IF NOT HERE, WHERE?: TRANSNATIONAL LITIGATION AGAINST U.S. TECH GIANTS AROUND THE WORLD

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In recent suits around the world against U.S. tech giants—e.g., litigation in Canada against Twitter (now X), in Kenya against Facebook, and in Europe against Google—plaintiffs urge foreign courts to adapt concepts like specific personal jurisdiction in flexible ways to allow litigation to proceed. In their defense, the U.S. companies are reusing the argument that similarly situated defendants successfully deployed in U.S. courts over the last few decades—that the cases are too foreign and do not belong in these courts. But these defendants have lost their home court advantage. They find themselves in courts with closer ties to the disputes at issue, and with stronger claims to both judicial jurisdiction and the authority to apply local substantive law. These companies then find themselves subject to liability—and potentially to remedies with worldwide effect.

As specific jurisdiction concepts develop around the world and adjust to modern technological realities, the United States finds itself on the narrower and more old-fashioned end of the spectrum. These trends showcase the importance of comparative law in understanding and developing both U.S. and foreign law in the transnational dispute resolution system—themes that have informed Linda Silberman's scholarship for decades.

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I. Introduction

In 1978, Professor Linda Silberman announced the end of a certain era of personal jurisdiction:[1] in Shaffer v. Heitner,[2] the Supreme Court famously overturned Pennoyer v. Neff. It also revealed, however, the Court's relatively lax attitudes towards choice-of-law doctrine. The contacts at issue—the ownership of Delaware corporate stock—were sufficient to support applying Delaware law, but not to subject the defendant to personal jurisdiction in Delaware. To Silberman, this was backwards: one should care more about who regulates conduct than where it is litigated.[3] In the decades to follow, Silberman also criticized U.S. courts' openness to transnational litigation based on doing business jurisdiction for cases that had few U.S. ties,[4] and she suggested ways to modernize and simplify the global reach of American law.[5] Now that Daimler has eliminated doing business jurisdiction,[6] much of this highly criticized transnational litigation has left U.S. courts. Further, developments in the presumption against extraterritoriality have cut off the global reach of some American regulations.[7] At least some of this reallocation is as it should be. But it also means that other nations and other courts may step in to fill the void both in regulating conduct and offering a forum in which to litigate about it.

The internet is a prime example of this development—it presents a perfect storm of overlapping jurisdiction and

1. Linda J. Silberman, Shaffer v. Heitner*: The End of An Era*, 53 N.Y.U. L. Rev. 33 (1978).

2. Shaffer v. Heitner, 433 U.S. 186 (1977).

3. Silberman, *supra* note 1, at 79–90.

4. *See, e.g.*, Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 681 (2015) (reinforcing previous criticism of "doing business" general jurisdiction); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 Hous. J. Int'l. L. 327, 333–39 (2004) (criticizing "doing business"-based general jurisdiction).

5. Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 466 (2009).

6. *See infra* Part II.A.

7. *See infra* Part II.C.

competing sovereign interests.[8] With the dominance of U.S. tech giants like Google, Meta (Facebook), and Twitter (X), and plaintiffs' traditional affinity for suing in U.S. courts, one might expect U.S. courts to be a magnet for transnational litigations about the internet.

While U.S. courts have grown less hospitable to transnational litigation even involving U.S. defendants,[9] foreign jurisdictions have become more hospitable, and foreign plaintiffs are suing U.S. defendants elsewhere—especially in internet cases. Before these foreign courts, U.S. tech giant defendants are using the same playbook of transnational litigation avoidance arguments that they advanced in U.S. courts to try to have these cases dismissed. But by suing in places with closer territorial ties to the dispute, plaintiffs have stronger claims not only to the courts' jurisdictions but also to their choice-of-law rules applying local substantive law. In some of these cases, the remedies may be locally confined, but in others, especially ones involving the internet, courts have issued injunctive relief with worldwide effect.

This Essay discusses the changing landscape of transnational litigation in U.S. courts and the rise of foreign courts as forums for such litigation. It provides examples of recent suits against U.S. tech giants in which foreign courts adapted concepts like specific personal jurisdiction in flexible ways to accommodate modern challenges. These trends showcase the importance of comparative law in understanding and developing both U.S. and foreign laws in the transnational dispute resolution system.

