whiz Now Faces the Task of Cleaning It Up. Sometimes That Brings Him to Tears*, N.Y. TIMES (May 19, 2019) <https://www.nytimes.com/2019/05/17/technology/facebook-ai-schroepfer.html> [<https://perma.cc/5775-AT6G>].

69. *Id.*

70. *See generally id.*