STATE-COURT LIABILITY FOR U.S. ENTITIES FURTHERING INTERNATIONAL HARMS: TORT CAUSATION & U.S. FINANCIERS OF ISRAELI SETTLER ORGANIZATIONS DISPOSSESSING PALESTINIANS IN SHEIKH JARRAH

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ABSTRACT

In an age of drastically narrowed federal-court remedies, this Article offers a new framework to hold a range of U.S. actors accountable for facilitating grave human rights abuses and international-law violations abroad. The Article responds to impacted communities' and international human rights practitioners' search for different legal tools in a post-Alien Tort Statute world. It identifies state tort law as a promising alternative, chiefly because, as a creation of the common law, tort law is flexible and adaptable. The Article grapples with a predictable but undertheorized obstacle to pursuit of human rights and international-law claims under tort law: showing a causal connection between U.S.-based actors' actions and the ultimate harm that individuals and communities experience at the hands of third parties. It demonstrates how tort jurisprudence already provides a path to liability in circumstances of complex causation and multiple tortfeasors via evidential grouping principles. Several variations of this doctrine prove particularly relevant for human rights litigation.

The Article applies this causation framework to the context of U.S.-based actors' role in aiding and abetting Israeli settler organizations' forced home expulsions and expropriation of Palestinian land in Sheikh Jarrah, occupied East Jerusalem. Sheikh Jarrah is a site of both particularly pitched dispossession efforts by Israeli settlement enterprise actors, and particularly strong organizing and resistance by Palestinian communities. In addition to its political and ideological importance, Sheikh Jarrah presents complex causation issues that lend themselves to testing the reach of evidential grouping variations. Numerous U.S.-based entities are responsible for funneling hundreds of millions of dollars to Israeli settlement organizations, which are in turn committing grievous harms against Palestinians in Sheikh Jarrah. Despite years of legal efforts by practitioners and

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directly impacted people, U.S. entities so far have escaped any meaningful accountability for their support of an enterprise that plainly violates international law. This Article illustrates how evidential grouping could operate in practice to reach liability in U.S. courts for Palestinian communities in Sheikh Jarrah. It also provides a roadmap that can be applied in a broad range of other contexts in which U.S. actors are funding or enabling rights violations. In so doing, this Article hopes to provide impacted communities, advocates, and legal practitioners with a new tool for seeking legal accountability for harms abroad enabled by U.S. actors' funding or facilitation, as part of the larger struggle toward collective liberation.

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INTRODUCTION

For forty years, the Alien Tort Statute (ATS)[1] afforded non-U.S.-citizens who had been subjected to grave violations of international law a way to vindicate their rights in U.S. federal courts. But no longer. The Supreme Court has narrowed the reach of the ATS in recent years to the point of near nonexistence, rendering accountability unlikely in federal court.

This Article presents a new framework for establishing liability under state tort law against U.S. actors for aiding and abetting international human rights violations. As a creation of the common law,[2] tort law is flexible and adaptable. Courts have repeatedly found creative solutions to extend tort liability where a strict but-for causation inquiry would prevent plaintiffs' recovery. In so doing, courts have focused on questions of "practical unfairness."[3] The Article focuses on evidential grouping, a category of specific alternative tort causation theories developed by courts to address complex causal relationships with multiple actors. It demonstrates how practitioners can harness evidential grouping[4] to establish causation for a broad range of state-law tort claims against U.S. entities facilitating international harms, through suits brought in the state where an entity is domiciled or under the law of that state.

A case study of U.S.-based actors' role in aiding and abetting Israeli settler organizations' dispossession of Palestinians in Sheikh Jarrah[5] offers a highly relevant context for testing the reach and utility of evidential grouping. U.S. entities

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1. The Alien Tort Statute is an eighteenth-century U.S. statute that allows non-citizens to assert claims in U.S. federal court for torts committed in violation of international law. Human rights advocates used the ATS for the first time in 1980. Since then, the Supreme Court has repeatedly narrowed the scope of ATS claims, until its most recent decision in June 2021, which virtually closed the door to ATS claims for violations committed outside of the United States. *See infra* Section I(A).

2. Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Legislation*, 125 HARV. L. REV. 1757, 1780 (2012) ("[Tort law reflects] a common law, nonlegislative, and incremental approach to the articulation of legal wrongs that . . . expose a defendant to liability[.]").

3. *See* Summers v. Tice, 199 P.2d 1, 3, 5 (Cal. 1948); *infra* Section II(B).

4. Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 460–71 (2006).

5. Sheikh Jarrah is a neighborhood in occupied East Jerusalem, located near the Old City. Israeli settler organizations view Sheikh Jarrah as a strategic location in a broader push to cut off East Jerusalem from the rest of the West Bank. Patrick Kingsley, *Palestinian Families Reject Deal in Area That Helped Set Off Gaza Conflict*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/11/02/world/middleeast/palestinian-jerusalem-eviction-jarrah.html [https://perma.cc/4RVW-M2J5]; Paola Caridi, *The Settlers' Grab of Jerusalem*, LETTERA 22 (May 11, 2021), https://www.lettera22.it/the-settlers-grab-of-jerusalem/ [https://perma.cc/6AA2-P36W]; Alex Kane, *Tax-Exempt U.S. Nonprofits Fuel Israeli Settler Push to Evict Palestinians*, INTERCEPT (May 14, 2021), https://theintercept.com/2021/05/14/israel-settler-evictions-jerusalem-nonprofits/ [https://perma.cc/R37Y-N3MU]. Efforts to dispossess Palestinian residents of Sheikh Jarrah helped spark the last round of Palestinian uprisings in May 2021. The uprisings have generated sustained U.S. and international media attention. *See also* Mohammed El-Kurd, *As I Write, Settlers and Police Are Attacking My Neighbors in Sheikh Jarrah*, NATION (Feb. 15, 2022), https://www.thenation.com/article/world/sheikh-jarrah-protest-gvir/ [https://perma.cc/YA7V-GCZV].

magnify and support the Israeli settlement enterprise—the constellation of actors and institutions that work collectively to establish, sustain, expand, and legitimize illegal[6] Israeli settlements in the West Bank,[7] East Jerusalem,[8] and the Golan Heights.[9] The Israeli settlement enterprise functions to dispossess Palestinians by

6. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, arts. 46, 55, Oct. 18, 1907, U.S.T. 539, *reprinted in* 2 AM. J. INT'L. L. 95 (1908) (Supp.) [hereinafter Fourth Hague Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 33, 43, 49, 53, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. *See infra* Section III(A) for a more detailed discussion of the applicable international humanitarian law prohibitions.

7. Israeli settlements in the West Bank are illegal. *See* G.A. Res. 446, ¶ 1 (March 22, 1979) (declaring that Israeli settlements in the occupied Palestinian territories of the West Bank, East Jerusalem, and the Gaza Strip, as well as the Syrian Golan Heights, have "no legal validity"); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 ¶¶ 19, 99 (July 9) [hereinafter ICJ Wall Decision].

8. Israel unilaterally annexed East Jerusalem in 1967 and considers it part of its sovereign territory. This annexation is illegal under international law. East Jerusalem remains an occupied territory under international law. G.A. Res. 2253 (July 4, 1967) (declaring invalid Israel's annexation of East Jerusalem).

9. Similarly, Israel's occupation of the Syrian Golan Heights is illegal under international law. *See* S.C. Res. 497 (Dec. 17, 1981) (declaring Israel's annexation of the Golan Heights "null and void and without international legal effect").

way of land expropriations,[10] forced home expulsions,[11] home demolitions,[12] coercive property transfers,[13] limitations on freedom of movement,[14] and settler violence.[15] So far, U.S. entities participating in the Israeli settlement enterprise have

10. B'TSELEM, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK 47–63 (May 2002), https://www.btselem.org/sites/default/files/sites/default/files2/publication/200205_land_grab_eng.pdf [https://perma.cc/8A6N-ZCCB]; AMNESTY INT'L, ISRAEL'S APARTHEID AGAINST PALESTINIANS: CRUEL SYSTEM OF DOMINATION AND CRIME AGAINST HUMANITY 113–63 (Feb. 1, 2022), https://www.amnestyusa.org/wp-content/uploads/2022/01/Full-Report.pdf [https://perma.cc/WHV7-7FYN]; HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION 176–82 (Apr. 27, 2021), https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf [https://perma.cc/958F-ATPA]; B'TSELEM & KEREM NAVOT, THIS IS OURS – AND THIS, TOO: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK 7–8 (Mar. 2021), https://www.btselem.org/sites/default/files/publications/202103_this_is_ours_and_this_too_eng.pdf [https://perma.cc/3C25-FJKC].

11. This Article uses the language of "forced home expulsions" rather than "forced evictions" to refer to the forcible removal of Palestinians from their homes. This terminology is in line with the stated preference of impacted communities, who reject the Israeli settler enterprise's strategic efforts to portray the systematic, illegal dispossession of Palestinians and population transfer of Israeli settlers into occupied Palestinian territory as individualized, isolated "real estate disputes." Mohammed El-Kurd (@m7mdkurd), TWITTER (Nov. 2, 2021, 7:34 AM), https://twitter.com/m7mdkurd/status/1455528716935831552 [https://perma.cc/PQW4-YY9B] (statement from the families of Sheikh Jarrah rejecting Israeli Supreme Court proposal to suspend eviction proceedings in Sheikh Jarrah in exchange for their recognition of Israeli settler organization's ownership and payment of rent to settlers) ("Our dispossession would still be imminent, and our homes would still be regarded as someone else's. Such 'deals' distract from the crime at hand, ethnic cleansing perpetrated by a settler-colonial judiciary and its settlers."); *see also* Hayes Brown, *The Latest Israel-Palestine Crisis Isn't a 'Real Estate Dispute.' It's Ethnic Cleansing*, MSNBC (May 11, 2021, 5:48 AM), https://www.msnbc.com/opinion/what-israel-calls-real-estate-dispute-really-ethnic-cleansing-n1266897 [https://perma.cc/A2P4-LCW8]; AMNESTY INT'L, *supra* note 10, at 133–34, 161, 222, 227; HUM. RTS. WATCH, *supra* note 10, at 113–14, 178.

12. HUM. RTS. WATCH, *supra* note 10, at 12, 92; *Breakdown of Data on Demolition and Displacement in the West Bank*, U.N. OFF. COORDINATOR FOR HUMANITARIAN AFFS. (OCHA), https://www.ochaopt.org/data/demolition [https://perma.cc/5X3M-SJDU] (last visited Oct. 15, 2023).

13. HUM. RTS. WATCH, *supra* note 10, at 181; *Selling Jerusalem: Middlemen Sell Jerusalemite Homes to Settlers*, AL-JAZEERA (Mar. 14, 2019), https://www.aljazeera.com/features/2019/3/14/selling-jerusalem-middlemen-sell-jerusalemite-homes-to-settlers [https://perma.cc/LV23-42D4].

14. B'TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID 5–6 (Jan. 12, 2021), https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_eng.pdf [https://perma.cc/T7EW-N2BW]; U.N. Secretary-General, *Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem*, U.N. Doc. A/HRC/31/44 (Jan. 20, 2016).

15. AL-HAQ, INSTITUTIONALISED IMPUNITY: ISRAEL'S FAILURE TO COMBAT SETTLER VIOLENCE IN THE OCCUPIED PALESTINIAN TERRITORY 21 (2013), https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/institutionalised-impunity.pdf [https://perma.cc/SKJ6-GPBG]; Steve Hendrix, *'Hate Crime' Attacks by Israeli Settlers on Palestinians Spike in the West Bank*, WASH. POST (Nov. 28, 2021, 4:00 AM), https://www.washingtonpost.com/world/middle_east/west-bank-settlers-violence-attacks/2021/11/28/7de2f9d2-4bb7-11ec-a7b8-9ed28bf23929_story.html [https://perma.cc/U8S2-ETBM].

evaded liability. This impunity continues despite long-standing legal efforts[16] and growing U.S.-based support for Palestinian human rights.[17] Moreover, there is a burgeoning international consensus—including among top human rights organizations Amnesty International and Human Rights Watch—that Israeli violations amount to apartheid and persecution, both crimes against humanity under international law.[18]

Section I traces the path of the ATS, including its step-by-step gutting by the U.S. Supreme Court. It discusses the implications for litigating international-law and human rights claims in U.S. federal courts. The Section then argues that claims in state court or under state law offer a promising avenue for litigating these claims, considering both state-law claims' advantages in comparison with federal-law claims and the hurdles that persist. Section II explains how human rights and international-law claims can be formulated as common-law torts such as wrongful death, assault and battery, or trespass. Recognizing the centrality and challenge of establishing causality for tort claims, it proposes an original analysis of alternative tort causation theories. The Section surfaces the rationales underlying evidential

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16. These efforts include the following federal-court cases and IRS administrative complaints: Ahmad v. Christian Friends of Israeli Communities, No. 13 Civ. 3376 (JMF), 2014 WL 1796322, at *4–5 (S.D.N.Y. May 5, 2014) (dismissing case), *aff'd*, 600 F. App'x 800 (2d Cir. 2015); Abdel Aziz v. Dep't of the Treasury, No. 15-cv-02186 (RDM), ECF No. 22, 11–16 (D.D.C. Mar. 4, 2017) (mem. op.) (dismissing case on causation and redressability grounds), *aff'd*, No. 17-5158, ECF No. 29, 4–5 (D.C. Cir. Aug. 14, 2018); Al-Tamimi v. Adelson, 916 F.3d 1 (D.C. Cir. 2019) (reversing district court's dismissal based on political question doctrine); Press Release, Avaaz, The Hebron Fund: Request to the Internal Revenue Service to Revoke Tax-Exempt Status (Mar. 3, 2015), https://avaazimages.s3.amazonaws.com/HebronFundComplaint - Avaaz public 2.pdf [https://perma.cc/N78B-4NG6]; Press Release, T'ruah: The Rabbinic Call for Human Rights, T'ruah Files IRS Complaint Against U.S. Jewish Groups Sending Funds to Israeli Terrorist Orgs (Aug. 30, 2018), https://truah.org/press/truah-files-irs-complaint-against-u-s-jewish-groups-sending-funds-to-israeli-terrorist-orgs/ [https://perma.cc/6MWU-QLQY].

17. *See, e.g.*, Sanya Mansoor, *How Online Activism and the Racial Reckoning in the U.S. Have Helped Drive a Groundswell of Support for Palestinians*, TIME (May 21, 2021, 3:26 PM), https://time.com/6050422/pro-palestinian-support [https://perma.cc/4SFV-S7JY]; Sarah Parvini, *Pro-Palestinian Activists Are Building a Broad Progressive Coalition in the U.S.*, L.A. TIMES (May 25, 2021), https://www.latimes.com/california/story/2021-05-25/pro-palestinian-activists-are-building-a-broad-progressive-coalition-in-the-u-s [https://perma.cc/9XZY-PPJQ]; Heba Saleh, *'We Live in a New Era': The Next Generation of Palestinian Activists*, FIN. TIMES (July 11, 2021), https://www.ft.com/content/b321e326-2feb-4d12-96e9-d15348cab3a8 [https://perma.cc/U6F2-HEUF]; Kerry Boyd Anderson, *US Media Coverage of Israel-Palestine Conflict is Changing*, ARAB NEWS (May 24, 2021, 10:26 PM), https://www.arabnews.com/node/1864141 [https://perma.cc/W7C3-UQAD].

18. Rome Statute of the International Criminal Court art. 7(1)(h), (j), July 17, 1998, 2187 U.N.T.S. 3 (defining persecution and apartheid as crimes against humanity); AMNESTY INT'L, *supra* note 10, at 12–13; HUM. RTS. WATCH, *supra* note 10, at 10; B'TSELEM & KEREM NAVOT, *supra* note 10, at 7–8; B'TSELEM, *supra* note 14, at 4–5; HARV. L. INT'L HUM. RTS. CLINIC & ADDAMEER, APARTHEID IN THE OCCUPIED WEST BANK: A LEGAL ANALYSIS OF ISRAEL'S ACTIONS, JOINT SUBMISSION TO THE U.N. INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE OCCUPIED TERRITORY, INCLUDING EAST JERUSALEM, AND ISRAEL 1–2 (Feb. 28, 2022), http://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf [https://perma.cc/WM6E-ZF38].

grouping and outlines six doctrinal tests that courts have already developed in response to large-scale harms.

Section III illustrates how evidential grouping offers a potential path to legal redress in U.S. courts for impacted Palestinian communities in Sheikh Jarrah. The section first defines the Israeli settlement enterprise. It then examines the settlement enterprise's illegality under international law and the gravity of the harms it enacts on Palestinian communities living under occupation. Finally, the Section demonstrates how practitioners and scholars can apply evidential grouping to draw a viable causal link between U.S. financiers and the harms Israeli settler organizations are causing in Sheikh Jarrah. The final section concludes.

I.
ALTERNATIVES TO THE ALIEN TORT STATUTE FOR U.S. HUMAN RIGHTS LITIGATION

This Section demonstrates why state common law offers a promising alternative to federal law in a post-ATS world. Several doctrinal obstacles that impede federal-law claims do not apply to state-law claims. The increasing embrace of federalism principles by the federal judiciary further supports the suitability of claims in state courts or under state law as an appropriate forum for vindicating rights in the context of grave harms.[19] Courts and scholars have emphasized states' interests in hearing these cases, including protecting victims, deterring wrongful conduct, and holding corporations and other entities domiciled in their states liable for the harm they perpetrate.[20]

A. The Demise of the ATS and the Search for Alternative Frameworks

In light of the shrinking space in U.S. federal courts to hold U.S. actors accountable for international-law violations that occur abroad, litigators and social movements are looking for other forums and frameworks to vindicate human rights.[21] This search has only grown more urgent in recent years, particularly following the U.S. Supreme Court's June 2021 decision in *Nestlé USA, Inc. v. Doe*, which gutted the ATS as a vehicle of international human rights litigation in U.S

19. *See infra* note 51.

20. In *Bowoto v. Chevron Corp*, for example, a California court held that the state's interests would be "significantly impaired" if the defendant U.S. corporation were found responsible but could not be held "fully liable" for its role in harming non-citizens. No. C 99-cv-02506 SI, 2006 WL 2455761, at *10 (N.D. Cal. Aug. 22, 2006). *See also* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 403 (2018) ("[P]roviding law for redressing wrongs is what states do, and for good reason . . . States provide law and courts for the redress of wrongs as a matter of course, particularly the types of tortious wrongs that constitute human rights violations."); Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 392 (2009).

21. *See supra* note 16 (listing unsuccessful attempts to sue for international-law violations in federal court).

federal courts.[22] For forty years prior to *Nestlé*, the ATS was the primary litigation vehicle for holding actors to account for rights violations suffered by non-U.S. citizens.

Enacted as part of the 1789 Judiciary Act, the statutory text of the ATS states in full: "The district courts shall have original jurisdiction of any civil action by an alien[23] for a tort only, committed in violation of the law of nations or a treaty of the United States."[24] After nearly two centuries of quiescence, in 1980, a landmark Second Circuit case, *Filártiga v. Peña-Irala*, recognized for the first time that federal courts had jurisdiction to hear claims by noncitizens for international-law violations committed by non-citizens outside of the territory of the United States.[25] This marked a watershed moment for international human rights litigation in U.S. courts.

The intervening four decades saw survivors of international human rights violations bring scores of ATS cases, as well as a surge of legal scholarship focusing on the ATS.[26] The ATS allowed plaintiffs to seek legal accountability for serious, often large-scale violations. ATS claims have included torture, genocide, and

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22. 141 S. Ct. 1931 (2021). *See also* Kayla Winarsky Green & Timothy McKenzie, *Looking Without and Looking Within:* Nestlé v. Doe *and the Legacy of the Alien Tort Statute*, 25 AM. SOC'Y INT'L L.: INSIGHTS 1 (July 15, 2021); William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/4DHY-5KEG].

23. This term in the statute refers to non-citizens. This Article uses the preferred term "non-citizen" apart from direct quotes from statutory text and the full name of the ATS, given the xenophobic and racist connotations of the term "alien."

24. The Judiciary Act established the modern U.S. federal court system. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350).

25. 630 F.2d 876, 880 (2d Cir. 1980). *See also* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1474–84 (2014); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations,* 18 HASTINGS INT'L & COMP. L. REV. 445 (1995); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).