The Essay first briefly charts developments in U.S. courts' attitudes toward transnational cases over the last few decades, discussing personal jurisdiction, forum non conveniens, choice-of-law rules, the presumption against extraterritoriality, and substantive legal immunity for internet platforms. The trajectory shows one of the reversions towards "litigation isolationism,"[10] leading U.S. courts to dismiss many transnational cases. Some of these cases had little connection to the United States, while

8. *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006) (discussing how the internet has challenged historical notions of territorial government and how national governments have attempted to assert control over the "borderless medium").

9. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (charting the rise of barriers to transnational litigation in U.S. courts).

10. *Id.*

others had "the United States written all over [them]."[11] But conventional wisdom suggested that plaintiffs were unlikely to pursue most of these cases elsewhere.[12]

Second, the Essay provides examples of recent suits around the world against U.S. tech giants that defy these predictions. In these cases, the U.S. defendants are reusing an argument honed by similarly situated defendants in U.S. courts—that the cases are too foreign and do not belong in these courts. But these defendants have lost their home court advantage. They find themselves in courts with closer ties to the disputes at issue, and with stronger claims to both judicial jurisdiction and the authority to apply local substantive law. These companies thus find themselves subject to liability—and potentially to remedies with worldwide effect.

The Essay concludes with a tribute to Silberman's deep understanding not only of American procedure, but also of comparative procedure. The examples in Part II reveal modern trends in foreign courts, recognizing a broader scope of specific jurisdiction than the U.S. conception and an amenability to some worldwide judicial relief. What happens in U.S. courts—and to U.S. parties—is interrelated to what happens in foreign courts. What happens at the beginning of a lawsuit (including issues of jurisdiction) is interrelated to what happens at the end (including issues of remedies and enforcement). Therefore, comparative law is essential to understand and improve both our own law and the transnational dispute resolution system.

II. From Exorbitant Jurisdiction to Litigation Isolationism

For years, U.S. courts were seen as a popular forum for plaintiff-driven lawsuits, including global class actions and international human rights suits, leading to Judge Bork's

11. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 361 (2016) (Ginsburg, J., concurring in part).

12. *See* Pamela K. Bookman, *Once and Future U.S. Litigation*, *in* Foreign Court Judgments and the United States Legal System 35 (Paul B. Stephan ed., 2014) (explaining that defendants routinely sought dismissal of tort claims brought in U.S. court under the sometimes mistaken assumption that plaintiffs would not pursue the cases elsewhere).

critique that U.S. courts carry out "judicial imperialism."[13] General personal jurisdiction was widely available against multinational corporations doing business in the United States, while major federal regulatory statutes, including securities and antitrust statutes, were interpreted to apply to actors and conduct around the world.

In recent decades, however, U.S. courts have pursued a studied retrenchment in civil procedure, narrowing courts' openness to litigation by raising pleading standards, curbing class actions, limiting discovery, and making summary judgment more readily available.[14] Meanwhile, U.S. courts have also raised barriers to transnational litigation through developments in various areas, including personal jurisdiction and forum non conveniens. The last few decades have likewise seen a tightening of the presumption against the extraterritorial application of federal statutes and the rise of substantive law immunity for certain kinds of suits, such as immunity for internet platforms through Section 230. This Part charts these trends.

A. *Personal Jurisdiction and Forum Non Conveniens*

In transnational litigation, conflicts arise when multiple fora have judicial jurisdiction over a given dispute. The classic basis for jurisdiction is either the defendant's home jurisdiction (where defendants can be sued for causes of action arising anywhere) or the place where the object of the suit arises, for example, the location of the tort. In the decades after *Shaffer*, U.S. courts' capacious—some would say exorbitant—interpretation of general or "all-purpose" jurisdiction opened the doors of U.S. courts to transnational cases that arose out of conduct

13. Robert H. Bork, *Judicial Imperialism*, Wall St. J. (June 17, 2003, 12:01 AM), https://www.wsj.com/articles/SB108958310422660738 [https://perma.cc/CE2D-2QQU]; *see also* Smith Kline & French Labs. Ltd. v. Bloch [1983] 1 WLR 730, 733 (AC) ("As a moth is drawn to the light, so is a litigant drawn to the United States.").

14. Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevoltuion Against Federal Litigation (2017).

elsewhere.[15] Companies "doing business" in the United States were assumed to be subject to general jurisdiction there, laying the foundation for suits against multinational corporations that did business in the United States for conduct abroad, so long as the plaintiffs could find a basis for the cause of action.

In 2011, and again in 2014, the Supreme Court rejected this "doing business" version of all-purpose jurisdiction, holding that defendants should be subject to general jurisdiction only where they are "essentially at home."[16] Silberman identified *Daimler* as marking the end of another era.[17] This ruling brought the U.S. conception of general jurisdiction "more closely in line with that of other countries."[18]

The Supreme Court, however, has also supported the use of forum non conveniens dismissals against U.S. defendants[19] even before determining whether the court otherwise has jurisdiction.[20] By contrast, many other countries, especially those in the civil law tradition, lack the doctrine of forum non conveniens, which supports dismissals when various interest factors suggest an alternative available forum is more appropriate.[21] The general view in the EU, for example, is that the defendants can be sued in their domiciles without the possibility of a forum-non-conveniens escape valve. But in the United States, general jurisdiction does not guarantee that the

15. *See* Bookman, *supra* note 9, at 1091–92 (highlighting the expansiveness of "doing business"-based general jurisdiction in suits against corporations for conduct overseas); Linda J. Silberman, Goodyear *and* Nicastro: *Observations from a Transnational and Comparative Perspective*, 63 S.C. L. Rev. 591, 594 (2012) (criticizing reasonableness as an "indeterminate standard for a constitutional test," particularly in transnational cases).

16. Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

17. *See* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675 (2015) (arguing that *Daimler* and *Goodyear* mark a turning point as the Supreme Court ended the availability of "doing business"-based).

18. Silberman, *supra* note 15, at 601.

19. *See* Piper Aircraft v. Reyno, 454 U.S. 235 (1981) (affirming forum non conveniens dismissal of a case against two U.S. defendants).

20. *See* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007) (holding that courts may dismiss on forum non conveniens grounds without first establishing their own jurisdiction).

21. *But cf.* Maggie Gardner, Pamela K. Bookman, Andrew Bradt, Zachary D. Clopton & D. Theodore Rave, *The False Promise of General Jurisdiction*, 73 Ala. L. Rev. 455, 465–67 (2022) (discussing state forum non conveniens doctrines that do not require the availability of an alternative forum).

defendant's home jurisdiction will always provide "one clear and certain forum" to sue the defendant.[22] Instead, plaintiffs may have to sue in fora with closer ties to the dispute under specific jurisdiction.

With respect to specific jurisdiction, however, the U.S. approach is often narrower than other countries', and seemingly less flexible. For example, in other systems, the presence of tortious injury, the effect of the injury, or activities of a defendant's branch in the forum are often sufficient bases for specific jurisdiction.[23] By contrast, in *J. McIntyre Machinery, Ltd. v. Nicastro*,[24] the fact that a shearing machine in New Jersey severed a New Jersey plaintiff's hand—i.e., that the tort and injury occurred in New Jersey—was insufficient to support New Jersey's judicial jurisdiction over the U.K. shearing-machine manufacturer. Likewise, the Brussels Recast reflects a desire to consolidate litigation against multiple defendants, so as to allow judicial jurisdiction over foreign defendants at the domicile of one of the defendants if the claims are closely connected.[25] Had it followed that rule, the U.S. Supreme Court may have found specific jurisdiction in *Bristol Myers Squibb v. Superior Ct. of California*.[26]

B. *Choice of Law and Extraterritoriality*

While the Supreme Court has made judicial jurisdiction more difficult for foreign plaintiffs to secure, there are still few due process constraints on choice-of-law rules.[27] A state with sufficient interests in a case to support judicial jurisdiction likely can have its substantive law apply to that case. For example, New Jersey law could have been applied to determine the issue of liability in *Nicastro* had jurisdiction existed.

But at the same time, the Supreme Court has strengthened a different kind of choice-of-law rule that counsels against

22. *Id.* at 464–465.
23. Silberman, *supra* note 15, at 608.
24. 564 U.S. 873 (2011).
25. Silberman, *supra* note 15, at 607–08, 608 n.98.
26. 582 U.S. 255 (2017).
27. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (upholding the application of Minnesota law under Minnesota choice-of-law rules as consistent with due process despite significant connections to Wisconsin in light of "significant aggregation of contacts" with Minnesota).

applying U.S. law in transnational contexts: the presumption against extraterritoriality.[28] Historically, a source of U.S. courts' magnetism for transnational litigation had been their broad extraterritorial application of U.S. law. This contributed to foreign plaintiffs' decisions to sue in California over a Scottish plane crash, hoping California law would apply;[29] to sue in New York federal court over securities fraud relating to shares traded on an Australian exchange, hoping U.S. securities law would apply;[30] and to sue in federal court over torture and killings in Nigeria, hoping international law would apply.[31] The Supreme Court has recently held that U.S. law does not regulate any of those cases.

C. *Section 230 Immunity*

Meanwhile, other statutes have precluded private litigation in some areas altogether. As relevant here, for offenses on the internet, here or abroad, Section 230 of the 1996 Communications Decency Act[32] immunizes social media platforms and other internet companies from suits both for failing to remove unlawful content and for removing lawful content.[33] While other nations recognize certain forms of immunity from suits, Section 230 immunity is particularly strong and broad.[34]

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28. *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (describing the evolution of the presumption against extraterritoriality over the last two centuries).

29. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 258 (1981) (noting Scottish plaintiff's "candid" admission that she chose to sue in California over Scotland because its laws were more favorable).

30. *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 252–53 (2010).

31. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 111 (2013) (noting that Nigerian nationals sued in the United States under the Alien Tort Statute for violations of "the law of nations").

32. 47 U.S.C. § 230.

33. Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. FORUM 475, 476 (2021).

34. The Supreme Court was expected to further clarify this breadth in the 2022 Term, but instead decided the cases on other grounds. *See* Gonzalez v. Google, 598 U.S. 617, 622 (2023) (declining "to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief"); Twitter v. Taamneh, 598 U.S. 471 (2023) (holding plaintiffs failed to state a claim under the Justice Against Sponsors of Terrorism Act).

III. Transnational Litigation Against U.S. Tech Giants Around the World

In 2016, I predicted that as litigation isolationism took hold in U.S. courts, transnational plaintiffs would abandon those courts and seek out foreign law and foreign courts to pursue cases that had previously gravitated to U.S. courts,[35] much as after *Morrison v. Nat'l Australia Bank*, global securities litigation migrated to other nations' courts.[36] Similar trends can be observed in the areas of privacy and internet regulation, including in suits against U.S. companies.

The rhetoric against transnational litigation in U.S. courts, even involving U.S. defendants, has long been that these cases belong in fora with a closer nexus to the suit's underlying events. Now in these fora, U.S. defendants are asserting similar arguments to get suits dismissed, contending that the cases, or they themselves as parties, are too foreign. These arguments fail, however, when the basis for jurisdiction and application of local law are increasingly tied to the forum.

This Part provides examples of recent litigation around the world against U.S. tech giants. In some senses, these cases have "the United States written all over them," whether because they involve U.S. defendants, or because they also involve U.S. interests, from commercial interests to protecting free speech to national security.[37] On the other hand, they do not necessarily represent exorbitant exercises of judicial jurisdiction on the part of foreign courts. To varying degrees, these courts likely have a sufficient jurisdictional nexus to support their authority to hear these cases, and, accordingly, to apply their forum law to defendants' local conduct. They may even regulate related conduct that extends worldwide because of the internet's global reach. As other countries regulate U.S. tech giants that harm their residents or regions, *U.S. users* could be the ones left

35. Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL Unbound 57, 61 (2016).