26. Over 4,000 law review articles cited the ATS between 1980 and 2014. Stephens, *supra* note 25, at 1468 n. 3. More than 1,000 additional law review articles have since cited the statute. WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A "Alien Tort Statute"&isPremiumAdvanceSearch=false&jurisdiction=ALLCASES&contentType=ANALYTICAL&querySubmissionGuid=i0ad740150000018601138a412e6ac837&categoryPageUrl=Home%2FSecondarySources%2FSecondarySourcesLibrary&searchId=i0ad7401500000186011323 9f8eb3fd5a&transitionType=ListViewType&contextData=(sc.Search) [https://perma.cc/S4NZ-ZT9T] (last visited Jan. 29, 2023).

apartheid, sometimes framed as crimes against humanity[27] or war crimes,[28] and sometimes framed as free-standing international human rights violations, as in *Filártiga*. In its 2004 decision in *Sosa v. Alvarez-Machain*, the U.S. Supreme Court cautiously endorsed *Filártiga*'s reading of the ATS, holding that the ATS contains an implied, federal common-law cause of action for a subset of modern international-law violations.[29] *Sosa* limited international violations covered by the ATS to those that "rest on a norm of international character accepted by the [international community] and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[30] This subset includes: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.[31]

After *Sosa*, the U.S. Supreme Court progressively narrowed the reach of the ATS doctrine to the point of near nonexistence for violations committed outside of the United States. First, in *Kiobel*, the Court articulated a new test, holding that ATS claims must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" and that "mere corporate presence" in the United States does not establish jurisdiction.[32] Next, in *Jesner*, the Court categorically barred ATS claims against foreign corporations.[33]

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27. Article 7 of the Rome Statute (the treaty establishing the International Criminal Court (ICC)) defines crimes against humanity as any one of a non-exhaustive list of acts—including murder, extermination, enslavement, forcible population transfer, torture, sexual violence, persecution, enforced disappearance, and apartheid—"when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, *supra* note 18, art. 7(1), 2187 U.N.T.S. at 93. Importantly, "attack" is not limited to armed hostilities or violent force. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Opinion and Judgment, ¶ 581 (Sept. 2, 1998) [hereinafter "Akayesu Trial Judgment"] ("An attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.").

28. War crimes, defined by Article 8 of the Rome Statute, include "[g]rave breaches of the [1949] Geneva Conventions" such as willful killing; torture; unlawful and wanton destruction and appropriation of property; depriving protected persons of due process rights, unlawful deportation, transfer, or confinement; taking of hostages. Rome Statute of the International Criminal Court, *supra* note 18, art. 8(2)(a), 2187 U.N.T.S. at 94. War crimes also encompass "[o]ther serious violations of the laws and customs applicable in international armed conflict," including attacks on civilians and civilian infrastructure and "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory." *Id.* (2)(b)(i)-(ii), (viii). Finally, war crimes apply in situations of "armed conflict not of an international character." *Id.* (8)(2)(c), (e).

29. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

30. *Id.*

31. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *68).

32. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

33. Jesner v. Arab Bank, 138 S. Ct. 1386, 1403, 1407 (2018).

Most recently, in *Nestlé*, the Court again took up the question of corporate liability under the ATS.[34] As in *Kiobel* and *Jesner*, *Nestlé* again left open the question of whether the ATS extended to claims against U.S. corporations, with five justices agreeing that there was no basis for limiting ATS claims to natural persons rather than corporations.[35] At the same time, the Court applied a more stringent extraterritoriality test than *Kiobel*'s "touch and concern" inquiry in *RJR Nabisco, Inc. v. European Community*.[36] In applying the presumption against extraterritoriality, the *RJR Nabisco* test asks (1) if a statute includes a clear indication of its geographic scope or, if not, (2) what the focus of the provision is.[37] In the context of the ATS, the Court in *Nestlé* held that "allegations of general corporate activity—like decision-making—cannot alone establish domestic application of the ATS," but it did not explain what level of domestic corporate activity *would* suffice.[38]

In response to the evisceration of the ATS, scholars and practitioners have been considering potential alternatives. Some have advocated for Congressional action to create a private right of action for the ATS.[39] Others have identified state law and state courts as presenting opportunities to litigate international-law claims.[40] So far, as detailed in the next section, this scholarship has primarily advanced normative arguments, exploring the ramifications of a shift toward human rights litigation in state courts and under state law,[41] and asserting that these tools *should* be available to plaintiffs seeking redress for human rights law violations.[42] Hoffman & Stephens have also traced a history of successful human rights claims

34. *Nestlè*, 141 S. Ct. at 1935.

35. *Id.* at 1947–48, n. 4 (Sotomayor, J., concurring in part and concurring in judgment); *id.* at 1942 (Gorsuch, J., concurring in part).

36. 579 U.S. 325, 337 (2016).

37. *Id.*

38. *Nestlè*, 141 S. Ct. at 1937; *see also* Dodge, *supra* note 22 (explaining that "if plaintiffs must show relevant conduct in the United States, it is hard to see how traditional ATS cases against individual defendants can continue").

39. Pierre-Hugues Verdier & Paul Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE (May 7, 2018, 7:00 AM), https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights [https://perma.cc/D3XS-Z8CL].

40. Davis & Whytock, *supra* note 20; Beth Stephens, *State Law Claims: The Next Phase of Human Rights Litigation (Remarks)*, 108 AM. SOC'Y INT'L L. PROC. 442 (2014); Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013).

41. Stephens, *supra* note 40.

42. Davis & Whytock, *supra* note 20, at 403; Hoffman & Stephens, *supra* note 40, at 18–32. Saldivar's recent, practice-oriented article proves a notable exception. Fernando C. Saldivar, *An Oasis in the Human Rights Litigation Desert? A Roadmap to Using California Code of Civil Procedure Section 354.8 as a Means of Breaking Out of the Alien Tort Statute Straitjacket*, 51 COLUM. HUM. RTS. L. REV. 507 (2020). The article provides a "roadmap" for human rights litigators to bring international-law claims through state tort law using California Code of Civil Procedure Section 354.8. Saldivar focuses on personal jurisdiction and access to courts, not causation.

in state court before *Filártiga*, under both international and state law, but do not investigate the issue of causation.[43]

This Article fills a gap in this literature by focusing on how a specific and undertheorized component of international-law claims under state tort law—the causation analysis—would work in practice. Causation has proved to be a key challenge for plaintiffs, both in the context of ATS claims and in tort claims for harms caused by the U.S. government, corporations, and other powerful actors. To date, there is no legal scholarship interrogating how the application of evidential grouping could make international-law claims against U.S.-based actors more viable under state law.

B. The Promise of Claims in State Courts and Under State Law

This next subsection compares federal- and state-law claims, demonstrating that key obstacles to ATS claims under federal law do not apply to claims brought under state common law; that state-law claims possess substantial advantages over federal-law claims; and that remaining obstacles to state-law claims are not insurmountable. However, causation—explored *infra* Section II(B)—remains a key challenge.

1. Preferring State-Law Claims

Bringing human rights claims against U.S. actors under state law could offer substantial advantages for plaintiffs and avoid many of the obstacles faced by ATS claims. *Jesner*'s bar on liability for foreign corporate defendants does not apply to U.S. entities.[44] *Kiobel*'s extraterritoriality problems are not present, since the federal presumption against extraterritoriality is ultimately a question of statutory interpretation around congressional intent and does not map onto state tort law.[45] And finally, foreign state immunities issues, which have defeated past ATS cases against foreign state officials,[46] are not present in the context of state-law claims against U.S. defendants.[47]

43. Hoffman & Stephens, *supra* note 40, at 13–15.

44. *See Jesner*, 584 U.S. at 1407 (barring ATS claims against foreign corporations).

45. *Kiobel*, 569 U.S. at 124–25; *Nestlé*, 141 S. Ct. at 1938–39.

46. Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2063 (2014); Belhas v. Ya'alon, 66 F. Supp. 2d 127, 133 (D.D.C. 2006) (dismissing class action suit brought under ATS and the Torture Victim Protection Act (TVPA) against former senior IDF official on foreign immunities grounds), *aff'd*, Belhas v. Ya'alon, 515 F.3d 1279, 1290 (D.C. Cir. 2008).

47. The foreign state immunity doctrine protects states and state officials from suit in another state's courts. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (1976); Whytock, *supra* note 46, at 2034–35 (tracing origins of and justifications for foreign state immunity doctrine). Such foreign state immunity bars would not apply to claims arising from human rights violations committed by private (non-state) actors. Whytock, *supra* note 46, at 2064.

Another key advantage of state-law claims is that they avoid federal courts' longstanding hostility to the creation of and reliance upon federal common law.[48] Concerns about common law do not apply to state law because state courts possess general jurisdiction—in contrast with the limited subject matter jurisdiction of federal courts[49]—empowering them to hear a far wider array of cases.[50] Indeed, state-law claims would only benefit from the increasing influence of states' rights and federalism principles.[51]

2. Applicability of Federal-Law Obstacles to State-Law Claims

This Article does not delve deeply into the application of the political question doctrine or state choice of law presumptions against extraterritoriality by state courts. In federal court, the political question doctrine has featured prominently in

48. In 1981, the Supreme Court reaffirmed that "[f]ederal courts, *unlike state courts*, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (emphasis added). More recently, in 2020 the Court confirmed its position that there should be no federal common law, except in extraordinary circumstances. Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020) ("there 'is no federal general common law'. . . only limited areas exist in which federal judges may appropriately craft the rule of decision.") (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)).

49. U.S. CONST. art. III, § 2.

50. *See Milwaukee*, 451 U.S. at 312; *Rodriguez*, 140 S. Ct. at 717.

51. Beginning in the 1980s with the late Justice William Rehnquist's tenure as Chief Justice, the Supreme Court began embracing principles of "new federalism." *See* Erwin Chemerinsky*, The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1763–64 (2006) (discussing how the U.S. Supreme Court has used federalism to "limit[] the scope of Congress's powers" and "to enlarge the states' sovereign immunity"); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 741–42 nn.2–5 (2000) (collecting scholarship); Luke Philip Plotca, *Federalism, Devolution, and Liberty*, 6 AM. POL. THOUGHT 106, 106–07 (2017). During and in the aftermath of Donald Trump's presidency from 2016–2020, progressives also increasingly embraced federalism and states' rights principles. *See* Erwin Chemerinsky, *Embracing Federalism*, TAKE CARE BLOG (Mar. 16, 2017), https://takecareblog.com/blog/embracing-federalism [https://perma.cc/4UXL-NBDM] (urging progressives to "embrace federalism"); Heather Gerkin & Joshua Revesz, *Progressive Federalism: A User's Guide*, 44 DEM. J. (Spring 2017), https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/ZWV3-XZY5] (arguing that progressives should recognize federalism as "one of the most powerful weapons in politics").

ATS cases as a way to foreclose relief for plaintiffs.[52] But state courts apply the political question doctrine far less commonly than their federal counterparts in light of the "widespread powerful presumption of justiciability among the states' judiciary."[53] Indeed, many state courts have rejected the political question doctrine's applicability outright.[54] It is possible, however, that a wave of state-law tort suits alleging international human rights violations by U.S. actors could prompt state courts to reassess this position. Even then, these suits would involve state and federal courts applying state law to violations by actors domiciled in their state and would therefore present less substantial political question issues as compared to ATS cases.

Plaintiffs bringing ATS claims in federal court have also had to contend with the federal presumption against extraterritoriality. This doctrine involves a rebuttable presumption that U.S. federal statutes operate and have effect only within the territorial limits of the United States.[55] The *federal* presumption against extraterritoriality does not apply under state law.[56] Although some states do apply a presumption against the extraterritorial application of state statutes (both out-of-state and internationally), no state applies the presumption against extraterritoriality to state common law.[57]

The inapplicability of federal-court-specific obstacles common in ATS claims, coupled with abundant precedent for bringing international human rights claims in state courts, renders state courts and state law even more attractive in the post-ATS landscape.

52. A federal court may invoke the political question doctrine where a case before it implicates an issue within the exclusive purview of another political branch. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). For examples of courts invoking the political question doctrine in cases alleging ATS claims, see Corrie v. Caterpillar, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (holding that request to enjoin sale of bulldozers used by Israel in extrajudicial killings was a political question); Matar v. Dichter, 500 F. Supp. 2d 284, 293–96 (S.D.N.Y. 2007) (dismissing class action suit against the former Director of Israel's General Security Service, Avi Dichter, on the basis of foreign immunities and the political question doctrine; suit charged Dichter with war crimes and extra-judicial killing for his role planning the aerial bombing of a Gaza residential neighborhood), *aff'd in part*, Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) (affirming district court's dismissal on immunity grounds but not reaching political question doctrine). *But see* Al-Tamimi v. Adelson, 916 F.3d 1, 13–14 (D.C. Cir. 2019) (reversing district court's dismissal based on political question doctrine; holding that court could resolve question of whether Israeli settlers were committing genocide without addressing the extricable political question of "*who has sovereignty over the disputed territory*") (emphasis in original).

53. Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 205 (2018) (discussing the frequency with which state courts reject claims of political questions).

54. *Id.* at nn.344–46 (collecting cases).

55. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1396 (2020) (articulating the current standard for the federal presumption against extraterritoriality).

56. *Id.* at 1389.

57. *Id.* at 1403.

3. Building on Precedent

In the post-World War II period, several state courts invoked the broad human rights provisions of the U.N. Charter and the Universal Declaration of Human Rights (UDHR) in the context of domestic human rights violations.[58] In the 1980s and 1990s, plaintiffs filed international human rights claims that "did not fit within the ATS" in state courts or in federal courts under state law.[59] For instance, since the ATS only applies to harm suffered by non-citizens, U.S. citizens subjected to international human rights violations have brought state-law claims in federal court.[60]

State tort-law claims arising outside of the United States have been brought successfully without accompanying ATS claims. In *Martínez v. City of Los Angeles*, a Mexican plaintiff sued the City of Los Angeles and two Los Angeles Police Department officers for providing Mexican authorities with false information that led to his imprisonment in Mexico for two months.[61] Although Martínez's ATS claims were dismissed on the merits, he prevailed on some of the state tort claims. The case ultimately settled out of court.[62] Similarly, in the context of suits against corporations, Palestinian families whose family members had died after being tear-gassed by Israeli state forces sued the U.S. tear gas manufacturer in *Abu-*

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58. *See, e.g.*, Namba v. McCourt, 204 P.2d 569, 579 (Or. 1949) (citing the U.N. Charter to support holding that a statute preventing Japanese Americans from owning agricultural land violated the Fourteenth Amendment); Sei Fujii v. State, 217 P.2d 481, 488 (Cal. App. 1950) (striking down the Alien Land Law, relying explicitly on the U.N. Charter and the UDHR), *vacated*, 242 P.2d 617, 630 (Cal. 1952) (affirming decision on constitutional grounds); *see also* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation, 1946-1955*, 69 IOWA L. REV. 901, 902 (1984); Hoffman & Stephens, *supra* note 40, at 13–14 (discussing human rights claims in state courts between 1949 and the early 1980s, and stating that "[l]ong before the Second Circuit decided the Filártiga case, human rights advocates looked to state courts to enforce international human rights norms").

59. Hoffman & Stephens, *supra* note 40, at 14–15.

60. *See, e.g.*, Linder v. Calero Portocarrero, 963 F.2d 332, 333–34 (11th Cir. 1992); Estate of Domingo v. Republic of the Philippines, 694 F. Supp. 782, 783–84 (W.D. Wa. 1988); Liu v. Republic of China, 892 F.2d 1419, 1434 (9th Cir. 1989) (reversing district court's dismissal of wrongful death claim based on assassination of plaintiff's husband); Letelier v. Republic of Chile, 488 F. Supp. 665, 674 (D.D.C. 1980) (denying motion to dismiss state and federal claims, including assault and battery, arising out of assassinations). For a survey of human rights cases filed under state law in federal court, see Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L. J. 1089, 1100 n.41 (2014) (listing federal cases in which ATS plaintiffs added pendent state tort claims or alleged state-law tort claims).

61. Martínez v. City of Los Angeles, 141 F.3d 1373, 1376–77 (9th Cir. 1998).

62. *Id.* at 1378–82, 1384–85. The Court of Appeals granted summary judgment in favor of the LAPD on Martínez's ATS, false arrest, and constitutional *Bivens* claims, and it reversed and remanded in Martínez's favor for the remainder of his state tort claims. The case then settled out of court. Hoffman & Stephens, *supra* note 40, at 14.

Zeinch v. Federal Laboratories, Inc.[63] A federal judge dismissed the case, but the plaintiffs refiled in state court, where the case ultimately settled.[64]

As the U.S. Supreme Court progressively narrowed the reach of the ATS, scholars anticipated that litigation in state courts and under state law would become increasingly important.[65] This prediction has borne out.[66] Several state-law human rights claims have involved corporate defendants, as well as aiding and abetting and other forms of indirect liability theories. For example, in *Bowoto v. Chevron Corp.*, plaintiffs brought claims against a U.S.-based multinational corporation for payments to the Nigerian military to carry out a "series of brutal attacks" against Nigerian villagers that killed seven people.[67] A federal district court held that California tort law applied due to the state's interest in protecting victims and holding domestic corporations "fully liable" for wrongs, reasoning that "if defendants were found responsible for the attacks allegedly committed by the Nigerian military but could not be held fully liable, California's interest would be significantly impaired."[68] While the case survived summary judgment, the jury returned a verdict for the defendants after a four-week trial.[69]

Another corporate accountability case, *Doe v. Unocal Corp.*, involved ATS and pendent state-law claims in federal court arising from a California corporation's alleged complicity in human rights abuses in Myanmar.[70] The district court

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63. 975 F. Supp. 774, 775 (W.D. Pa. 1994).

64. Hoffman & Stephens, *supra* note 40, at 15; *see also* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of* Abu-Zeinch v. Federal Laboratories, Inc., 11 AM. U. J. INT'L L. & POL'Y 195, 198 (1996).

65. Stephens, *supra* note 40, at 442 (stating that "victims of human rights abuses will increasingly file their claims in state courts"); Hoffman & Stephens, *supra* note 40, at 15 ("If the ATS is restricted, it is likely that international human rights arguments and claims will become more common in state-court litigation."); Davis & Whytock, *supra* note 20, at 400 (citing Alford, *supra* note 60, at 1091); Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *After* Kiobel*—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5 (2013); Marco Simons, Keynote Address, Kiobel v. Royal Dutch Petroleum*: A Practitioner's Viewpoint*, 28 MD. J. INT'L L. 28, 41 (2013) (arguing that "there is still no likelihood that transnational human rights litigation is going away anytime soon—the state courts remain open to transnational lawsuits for transitory torts"); Svetlana Meyerzen Nagiel, Note, *An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims*, 46 COLUM. J. TRANSNAT'L L. 133, 133 (2007).

66. For a survey of human rights litigation in state courts, *see* I. INDIA THUSI & MARTHA F. DAVIS, PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY, HUMAN RIGHTS IN STATE COURTS (Elizabeth Ennen & Juhu Thukral eds., 2016).

67. No. C 99-cv-02506 SI, 2006 WL 2455761, at *1 (N.D. Cal. Aug. 22, 2006).

68. *Id.* at *10. The court found that both Nigeria and California had equally compelling interests in applying their own law, and that it was a "close call," in which California's law applied because of the presumption in favor of applying the law of the forum state.

69. *Bowoto*, No. C 99-02506 SI, 2009 WL 1081096, at *1 (N.D. Cal. Apr. 22, 2009). Plaintiffs' appeal focused solely on two of the federal statutory claims and not state tort-law claims. *Bowoto*, 621 F.3d 1116, 1121 (9th Cir. 2010) (affirming district court judgment).

70. *See* Hoffman & Stephens, *supra* note 40, at 16 (citing Doe v. Unocal Corp., 963 F. Supp. 880, 883–84 (C.D. Cal. 1997) (denying motion to dismiss)).

dismissed the ATS claims, and the *Unocal* plaintiffs appealed.[71] They also refiled their pendent state claims in state court, converting their ATS claims into state common-law tort claims.[72] The state-court judge held a hearing on choice of law and determined that California law applied to the plaintiffs' claims.[73] Several months before the trial in the state case, and while the plaintiffs' corresponding ATS claims remained pending in the Ninth Circuit, both cases settled.[74]

In *Doe v. Exxon Mobile Corp.*, plaintiffs brought both ATS and common-law tort claims in Washington, D.C., alleging that Exxon had paid and directed Indonesian soldiers to commit acts of torture, sexual violence, and murder in the course of protecting natural gas facilities in Aceh, Indonesia.[75] After two decades of litigation and multiple trips to the D.C. Circuit, the case remains pending; while the ATS claims have not survived, the courts involved in the case have refused to dismiss the common-law tort claims including wrongful death, assault and battery, and false imprisonment.[76]

Ibrahim v. Titan Corp., also a D.C. case, involved ATS claims for torture against private contractors in Iraq.[77] Although the court rejected the ATS claims, it declined to dismiss the state-law claims—including assault and battery, wrongful death, intentional infliction of emotional distress, and negligence.[78] In 2009, the D.C. Circuit dismissed the case in a two-to-one decision on preemption grounds, holding that the state-law tort claims against private military contractors working for the federal government were preempted by federal law.[79] In *Funk v. Belneftekhim*, plaintiffs brought claims under New York state law against the

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71. The district court granted Unocal's motion for summary judgment on the ATS claims. A Ninth Circuit panel later affirmed the decision in part, reversed in part, and remanded the case for trial. Hoffman & Stephens, *supra* note 40, at 16 (citing Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part sub nom.* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)).

72. Hoffman & Stephens, *supra* note 40, at 16.

73. *Id.* at 16 n.39 (citing Doe v. Unocal Corp., Nos. BC 237980, BC 237679, 2002 WL 33944506, at *13–14 (Cal. Super. Ct. June 11, 2002)).