36. *Id.*

37. *See, e.g.*, Chinmayi Sharma, *The Tragedy of the Digital Commons*, 101 N.C. L. Rev. 1129, 1205–08 (arguing for designating open source software "critical infrastructure" because of, *inter alia*, how highly integrated it is with other critical infrastructure sectors).

unprotected when internet platforms' policies and practices enable harm against them.[38]

A. *Twitter in Canada*

In our first example, Frank Giustra, a Canadian billionaire businessman and philanthropist, sued Twitter in a British Columbia (B.C.) court for defamation.[39] Twitter moved to dismiss for lack of personal jurisdiction or on forum non conveniens grounds, arguing that California was a more appropriate forum.

Both the United States and Canada had interests in the case. Giustra owned a home in California. He sued Twitter, a U.S. corporation headquartered in California, for publishing statements that were "overwhelmingly posted by Americans about United States topics, particularly in reference to the 2016 US election and the connections between Mr. Giustra and the Clintons."[40]

The "metaphorical elephant" "lurking in the corner of the room," however, was that any U.S. suit against Twitter on these grounds was "doomed to fail" because of Section 230, and no U.S. court would ever enforce a foreign libel judgment against Twitter.[41] The B.C. court clearly had judicial jurisdiction because the tweets were published in British Columbia and harmed a B.C. resident. Under B.C. conflict rules, B.C. law would apply. The lower court reasoned that under these circumstances, California cannot be an alternative forum when the plaintiff would have no cause of action there notwithstanding these clear B.C. ties.[42] Twitter objected to this reasoning on appeal.

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38. Rebecca Hamilton & Rosa Curling, *Facebook Beware: The "Rest of World" is Hitting Back*, Just Security (Feb. 6, 2023), https://www.justsecurity.org/84982/facebook-beware-the-rest-of-world-is-hitting-back/ [https://perma.cc/H2VN-5LSA].

39. Giustra v. Twitter, Inc. (*Giustra I*), 2021 BCSC 54, paras. 2, 4.

40. Giustra v. Twitter, Inc. (*Giustra II*), 2021 BCCA 446, para. 33.

41. *Id.* at paras. 6, 101. *See also* Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C. §§ 4101–05 (detailing requirements for enforcing a foreign defamation judgment in the United States); John F. Coyle, *The SPEECH Act and the Enforcement of Foreign Libel Judgments in the United States*, 18 Y.B. Priv. Int'l L. 245 (providing an overview of the SPEECH Act).

42. *Giustra I*, 2021 BCSC at para. 101 (emphasis in original); *Giustra II*, 2021 BCCA at para 115.

The Court of Appeals affirmed B.C. courts' exercise of jurisdiction. It considered Twitter's U.S. law immunity as relevant to, but not dispositive of, the forum non conveniens question. Moreover, it criticized Twitter's position as casting comity as "run[ning] as a one-way street."[43] What of Canadian courts' right to be respected in having a different constitutional and legal approach to internet defamation that affects Canadian citizens?[44]

B. *Meta in Kenya*

Facebook, the most popular social network, boasts approximately 2.9 billion monthly active users worldwide.[45] It operates nearly everywhere but is immune to many suits in its home jurisdiction. For decades, U.S. companies sued at home for malfeasance abroad argued that such suits had no place in U.S. courts and should instead be brought in a foreign forum. Now that plaintiffs are doing so, however, these companies once again seek to have the cases dismissed on account of their "foreignness."[46] They face courts that seem amenable to asserting judicial jurisdiction and to applying their local law. Two recent suits against Meta (Facebook's parent company) in Kenyan courts illustrate the point.

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43. *Giustra II*, 2021 BCCA at para. 137.

44. Giustra and Twitter reached an undisclosed settlement in January 2023. *B.C. Billionaire Frank Giustra Settles Lawsuit Against Twitter*, CBC NEWS (Jan. 18, 2023), https://www.cbc.ca/news/canada/british-columbia/twitter-frank-giustra-lawsuit-pizzagate-court-1.6717814 [https://perma.cc/SV73-3K7P]. Australian courts have also allowed suits against American online publishers accused of defaming Australian residents. *See* Dongsheng Zang, *Revolt Against the U.S. Hegemony: Judicial Divergence in Cyberspace*, 39 WIS. INT'L L.J. 1, 29–32 (2021) (discussing *Dow Jones v. Gutnick* and its impact on other common law countries).