74. Hoffman & Stephens, *supra* note 40, at 16.

75. 473 F.3d 345 (D.C. Cir. 2007) (affirming denial of defendants' motion to dismiss common-law tort claims).

76. 391 F. Supp. 3d 76, 93 (D.D.C. 2019). However, note that the Court found that under the District of Columbia's choice of law doctrine, Indonesian law, rather than the District of Columbia, or Delaware's law, governed the substantive common-law tort claims. Doe v. Exxon Mobile Corp., 654 F.3d 11, 70–71 (D.C. Cir. 2011) (reversing dismissal of ATS and common-law tort claims and applying Indonesian law to common-law tort claims), *vacated in part by* 527 Fed. App'x. 7 (D.C. Cir. 2013) (mem.) (ordering reconsideration of ATS claims under *Kiobel*), 391 F. Supp. 3d 76, 93 (D.D.C. 2019) (dismissing ATS claims but preserving common-law tort claims), 539 F. Supp. 3d 59 (D.D.C. 2021) (granting plaintiffs' motion to compel discovery and for sanctions; denying defendants' cross-motion for sanctions), No. 1:01-cv-1357-RCL, 2021 WL 1910892, at *8 (D.D.C. May 12, 2021) (ordering further sanctions against defendants).

77. 391 F. Supp. 2d 10, 13 (D.D.C. 2005).

78. *Id.* at 15–19.

79. Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009), *aff'g in part, rev'g in part* Ibrahim, 391 F. Supp. 2d at 10.

defendant for aiding and abetting human rights violations by the Belarusian KGB.[80] The case is trial-ready, pending only the substitution of one plaintiff's estate as a party.[81]

In parallel with the rise in human rights litigation in state court and under state law, some state legislatures have enacted provisions explicitly expanding state-level human rights remedies. Most notably, the California state legislature amended its civil procedure laws in 2016 to create a ten-year statute of limitations for victims to bring civil tort claims for assault, battery, or wrongful death when the conduct would also constitute torture, genocide, a war crime, an attempted extrajudicial killing, a crime against humanity, or the taking of property in violation of international law.[82] The statute's legislative history demonstrates clear intent to provide a state forum for vindicating human rights violations, lamenting "that most human rights claims go unheard, allowing even the most reprehensible human rights abusers to escape justice simply because time is on their side" and asserting that Section 354.8's purpose is "to allow victims of those crimes the time needed to bring their claims to state court if they can establish that their claims result from an egregious abuse of their fundamental rights."[83]

As the path to federal common-law remedies continues to narrow, state-law claims have remained relatively open. In some instances, state courts have widened the door to human rights and international-law claims, making it imperative for practitioners to explore litigation in state courts and under state law.

II.
CAUSATION IN STATE TORT SUITS AGAINST U.S.-BASED ENTITIES FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

To date, the vast majority of international-law and human rights litigation in the United States has taken place in federal court. However, state tort law offers a

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80. The KGB is the security agency of Belarus. Mem. Decision and Order that Pls.' Mot. Sanctions is Granted and Defendants' Mot. Dismiss is Den'd at 21, Funk v. Belneftekhim, No. 14-cv-0376 (BMC), 2017 WL 5592676, at *10 (E.D.N.Y. Nov. 17, 2017) (order granting plaintiffs' motion for sanctions and denying defendants' motion to dismiss because "defendants' New York-based activities" were factual cause of "physical and psychological harm that plaintiffs suffered at the hands of KGB agents").

81. Mem. Decision and Order that Defs.' Mot. 363 is Den'd, Funk v. Belneftekhim, No. 14-cv-376 (BMC), 2021 WL 3774196 (E.D.N.Y. Aug. 25, 2021) (denying defendants' motion to dismiss for lack of personal jurisdiction, which the court deems to be in effect an untimely motion for reconsideration of the order denying a previous motion to dismiss); Ord. Granting Mot. Continue, *Funk*, No. 14-cv-376 (BMC) (E.D.N.Y. Nov. 30, 2021) (granting defendants' motion to continue the trial); Pl. Letter Mot. Continue, *Funk*, No. 14-cv-376 (BMC) (E.D.N.Y. Aug. 23, 2022), (letter from plaintiff requesting more time to respond regarding substitution of representative for estate and appointment of counsel for surviving plaintiff after death of one of the plaintiffs, who had also served as primary counsel in the case).

82. CAL. CIV. PROC. CODE § 354.8 (Deering 2019). *See also* Saldivar, *supra* note 42, at 514.

83. KHADIJAH HARGETT, CAL. ASSEMB. COMM. ON JUD., BILL ANALYSIS OF AB 15 (HOLDEN), at 2 (May 5, 2015), *quoted in* Saldivar, *supra* note 42, at 515.

promising avenue for framing international-law violations as common-law torts such as wrongful death, assault, and battery. State common-law principles can apply to address violations of plaintiffs' human rights by U.S. actors through straightforward application of tort-law doctrines that capture the nature of the harm. Plaintiffs also may be able to frame their claims through the incorporation of international-law principles into state common law.[84]

The goal of this Article is not to evaluate the substantive legal claims that could be brought in state court or under state law, but rather to address a question integral to any tort claim: how to satisfy the element of causation. The state-law claims proposed here involve intentional torts.[85] While not the focus of the Article, negligence-based tort claims against U.S. actors facilitating transnational harms could capture a broader range of conduct.

A. Relevance of State Tort Law

Plaintiffs can articulate international-law human rights violations as common-law torts. For instance, "[t]orture is assault and battery" and "[s]lavery is false imprisonment."[86] It is possible that state tort law may be "an inadequate placeholder" for the values protected by international human rights law.[87] However, applying state tort law is undoubtedly preferable to leaving plaintiffs with no legal recourse at all.[88] Further, tort law already addresses some catastrophic harms, including the health and environmental consequences of mass exposure to

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84. Many U.S. states adopted and absorbed English common law when adopting their constitutions in the eighteenth and nineteenth centuries. Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–800 (1951); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556 (1984). English common law, in turn, incorporated international law, known at the time as the "law of nations." EDWARD COKE, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 11(b) (Birmingham, Legal Classics Library, 1985) (1658). Framing transnational harms as "new" international torts under state common law (as opposed to translating them into domestic tort-law analogs like wrongful death or trespass) could prove a promising avenue for bringing international human rights cases in U.S. courts. Hoffman & Stephens, *supra* note 40, at 21. This framing also raises a number of undertheorized issues, including: the applicability of international humanitarian law, international criminal law, and international human rights law to these claims; the scope of non-state actor liability for international harms; and the process of recognizing new or dormant torts under state law. This pathway falls outside the scope of this Article and merits further exploration elsewhere.

85. Intentional torts require a showing of intent, causation, and damages. Negligence-based torts require a showing of duty, breach, causation, and damages. W. PAGE KEETON & WILLIAM PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS § 30, 164 (5th ed. 1984).

86. Alford, *supra* note 60, at 1750.

87. Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) (expressing concern that framing the international-law violation of torture as a state tort would "reduc[e] it to no more (or less) than a garden-variety municipal tort").

88. Hoffman & Stephens, *supra* note 40, at 21.

toxic substances, such that "[s]tate courts can apply municipal tort law without diminishing the gravity of the abuses alleged."[89]

Under the doctrine of transitory torts,[90] state courts possess subject matter jurisdiction over tort claims for wrongful death, assault and battery, false imprisonment, intentional infliction of emotional distress, and similar torts, including those committed in another country.[91] State courts offer other advantages as well. The state actor element inherent in some international humanitarian law and human rights law violations and the nexus requirement for war crimes are absent from the state tort approach.[92]

Tort law proves an especially strong candidate for post-ATS state-court international human rights litigation given its inherent adaptability and creativity. At bottom, tort law aims to redress harm both at an individual level and at a collective

89. *Id.*

90. Transitory torts are claims arising from harm inflicted outside of a court's territory. *Id. at* 11 ("State courts generally have jurisdiction to hear claims based on injuries inflicted outside of the United States, because U.S. courts—both state and federal—can generally hear 'transitory torts,' claims arising outside their territory, if the court has personal jurisdiction over the defendant."). The doctrine of transitory torts has been recognized in U.S. courts for more than 200 years. *See, e.g.*, Livingston v. Jefferson, 15 F. Cas. 660, 664 (C.C.D. Va. 1811) (No. 8411) (Marshall, Circuit J.) (stating that "an action for a personal wrong . . . is admitted to be transitory").

91. INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 120 (Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman, & Michael Ratner eds., 2008) ("[A] state court would have subject matter jurisdiction over a complaint . . . even if the torts had been committed in another country."); James M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filártiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 63 (1981) ("[T]he tortfeasor's wrongful acts create an obligation which follows him across national boundaries.").

92. International law historically has been understood to govern the rights and obligations of states. This doctrinal interpretation is shifting in light of the increasing importance of non-state actors and changing social norms. However, the obligations of non-state actors under humanitarian law and international human rights law remain both contested and ill-defined. *See* Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 3–7 (Philip Alston ed., 2005); Yaël Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT'L L.J. 21, 21 (2013). Moreover, in order to qualify as a war crime, an offense must have a nexus with an armed conflict. Harmen van der Wilt, *War Crimes and the Requirement of Nexus with an Armed Conflict*, 10 J. INT'L CRIM. J. 1113, 1113 (2012).

scale.[93] Tort law responds to societal and cultural changes, reflecting shifting "ideas of what justice demands, or of what is administratively possible and convenient."[94] At the same time, tort law also fundamentally considers—and reflects—power. It has historically embodied and reinforced the structural, imbricated forms of oppression on the basis of race,[95] class,[96] disability,[97] gender,[98]

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93. "Taken as a whole, tort law defines *wrongs* and provides an avenue through which victims can seek *redress*." JOHN C.P. GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 26 (2020) (emphasis in original). Scholars have developed a variety of interrelated normative theories of tort law, including corrective justice (restoring the individual-level status quo between the injured party and tortfeasor), distributive justice (remedying broader societal imbalances in the distribution of resources and harm), and civil recourse (focusing on injured parties' right of action to seek redress from the actor that harmed them rather than on tortfeasors' duty to repair the harm they cause). *See* Richard W. Wright, *Right, Justice, and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 158, 161, 166–70 (David G. Owen ed., 1995) (arguing that the purpose of tort law is just compensation and deterrence, rather than a utilitarian or economic efficiency theory); Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 403–13 (1998); GOLDBERG & ZIPURSKY, *supra*, at 29–30 (asserting that civil recourse theory better captures the principles animating tort law than deterrence or compensation theories).

94. KEETON & PROSSER, *supra* note 85, § 41 at 264; Jean Thomas, *Which Interests Should Tort Protect?*, 61 BUFF. L. REV. 3, 23 (2013) (Tort law reflects a "sense of ourselves as persons within society, and our sense of what we owe one another.").

95. Jennifer Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 HOW. L.J. 99, n.22 (2005) (describing racist exclusionary practices in the civil justice system); Ronen Avraham & Kimberly A. Yuracko, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018); Jonathan Cardi, Valerie P. Hans, & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507 (2020); Alberto Bernabe, *Do Black Lives Matter? Race as a Measure of Injury in Tort Law*, 18 THE SCHOLAR, ST. MARY'S L. REV. RACE & SOC. JUST. 41 (2015); Helen E. White, Note, *Making Black Lives Matter: Properly Valuing the Rights of the Marginalized in Constitutional Torts*, 126 YALE L.J. 1478 (2019); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

96. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN L. REV. 1 (1988); Susan Carle & Michelle Lapointe, *Short Notes on Teaching About the Micro-Politics of Class, with Examples from Torts and Employment Law Casebooks*, 56 BUFF. L. REV. 1129 (2008); David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 L. & SOC. INQUIRY 1, 60–61 (1996); Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 12 (1984).

97. Lydia X. Z. Brown, *Legal Ableism, Interrupted: Developing Tort Law & Policy Alternatives to Wrongful Birth & Wrongful Life Claims*, 38 DISABILITY STUD. Q., at 1 (Spring 2018); Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011); Jennifer Ann Rinaldi, *Wrongful Life and Wrongful Birth: The Devaluation of Life with Disability*, 1 J. PUB. POL'Y, ADMIN. & L. 1, 1 (2009); Adam A. Milani, *Living the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323 (1999).

98. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2018–2019); Joanne Conaghan, *Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment*, 16 OXFORD J.L. STUD. 407 (1996); Lucinda M. Finley, *Breaking the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); JOANNE CONAGHAN & WADE MANSELL, THE WRONGS OF TORT, ch. 7 (1993); Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, DUKE L.J. 848 (1990); Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L. REV. 759 (1990).

sexuality,[99] indigeneity,[100] citizenship status,[101] and, crucially, their intersections,[102] that shape U.S. society.

As a creation of judge-made common law,[103] U.S. tort law is continually negotiating its prioritization of a variety of professed societal interests:[104] to return an injured party to the pre-injury status quo, regardless of the fairness of their relative position; to distribute compensation with a broader eye to parties' relative power and resources; to regulate the behavior of private actors to promote "economic efficiency"; to offer a forum for victims of harm to assert their rights; and to communicate the values the U.S. wants to protect or advance as a society.[105] Tort law, as detailed below, has developed in response to the evolving needs of an

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99. Geoffrey Christopher Rapp, *LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After Obergefell*, 2022 U. ILL. L. REV. 1103 (2021); WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020); Keith J. Hilzendeger, Comment, *Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person's HIV-Positive Status*, 35 ARIZ. ST. L.J. 187 (2003); John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2001).

100. Ian F. Tapu, *The Reasonable Indigenous Youth Standard*, 56 GONZ. L. REV. 529 (2020/2021); Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 248 (2015); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984).

101. *See* Daniel Procaccini, Note, *First, Do No Harm: Tort Liability, Regulation and the Forced Repatriation of Undocumented Immigrants*, 30 B.C. THIRD WORLD L.J. 475, 480 (2010); Dina Lexine Sarver, Note, *The Future of Tort Litigation for Undocumented Immigrants in Donald Trump's "Great" America*, 8 UNIV. MIA. RACE & SOC. JUST. L. REV. 83 (2018); Wendy Andre, Note & Comment, *Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law*, 13 ROGER WILLIAMS UNIV. L. REV. 530, 532 (2008).

102. Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557 (2016); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).

103. *See supra* note 2.

104. "[T]he common law is always in the process of becoming. It will be motionless only when it ceases to exist." Thomas F. Lambert, Jr., Editorial, *Reflections of an Optimist*, 21 N.A.C.C.A. L.J. 25, 27 (1958). *See also* William B. Lockhart, Book Review, 30 CAL. L. REV. 120, 122 (1941) (reviewing WILLIAM J. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941)) (emphasizing that tort law is "in a continual state of development and evolution" in response to "many unsolved problems, and problems to which the current solution is not satisfactory").

105. In any given case, some or all of these interests likely will be in tension. Thomas, *supra* note 94, at 23–24 (asserting that tort law expresses political and societal values and ought to be justified against background public morality, which would require extending tort-law protections to a wider array of nonproprietary personal interests that people in the United States have committed to as a society).

increasingly globalized society, providing a way to collectivize some solutions to harms that had no redress elsewhere in the legal system.[106]

B. Causation as a Persistent Hurdle in State-Law Tort Claims

Claims under tort jurisprudence often hinge on proving causation. The standard tort causation analysis asks whether there is a close enough connection between the actions or omissions of a tortfeasor and the harm experienced by the injured party.[107] The but-for test proves difficult to administer in situations involving multiple tortfeasors, or in those with temporally or geographically remote harms, where but-for causation is impossible to establish. The problem of causation will be present whether litigators are using international-law norms or traditional common-law norms to challenge U.S.-based actors' behavior. Where causation fails, liability is foreclosed.

Circumstances in which causation fails fall into two main categories: (1) causal over- and under-determination and (2) epistemic problems. Where two or more actors act at the same time, and each alone would have caused the entire harm, but-for causation will fail because of causal over-determination: the harm would still have happened even without any individual tortfeasor.[108] For example, if two actors shoot simultaneously at a third person, neither of the two tortfeasors is a but-for cause, since the harm would still have occurred without their actions. Relatedly, tortfeasors may act together to bring about harm through the combination of their individually insufficient actions. For example, if several people push a plaintiff's car off a cliff, none of the actors alone would have been able to push the car over the edge. Again, there is no but-for causation, but this time because of causal under-determination: None of the tortfeasors, taken separately, would be

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106. *See, e.g.*, Symeonides, *supra* note 20, at 380 (analyzing a comprehensive study of how U.S. courts have resolved conflict-of-laws issues resulting from international or cross-border torts for four decades; finding that vast majority of cases involved the application of the law most favorable to the victim).

107. The classic tort causation test has two components: but-for and proximate causation. KEETON & PROSSER, *supra* note 85, § 41 at 263–65; ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775 (1985). But-for causation requires a plaintiff to prove that a tortfeasor's conduct was necessary: that without it, the harm would not have occurred. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 26 (2010). Once satisfied, the analysis moves to proximate cause, asking whether the tortfeasor's conduct is sufficiently connected to the harm to warrant liability. Applied strictly, this standard forecloses liability where a plaintiff is unable to prove but-for causation, no matter how closely connected the tortfeasor is to the harm.

108. Wright, *supra* note 107, at 1777 (noting that but-for causation is "too restrictive" and produces "obviously incorrect results" in the context of overdetermined causation); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 cmt. b (2010) ("Courts and scholars have long recognized the problem of overdetermined harm—harm produced by multiple sufficient causes—and the inadequacy of the but-for standard for this situation.").

sufficient to cause the harm.[109] In addition, plaintiffs may run into epistemic problems with establishing causation, including the limitations of what can be known or scientifically proven, the consequences of long latency periods between the cause and resultant harm, and information asymmetries.[110] For instance, proving that exposure to a toxin was the cause of a plaintiff's cancer may be impossible to establish with certainty.

Past tort cases alleging large-scale rights violations have failed on causation grounds. These include the *Agent Orange Products Liability* case,[111] brought by U.S. military veterans for injuries caused by exposure to Agent Orange, a mixture of toxic herbicides that the U.S. military sprayed during its herbicidal warfare program during the Vietnam War,[112] as well as *In re TMI Litigation*, a case consolidating the claims of over 2,000 plaintiffs alleging personal injuries caused by exposure to radioactive materials.[113] In response to the limitations of but-for causation, courts have adapted and expanded tort jurisprudence to better address the needs and values of an increasingly globalized and complex reality.

109. Wright, *supra* note 107, at 1813–15 (discussing challenges to but-for causation posed by risk-exposure cases, where plaintiffs are unable to prove that a defendant's conduct more likely than not caused the injury, but are able to demonstrate either increased risk of harm or a lost chance of avoiding the harm). *See also* Maytal Gilboa, *Multiple Reasonable Behaviors Cases: The Problem of Causal Underdetermination in Tort Law*, 25:2 LEGAL THEORY, 77–104 (2019); Saul Levmore, *Probabilistic Recoveries, Restitution and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 706 (1990) (noting the problem of "recurring misses," where the but-for test repeatedly fails to find causation in circumstances where the estimated chance that the defendant caused an injury is less than 50 percent).

110. Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 376–77 (1996); E. Donald Elliott, *Goal Analysis Versus Institutional Analysis of Toxic Compensation Systems*, 73 GEO. L.J. 1357, 1372 (1985) (both scientific uncertainty and sheer number of contributors to total risk makes matching particular exposures to particular diseases untenable).

111. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 784 (E.D.N.Y. 1984) (granting defendants' motion for summary judgment on causation grounds), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *see also* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987).

112. Vietnam Assoc. for Victims of Agent Orange v. Dow Chemical Co. (*In re* "Agent Orange" Prod. Liab. Litig.), 373 F. Supp. 2d 7, 15–16 (E.D.N.Y. 2005) (dismissing case and holding that herbicidal warfare did not violate a "universally accepted" norm as required by *Sosa* to establish liability under the ATS), *aff'd*, 517 F.3d 104, 107 (2d Cir. 2008).

113. *In re* TMI Litig., 193 F.3d 613, 623 (3d Cir. 1999) (affirming grant of summary judgment for defendants on causation grounds), *and amended*, 199 F.3d 158 (3d Cir. 2000), *and aff'd in relevant part*, *In re* TMI Cases Consol. II, 53 F. App'x 648, 649 (3d Cir. 2002).

C. Availability of Evidential Grouping Where But-For Causation Falls Short

Tort jurisprudence, particularly surrounding causation, has always been flexible.[114] Recognizing the troubling legal and public policy implications of shutting the door on plaintiffs in cases with complex causation, both courts and legal scholars have long embraced adaptive causation theories to provide redress and better serve the public policy goals of tort law.[115] As Ripstein & Zipursky have observed, where a court "acts to prevent" procedural rules from "work[ing] an injustice in a particular case," the party that would have benefited from that injustice cannot argue that they have been wronged.[116]

Rigid adherence to the standard but-for test sometimes "demand[s] the impossible,"[117] including where multiple tortfeasors cause harm. Courts instead have applied what tort law expert Mark Geistfeld has termed "evidential grouping" to avoid unjust outcomes:

> Evidential grouping, therefore, is based upon the following principle: *Once the plaintiff has proven by a preponderance*[118] *of the evidence that (1) each defendant may have tortiously caused the harm, (2) one or more of the defendants did actually cause the harm, and (3) each defendant would be subject to liability for having actually caused or contributed to the harm, then no defendant can avoid liability by relying upon the tortious conduct of the other defendants, when that form of exculpatory causal proof would enable all of the defendants to avoid liability.*[119]

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114. Henry W. Edgerton, *Legal Cause*, pt. 2, 72 U. PA. L. REV. 343, 364 (1924) ("A legal cause is a justly-attachable cause . . . meaning by 'just,' not merely fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved."); Henry W. Edgerton, *Legal Cause*, pt. 1, 72 U. PA. L. REV. 211, 223 (1924) (comparing formalist proximate causation test to the case law and observing: "This is complicated; it is ambiguous; it seems arbitrary; and the authorities do not drive us to it."); Palsgraf v. Long Island R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.").