45. Stacy Jo Dixon, *Number Of Global Social Network Users 2017-2027*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ [https://perma.cc/NV5E-M3GF]. *See generally, e.g.,* Rebecca J. Hamilton, *Governing the Global Public Square*, 62 HARV. INT'L L.J. 117 (2021) (discussing free speech challenges for social media in the Global South).

46. *See generally,* Maggie Gardner, "*Foreignness*", 69 DEPAUL L. REV. 469 (2020) (discussing the rhetorical use of "foreignness" as a short-hand for dismissing cases in U.S. courts).

1. Motaung v. Meta: *The Content Moderators*

Daniel Motaung moved from his home country of South Africa to Kenya to work at Facebook's Nairobi content moderation hub. While there, he alleges, he was exposed to "gruesome content such as rape, torture, and beheadings that risked his and his colleagues' mental health."[47] In 2022, he sued Meta Platforms, Inc. and Meta Platforms Ireland (together, "Meta"), and Samasource Ltd, the local hub operator, in Kenyan High Court, alleging violation of his rights under the Kenyan Constitution.[48]

Meta objected to the suit, arguing that as foreign corporations that are neither domiciled nor doing business in Kenya, the Kenyan courts have no jurisdiction over them.[49] Meta also argued that the Kenyan constitution does not apply extraterritorially to foreign defendants like itself.[50] The court rejected these arguments, reasoning, inter alia, that Meta were "necessary and proper parties to the suit."[51]

While Motaung hailed this decision a victory, the legal issues are thorny and Meta is appealing.[52] The threshold questions relate to whether Meta itself operates in Kenya, or only through

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47. Evelyne Musambi, *Kenya Labor Court Rules That Facebook Can Be Sued*, AP News (Feb. 6, 2023), https://apnews.com/article/technology-kenya-nairobi-business-mental-health-83b21e1c5a058f4221699dfc0cd16aa8 [perma.cc/AE9N-86MZ].

48. Motaung v Samasource Kenya EPZ Ltd. t/a Sama & 2 others (2023) 320 K.L.R. para. 7 (Kenya), available at http://kenyalaw.org/caselaw/caselawreport/?id=250879 [https://perma.cc/GX2T-SV8S]. A similar suit in California succeeded in 2021. Over 10,000 content moderators accused Facebook of failing to protect them from psychological injury from their exposure to graphic and violent imagery. The case settled for $85 million. Daniel Wiessner, *Judge OKs $85 Mln Settlement of Facebook Moderators' PTSD Claims*, Reuters (July 23, 2021), https://www.reuters.com/legal/transactional/judge-oks-85-mln-settlement-facebook-moderators-ptsd-claims-2021-07-23/ [https://perma.cc/6N3V-ZNXE].

49. Annie Njanja, *Meta Says Kenyan Court Has No Jurisdiction To Determine Case Against It, Wants It Thrown Out*, Tech Crunch (June 9, 2022), https://techcrunch.com/2022/06/09/meta-says-kenyan-court-has-no-jurisdiction-to-determine-case-against-it-wants-it-thrown-out/ [https://perma.cc/P29D-7LNH].

50. Motaung, [2023] KEELRC 320, para. 20.

51. *Id.* at para. 114.

52. The Kenyan court, for example, expressed skepticism that it had jurisdiction. "In the circumstances, the court is not satisfied that it has assumed jurisdiction over the applicants." *Id.* at para. 114.

Samasource. These questions about imputing a relationship with a forum from one corporation to another are familiar from those left unresolved by *Daimler*. They are also issues that courts in the UK and the Netherlands have somewhat circumvented by finding that parent corporations have supervisory liability over their subsidiaries.[53] Depending on the facts, finding jurisdiction over Meta here may require extending conceptions of presence and legal responsibility beyond subsidiaries to subcontracting parties. But this Kenyan court, at least, may be amenable to such developments. Based on the complaint, the court found that although Motaung's employment contract was with Samasource, Meta was his employer "as well, in that they supervised and assigned tasks and carried on business in Kenya."[54]