115. Geistfeld, *supra* note 4, at 460–71 (providing a comprehensive overview of evidential grouping principles and case law); *see also* Wright, *Causation in Tort Law*, *supra* note 107; Sara M. Peters, *Shifting the Burden of Proof on Causation: The One Who Creates Uncertainty Should Bear Its Burden*, 13 J. TORT L. 237 (2020).

116. Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 214, 235 (Gerald J. Postema ed., 2001) (discussing corrective justice); *see also* Geistfeld, *supra* note 4, at 461 (quoting Ripstein & Zipursky and arguing that their reasoning applies to evidential grouping).

117. *See* Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956) (describing challenges to but-for causation).

118. To prove by a "preponderance" means to show that something is more likely than not (i.e. more than 50 percent likely).

119. Geistfeld, *supra* note 4, at 469.

With evidential grouping, courts use burden-shifting to balance the competing interests of plaintiffs (in redressing the harm they have experienced and deterring future harms) and defendants (in ensuring that the scope of liability does not sweep so far that it covers non-culpable conduct). Under this burden-shifting framework, the plaintiff must first make a *prima facie* showing of causation, demonstrating by a preponderance of the evidence that they were harmed by defendants' tortious conduct, and that each defendant's tortious conduct may have caused or contributed to that harm.[120]

Once the plaintiff meets their *prima facie* burden, the court shifts the burden to the defendants to disprove causation.[121] At this stage, the defendants must proffer evidence demonstrating that they either did not act tortiously or could not have caused the plaintiff's harm.[122] Individual defendants cannot avoid liability solely by arguing that they are not the probable cause of the plaintiff's harm, if that same argument would enable every other defendant to escape liability.[123] For example, a defendant chemical supplier must show that it either did not sell a defective product, or that its product—even if defective—could not have caused the plaintiff's harm.[124] A defendant may also escape liability by marshalling evidence that identifies a different defendant as causally responsible.[125] If a defendant cannot meet its burden, then it will be liable for its portion of the harm.[126]

1. Rationales for Applying Evidential Grouping

The core principle underlying evidential grouping is that it would be unfair and logically inconsistent to deny plaintiffs redress in the context of multiple tortfeasors who would all escape liability if but-for causation were applied to each one individually, but whose conduct, taken together, was responsible for the harm.[127] Put differently, evidential grouping applies where actors' "combined

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120. *Id.* at 464.

121. *Id.* at 465.

122. *Id.*

123. *Id.* at 464.

124. *Id.* at 468.

125. *Id.* This defense would be inapplicable where every defendant could claim that their causal role was too small to support liability.

126. *Id.* at 490–92. Courts may apportion damages among multiple defendants based upon proportional responsibility or proximity to the harm.

127. *See* Summers v. Tice, 199 P.2d 1, 3, 5 (Cal. 1948); Haft v. Lone Palm Hotel, 478 P.2d 465, 476 (quoting *Summers* at 5); *accord* Price Waterhouse v. Hopkins, 490 U.S. 228, 261, 263–64 (1989) (plurality opinion) ("[T]he law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care . . . . '[at] times the [but-for] test demands the impossible.'") (quoting Malone, *supra* note 117, at 67); Paroline v. United States, 572 U.S. 434, 452 (2014) ("[T]ort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes, [including where] conduct cannot in a strict sense be said to have caused [an] outcome."); *see also* Geistfeld, *supra* note 4, at 458 (quoting KEETON & PROSSER, *supra* note 85); Levmore, *supra* note 109, at 693–96.

conduct, viewed as a whole" is a but-for cause of the harm, and the strict application of but-for causation to each individual actor would "absolve all of them."[128] In these circumstances, courts consider the conduct of each actor to be a cause of the harm.[129]

In foundational doctrinal cases, courts have explained that tort law does not leave plaintiffs without a remedy purely because of an inability to satisfy but-for causation. To do so would be to unjustly leave the victim of a tort "remediless."[130] Recovery under an alternate theory of liability should be available where, "if the traditional but-for definition of proximate cause was invoked, the injured party would virtually never be able to recover for damages."[131] Courts have expressed concern about making "a wrongdoer a favorite of the law" if liability were foreclosed, noting that "[t]he injustice of such a doctrine sufficiently impeaches the logic upon which it is founded."[132] The U.S. Supreme Court itself has stated that"[i]t would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy."[133]

This analysis is closely tied to the changing needs and demands of an increasingly complex and globalized reality. As U.S. society and its needs have changed, so has tort law. Courts have recognized that while "[U.S.] tort law developed in the late nineteenth and early twentieth centuries, when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces," circumstances have changed.[134] Courts "must adapt" to these changes by expanding tort law to cover the kinds of tortious harm individuals and communities are experiencing.[135] The California Supreme Court has emphasized that courts can and should consider the changing needs of a "contemporary complex industrialized society." Rather than

128. KEETON & PROSSER, *supra* note 85, § 41 at 268.

129. *Id.*

130. In the landmark case *Summers v. Tice*, the California Supreme court reasoned that the defendants "brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can." 199 P.2d at 5; *see also Haft*, 478 P.2d at 476 (quoting *Summers*, 199 P.2d at 5).

131. Ford Motor Co. v. Boomer, 736 S.E.2d 724, 729 (Va. 2013).

132. Kingston v. Chi. & Nw. Ry. Co., 211 N.W. 913, 915 (Wis. 1921). In *Kingston*, two fires united to damage the plaintiff's property. Each fire independently was a sufficient cause of all of the plaintiff's harm, but because the fires merged, neither could be said to be the "but-for" cause.

133. Paroline v. United States, 572 U.S. 434, 452 (2014).

134. Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901 (Mass. 2009). *Donovan* involved a class action suit against the company that made Marlboro cigarettes, alleging that they deliver an unreasonably dangerous quantity of carcinogens when smoked.

135. *See id.*

"adher[ing] rigidly to prior doctrine" that would "deny[] recovery" to deserving plaintiffs, they should "fashion remedies to meet these changing needs."[136]

Courts have found evidential grouping frameworks to be particularly appropriate where the lack of information would allow defendants to "gain the advantage" of an "evidentiary void" that they helped create.[137] This reasoning follows the classic *res ipsa loquitur*[138] case *Ybarra v. Spangard*'s maxim that "for every wrong there is a remedy."[139] As such, but-for causation "yields to the more general substantial factor causation in situations where proof of but-for causation is not practically possible or such proof otherwise should not be required."[140] This applies regardless of whether defendants themselves possess specific information about causation.[141] Many state supreme courts, including Virginia, Wisconsin, and Texas, have adopted the substantial factor causation analysis in circumstances

136. Sindell v. Abbott Lab'ys, 607 P.2d 924, 936 (Cal. 1980). The *Sindell* court observed that if it were constrained to existing tort causation theories, it would effectively preclude liability for a class of plaintiffs who were rendered infertile because of a prescription drug manufactured by defendants that their mothers had taken while pregnant. Following the logic of *Summers*, the court rejected this constraint and awarded damages to the plaintiffs ("[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.") *Id.* at 937.

137. Haft v. Lone Palm Hotel, 478 P.2d 465, 474–75 (Cal. 1970).

138. In Latin, "the thing speaks for itself"; refers to circumstances where the occurrence of harm itself implies negligence, even without direct proof of causation. *See* Byrne v. Boadle, 159 Eng. Rep. 299 (1863) (LR Exch.) (English tort-law case first applying the doctrine of *res ipsa loquitur*, where a barrel of flour fell from defendant's window onto plaintiff. Despite no evidence of causation, the court held that the fact that the barrel fell on plaintiff sufficed to establish defendant's negligence.).

139. *Summers* relied heavily on *Ybarra v. Spangard*, which extended liability despite a lack of information about causation. Summers v. Tice, 199 P.2d 1, 6 (Cal. 1948) (citing 5 Cal. 2d 486, 490 (1944)). *Ybarra* reasoned that it would be unfair to deny a remedy to the plaintiff, who was "patently entitled to damages." 5 Cal. 2d at 490. The court determined that the number of defendants involved "is not a good reason for denying [a plaintiff] all reasonable opportunity to recover for negligent harm." *Id.* Similarly, the California Supreme Court has held that "[p]laintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber," instead "bridg[ing] this gap in the humanly knowable" by applying the substantial factor test, a form of evidential grouping described *infra*. Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1219 (Cal. 1997) (citation omitted).

140. Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332, 344 (Tex. 2014).

141. The court in *Summers* chose not to impose a requirement that a defendant have more information than the plaintiff about causation. *Summers*, 199 P.2d at 5.; *see also Sindell*, 607 P.2d at 929 ("To be sure, *Summers* states that defendants are '[ordinarily] . . . in a far better position to offer evidence to determine which one caused the injury' than a plaintiff . . . but the decision does not determine that this 'ordinary' situation was present. Neither the facts nor the language of the opinion indicate[s] that the two defendants . . . were in a better position than the plaintiff to ascertain whose shot caused the injury.") (internal citation omitted).

where causal information is unavailable, but not through any fault of the injured party.[142]

2. Embedded Limiting Principles

Causation theories based on evidential grouping contain built-in limiting principles. These limiting principles allow courts to provide accountability while ensuring that they do not cast the net of causal responsibility so wide that it captures non-culpable conduct. These limiting principles include the opportunity for defendants to rebut causation; consideration of the extent to which the U.S. actors engaged in targeted, risky activity; the default to proportional rather than joint and several liability; and accounting for the severity or scale of the harm experienced by plaintiffs.

For all of these causation theories, defendants have an opportunity to provide evidence rebutting causation. The specific showing a defendant must make varies across tests: that they were not a necessary cause (but-for with burden-shifting);[143] that they were not a sufficient cause (multiple sufficient causes);[144] that they were not part of the group of culpable actors (aggregate causation and concerted action liability);[145] or that there was already a high risk of the kind of harm experienced by the plaintiff (increased risk probability and substantial factor).[146] If the defendant meets their burden, they will not be held liable, thereby insulating against the unfair imposition of liability on defendants who are not responsible for plaintiffs' injuries.

Moreover, courts consider whether the U.S.-based defendants are engaged in targeted activity that facilitates the harm experienced by plaintiffs, as distinguished from isolated or insubstantial conduct that could reflect accidental involvement.[147] Factors relevant to this analysis may include the existence of

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142. *See, e.g.*, Ford Motor Co. v. Boomer, 736 S.E.2d 724, 729 (Va. 2013), ("If the traditional but-for definition of proximate cause was invoked, the injured party would virtually never be able to recover for damages arising from mesothelioma in the context of multiple exposures."); Kingston v. Chi. & Nw. Ry. Co., 211 N.W. 913, 915 (Wis. 1921) ("No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both [sufficient causes] in order to recover the damages for which either or both [causes] are responsible."); *Bostic*, 439 S.W.3d at 344 (but-for causation "yields to the more general substantial factor causation in situations where proof of but for causation is not practically possible or such proof otherwise should not be required").

143. *See Summers*, 199 P.2d at 5.

144. *See Kingston*, 211 N.W. at 915.

145. *See Sindell*, 607 P.2d at 937; Hall v. E. I. Du Pont de Nemours & Co., 345 F. Supp. 353, 379 (E.D.N.Y. 1972).

146. *See* Haft v. Lone Palm Hotel, 478 P.2d 465, 475 (Cal. 1970).

147. *See, e.g.*, Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (N.Y. 1928) (discussing foreseeability and scope of the risk as a foundational limitation on tort liability; dismissing case on causation grounds due to disconnect between the scope of the risk that defendant's actions took on and the ultimate harm experienced by plaintiff).

statutory prohibitions against such conduct,[148] the length of time an actor has been engaged in the risky or harmful conduct,[149] and the relative amount of funding or other support provided by the defendants.[150]

Finally, defendants are only liable for the portion of the harm for which they are causally responsible. As the *Restatement (Third)* instructs: "No party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility."[151] This provides a substantial check on the scope of liability. The imposition of joint and several liability is limited to circumstances of indivisible injury, including in contexts of concerted action[152] and multiple sufficient causes.[153] Concerted action liability is limited by "the share of comparative responsibility assigned to each person" or actor.[154] Similarly, multiple sufficient causal responsibility is constrained by state law, with most states adopting a hybrid version of joint and several, several, or comparative liability.[155] In all other contexts, courts default to proportional liability.[156]

Finally, the severity or scale of the harm experienced by plaintiffs informs whether a court applies evidential grouping. The more egregious the breach, the more sympathetic a court will be to relaxing causation requirements.[157] Where the harm experienced by plaintiffs is severe—including coordinated, systematic, or widespread harms, or other particularly reprehensible conduct by defendants—courts have been more open to making these frameworks available.[158] Changing

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148. *See, e.g.*, *Haft*, 478 P.2d at 475 (defendants' conduct involved statutory violation regarding lifeguard requirement for pools); Paroline v. United States, 572 U.S. 434, 452 (2014) (defendant's conduct involved violations of child pornography possession laws).

149. *See, e.g.*, *Sindell*, 607 P.2d at 925–26 (defendants knew or should have known that DES was both highly carcinogenic and ineffective at preventing miscarriages, but continued to manufacture, promote, and market DES for thirty years).

150. *Compare* Loeb v. Kimmerle, 9 P.2d 199, 201–03 (Cal. 1932) (defendant did not directly assault victim but provided facilitation and support to the assailant), *with* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 36 (AM. LAW INST. 2010) (providing that a defendant does not bear liability where its conduct involves "only a trivial causal contribution" to the plaintiff's harm).

151. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 26 cmt. a (AM. LAW INST. 2010).

152. *See id.*§ 15 cmt. a.

153. *Id.* § 17 cmt. a (noting that most states have moved away from pure joint and several liability in favor of various comparative responsibility formulations in the context of multiple sufficient causes).

154. *Id.* § 15.

155. *Id.* § 17 cmt. a.

156. *See id.* § 26.

157. "[T]he intentional wrongfulness, and still more the criminality, which, as characteristics of the defendant's act, tend to lengthen the reach of legal cause, as characteristics of the intervening action tend to shorten it." Edgerton, *supra* note 114, at 364.

158. Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2098 (2019) (noting that the degree of wrongfulness of conduct targeted proves a key factor in success of proposed or emerging torts).

social norms and public pressure to redress harms have long played a substantial role in motivating courts to expand the outer limits of tort law.[159]

D. Formulations of Evidential Grouping

This Section details six formulations of evidential grouping—but-for with burden-shifting,[160] multiple sufficient causes, increased risk probability, aggregate causation, concerted action liability, and substantial factor causation—that are particularly relevant for litigating international human rights claims under state law. While each variation involves a slightly different standard for the causal relationships required for liability to attach, they all flow from the same principles. These causation theories come from prominent state-court tort cases, elucidating principles that this Article suggests are broadly transferable, even if, for example, a highlighted case would not be technically binding on a court in a different jurisdiction. For each theory, this Section outlines key cases in the development of the specific causation test.

1. But-For with Burden-Shifting

Courts have adopted but-for causation with burden-shifting in cases that face epistemic obstacles to establishing causation. *Summers v. Tice* is the emblematic case of this version of evidential grouping.[161] The two defendant tortfeasors in *Summers* both shot negligently in the direction of the plaintiff at the same time.[162] The plaintiff—who was injured, with buckshot lodged in his eye and lip—had shown that one of the two defendants had caused his injury but had no way of proving which one was responsible.[163] Because of this epistemic problem, adhering to a strict but-for test would have prevented the plaintiff from recovering. Instead, motivated by common-sense intuitions about fairness, the California Supreme Court determined that they possessed a "manifest" obligation to apply burden-shifting in these circumstances."[164] In *Summers*, the plaintiff made his *prima facie* showing by demonstrating that the named defendants were "both wrongdoers—both negligent toward plaintiff" and that they had "brought about a situation where the negligence of one of them injured the plaintiff."[165]

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159. G. EDWARD WHITE & KENNETH S. ABRAHAM, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY (2022) (analyzing two centuries of U.S. tort jurisprudence and concluding that judges have developed tort law in response to emerging social changes in addition to applying existing legal rules).

160. As variations on evidential grouping, each of these frameworks involves burden-shifting. This Article only includes burden-shifting in the name of the first framework—but-for with burden-shifting—to avoid confusion with standard but-for causation.

161. Summers v. Tice, 199 P.2d 1 (Cal. 1948).

162. *Id.* at 1–2.

163. *Id.* at 4.

164. *Id.* at 5.

165. *Id.*

2. Multiple Sufficient Causes

Courts have also applied burden-shifting in the context of "multiple sufficient" causes.[166] When the conduct of two or more actors or phenomena would have been independently sufficient to bring about the harm—for instance, where two independent fires converge and cause harm—courts make an exception to but-for causation. In these circumstances of causal overdetermination, courts consider both actors' conduct to be causes-in-fact in order to "comport[] with deep-seated intuitions about causation and fairness in attributing responsibility."[167]

For instance, in *Kingston v. Chicago & Northwestern Railway Company*, a fire of unknown origin converged with a fire set by sparks from the defendant's railroad.[168] The Wisconsin Supreme Court found that each fire was itself a sufficient cause: "[e]ither fire, if the other had not existed, would have reached the property and caused its destruction at the same time."[169] The plaintiff satisfied their *prima facie* burden by proving the origin and course of the fire set by sparks from the defendant's railroad.[170] After demonstrating that the defendant was one of the multiple sufficient causes, the burden shifted to that defendant to show that "the fire set by him was not the [legal] cause of the damage."[171] Burden-shifting in cases involving multiple sufficient causes has become nearly universal.[172]

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166. This causation framework is also sometimes referred to as "alternative liability." This Article uses the term "multiple sufficient causes" instead, for two reasons. First, the term "alternative liability" does not provide any descriptive clarity about the causation test it involves. Second, it also can be used as an umbrella term for any number of alternatives to but-for causation, creating the potential for confusion.

167. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 cmt. c (AM. LAW INST. 2010); *see also* PROSSER & KEETON, *supra* note 85, § 41 at 268 ("When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event."); Kingston v. Chi. & Nw. Ry. Co., 211 N.W. 913, 915 (Wis. 1927) ("The conclusion [that multiple sufficient causes bars recovery] is so clearly wrong as not to deserve discussion . . . . [I]t would be a childish casuistry that would engage in a debate as to which of the wrongdoers was innocent on the ground that the other was guilty.") (quoting THOMPSON ON NEGLIGENCE, § 739).

168. *Kingston*, 211 N.W. at 914.

169. *Id.*

170. *Id.* at 915.

171. *Id.*

172. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 (AM. LAW INST. 2010) ("If multiple acts occur, each of which alone would have been a factual cause under § 26 [setting forth the but-for test] of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 383 (2013) (Ginsburg, J., dissenting) (noting "near universal agreement that the but-for standard is inappropriate when multiple sufficient causes exist" (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 cmt. a (AM. LAW INST. 2010))).

3. Increased Risk Probability

A third type of burden-shifting occurs where there is no direct evidence that defendants caused the harm, but their conduct increased the risk that the harm would occur.[173] For example, in *Haft*, a father and son drowned in defendants' pool.[174] There was no lifeguard present and no warning signs at the pool at the time, in violation of a state statute. These facts established defendants' negligence, and plaintiffs also provided evidence suggesting that a competent lifeguard would have prevented the deaths. The California Supreme Court held that plaintiffs had met their *prima facie* causation burden.[175] The court then shifted the causation burden to "defendants to show that their violation was not a proximate cause of the deaths."[176] If the defendant is not able to make this showing, "defendants' causation of such [harm] is established as a matter of law."[177] In *Haft*, the court found that the defendants had failed to meet their burden, and that the trial court had therefore erred "in declining to take the matter from the jury."[178] The case was remanded for a new trial.[179]

4. Aggregate Causation

The "aggregate causation" doctrine requires a lesser showing of causal responsibility: it provides for liability where a cause is neither necessary nor sufficient.[180] Courts have used an aggregate causation theory where an individual tortfeasor's conduct, though alone "insufficient . . . to cause the plaintiff's harm," proves "more than sufficient to cause the harm" when combined with conduct by

173. *See* Donna H. Smith, *Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U. L. REV. 275 (1985); Brent Carson, *Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH. L. REV. 635 (1985); Barton C. Legum, *Increased Risk of Cancer as an Actionable Injury,* 18 GA. L. REV. 563, 588 (1984); Howard Ross Feldman, *Comments: Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. BALT. L. REV. 139, 151–54 (1987); Malone, *supra* note 117, at 85–87.

174. Haft v. Lone Palm Hotel, 478 P.2d 465, 467–468 (Cal. 1970).

175. *Id.* at 467.

176. *Id.* at 469.

177. *Id.* at 473, 475.

178. *Id.* at 477.

179. *Id.*

180. Factual cause exists where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 cmt. g (AM. LAW INST. 2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm . . . "). Because factual cause "exists on the aggregate level . . . there is no reason to find it lacking on the individual level." United States v. Hargrove, 714 F.3d 371, 374–75 (6th Cir. 2013) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 36 cmt. a (AM. LAW INST. 2010)).

others.[181] Aggregate causation has garnered the support of prominent tort scholars[182] and is consistent with a number of tort cases from the late nineteenth and early twentieth centuries.[183] *Sindell v. Abbott Laboratories* and *Paroline v. United States* offer particularly helpful statements of the aggregate causation framework.

Sindell is perhaps the best-known example of aggregate causation.[184] In *Sindell*, the California Supreme Court created market share liability, a version of aggregate causation. The case's plaintiff was the daughter of one of the estimated millions of pregnant people in the U.S. who were prescribed diethylstilbestrol (DES), a synthetic form of estrogen.[185] A generation later, the daughters of people who took DES while pregnant, including the plaintiff in *Sindell*, developed cancerous growths such as adenocarcinoma at high rates due to the DES ingested by their mothers.[186] Tort law at the time did not offer a path to a remedy, both because the plaintiff had no way to identify which specific manufacturer supplied the DES her mother had taken, and because it was not feasible to name each DES manufacturer as a defendant.[187]

Under *Sindell*'s market share liability causation framework, a plaintiff must name as defendants the manufacturers of a "substantial share" of the product

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181. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2010), *quoted in* Paroline v. United States, 572 U.S. 434, 452 (2014); *see also* State v. Velezmoro, 384 P.3d 613, 617 (Wash. 2016) (following *Paroline* and applying an aggregate causation framework); Hue v. Farmboy Spray Co., 896 P.2d 682, 695 (Wash. 1995) (upholding jury instruction reflecting aggregate causation in a case involving pesticides sprayed by crop-dusting airplanes).

182. *See* PROSSER & KEETON, *supra* note 85, § 41 n.40, at 268; DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 189, 635 (2d ed. 2011); Wright, *supra* note 107, at 1774, 1788–1803.

183. *See, e.g.*, United States v. Luce, 141 F. 385, 412 (C.C.D. Del. 1905) ("It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained . . . The extent to which the [defendant] has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together and contribute to a common result, that they become important as factors, in producing the mischief complained of." (quoting Woodyear v. Shaefer, 57 Md. 1 (1881))); Indianapolis Water Co. v. American Strawboard Co., 57 F. 1000, 1003–1004 (C.C.D. Ind. 1893); Warren v. Parkhurst, 92 N.Y.S. 725, 725–727 (Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906); Chipman v. Palmer, 77 N.Y. 51, 52 (1879) (finding defendant, who owned boarding house upstream from plaintiff's boarding house, liable for discharging sewage into stream; this sewage, along with the discharge from other homes and large hotels, caused 'stench' that injured plaintiff's business).

184. Sindell v. Abbott Lab'ys, 607 P.2d 924, 936 (1980).

185. *Id.* at 925.

186. *Id.*

187. *Id.* at 929, 936. The length of time since Sindell's mother, and the mothers of other plaintiffs, had taken DES made it infeasible to identify a particular manufacturer. In addition, some of the DES manufacturers had since gone out of business and/or would not be subject to the jurisdiction of California state courts. *Id.*

alleged to have caused the harm.[188] At that point, the burden shifts to the defendants to demonstrate that they could not have made the substance. In addition, the *Sindell* approach allows defendants to join other unnamed manufacturers through cross-claims.[189] Ultimately, the burden fully shifts: any defendant that fails to demonstrate that they could not have made the injury-causing product will be liable for a proportion of the total damages that corresponds with their share of the overall product market.[190]

More recently, the U.S. Supreme Court applied aggregate causation in the 2014 landmark case *Paroline v. United States*.[191] The Court observed that "courts have departed from the but-for standard where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome."[192] The Court articulated a test akin to *Sindell*'s market-share liability.[193] Where a defendant has participated in causing harm, a victim has "outstanding losses caused by the continuing [harm]," and it is impossible to trace a specific amount of the losses to the individual defendant under a "more traditional causal inquiry," a court should apply an aggregate causation analysis.[194] The defendant's liability is proportional, corresponding to their "relative role in the causal process underlying the victim's general losses."[195]

Courts in at least the First, Fourth, Sixth, Ninth, and D.C. Circuits have applied an aggregate causation framework in order to find causation where an

188. *Id.* at 937.

189. *Id.*

190. Although "[s]ome minor discrepancy in the correlation between market share and liability is inevitable[,]" the Court maintained that the "difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt." *Id.*

191. *Paroline* applied aggregate causation in interpreting the causal relationship required by a restitution statute. 572 U.S. 439, 451–62 (2014). The statute at issue, 18 U.S.C. § 2259, requires federal district courts to award restitution for certain federal criminal offenses, including child pornography possession. The petitioner in *Paroline* had pleaded guilty to possessing child pornography, including two images at issue in the case. The question before the Court was whether the victim of child abuse depicted in the petitioner's images could obtain restitution from him under § 2259, even though thousands of others possessed these images as well. *Id.* at 439–41.

192. *Id.* at 451 (citing Burrage v. United States, 571 U.S. 204, 214 (2014) (acknowledging "the undoubted reality that courts have not always required strict but-for causality, even where criminal liability is at issue")).

193. *Paroline*, 572 U.S. at 458; *Sindell*, 607 P.2d at 937.

194. In *Paroline*, the defendant participated in the harm through possession of images of the victim; the ongoing traffic in the victim's images constituted her "outstanding losses." 572 U.S. at 458.

195. *Id.*

individual actor's conduct taken in isolation was not sufficient or necessary to bring about the harm.[196]

5. Concerted Action

Under the concerted action doctrine, courts have imposed joint and several liability when faced with multiple actors that coordinate in harming others. This framework applies where defendants "were not acting independently of each other, [but rather] were jointly engaged in a series of acts which led directly" to the harm.[197] *Loeb v. Kimmerle*, a 1932 California Supreme Court case, laid out an initial test for determining liability: did an actor "unite or cooperate in inflicting a wrong upon the respondent?"[198] The court emphasized that the injured party "may recover judgment . . . against all those who have united or cooperated in inflicting that injury" regardless of whether they were a "mental participant" or a "physical participant."[199] The "mental participant" in *Loeb* did not directly take part in an assault, but he collaborated with the "physical participant" to plan and facilitate the attack.[200] *Loeb* imposed concerted action liability on both defendants, reasoning that they were "acting in concert and each knew the intent and purpose of the other."[201]

Modern concerted action liability attaches to an actor if any of three conditions are met: (a) they commit a tortious act in concert with the other tortfeasor or pursuant to a common design with them; (b) they know that the other's conduct

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196. These cases concern the application of a federal statute providing mandatory restitution in child pornography cases. *See, e.g.*, United States v. Kearney, 672 F.3d 81, 98 (1st Cir. 2012) ("Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort."); United States v. Dillard, 891 F.3d 151, 159 (4th Cir. 2018) (emphasizing the "indisputable role of the offender in the causal process underlying the victim's losses" and ordering restitution commensurate with "the relative size of that causal role"); United States v. Burgess, 685 F.3d 445, 459–60 (4th Cir. 2012); United States v. Hargrove, 714 F.3d 371, 377 (6th Cir. 2013); United States v. Gamble, 709 F.3d 541, 551–52 (6th Cir. 2013); State v. Velezmoro, 384 P.3d 613, 617 (Wash. 2016); United States v. Monzel, 641 F.3d 528, 538 (D.C. Cir. 2011).

197. Agovino v. Kunze, 5 Cal. Rptr. 534, 537 (Cal. Dist. Ct. App. 1960) (quoting People v. Kemp, 310 P.2d 680, 682 (Cal. Dist, Ct. App. 1957)); *see also* WILLIAM PROSSER, LAW OF TORTS, § 46, at 292 (4th ed. 1971) (describing the concerted action doctrine as covering "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit," rendering them "equally liable" with the other tortfeasor.); Reader v. Ottis, 180 N.W 117, 180 (Minn. 1920) ("The rule is well settled that where two or more tort-feasors, by concurrent acts of negligence which, although disconnected, yet, in combination inflict injury, all are liable.").

198. 9 P.2d 199, 202 (Cal. 1932).

199. *Id.* at 202–03 (quoting Smith v. Blodgett, 201 P. 584, 587 (Cal. 1921)); *see also* Orser v. George, 60 Cal. Rptr. 708, 713–14 (Cal. Dist. Ct. App. 1967) (reversing summary judgment where a material question of fact remained about whether a defendant knew that the other defendants acted tortiously toward the plaintiff and gave them substantial assistance and encouragement).

200. *Loeb*, 9 P.2d at 201–03.

201. *Id.*

constitutes a breach of duty and give substantial assistance or encouragement to them; or (c) they give substantial assistance to the other in accomplishing a tortious result and their own conduct, separately considered, constitutes a breach of duty to the third person.[202] Express agreement is not necessary; a tacit understanding is enough for joint and several liability to attach.[203] Courts have found concerted action "in various business and property relationships, group activities such as automobile racing, cooperative efforts in medical care or railroad work, and concurrent water pollution."[204]

The classic blasting cap case, *Hall v. E. I. Du Pont de Nemours & Co.*, affirmed that "an entire industry" could be held liable for harm it causes.[205] *Hall* established industry-wide liability, a variation on concerted action liability.[206] The court denied the defendants' motion to dismiss, noting that the plaintiffs had raised "genuine issues" indicating that the defendants jointly controlled the risk: although the defendants had acted independently, they cooperated as to manufacture and design and delegated some functions to their trade association.[207] The district court held that if the plaintiffs could establish that the caps had been manufactured by one of the defendants, the burden would shift to all of the defendants to disprove causation.[208] This theory of liability applies to industries with a limited number of manufacturers.[209]

Similarly, courts applied a concerted action theory in *Concord Gen. Mut. Ins. Co. v. Gritman*, where the plaintiffs' home burned down after a group of teenagers trespassed onto their property and negligently built, maintained, and left a fire burning on their deck after drinking a substantial amount of alcohol.[210] While there was no direct evidence of causation, the Vermont Supreme Court held that there was enough evidence for a jury to "connect the dots," and that circumstantial evidence "need not rise to that degree of certainty which [would] exclude any and every other reasonable conclusion."[211]

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202. RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979).

203. William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 429–30 (1937).

204. Hall v. E.I. Du Pont De Mours & Co., 345 F. Supp. 353, 371–72 (E.D.N.Y. 1972) (citing Prussak v. Hutton, 51 N.Y.S. 761 (App. Div. 1898) (powder house used and maintained by several defendants); Troop v. Dew, 234 S.W. 992 (Ark. 1921) (defendant contractors broke fences, allowing cattle to enter); Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968) (racing cars); Sprinkle v. Lemley, 414 P.2d 797 (Or. 1966) (doctors treating same patient); Mich. Millers Mut. Fire Ins. Co. v. Or.-Wash. R. & Nav. Co., 201 P.2d 207 (Wash. 1948) (railroads burning brush); Moses v. Morganton, 133 S.E. 421 (N.C. 1926) (independent discharging of refuse into stream); Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (manufacturers of components)).

205. *Hall*, 345 F. Supp. at 358 (ruling in a motion to dismiss that "virtually the entire blasting cap industry" could be held jointly liable).

206. *Id.* at 374, 386.

207. *Id.* at 371–376.

208. *Id.* at 379.

209. *Id.* at 378.

210. 146 A.3d 882, 884–87 (Vt. 2016).

211. *Id.* at 889 (citing Am. Fam. Mut. Ins. Co. v. Grim, 440 P.2d 621, 624 (Kan. 1968)).

6. Substantial Factor

Finally, courts have used substantial factor causation where but-for causation falls short. This framework is particularly common in the "toxic torts" context.[212] Toxic torts cases include asbestos workers' claims for various lung diseases;[213] Vietnam veterans' claims connected to Agent Orange exposure;[214] and the DES cases referenced above.[215] In these cases, particularized evidence establishing but-for causation is virtually always unavailable, both because of the extended time period between exposure and injury, and the scientific impossibility of attributing an illness like cancer to a single cause.[216] Courts have reframed the causation analysis in response to the unavailability of causation evidence, framing the inquiry instead in terms of increased risk or probability of disease.[217] A majority of state and federal courts have interpreted substantial factor causation as requiring evidence of sufficiently "frequent, regular, and proximate" exposure to the toxic substance to warrant the imposition of liability, after which the burden shifts to defendants to provide particularized evidence that they did not cause the harm.[218] In the context of whistleblower protections, some states have taken substantial factor causation and created an even more plaintiff-friendly causation standard.[219]

State courts and federal courts applying state law have long used evidential grouping to allow plaintiffs to recover in circumstances of complex causation. The six causation theories detailed above offer variations on evidential grouping

212. Gold, *supra* note 110, at 376, 396–97.

213. *See, e.g.*, Rost v. Ford Motor Co., 151 A.3d 1032 (Pa. 2016).

214. *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984); Kenneth S. Abraham, *The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law*, 6 U. PA. J.L. & PUB. AFFS. 347, 365–66 (2021).

215. *See, e.g.*, Sindell v. Abbott Lab'ys, 607 P.2d 924; Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984).

216. Gold, *supra* note 110, at 376.

217. "Substantial factor" lacks a precise analytical definition. It has generally corresponded to estimated responsibility for less than 50 percent but more than about 30 percent of an injury. *See* Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901 (Mass. 2009) ("No particular level or quantification of increase in risk of harm is necessary, so long as it is substantial and so long as there has been at least a corresponding subcellular change . . . [This] permit[s] a genuinely injured person to recover legitimate expenses without having to overcome insurmountable problems of proof in this difficult and complex area.").

218. Holcomb v. Ga. Pacific, LLC, 289 P.3d 188, 195 (Nev. 2012) (quoting Charles T. Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 AM. J. TRIAL ADVOC. 571, 572 (2008)); *Rost*, 151 A.3d at 1048. Texas has developed a test that is somewhat more stringent than the frequency, regularity, and proximity test. *See* Bostic v. Georgia-Pacific Corp., 439 S.W.3d 332, 338 (Tx. 2014) (requiring detailed expert testimony to establish the extent and intensity of the plaintiff's exposure to the defendant's product).

219. This standard requires only a showing that an employee's protected activity was a "contributing factor" in the employer's decision to terminate them, without requiring any minimum showing of causal significance. Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. RICH. L. REV. 1193, 1207–1208, 1225–1226 (2016). *See* Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 94–95 (Mo. 2010) (adopting "contributing factor" causation standard for workers' compensation retaliation claims under Missouri law).

principles. Each of these frameworks is driven by a commitment from courts to providing redress where strict but-for causation would arbitrarily foreclose liability, despite evidence of harm and the tortfeasors' collective causal role.

III.
EVIDENTIAL GROUPING & U.S. ENTITIES' ROLE IN SHEIKH JARRAH

The central question explored in this Section is how to demonstrate that U.S. entities funding Israeli settlement organizations are causally responsible for expropriation and associated harms to Palestinian communities. The Section contains three parts. The first provides essential historical and political context for the Israeli settlement enterprise, grounded in harm to Palestinian communities living under Israeli occupation. The second part brings into focus the relationship between the specific U.S. entities funding Israeli settler organizations that are committing grave international-law violations in Sheikh Jarrah. The third part demonstrates how evidential grouping, detailed in *supra* Section II(C), applies to these facts. It shows how specific alternative causation frameworks can offer a path to meaningful legal accountability for this harm—and other international-law violations facilitated by U.S.-based actors.

A. Background on the Israeli Settlement Enterprise

The Israeli settlement enterprise—the constellation of actors and institutions that work collectively to establish, sustain, expand, and legitimize illegal Israeli settlements in the West Bank, East Jerusalem, and the Golan Heights—operates in clear violation of international law. As detailed below, international law prohibits occupying powers from transferring their populations *into* occupied areas. Similarly, they may not force people living under occupation *out of* occupied areas. Occupying powers also may not expropriate, pillage, or destroy the property of a population under occupation, or otherwise create systems of apartheid, persecution, discrimination, or domination.

1. Israeli Settlements Under International Law

Israel has a deeply entrenched policy of establishing and expanding settlements in the occupied West Bank, East Jerusalem, the Golan Heights, and, until 2005, in the Gaza Strip,[220] in collaboration with a number of U.S. actors. Israeli

220. Israel unilaterally dismantled its settlements in Gaza in 2005. Concern over maintaining a demographic Israeli majority in Israeli-controlled areas served as a significant motivating factor. Jonathan Rynhold & Dov Waxman, *Ideological Change and Israel's Disengagement from Gaza*, 123 POL. SCI. Q. 11 (2008).

settlements are unequivocally illegal under international law.[221] All states, including Israel and the United States, are bound by the customary international-law provisions of the Fourth Hague Convention of 1907 and its Regulations and the Fourth Geneva Convention of 1949. Together, these instruments supply the legal standards for military occupations.[222] The U.N. Security Council passed Resolution 2334 in 2016 and the General Assembly passed Resolution 72/86 in 2017, both reaffirming the illegality of Israeli settlements.[223] As such, the construction and expansion of settlements in occupied Palestinian territory is itself a "presumptive war crime."[224] Similarly, forced home expulsions and home demolitions of Palestinians living under Israeli occupation also violate international humanitarian law.[225]

As of February 2021, the International Criminal Court (ICC) has also confirmed that Palestine qualifies as a State Party to the Rome Statute and that the

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221. ICJ Wall Decision, *supra* note 7, ¶ 120 ("The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."); S.C. Res. 2334, ¶ 1 (Dec. 23, 2016), https://www.un.org/webcast/pdfs/SRES2334-2016.pdf [https://perma.cc/A83N-ZDWU]; G.A. Res. 72/86, ¶ 1 (Dec. 14, 2017), https://undocs.org/en/A/RES/72/86 [https://perma.cc/FV4J-TUGE] (reaffirming that Israeli settlements in occupied Palestine have "no legal validity and constitute[] a flagrant violation under international law"); *see* Michael Lynk (Special Rapporteur on the situation of hum. rts. in the Palestinian territories occupied since 1967), *Rep. of the Special Rapporteur on the situation of hum. rts. in the Palestinian territories occupied since 1967,* ¶ 43, U.N. Doc. A/76/433 (Oct. 22, 2021) (affirming that "[Israeli] settlements . . . are a presumptive war crime under the Rome Statute [and] are the product of Israeli State policy"); NASSER EL-RAYYES, AL-HAQ, THE ISRAELI SETTLEMENTS FROM THE PERSPECTIVE OF INTERNATIONAL LAW 81–92 (2000), https://www.alhaq.org/cached_uploads/download/alhaq_files/publications/The_Israeli_Settlements_from_the_Perspective_of_International_Law.pdf [https://perma.cc/E5PV-ZA46].

222. Fourth Hague Convention, *supra* note 6, arts. 46 ("[T]he lives of persons and private property . . . must be respected. Private property shall not be confiscated."); 55 ("The occupying nation shall consider itself merely as the administrator and usufructuary of the public buildings, real estate, forests, and farms belonging to the hostile government and situated within the occupied territory. It shall protect this property and administer it in accordance with the rules governing usufructs."); Fourth Geneva Convention, *supra* note 6, arts. 53 ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."); 49 ("Individual or mass forcible transfers . . . are prohibited, regardless of their motive . . . The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."); 33 ("Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited."); *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 283 (Jean S. Pictet ed., 1958) ("[Article 49 of the Fourth Geneva Convention] is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons, or in order, as they claimed, to colonize those territories.").

223. S.C. Res. 2334, *supra* note 221, ¶ 1; G.A. Res. 72/86, *supra* note 221, ¶ 1.

224. Lynk, *supra* note 221, ¶ 43 (affirming that "[Israeli] settlements . . . are a presumptive war crime under the Rome Statute [and] are the product of Israeli State policy").

225. *See supra* notes 6–8, 24–26, 221–223.

ICC has territorial jurisdiction over occupied Palestine, including the West Bank, East Jerusalem, and Gaza, allowing the court to proceed with an investigation into Israeli violations.[226] This provides a pathway to accountability for the Israeli state's violations of international humanitarian law, and, more broadly, affirms the self-determination of Palestinians and other communities under occupation.[227]

Israeli settlement expansion involves not just the construction of new settlements, but also the dispossession and control of Palestinians.[228] Palestinians living under Israeli occupation are subjected to extreme human rights violations in nearly every aspect of their lives. They are often unable to access their farmland;[229] build on their property;[230] travel within Palestine to go to work, school, or visit

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226. Israel has not ratified the Rome Statute. In 2015, Palestine acceded to the Rome Statute as a State Party after gaining United Nations non-member observer State status. Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Int'l Crim. Court (ICC), ICC-01/18 (Feb. 5, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF [https://perma.cc/H4N3-M4ZG]. The ICC can exercise jurisdiction over a non-State Party if the crimes alleged were committed on the territory of a State party to the Rome Statute. ICC Statute art. 12(2) provides:

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . .

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

(b) the State of which the person accused of the crime is a national.

Rome Statute of the International Criminal Court, *supra* note 18, art. 12(2), 2187 U.N.T.S. at 99.

227. Aeyal Gross, *Decolonizing the ICC: The Situation in Palestine and Beyond*, JUST SECURITY (Mar. 8, 2021), https://www.justsecurity.org/75204/decolonizing-the-icc-the-situation-in-palestine-and-beyond/ [https://perma.cc/L4WZ-DGX5].

228. *See* NUR MASALHA, THE PALESTINE NAKBA: DECOLONISING HISTORY, NARRATING THE SUBALTERN, RECLAIMING MEMORY (2012); OREN YIFTACHEL, ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE (2006); Alexandre Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, 5 CURRENT LEGAL ISSUES 401 (2003); NUR MASALHA, A LAND WITHOUT A PEOPLE: ISRAEL, TRANSFER, & THE PALESTINIANS 1949-1996 (1997); ALEXANDRE KEDAR, AHMAD AMARA & OREN YIFTACHEL, EMPTIED LANDS: A LEGAL GEOGRAPHY OF BEDOUIN RIGHTS IN THE NEGEV (2018).

229. B'TSELEM, EXPEL AND EXPLOIT: THE ISRAELI PRACTICE OF TAKING OVER RURAL PALESTINIAN LAND (Dec. 2016), https://www.btselem.org/download/201612_expel_and_exploit_eng.pdf [https://perma.cc/5PSA-8HCE]; *Israel: Palestinians Cut Off from Farmlands,* HUM. RTS. WATCH, (Apr. 5, 2012, 5:49 PM), https://www.hrw.org/news/2012/04/05/israel-palestinians-cut-farmlands [https://perma.cc/XNR6-K5KG].

230. Hagar Shezaf, *Israel Rejects Over 98% of Palestinian Building Permit Requests in West Bank's Area C*, HAARETZ (Jan. 21, 2020, 2:02 AM), https://www.haaretz.com/israel-news/.premium-israel-rejects-98-of-palestinian-building-permit-requests-in-west-bank-s-area-c-1.8403807 [https://perma.cc/9G2J-K8MP]; U.N.-Habitat, *Most Palestinian Plans to Build in Area C Not Approved*, U.N. OCHA, HUMANITARIAN BULL. (June 22, 2021), https://www.ochaopt.org/content/most-palestinian-plans-build-area-c-not-approved [https://perma.cc/6RRX-ZRUZ].

relatives;[231] earn a living;[232] exercise freedom of expression and assembly;[233] travel abroad;[234] access clean water;[235] receive emergency healthcare;[236] access citizenship and maintain residency status;[237] or even bury the bodies of loved ones

231. U.N. Secretary-General, *Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem*, *supra* note 14.

232. *See* U.N. Conference on Trade & Development (UNCTAD), *Economic Costs of the Israeli Occupation for the Palestinian People: Poverty in the West Bank Between 2000 and 2019, Rep. to the U.N. G.A.*, ¶ 28, U.N. Doc. A/76/309 (Aug. 30, 2021) [hereinafter UNCTAD, *West Bank Report*] (estimating loss of real GDP for the West Bank due to Israeli closures, restrictions, and military operations since 2005 at $57.7 billion, four and a half times the West Bank's 2019 GDP and three and a half times the 2019 GDP of the entire occupied Palestinian territory); UNCTAD, *Economic Costs of the Israeli Occupation for the Palestinian People: The Gaza Strip Under Closure and Restrictions*, at 2, ¶ 40, U.N. Doc. A/75/310 (Aug. 13, 2020) [hereinafter UNCTAD, *Gaza Report*] (estimating toll of Israeli blockade on Gaza at $16.7 billion, six times Gaza's GDP in 2018 and 107% of the total Palestinian GDP).

233. Press Release, Amnesty Int'l, Israeli Police Targeted Palestinians with Discriminatory Arrests, Torture and Unlawful Force (June 24, 2021), https://www.amnesty.org/en/latest/news/2021/06/israeli-police-targeted-palestinians-with-discriminatory-arrests-torture-and-unlawful-force/[https://perma.cc/NX75-J2PK]; Amy Braunschweiger, *Witness: How Israel Muzzles Free Expression for Palestinians*, HUM. RTS. WATCH (Dec. 17, 2019, 4:00 AM), https://www.hrw.org/news/2019/12/17/witness-how-israel-muzzles-free-expression-palestinians [https://perma.cc/7NEQ-XAAV].

234. *Israel Bars Thousands of Palestinians from Traveling Abroad; Many Other* [sic] *Don't Even Bother to Make the Attempt*, B'TSELEM (May 15, 2017), https://www.btselem.org/freedom_of_movement/20170515_thousands_of_palestinians_barred_from_traveling_abroad [https://perma.cc/5U5M-28SQ]; EURO-MEDITERRANEAN HUM. RTS. MONITOR, PUNISHING JOURNALISTS: ISRAEL'S RESTRICTIONS ON FREEDOM OF MOVEMENT AND TRAVEL AGAINST PALESTINIAN JOURNALISTS (Nov. 2021), https://reliefweb.int/sites/reliefweb.int/files/resources/JournalistsEN.pdf [https://perma.cc/D2NA-FJZZ].

235. *See The Occupation of Water*, AMNESTY INT'L (Nov. 29, 2017), https://www.amnesty.org/en/latest/campaigns/2017/11/the-occupation-of-water/ [https://perma.cc/ECJ8-FQCE]; U.N. EMERGENCY WATER, SANITATION AND HYGIENE GROUP (EWASH) & AL-HAQ, ISRAEL'S VIOLATIONS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS WITH REGARD TO THE HUMAN RIGHTS TO WATER AND SANITATION IN THE OCCUPIED PALESTINIAN TERRITORY, JOINT PARALLEL REPORT TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE OCCASION OF THE CONSIDERATION OF THE THIRD PERIODIC REPORT OF ISRAEL (Sept. 2011), https://www.un.org/unispal/document/auto-insert-195880/ [https://perma.cc/TT9V-TG2W].

236. Press Release, Save the Children, 'Denial of Healthcare Outside Gaza Is a Death Sentence for Children': Save the Children (July 29, 2020), https://www.savethechildren.net/news/'denial-healthcare-outside-gaza-death-sentence-children'-save-children [https://perma.cc/72XK-72A7]; YARA ASI, AL-SHABAKA, THE CONDITIONAL RIGHT TO HEALTH CARE IN PALESTINE (June 30, 2019), https://al-shabaka.org/briefs/the-conditional-right-to-health-in-palestine/ [https://perma.cc/Z3VR-NU8W]; MEDICAL AID FOR PALESTINIANS & PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, HEALTHCARE DENIED: THE IMPACT OF CHECKPOINTS ON AMBULANCE ACCESS, ch. 1 (Mar. 24, 2016), https://www.map.org.uk/downloads/map-ch1--access-to-healthcare.pdf [https://perma.cc/2RLW-TCH9].

237. *See Israel: Jerusalem Palestinians Stripped of Status*, HUM. RTS. WATCH (Aug. 8, 2017, 12:00 AM), https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status [https://perma.cc/N8UR-ZQ5N]; *Forced Population Transfer: The Case of Palestine – Denial of Residency* (BADIL Res. Ctr. for Palestinian Residency & Refugee Rts., Working Paper No. 16, 2014), https://reliefweb.int/sites/reliefweb.int/files/resources/wp16-Residency.pdf [https://perma.cc/AD4B-SQNP].

killed by Israeli state forces.[238] Israeli authorities are nearly two decades into construction of an illegal separation wall.[239] The occupation has also built over 1,000 miles of Israeli-only bypass roads[240] and over 500 military checkpoints in the West Bank.[241] Finally, the Israeli state maintains a 16-year land, air, and sea blockade on Gaza with devastating consequences for the approximately 2 million people who live there.[242]

Over the last five decades, Israel has illegally expropriated more than 500,000 acres of Palestinians' land, amounting to more than one-third of the West Bank.[243] Israeli settlements, built on illegally expropriated Palestinian land, resemble affluent gated communities, replete with identical apartment buildings, swimming pools, lush greenery, schools, community centers, and health clinics. Palestinians

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238. Israel began a practice of withholding the bodies of Palestinians killed by Israeli state actors in 1967. This practice has reemerged since 2015. As of August 2020, Israel was holding the bodies of at least 55 Palestinians whom the Israeli military claims carried out or attempted attacks against Israelis. Suhad Daher-Nashif, *Colonial Management of Death: To Be or Not to Be Dead in Palestine*, 69 CURRENT SOCIO. 945, 946–47 (2021), https://journals.sagepub.com/doi/pdf/10.1177/0011392120948923 [https://perma.cc/V9SD-TD39]. Complete statistics remain unavailable for the number of bodies Israel has held or returned since 1967. Advocates estimate that the number is in the hundreds. *Israeli High Court Greenlights Holding Palestinian Bodies as Bargaining Chips*, B'TSELEM (Oct. 22, 2019), https://www.btselem.org/routine_founded_on_violence/20191022_hcj_greenlights_holding_palestinian_bodies_as_bargaining_chips [https://perma.cc/3F3J-3QUX]; BUDOUR HASSAN, JERUSALEM LEGAL AID & HUM. RTS. CTR., THE WARMTH OF OUR SONS: NECROPOLITICS, MEMORY, AND THE PALESTINIAN QUEST FOR CLOSURE (2019), https://www.jlac.ps/en/Article/888/The-Warmth-of-our-Sons [https://perma.cc/A5NT-YPF8].

239. ICJ Wall Decision, *supra* note 7, ¶¶ 142, 163; EYAL HAREUVENI, B'TSELEM, ARRESTED DEVELOPMENT: THE LONG TERM IMPACT OF ISRAEL'S SEPARATION BARRIER IN THE WEST BANK (Yael Stein ed., Deb Reich trans., 2012), https://www.btselem.org/sites/default/files/sites/default/files2/201210_arrested_development_eng.pdf [https://perma.cc/KL56-47S6]; Joseph Krauss, *Nearly 20 Years On, Israeli Barrier Shapes Palestinian Lives*, ASSOCIATED PRESS (Nov. 8, 2021, 3:17 AM), https://apnews.com/article/middle-east-israel-west-bank-85b8027e4a367d534a42658358ca3358 [https://perma.cc/8PM2-6DZR].

240. *Quick Facts: Israel's West Bank Settlement Enterprise*, INST. FOR MIDDLE E. UNDERSTANDING (June 22, 2020), https://imeu.org/article/quick-facts-israels-west-bank-settlement-enterprise [https://perma.cc/8LDE-24LH] (citing Laleh Khalili, *The Roads to Power: The Infrastructure of Counterinsurgency*, 34 WORLD POL'Y J. 93, 97 (2017)).

241. U.N. OCHA, *Longstanding Access Restrictions Continue to Undermine the Living Conditions of West Bank Palestinians*, HUMANITARIAN BULL. (Mar.–May 2020), https://www.ochaopt.org/content/longstanding-access-restrictions-continue-undermine-living-conditions-west-bank—palestinians [https://perma.cc/2LN7-472W]; Hagar Shezaf, *Highways to Annexation: Across the West Bank, Israel Is Bulldozing a Bright Future for Jewish Settlers*, HAARETZ (Dec. 11, 2020), https://www.haaretz.com/israel-news/.premium.MAGAZINE-highways-to-annexation-israel-is-bulldozing-a-bright-future-for-jewish-settlers-1.9363413 [https://perma.cc/8X48-4TPK].

242. Farah Najjar, *'54 Palestinians Die' as Israel Refuses Medical Permits*, AL-JAZEERA (Feb. 13, 2018), https://www.aljazeera.com/news/2018/2/13/54-palestinians-die-as-israel-refuses-medical-permits [https://perma.cc/9CWC-E3AZ]; UNCTAD, *Gaza Report*, *supra* note 232, ¶ 40.

243. HUM. RTS. WATCH, *supra* note 10, at 11.

are not allowed to live in or access these settlements.[244] Figure 1 is an aerial photograph of the illegal Israeli settlement of Ramat Shlomo in East Jerusalem.

Fig. 1, Ramat Shlomo settlement, East Jerusalem | Photo Credit: Mosessco (Israeli architecture firm responsible for designing Ramat Shlomo Master Plan)

The most recent iteration of Israel's settlement project began in 1967, shortly after it occupied the West Bank, the Syrian Golan Heights, and the Egyptian Sinai

244. The Jewish Agency for Israel is an arm of the World Zionist Organization, a semi-governmental Israeli entity. (See *infra* note 254 for more on semi-governmental Israeli organizations.) The Jewish Agency for Israel's website encourages and explains Aliyah (Jewish immigration to Israel) as available specifically to Jewish people. *Who We Are*, JEWISH AGENCY FOR ISR., https://www.jewishagency.org/who-we-are/ [https://perma.cc/2B4N-MJFC] (last visited March 13, 2023) ("The Jewish Agency provides the global framework for Aliyah, ensures global Jewish safety, strengthens Jewish identity and connects Jews to Israel and one another, and conveys the voice of the Jewish People to the State of Israel to help shape its society."). The housing options and neighborhoods advertised to Jewish people considering Aliyah comprise numerous illegal Israeli settlements, including Beitar Illit, Efrat, Gush Etzion, and Ma'ale Adumim. *See Community Guide*, NEFESH B'NEFESH, https://www.nbn.org.il/community-guide/ [https://perma.cc/F88W-4WXW] (last visited March 13, 2023). The Article reproduces these Israeli semi-governmental sources not to legitimize them, but rather to evidence both the explicitly religious framing and the advertisement of illegal Israeli settlements to prospective Jewish immigrants. *See also* B'TSELEM, *supra* note 10, at 70 ("Palestinians are forbidden to enter the areas of jurisdiction . . . of [Israeli] settlements unless they receive[] special authorization."); HUM. RTS. WATCH, *supra* note 10, at 6–7, 13 (confirming that "[s]ince 1948, the [Israeli] government has authorized the creation of more than 900 'Jewish localities' in Israel" and noting a 2018 Knesset law enshrining "Jewish settlement" as a national value).

Peninsula in the Six-Day War.[245] However, a version of this settlement project began long before, stretching back to the 1948 war and establishment of Israel.[246] Israel also illegally annexed East Jerusalem in 1967 and has since made it a priority for establishing illegal Israeli settlements.[247] By the late 1980s, approximately 50,000 settlers lived in the occupied West Bank.[248] The settlement enterprise has only accelerated since: as of July 2021, at least 666,778 settlers lived in the West Bank, including 225,178 in East Jerusalem,[249] across more than 280 settlements.[250] Across the political spectrum, every successive Israeli government has

245. Alexandre Kedar, *The Legal Transformation of Ethnic Geography*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001) (investigating the formation of the Israeli land regime from 1948 to the late 1960s, showing how Israel crafted legal tools to curtail Palestinian land ownership and entrench Israeli power); A CIVILIAN OCCUPATION: THE POLITICS OF ISRAELI ARCHITECTURE (Rafi Segal, David Tartakover, & Eyal Weizman eds., 2003) (exploring the politics and ideology of Israeli planning through essays and photographs); George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 524 (1994), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1537&context=aulr [https://perma.cc/V26J-GR5V] (tracing how Israel has used land laws to legitimize Palestinian dispossession in the eyes of the Israeli public and international community).

246. GERSHON SHAFIR, LAND, LABOR AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT: 1882-1914, at 17–21, 135–86 (1989) (investigating the relationship between the first thirty years of Zionist immigration and settlement (from 1882-1914) to Israeli state formation and settler-colonialism); NEVILLE J. MANDEL, THE ARABS AND ZIONISM BEFORE WORLD WAR I, at xxiv, 29 (1976) (explaining that the number of Jewish settlers living in "colonies" in Palestine rose from 10,000 in 1908 to 35,000 by 1914); NUR MASALHA, EXPULSION OF THE PALESTINIANS: THE CONCEPT OF 'TRANSFER' IN ZIONIST POLITICAL THOUGHT, 1882-1948 (1992) (using declassified Israeli archival material to trace the extent and development of Zionist political figures' support for Palestinian expulsion); Geremy Forman & Alexandre Kedar, *From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLAN. D: SOCIETY AND SPACE 809 (2004) (examining the Israeli government's use of law to institutionalize Palestinian dispossession, tracing the legal transformation of Palestinians' land during the formative years of Israel's land regime (1948-1960)).

247. Israel formalized this illegal annexation in 1980 and considers it part of its sovereign territory. This does not change East Jerusalem's status as occupied territory under international law. AL-HAQ, ANNEXING A CITY: ISRAEL'S ILLEGAL MEASURES TO ANNEX JERUSALEM SINCE 1948, at 24–25 (2020), https://www.alhaq.org/cached_uploads/download/2020/05/11/annexing-a-city-web-version-1589183490.pdf [https://perma.cc/3VTX-7GB7]; S.C. Res. 2334, *supra* note 221, ¶¶ 1, 3; Lynk, *supra* note 221, ¶ 29 ("East Jerusalem has been illegally annexed by Israel and remains occupied territory."); NUR MASALHA, IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION (2000) (providing a history of Israeli expansionism from 1967-2000).

248. Yotam Berger, *How Many Settlers Really Live in the West Bank? Haaretz Investigation Reveals*, HAARETZ (June 15, 2017), https://www.haaretz.com/israel-news/.premium.MAGAZINE-revealed-how-many-settlers-really-live-in-the-west-bank-1.5482213 [https://perma.cc/Q95P-DEC7].

249. AMNESTY INT'L, *supra* note 10, at 24.

250. Lynk, *supra* note 221, ¶ 29.

supported Israel's settlement project despite the unequivocal illegality of settlements in occupied territory.[251]

The Israeli settlement enterprise has accomplished the immense expropriation of Palestinian land through a variety of tactics, discussed in detail below. Figure 2 illustrates the constellation of actors (dark grey) and tactics (light grey) involved in the Israeli settlement enterprise.

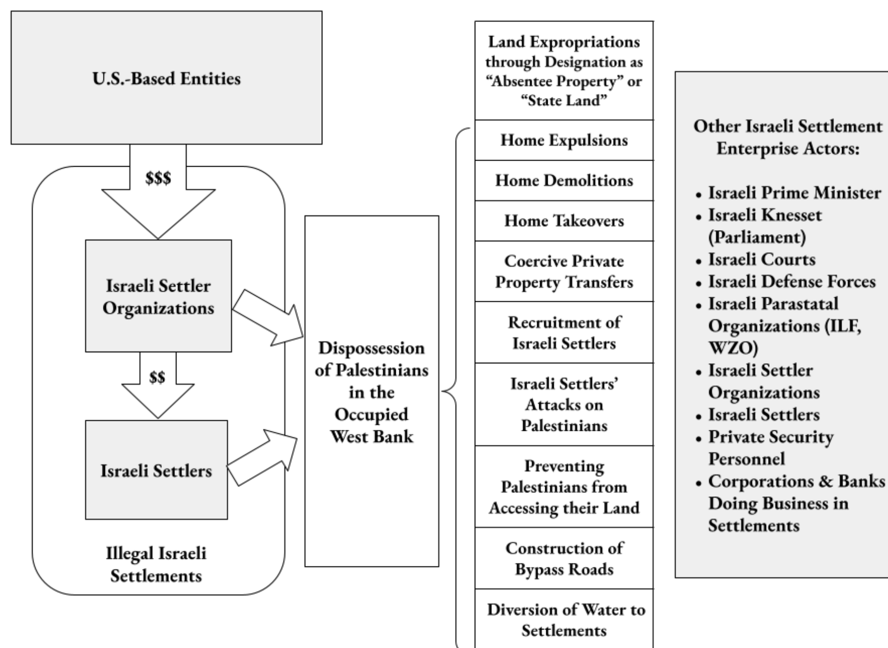

Fig. 2: Diagram of the Israeli Settlement Enterprise

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251. Michael Lynk (Special Rapporteur on the situation of hum. rts. in the Palestinian territories occupied since 1967), *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, ¶ 49, U.N. Doc. A/72/43/106 (Oct. 23, 2017) ("Every Israeli government since 1967 has pursued the continuous growth of the settlements, and the significant financial, military and political resources committed to the enterprise belies any intention on its part to make the occupation temporary.") Israeli political actors' stances on settlements are not monolithic. All Israeli governments have supported the occupation of East Jerusalem. Still, some left-leaning Israeli coalitions have expressed opposition to settlements in the West Bank and Gaza, particularly before the 1995 assassination of former Labor PM Yitzhak Rabin by an Israeli ultranationalist. Joshua Mitnick, *Did Rabin Assassination Mark Decline of Israel's Peace Camp?*, CHRISTIAN SCI. MONITOR (Nov. 4, 2010), https://www.csmonitor.com/World/Middle-East/2010/1104/Did-Rabin-assassination-mark-decline-of-Israel-s-peace-camp [https://perma.cc/ZB2P-36P7]. Israeli state support for settlement expansions has reached a new high-water mark with PM Benjamin Netanyahu's new government, composed of a far-right ultranationalist religious faction affiliated with the Israeli settler movement, the Likud party, and ultra-Orthodox parties. *Benjamin Netanyahu's New Israeli Government Will Make West Bank Expansion a Priority*, NPR (Dec. 29, 2022, 4:05 AM), https://www.npr.org/2022/12/29/1145952664/benjamin-netanyahus-new-israeli-government-will-make-west-bank-expansion-a-prior [https://perma.cc/QZ6L-V3VL].