2. Amare v. Facebook: *Content Regulation*

A December 2022 complaint in another Kenyan case could yield a decision applying these principles to internet content regulation affecting the entire region. In October 2021, an Ethiopian chemist, Professor Meareg Amare, was murdered after several Facebook posts made false accusations against him, identified where he lived and worked, and called for his death.[55]

Meareg's son, Abrham, and Fisseha Tekle, an Ethiopian legal adviser at Amnesty International, sued Meta in Kenyan High Court for violations of the Kenyan Constitution, alleging that through its algorithms that promote hateful and inciting posts, Meta prioritizes profit over Africans' lives and thereby discriminates against Facebook users in Africa on account of "race, and ethnic and social origin."[56] Although the plaintiffs

53. *See, e.g.*, Lucas Roorda & Daniel Leader, Okpabi v Shell and Four Nigerian Farmers v Shell: *Parent Company Liability Back in Court*, 6 Bus. & H.R. J. 368 (2021) (discussing the hurdles facing plaintiffs even after courts recognized the possibility of parent company liability).

54. Motaung, [2023] KEELRC 320, para. 88.

55. Hamilton & Curling, *supra* note 38.

56. Meareg et al. v. Meta Platforms, Inc., et al., Complaint, https://www.foxglove.org.uk/wp-content/uploads/2022/12/Constitutional-Petition-Abrham-Another-V-Meta.pdf [https://perma.cc/J6W3-PCLS].

and the decedent are Ethiopians, they sued in Kenya based on the location of the nearest Facebook content moderation hub.[57]

In future filings, Meta will likely assert the same kinds of jurisdictional defenses that it asserted in the *Motaung* case. But although the nexus to Kenya may seem more tenuous because the underlying events occurred in Ethiopia, the complaint is framed to target the hub's conduct affecting Kenya and all of Africa, which would justify not only judicial jurisdiction but application of Kenyan law.

C. *Facebook and Google in Europe*

Internet cases also raise important questions of how far a domestic court's remedial powers extend. For example, can a court order a platform to take down offending information only in the court's jurisdiction, or can the take-down order have worldwide effect?

In 2016, a Facebook user shared an article with a photo of Eva Glawischnig-Piesczek, an Austrian politician, along with a commentary calling her a "lousy traitor," "corrupt oaf," and "member of a 'fascist party."[58] Ms. Glawischnig-Piesczek sued Facebook for defamation and demanded that Facebook take down the post and monitor for copycat posts to remove as well. Facebook took down the post, but only for those who logged onto Facebook in Austria, and it objected to the monitoring responsibility. On referral from the Austrian Supreme Court, the European Court of Justice (ECJ) held that no EU law restricted the Austrian court's ability to impose a global takedown order or to require monitoring and blocking in Austria only, paving the way for EU Member States to issue such extraterritorial takedown orders for both harmful comments and their "equivalents."[59]

The defendant in that case was Facebook Ireland, which is located in an EU Member state. But in other contexts, the

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57. Eliza Mackintosh, *An Ethiopian professor was murdered by a mob. A lawsuit alleges Facebook fueled the violence*, CNN Business (Dec. 14, 2022), https://www.cnn.com/2022/12/14/tech/ethiopia-murdered-professor-lawsuit-meta-kenya-intl [https://perma.cc/78Q2-6BPE].

58. Jennifer Daskal, *Speech Across Borders*, 105 Va. L. Rev. 1605, 1608 (2019) (describing Case C-18/18, Glawischnig-Piesczek v. Facebook Ireland Ltd. (Judgment Facebook Opinion), ECLI:EU:C:2019:821, ¶ 12 (Oct. 3, 2019)).

59. *See id.* at 1609 (criticizing the breadth of this ruling).