The central doctrinal question this Section will explore is how to demonstrate that, as a matter of law, U.S. entities funding Israeli settlement organizations, as depicted in Fig. 2, are causally responsible for expropriation and associated harms to Palestinians.

2. Israeli Land Expropriation Tactics over Time

Initially, the Israeli government largely expropriated land for settlements through military orders as a way to skirt international-law prohibitions on construction for civilian purposes in occupied territories by the occupying power.[252] From 1967 until the late 1970s, the Israeli government sought to limit settlement establishment and expansion to state and parastatal institutions rather than private individuals or companies.[253] Two semi-governmental organizations, both of which predated the establishment of Israel, controlled this process: the Settlement Division of the World Zionist Organization (WZO) and the Jewish National Fund (JNF).[254] When the right-wing Likud party came to power in 1977, Israel loosened its restrictions on private Israeli actors.[255] After the Israeli Supreme Court banned the use of military seizure orders in 1979, the settlement enterprise quickly adapted, relying on other tactics for land expropriation.[256] Rather than evincing a change of heart by Israeli institutions with respect to the settlement enterprise, the Israeli Supreme Court's decision reflected the growing leverage of religious Zionist political movements. These actors were unwilling to justify the establishment of settlements on security grounds since it involved framing the settlements as temporary; instead, they insisted that the settlements be permanent, as part of a

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252. Israeli authorities issued military orders to confiscate the land intended for the settlement as a matter of professed military necessity; proceeded with construction while assuring local Palestinian elected officials that the land was intended for military use; and subsequently transferred the land to settlers. *See* Yotam Berger, *Secret 1970 Document Confirms First West Bank Settlements Built on a Lie*, HAARETZ (July 28, 2016), https://www.haaretz.com/israel-news/.premium-document-confirms-first-settlements-built-on-a-lie-1.5416937 [https://perma.cc/RFB4-QJCC]; Feras Hammami, *Rupture in Heritage: Strategies of Dispossession, Elimination and Co-resistance*, 1 SETTLER COLONIAL STUD. 3, 6–8 (2022).

253. B'TSELEM, *supra* note 10, at 62 (citing Order Regarding Land Transactions (Judea and Samaria) (No. 25), 5727-1967, *in* PLAN., BUILDING & LAND L. 513–14). Private Israeli individuals and organizations played a large role in Israel's colonization policies before 1967, and, as described in *infra* Section III(A)(3), would again come to play a substantial role in the settlement enterprise.

254. The Israeli state funds the WZO Settlement Division's entire budget, but as a non-governmental entity it is not subject to the rules and procedures governing Israeli state institutions. *Id.* at 78. The JNF works through its subsidiary company Himanuta to purchase land from Palestinians. *Id.* at 62. According to its Memorandum and Articles of Association, the JNF's mandate is to acquire property "for the purpose of settling Jews on such lands and properties." *Excerpts from the Jewish National Fund's Response to H.C. 9205/04 and H.C. 9010/04*, ADALAH 88 (Dec. 9, 2004), https://www.adalah.org/uploads/oldfiles/eng/publications/makan/hc9010.pdf [https://perma.cc/PRA8-WKJN].

255. Israel's Ministerial Committee for Settlement issued a decision in April 1982 allowing, for the first time, settlements to be established by "private initiative." B'TSELEM, *supra* note 10, at 62.

256. *Id.* at 49–51.

Zionist project of land "reclamation."[257] Israeli authorities repurposed the military seizure mechanism in 1994 and have used it ever since as a tool for expropriating land to build illegal Israeli-only bypass roads.[258]

This allowed both Israeli settler organizations and individual Israeli entrepreneurs to take on a larger role in land expropriations over time. As the process of expropriation and settlement expansion in occupied Palestine became increasingly fundamental to the Israeli state and private actors, it grew more decentralized, with nonprofit actors playing a key role in the "purchase" of land in the West Bank.[259]

a. State Land Designation

The single most-used tactic for expropriating Palestinian property has been the "state land" designation. This mechanism usually relies on a distorted interpretation of a nineteenth-century Ottoman land law, leveraging the fact that many Palestinians had not officially registered their land due to difficulties with registration under Jordanian law.[260] Specifically, Israeli state actors, with the acquiescence of the judiciary, have used a military order to declare the following three types of land as "state land" based on its interpretation of the Ottoman Land Law: (1) agricultural land near places of settlement that had not been farmed for at least three consecutive years; (2) agricultural land near places of settlement that had been farmed for less than ten years; and (3) land half an hour walking-distance from places of settlement.[261] The "state land" declaration process has proved enormously effective for expropriating Palestinian land; since 1967, Israel has declared approximately forty percent of the West Bank to be state land.[262] Virtually all state land allocations (99.76 percent) have been for the exclusive benefit of Israeli settlements.[263] While the Israeli authorities afford nominal rights to Palestinians to

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257. *Id.* at 49.

258. *Id.* at 50. Over 1,000 miles of roads have been designated for exclusive use by settlers. SAREE MAKDISI, PALESTINE INSIDE OUT: AN EVERYDAY OCCUPATION 32–33 (2010).

259. The Israeli government used military orders to amend land laws to facilitate good-faith Palestinian landowners unknowingly selling their land to settler organizations. The change in land laws postpones the registration period for land transactions, allowing private sale of Palestinian land without making public the identities of the transacting parties for as long as fifteen years. This provision, coupled with coercive and fraudulent transfers, resulted in even more transfer of Palestinian land and properties in the occupied West Bank to Israeli settlers. For instance, anonymous or ostensibly Palestinian buyers made lucrative offers to Palestinian property owners, some of whom agreed to sell their land. Only much later would they learn that the buyer of their land had been acting as a middleman for settler organizations, ultimately transferring the land to Israeli settlers. B'TSELEM, *supra* note 10, at 60–63.

260. *Id.* at 54. The law of occupation—specifically, Article 43 of the Hague Convention—supplies the legal basis for Israel applying pre-existing Ottoman (and Jordanian) law in this context. Article 43 instructs occupying powers to respect "the laws in force in the country." Fourth Hague Convention, *supra* note 6, art. 43.

261. The Ottoman Land Law of 1858 outlines a number of individual and collective forms of land ownership. B'TSELEM, *supra* note 10, at 51–53.

262. *Id.* at 51; *see also* AMNESTY INT'L, *supra* note 10, at 141–42.

263. AMNESTY INT'L, *supra* note 10, at 141.

contest "state land" determinations, in practice there is no meaningful opportunity to exercise these rights.[264]

b. "Abandoned" or "Absentee" Property Designation

A second tactic for expropriating Palestinian property is Israel's institutionalized practice of designating land as "abandoned" property. Under the 1967 Israeli Absentees' Property Military Order, if a landowner leaves the West Bank their property is deemed "abandoned" and subject to expropriation by the Israeli Defense Forces (IDF), the Israeli state's military branch.[265] This tactic primarily targets properties of Palestinian refugees who were forcibly displaced in the 1948 *Nakba* or 1967 *Naksa*, but it has also been deployed against Palestinian landowners who were still in the area after 1967.[266] "Abandoned" property that was not farmed—either, for Palestinian refugees, because they were not allowed to return to their land, or, for Palestinian farmers still in Palestine, because of Israeli restrictions on their ability to access their own land—was later declared "state land"

264. First, the window to appeal these determinations is short—only forty-five days—and Palestinian landowners generally have had no way of learning about "state land" determinations until settlement construction on their land begins, often months or years after the appeal window has closed. Second, appeals are prohibitively expensive for most landowners, since they require a steep filing fee, a formal land survey, and retaining an attorney. Third, appeals are often impossible to win due to a lack of formal land registration. Fourth, the military appeals committee that hears these appeals is exceptionally compromised. Its decisions are not public; it is not bound by the rules governing Israeli judicial proceedings or of evidence; and the same body that issues land-seizure orders appoints and dismisses its members. Fifth, the committee's existence as a quasi-judicial body—despite gross due process deficiencies—precludes judicial review of "state land" designations. The High Court has affirmed the legality of the entire process. Finally, proving title to the land does not necessarily suffice. If Israeli authorities have already signed a contract with settlers or settler organizations, or if initial preparations for establishing a settlement have begun, it does not matter if a Palestinian resident can prove that the land was incorrectly designated as "state land." Israeli law provides: "No transaction undertaken in good faith . . . shall be nullified, and it shall continue to be valid even if it is proved that the property was not at that time government property." B'TSELEM, *supra* note 10, at 51–58 (quoting Military Order 59 Concerning State Property (Judea & Samaria), art. 5 (1967)); *see also* ADALAH, THE STATE OF ISRAEL'S USE OF THE 'GOOD FAITH' TO CONFISCATE PRIVATE PALESTINIAN LAND IN THE OCCUPIED WEST BANK – IN BAD FAITH (2019), https://www.adalah.org/uploads/uploads/Position_Paper_Good_Faith_English_December_2019.pdf [https://perma.cc/KXU7-VNQY].

265. This Order builds upon the Absentees' Property Law, which defines "absentee" as any person owning land in Israel who: is a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, or the Yemen; is in one of these countries or in any part of Palestine outside the area of Israel; is a Palestinian citizen and left their ordinary place of residence in Palestine (a) for a place outside Palestine before September 1, 1948; or (b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment; or is a company, partnership, association, or the like that is "decisively controlled" by individual absentees. AMNESTY INT'L, *supra* note 10, at 115 (quoting Article 1(b) of the Absentees' Property Law, 4 L.S.I. 68 (1950)); *see also* Bisharat, *supra* note 245; Memorandum from Norwegian Refugee Council, The Absentee Property Law and Its Application to East Jerusalem (Feb. 15, 2017), https://www.nrc.no/globalassets/pdf/legal-opinions/absentee_law_memo.pdf [https://perma.cc/84B2-LFP6].

266. B'TSELEM, *supra* note 10, at 59.

and expropriated.[267] In many cases, Palestinian "absentees" never crossed an international border, and some remain only a few kilometers from their homes and land.[268] They have not been allowed to return. Israel has used "abandoned" and "absentee" designations to expropriate nearly 60 percent of the fertile land belonging to Palestinian refugees in Israel and East Jerusalem.[269]

c. Public Needs Expropriation

The Israeli state also designates land for "public needs" under a Jordanian land expropriation law.[270] Israel unilaterally amended this law to minimize Palestinians' ability to receive notice of and appeal these determinations.[271] Although expropriations under the Jordanian law may be made only for a "public purpose," Israel has used it to expropriate land for the Ma'ale Adummim settlement as well as for bypass road construction.[272]

3. Israeli Settlement Enterprise Actors

The current incarnation of the Israeli settlement enterprise has been operating for over half a century, and in that time it has come to rely on the support of a whole constellation of institutional and private actors. To understand how U.S.-based actors fit into the broader picture, this Section summarizes the roles of key actors in the Israeli settlement enterprise, including Israeli state and quasi-state institutions, Israeli settler organizations, multinational corporations and banks, and U.S.-registered entities.

Israeli state institutions orchestrate much of the settlement enterprise and function to provide impunity for the enterprises' individual and organizational perpetrators. Israeli courts, from quasi-judicial bodies like the military appeals committee to the High Court of Justice (the Israeli Supreme Court), have ratified

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267. B'TSELEM & KEREM NAVOT, *supra* note 10, at 50–61 (detailing access restrictions Palestinians have experienced in conjunction with state land designations and expansion of the following Israeli settlements and outposts: Giv'at Ha'eitem, Tekoa, Nokdim, Eli, Shilo, Rehelim, Malachei Hashalom, Nofei Nehemia, and Ge'ulat Zion); B'TSELEM, ACCESS DENIED: ISRAELI MEASURES TO DENY PALESTINIANS ACCESS TO LAND AROUND SETTLEMENTS 7–8, 12 (2008), https://www.btselem.org/sites/default/files/sites/default/files2/publication/200809_access_denied_eng.pdf [https://perma.cc/SCW8-VMXL] (providing overview of land access restrictions for Palestinians in the West Bank).

268. For example, in 1948, the Israeli military directed about 600 residents of the Palestinian village of Iqrit (in northern Israel) to leave their homes "temporarily." They were not allowed to return, and in 1951, Israeli authorities destroyed the village except for the church and cemetery. The Palestinian community of Iqrit currently comprises around 1,500 people who live in Al-Rameh, just 20 kilometers away. They are still fighting for the right to return to their homes and land in Iqrit. AMNESTY INT'L, *supra* note 10, at 22–23.

269. In addition to arable lands, Israeli authorities have also used the Absentees' Property Law to expropriate more than 10,000 shops and 25,000 buildings owned by Palestinians. *Id.* at 23.

270. *See id.* at 115, 125; *see also* B'TSELEM, *supra* note 10, at 60–61.

271. B'TSELEM, *supra* note 10, at 60.

272. *Id.* at 61.

expropriations and forced evictions.[273] In addition, Israeli authorities provide subsidies to settlers and settler organizations to incentivize the development and expansion of illegal Israeli settlements.[274] The IDF and police have long protected settlers who engage in violence against Palestinians.[275] Settler violence against Palestinians continues to spike. Attacks by settlers rose by about 150 percent from 2019 to 2021.[276] Rather than preventing this violence, Israeli soldiers have stood by and even participated.[277]

Israeli settler organizations support illegal settlement construction, coordinate the forced expulsions of Palestinians (including bringing and financing eviction lawsuits on behalf of settlers), coordinate coercive private property transfers, facilitate settler takeovers of Palestinians' properties, and provide settlements with money for arms and private security. These organizations share a common goal: transferring land from Palestinian ownership to exclusive and permanent Israeli possession. Settler organizations and their supporters refer to this process as land "redemption."[278]

The U.S. government provides Israel with nearly $4 billion in military aid per year.[279] Pursuant to longstanding U.S. executive policy, Israel cannot formally

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273. *See supra* note 264; *Israel: Court Permits Discriminatory Evictions–Arab Villages in Israel, West Bank Face New Displacement*, HUM. RTS. WATCH (May 19, 2015, 12:00 AM), https://www.hrw.org/news/2015/05/19/israel-court-permits-discriminatory-evictions [https://perma.cc/82YJ-H2ML]; Yara Hawari, *The Israeli Legal System: No Place for Justice*, AL-JAZEERA (Aug. 5, 2021), https://www.aljazeera.com/opinions/2021/8/5/the-israeli-legal-system-no-place-for-justice [https://perma.cc/7C9Y-47NR]; Penny Green & Amelia Smith, *Evicting Palestine*, 5 ST. CRIME J. 81, 88 (Spring 2016), https://www.jstor.org/stable/pdf/10.13169/statecrime.5.1.0081.pdf [https://perma.cc/3NDN-QLCQ].

274. *See supra* note 15; B'TSELEM & KEREM NAVOT, *supra* note 10, at 14–16.

275. AL-HAQ, *supra* note 15, at 21.

276. *Id.*; Hendrix, *supra* note 15.

276. Hendrix, *supra* note 15.

277. Yuval Abraham, *Joint Militias: On a Single Day in May, Israeli Settlers and Soldiers Cooperated in Attacks That Left Four Palestinians Dead*, INTERCEPT (July 15, 2021, 6:00 AM), https://theintercept.com/2021/07/15/israel-army-settlers-palestinians-killed/ [https://perma.cc/T2GM-7V7Y].

278. Naftali Greenwood, *The Redeemers of the Land*, ISR. MINISTRY FOREIGN AFFS. (Oct. 18, 1999), https://web.archive.org/web/20150518154549/https://mfa.gov.il/MFA/AboutIsrael/History/Zionism/Pages/The%20Redeemers%20of%20the%20Land.aspx [https://perma.cc/6YTY-AWGD] (previous version of Israel Ministry of Foreign Affairs website page accessed via Wayback Machine) ("'Redemption of the Land' in modern times is the purchase, reclamation and settlement of land in Eretz Israel by the Jewish National Fund, by private individuals and organizations and later by the State of Israel.").

279. Press Release, The White House, Off. of the Press Sec'y, Fact Sheet: Memorandum of Understanding Reached with Israel (Sept. 14, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/09/14/fact-sheet-memorandum-understanding-reached-israel [https://perma.cc/B79R-42FU] (summarizing 10-year Memorandum of Understanding between the United States and Israel that provides for $38 billion in U.S. military aid to Israel from FY2019 to FY2028).

use this money in occupied Palestine, including in Israeli settlements.[280] The Israeli settlement enterprise has found other means of securing funding and support from U.S.-based individuals and entities, however.[281]

The settlement enterprise benefits from doing business with hundreds of multinational corporations and banks, including those registered in the United States.[282] In 2020, the U.N. released a database of businesses involved in the Israeli settlement enterprise.[283] The database includes U.S. corporations Airbnb, Expedia, General Mills, Motorola Solutions, RE/MAX, and Tripadvisor.[284] In addition to corporations named in the U.N. database, Caterpillar provides heavy machinery to the Israeli military, including armored bulldozers used to demolish Palestinians' homes.[285] Cisco Systems has established "technological hubs" within Israeli settlements.[286] Hewlett-Packard conducted extensive business activities in Israeli settlements, including operating a research and development center,

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280. This requirement reflects a determined—and, with the exception of the Trump administration, consistent—stance of the U.S. executive branch in opposition to the expansion of Israeli settlements. *See* Ned Price, Dep't Spokesperson, U.S. Dep't of State, Department Press Briefing (Oct. 26, 2021), https://www.state.gov/briefings/department-press-briefing-october-26-2021/ [https://perma.cc/4DD9-3XYM]; CLYDE R. MARK, CONG. RSCH. SERV. IB85066, ISRAEL: U.S. FOREIGN ASSISTANCE, 5–6 (Apr. 26, 2005), https://sgp.fas.org/crs/mideast/IB85066.pdf [https://perma.cc/D6HC-YKSR] ("It has been executive branch policy that no U.S. assistance to Israel . . . can be used by Israel in the occupied territories . . .").

281. "U.S. citizens have been particularly strong supporters" of the Israeli settlement enterprise. Diala Shamas, *Tax Breaks for Colonization?*, L. & POL. ECON. BLOG (June 30, 2021), https://lpeproject.org/blog/tax-breaks-for-colonization/ [https://perma.cc/N6XL-VLN5] (discussing U.S.-born right-wing Israeli settler leaders, U.S. Christian Evangelical groups' "deep ties" with the settler movement, the thousands of U.S. citizens who join the Israeli military every year through its "lone soldier" program, and the 60,000-some U.S. citizens who live in Israeli settlements in the West Bank, not including East Jerusalem).

282. *See generally Settlement Enterprise*, WHO PROFITS, https://www.whoprofits.org/involvement/ [https://perma.cc/BDF9-MFR8] (last visited Feb. 20, 2023) (identifying Israeli and international business entities involved in settlement construction, settlements' economic production, and service provision to settlements).

283. U.N. HIGH COMM'R HUM. RTS., *Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social, and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem, Human Rights Situation in Palestine and Other Occupied Arab Territories*, U.N. Doc. A/HRC/43/71 (Feb. 28, 2020), https://undocs.org/en/A/HRC/43/71 [https://perma.cc/QP26-RWXK].

284. *Id.* ¶ 31 (listing Airbnb Inc. at no. 2, Expedia Group Inc. at no. 35, RE/MAX Israel (Israeli franchise of U.S. multinational RE/MAX, LLC) at no. 74, and Tripadvisor Inc. at no. 82 as "[b]usiness enterprises involved in listed activities"; and listing Booking Holdings Inc. at no. 96, General Mills Inc. at no. 103, and Motorola Solutions Inc. at no. 109 as "[b]usiness enterprises involved as parent companies").

285. DON'T BUY INTO OCCUPATION, EXPOSING THE FINANCIAL FLOWS INTO ILLEGAL ISRAELI SETTLEMENTS 32 (2022), https://dontbuyintooccupation.org/wp-content/uploads/2021/09/2022_11_29_DBIO-report-DEF.pdf [https://perma.cc/5KS7-782E] (profiling Caterpillar Inc.).

286. *Id.* at 37 (profiling Cisco Systems).

implementing a pilot "Smart City" program, and contracting with subsidiary companies located in Israeli settlements.[287] An *In These Times* investigation additionally determined that the corporate foundations of Verizon, Pfizer, Bank of America, Deutsche Bank, American Express, and JPMorgan Chase collectively gave over $25,000 from 2001 to 2016 to U.S. nonprofits that fund Israeli settler organizations, and an additional $48,000 to Friends of the Israel Defense Forces, a U.S. nonprofit that sends millions of dollars to the Israeli military.[288]

Financial institutions also contribute to the Israeli settlement enterprise. From 2018 to May 2021, 672 European financial institutions—including banks, asset managers, insurance companies, and pension funds—maintained financial relationships with fifty businesses actively involved in Israeli settlements.[289] There is no comprehensive, publicly available accounting of U.S. financial institutions' involvement in the settlement enterprise.