ECJ has found that courts in the EU have judicial jurisdiction over non-EU companies (e.g., Google) if the company operates out of an EU base and uses its search engine for profit within the union.[60] In 2014, the ECJ articulated this scope of judicial jurisdiction in the same case where it recognized the "right to be forgotten," which provides EU citizens with the right to petition companies like Google to de-list certain information from the Google search engine.[61] In later right-to-be-forgotten litigation, the ECJ clarified that the right entitled the petitioner to a *local* takedown order, not a global one.[62] However, the *Glawischnig-Piesczek* case suggests that worldwide injunctions may be available for violations of other rights.[63]

IV. Conclusion: Transnational Litigation and Comparative Law

The foregoing examples show litigation around the world against U.S. tech companies where the basis for jurisdiction and application of forum law is more localized, but is not entirely uncontroversial. As specific jurisdiction concepts develop around the world and adjust to modern technological realities, the United States finds itself on the narrower and more old-fashioned end of the spectrum. This limits U.S.

60. Kevin D. Benish, *Whose Law Governs Your Data?: Takedown Orders and "Territoriality" in Comparative Perspective*, 55 Willamette L. Rev. 599, 615 (2019).

61. Case C-131/12, Google Spain v. AEDP, 2014 EU:C:2014:317, ¶¶ 41–60 (May 13, 2014); *see also* Regulation 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, Repealing Directive 95/46/EC (General Data Protection Regulation), 2018 O.J. (L 127) art. 17 (providing for a "right to be forgotten").

62. Benish, *supra* note 60, at 619.

63. Both the United States and other countries permit worldwide takedown orders in other contexts. For example, in the United States, Microsoft obtained a default judgment and permanent injunction against the hacking outfit known as "Fancy Bear," behind the Russian-led hacking of the Democratic National Committee in 2016, which transferred ownership of internet domains to Microsoft and has allowed it to shut down Fancy-Bear-operated websites. *Id.* at 621-23 (discussing Microsoft Corp. v. John Does 1-2, No. 16-cv-993, 2017 WL 3605317 (E.D. Va. Aug. 22, 2017)). And in Canada, a worldwide injunction required Google to remove all websites hosted by a company that was using the plaintiff's trade secrets to manufacture and sell a competing product. *See id.* at 619–621 (discussing Equustek Solutions Inc. v. Google Inc., (2015), 386 D.L.R. 4th 224 (Can. B.C. C.A.)).

plaintiffs' ability to sue foreign defendants in U.S. courts, even as foreign plaintiffs are using their courts to sue U.S. defendants.[64] Likewise, because of Section 230 immunity, U.S. plaintiffs cannot sue these tech companies for wrongdoings at home, even though foreigners can sue them abroad for similar wrongdoings. Scholars' and business' argument against transnational litigation in U.S. courts based on doing business jurisdiction was once that subjecting them to such suits put them at a comparative disadvantage. Today's landscape, however, may place U.S. plaintiffs at a comparative disadvantage, at least against certain defendants.

Understanding the full implications of these developments requires a deep understanding of transnational litigation doctrine in U.S. law, including civil procedure, federal courts, conflicts of law, and choice of law rules and principles. It also requires both a bird's-eye view of the entire life cycle of a litigation—from jurisdictional issues to remedies and enforcement. It is critical to "see these issues in the context of the interconnected whole."[65]

But as Silberman deeply appreciates, that understanding also requires knowledge of foreign law, procedures, and practices.[66] Indeed, it requires acquaintance with foreign lawyers. And the diverse international group gathered for this symposium in Linda's honor demonstrates that over the course of her career, Linda has mastered not only these various U.S. doctrines and a deep understanding of comparative law, but also friendships with colleagues around the world.

Linda's retirement perhaps marks the end of an era, but she has and continues to sharpen our vision of the balances to be struck in the domestic and international systems of litigation and to inspire us all.

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64. *See* Zang, *supra* note 44, at 31 (arguing that other nations in Europe, Asia, and around the world, have a stricter approach to internet regulation and a broader approach to personal jurisdiction than the United States).

65. Linda Silberman, *Transnational Litigation: Is There A "Field"? A Tribute to Hal Maier*, 39 VANDERBILT L. REV. 1427, 1431 (2006).

66. *See, e.g.*, OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, JOHN SORABJI, ROLF STÜRNER, YASUHEI TANIGUCHI,| VINCENZO VARAN, CIVIL LITIGATION IN COMPARATIVE CONTEXT (2d ed., 2017; 1st ed., 2007) (comparing civil procedure in the United States, Germany, France, and Japan).