Finally, the Israeli settlement enterprise relies heavily on financial support from U.S.-registered nonprofits and private foundations. U.S.-based entities provide substantial financial support to Israeli settler organizations, including hundreds of millions of dollars of tax-exempt funding from nonprofits. Hagit Ofran, head of the Settlement Watch team at Peace Now, an Israeli human rights organization, affirms: "Without the donations, [these groups] don't exist."[290] While precise, current statistics about the total amount of money transferred are not publicly available, the information that is available reveals the integral role U.S. actors play in furthering illegal settlements.[291] Nonprofit status confers key benefits on a subset of these entities, allowing them to incentivize and efficiently channel donations to Israeli settler organizations.[292] A 2015 *Haaretz* investigation revealed that from 2007 to 2013 alone, U.S. nonprofits sent more than $220 million to settler

287. Am. Friends Serv. Comm., *HP Inc*, INVESTIGATE (Nov. 5, 2020), https://investigate.afsc.org/company/hp [https://perma.cc/A246-FGKV] (providing background on settlement enterprise support from Hewlett-Packard and its successor organizations after the company split into HP Inc. and Hewlett Packard Enterprise in 2015).

288. Alex Kane, *Verizon. Pfizer. Bank of America. U.S. Corporations Are Funding Israeli Settlements.*, IN THESE TIMES (Feb. 21, 2019), https://inthesetimes.com/article/israel-settlements-palestine-verizon-pfizer-bank-of-america-jpmorgan-chase [https://perma.cc/AY59-JLHA].

289. This support includes $114 billion in loans and underwritings and $141 billion in shares and bonds. DON'T BUY INTO OCCUPATION, *supra* note 285, at 6.

290. Willy Lowry, *How U.S. Donors Fund Settler Activity in East Jerusalem*, THE NATIONAL (May 19, 2021), https://www.thenationalnews.com/world/the-americas/how-us-donors-fund-settler-activity-in-east-jerusalem-1.1225992 [https://perma.cc/9QU2-UL2H].

291. *Id.*; Uri Blau, *The Money Trail Behind the Jerusalem Eviction Battle that Sparked the Latest Israeli-Palestinian Violence, Exposed*, FORWARD (May 25, 2021), https://forward.com/news/470181/the-money-trail-jerusalem-sheikh-jarrah-seymour-braun-shomrim/ [https://perma.cc/LK8J-M7U6] [hereinafter *Money Trail*].

292. *See* Shamas, *supra* note 281; Elena Hodges, *Hidden in Plain Sight: U.S. Nonprofits as Drivers of Illegal Israeli Settlements*, JUST SECURITY (June 10, 2022), https://www.justsecurity.org/81847/hidden-in-plain-sight-us-nonprofits-as-drivers-of-illegal-israeli-settlements/ [https://perma.cc/TH9G-24TN].

organizations.[293] Funding from U.S. entities often makes up the majority of settler organizations' budgets.[294]

B. U.S. Entities Funding Settler Organizations in Sheikh Jarrah

Opaque funding relationships have long characterized the Israeli settlement enterprise's operations. Danny Yatom, a former Labor Party official and confidant of the late Israeli Prime Minister Yitzhak Rabin, asserted in 2005 that most funding for settlements "[was] not camouflaged, but [that] it is not possible to connect A to B to C to D to E to F to G."[295] According to Yatom, "[n]o one eye in the world saw the whole picture."[296] The lack of information about Israeli settler organizations' funding sources persists. Ofran has explained that "[Israeli] settlers are making a lot of efforts to conceal the sources of their funds and the identity of their supporters . . . [T]he Palestinian families who are facing displacement[] don't even know who are they facing."[297]

This Section focuses on the role of specific U.S. entities that fund settler organizations operating in Sheikh Jarrah, a neighborhood of occupied East Jerusalem. While limited, information about these funding relationships and ensuing harms is publicly available. The Article centers Sheikh Jarrah as a particularly salient example in light of the scale and intensity of Israeli settler organizations' efforts to dispossess Palestinians in the neighborhood, the sustained resistance and mobilization of Palestinian communities in Sheikh Jarrah over decades, and the growing international visibility of and solidarity with this struggle.

Israeli settler organizations have been active in Sheikh Jarrah since the early 1970s. These organizations work to dispossess Palestinians and expand Israeli settlements in the neighborhood, in flagrant contravention of international humanitarian law. Israeli settler organizations have funded legal battles to expropriate Palestinians' property and forcibly expel Palestinian families from their homes in Sheikh Jarrah. These organizations have facilitated at least twenty-one demolitions of Palestinians' homes since 2009.[298] This Section profiles four U.S. organizations—the Central Fund for Israel, Nahalat Shimon International, American

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293. From 2009 to 2013, approximately fifty U.S. charities funneled over $220 million to Israeli settler organizations. Uri Blau, *Haaretz Investigation: U.S. Donors Gave Settlements More than $220 Million in Tax-Exempt Funds over Five Years*, HAARETZ (Dec. 7, 2015), https://www.haaretz.com/haaretz-investigates-u-s-donors-to-israeli-settlements-1.5429739 [https://perma.cc/4GLL-2U3T].

294. Uri Blau, *U.S. Group Invests Tax-Free Millions in East Jerusalem Land*, HAARETZ (Aug. 17, 2009), https://www.haaretz.com/1.5092286 [https://perma.cc/VE2B-SVB7].

295. *Settler-Funding a Billion Dollar Question*, AL-JAZEERA (Aug. 12, 2005), https://www.aljazeera.com/news/2005/8/12/settler-funding-a-billion-dollar-question [https://perma.cc/MVC2-5GZA].

296. *Id.*

297. *Money Trail*, *supra* note 291.

298. AMNESTY INT'L, *supra* note 10, at 133 (citing U.N. OCHA, *supra* note 12).

Friends of Ateret Cohanim, and Friends of Ir David—with demonstrated ties to Israeli settler organizations in Sheikh Jarrah.[299]

1. Central Fund of Israel & the Israel Land Fund

The Central Fund of Israel (CFI) is a powerful U.S.-registered nonprofit that funds the Israel Land Fund (ILF), among many other Israeli settler organizations.[300] Aryeh King, appointed to serve as deputy mayor of Jerusalem in 2021, founded the ILF in 2007.[301] The ILF's work involves buying or otherwise acquiring land in Palestinian neighborhoods throughout occupied East Jerusalem to transfer to Jewish settlers.[302]

According to its website, the ILF "believe[s] that the entire Land of Israel belongs to the Jewish people" and "strives to ensure that the land is returned to Jews and maintained by Jews" to guarantee that "[h]ouse after house, plot after plot . . . the Land of Israel will remain in the hands of the Jewish people forever."[303] The ILF advertises its on-the-ground expropriation activities to donors.[304] The ILF explains that its operations include four areas: "[a]cquisition of lands and properties from non-Jews by Jewish investors"; "[p]urchase of land and property from Jewish heirs"; "[a]ssisting owners and tenants of Jewish-owned properties in strategic areas"; and "geopolitical informational tours at acquisition and transaction sites."[305] The ILF's website confirms both that the organization operates without providing full transparency to sellers[306] and that it sells land. [307]

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299. Note that numerous other U.S.-based organizations provide funding to Israeli settler organizations in East Jerusalem, the West Bank, and the Golan Heights.

300. CFI has distributed at least $75 million in funding since 2015. Letter from Rashida Tlaib, Cori Bush, Alexandria Ocasio-Cortez, André Carson, Mark Pocan, Betty McCollum, & Ayanna Presley, Members, House of Representatives, to Honorable Janet Yellen, Sec'y, U.S. Dep't of the Treasury (July 22, 2021), *in* CTR. FOR CONST. RTS., PALESTINIAN SOLIDARITY (July 23, 2021), https://ccrjustice.org/reps-tlaib-ocasio-cortez-carson-betty-mccollum-pocan-pressley-and-bush-seek-treasury-dept [https://perma.cc/85JE-Q2UG].

301. Kane, *supra* note 5; *About the Fund*, ISR. LAND FUND, https://www.israelland-fund.com/about-the-fund [https://perma.cc/D4YW-BW5D] (last visited Feb. 21, 2023).

302. Kane, *supra* note 5.

303. ISR. LAND FUND, *supra*, note 301.

304. "The fund locates hundreds of properties for sale all over the country and offers every Jew, regardless of his place of residence, the opportunity to own land . . . You too can take part in this effort." *Id*.

305. *Id*.

306. *Acquisition and Redemption of Land*, ISR. LAND FUND, https://www.israelland-fund.com/acquisition-and-acquiring-land [https://perma.cc/6LLT-8JWH] (last visited Feb. 21, 2023) (ILF shows properties or land to buyers "without direct identification of the property[] [i]n order to avoid the possibility of risk to the transaction").

307. *Id.* (ILF requires prospective buyers to submit a recommendation letter from a person or organization "that we know or have worked with in the past . . . in order to prevent the sale of land to hostile parties."); *Accompanying Land Sellers*, ISR. LAND FUND, https://www.israelland-fund.com/accompanying-land-sellers [https://perma.cc/QXK8-BNUQ] (last visited Feb. 21, 2023) ("Do you have land and are interested in selling it? The Israel Land Fund will assist you in the process of selling to a Jew with professionalism and discretion.").

The ILF engages in affirmative outreach to Jewish people with prospective property claims, mainly in the East Jerusalem neighborhoods of Sheikh Jarrah, Beit Hanina and Beit Safafa[308] The ILF gives prospective claimants "legal [and] financial assistance," in addition to "security" assistance to help Jewish property claimants who are "too frightened to get there."[309]

King has made clear the ILF's plans for Sheikh Jarrah and the rest of East Jerusalem: "We are working to settle [Jewish settlers] in strategic places to ensure as many Jews as possible are living inside the Old City and near the Old City . . . so no one will give it to our enemies."[310] In a 2017 *Jerusalem Post* interview, King described the organization's goal of expanding from its then-current "four main compounds" to "two more compounds – one of 300 housing units and the other of 200 housing units."[311] King stated that he expected a total of 400 to 500 families of Israeli settlers to be living in Sheikh Jarrah by 2027.[312] In 2021, speaking as deputy mayor, King told a reporter for *VICE News* that "of course" he wants to see a Sheikh Jarrah that is Jewish.[313]

The ILF has publicly advertised the sale of land owned by Palestinians in Sheikh Jarrah.[314] As of September 2023, the ILF website actively advertised properties for sale in Sheikh Jarrah.[315] As recently as January 22, 2022, the ILF's website included an "Investing Opportunities" page.[316] This page contained eight

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308. Udi Shaham, *'In 10 Years, 400 Jewish Families Will Live in Arab Sheikh Jarrah'*, JERUSALEM POST (Aug. 25, 2017), https://www.jpost.com/israel-news/in-10-years-400-jewish-families-will-live-in-sheikh-503346 [https://perma.cc/2LWF-B77R].

309. *Id.*

310. Dina Kraft & Fatima Abdulkarim, '*They Changed Everything': A Central Tension Roiling Jerusalem*, CHRISTIAN SCI. MONITOR (May 5, 2021), https://www.csmonitor.com/World/Middle-East/2021/0505/They-changed-everything-A-central-tension-roiling-Jerusalem [https://perma.cc/QZ2P-NRDQ].

311. Shaham, *supra* note 308.

312. *Id.*

313. VICE News, *Inside the Battle for Jerusalem*, YOUTUBE, at 12:50–13:02 (May 19, 2021), https://www.youtube.com/watch?v=ZiSRCPiklhI [https://perma.cc/3JNJ-TW3A].

314. Kane, *supra* note 5.

315. *Plots with Small Houses in Jerusalem's Shimon Hatzaddik Neighborhood*, ISR. LAND FUND, https://www.israellandfund.com/real-estate/plots-with-small-houses-in-jerusalem-s-shimon-hatzaddik-neighborhood?c=jerusalem [https://perma.cc/9WGX-ZZCF] (last visited Sept. 9, 2023). Past versions of the ILF's real estate listings for properties in Sheikh Jarrah described the plots as being in a "very strategic location" and as "being occupied by squatters who have built on them illegally or are renting. The plots are intended for future building projects." *Rare Opportunity in Eastern Jerusalem!*, ISR. LAND FUND, https://www.israellandfund.com/real-estate/rare-opportunity-in-eastern-jerusalem?c=jerusalem [https://perma.cc/3RW8-YSTE] (last visited Feb. 21, 2023); *Plots with Small Houses in Jerusalem's Nachalat Shimon Neighborhood*, ISR. LAND FUND, https://www.israellandfund.com/real-estate/plots-with-small-houses-in-jerusalem-s-nachalat-shimon-neighborhood [https://perma.cc/SSS3-95V9] (last visited Mar. 18, 2023)

316. *Search Investing Opportunities*, ISR. LAND FUND, https://web.archive.org/web/20220122140515/http://www.israellandfund.com/en-us/investing-opportunities/ [https://perma.cc/A7MD-RQLP] (last visited Mar. 18, 2023) (previous version of ILF website page accessed via Wayback Machine).

"Ideology Property" listings, including one in Sheikh Jarrah under the name "Nachalat Shimon Residential Plots."[317] The page provided five other listings in East Jerusalem.[318]

The ILF also financially supports legal proceedings to expel Palestinians in Sheikh Jarrah from their homes. King told the *Jerusalem Post* in a 2010 interview that he "expect[ed]" Palestinian families in Sheikh Jarrah at risk of forced eviction "to show gratitude" to Israeli settlers and confirmed that the ILF "will try to convince [Jewish settlers] to sue Arabs [term for Palestinians preferred by the settler movement] for large amounts of money[.]"[319] The ILF funded and coordinated the legal battle underlying the illegal eviction of the Shamasneh family in Sheikh Jarrah.[320] After successfully expelling the Shamasneh family, the ILF transferred possession to Israeli settlers.[321] The ILF was not directly responsible for the round of forced eviction efforts in Sheikh Jarrah that culminated in high-profile legal proceedings in May 2021,[322] but the organization remains a prominent advocate of home expulsions.[323]

The ILF publicly solicits donations for its land expropriation work in occupied Palestine. The ILF's website donations page specified, as of September 2023, that contributions support "fieldwork and personal accompaniment to buyers," including "lengthy legal battle[s] that require[] professional involvement."[324] The

317. *Id.*

318. *Id.*

319. Lahav Harkov, *Israel Land Fund to Continue Building in Sheikh Jarrah*, JERUSALEM POST (Sept. 28, 2010, 11:18 AM), https://www.jpost.com/israel/israel-land-fund-to-continue-building-in-sheikh-jarrah [https://perma.cc/97KK-V6XD].

320. Nir Hasson, *Israel Evicts Palestinian Family from East Jerusalem Home to Make Way for Pre-'48 Jewish Owners*, HAARETZ (Sept. 5, 2017), https://www.haaretz.com/israel-news/.premium-israel-evicts-palestinian-family-from-j-lem-arab-neighborhood-1.5448364 [https://perma.cc/S597-GMEJ] ("The Israel Land Fund – a right-wing nonprofit – contacted the heir of the original owners of the site where the Shamasnehs were living and represented her in legal proceedings to reclaim it."); Sarah Wildman, *Facing Eviction in Sheikh Jarrah*, NEW YORKER (Apr. 9, 2013), https://www.newyorker.com/news/news-desk/facing-eviction-in-sheikh-jarrah [https://perma.cc/5SAX-9KEW] (confirming that Aryeh King tweeted in 2012: "Good News from Jerusalem, Thursday we got an order of aviction [sic] of [an] Arab family"). Forced home expulsions, including that experienced by the Shamasneh family, are illegal because they violate the Fourth Geneva Convention and other international human rights prohibitions against forced transfer, usufruct, and pillage. *See supra* notes 6, 221–222.

321. Letter from The Palestinian Hum. Rts. Org. Council; The Civic Coal. for Palestinian Rts. in Jerusalem; Cmty. Action Ctr., Al-Quds Univ.; & Cairo Inst. for Hum. Rts. Stud. to S. Michael Lynk, Special Rapporteur on the Situation of Hum. Rts. in the Palestinian Territory Occupied Since 1967, United Nations et al., Joint Urgent Appeal to the United Nations Special Procedures on Forced Evictions in East Jerusalem 6 (Mar. 10, 2021), https://www.alhaq.org/cached_uploads/download/2021/03/10/joint-urgent-appeal-to-the-united-nations-special-procedures-on-forced-evictions-in-east-jerusalem-1615372889.pdf [https://perma.cc/VLR2-N2VQ] [hereinafter Joint Urgent Appeal].

322. AMNESTY INT'L, *supra* note 10, at 134; *supra* note 5.

323. Kane, *supra* note 5.

324. *Donation to the ILF*, ISR. LAND FUND, https://www.israellandfund.com/donation-to-the-ilf [https://perma.cc/QRF8-HRG3] (last visited Sept. 9, 2023).

donations page explains to prospective donors that "[w]ith the help of your partnership, we will be able to reach more signed deals and actually promote the vision of Shivat Zion [Return to Zion]!"[325] The ILF has emphasized the importance of donations to its work, stating that that the organization was "running critically low on funding" and stating that "[y]our generous contribution will yield immediate results."[326]

As recently as December 2, 2021, the ILF website's donations page listed CFI, a New York-registered nonprofit, as the point of contact for U.S. donors' contributions.[327] CFI takes in tens of millions of dollars annually in tax-deductible contributions.[328] CFI has sent at least $75 million to settler organizations since 2015.[329] *The National* reports that CFI provided $36 million to Jewish charities in 2019, including Israeli settler organizations.[330] A spokesperson for CFI stated that the organization gives money to charities "all around the land of Israel without discrimination," drawing no distinction between organizations operating within Israel and those operating within the occupied West Bank and East Jerusalem.[331]

CFI funding comprised over 99 percent of the ILF's total budget in 2017.[332] This financial support coincided with the ILF's 2017 eviction of the Shamasneh family. CFI sent the ILF more than $720,000 from 2011 to 2021 to fund its settlement activities, according to documents filed with Israeli regulators.[333] Other U.S. entities that fund the ILF include the Cherna Moskowitz and Irving Moskowitz Foundations, which respectively contributed over $3 million and $2.1 million in 2018.[334]

2. Nahalat Shimon International & Nahalat Shimon

Nahalat Shimon is an Israeli settler organization controlled by an opaque array of U.S.- and Israeli-registered entities, including the U.S. company Nahalat Shimon International (NSI).[335] Neither Nahalat Shimon nor NSI maintains a public website. Nahalat Shimon functions as both a settler organization and a real

325. *Id.*

326. *Donations*, ISR. LAND FUND, https://web.archive.org/web/20211202062056/http://www.israellandfund.com/en-us/contact/donations.htm [https://perma.cc/777K-KJZG] (last visited Mar. 18, 2023) (previous version of ILF website accessed via Wayback Machine).

327. *Id.*

328. *Central Fund of Israel*, PROPUBLICA: NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/organizations/132992985 [https://perma.cc/B37C-NJXS] (last accessed Mar. 18, 2023). According to CFI's most recent tax filings, the organization took in approximately $48 million in tax-deductible contributions in both 2020 and 2021. *Id.*

329. Tlaib, Bush, Ocasio-Cortez, Carson, Pocan, McCollum, & Pressley, *supra* note 300.

330. Lowry, *supra* note 290.

331. *Id.*

332. Kane, *supra* note 5.

333. *Id.*

334. Lowry, *supra* note 290.

335. *See Money Trail*, *supra* note 291.

estate company.[336] Tzahi Mamo, an Israeli settler from the Ofra settlement, is the public face of Nahalat Shimon.[337] A 2012 *Haaretz* investigation into Nahalat Shimon's efforts to dispossess Palestinians in the West Bank demonstrates the coercive tactics that the settler organization employs.[338] An unnamed Israeli lawyer who had worked with Mamo stated that he and his colleagues are driven by "pure ideology," that "[t]hey are focused solely on the question of how to redeem land," and that their approach is that "the end justifies the means."[339] Nahalat Shimon goes to great lengths to obscure its identity to Palestinian property owners during property transactions.[340]

Nahalat Shimon has played a particularly active role in coordinating legal battles in Israeli courts to dispossess Palestinians in Sheikh Jarrah and transfer Israeli settlers into the neighborhood.[341] Since the 1990s, the organization has filed and funded legal battles against 28 Palestinian families in the Karm al-Ja'ouni neighborhood of Sheikh Jarrah.[342] By 2009, Nahalat Shimon had succeeded in forcibly expelling the Fawzia el-Kurd, al-Ghawi, and Hanoun families, displacing 11 households and 67 people.[343] Nahalat Shimon provided no compensation or arrangements for alternative housing for the families.[344] The organization immediately transferred the homes to Israeli settlers.[345] Nahalat Shimon then transferred part of the Rifqa el-Kurd household's home to settlers in 2009.[346] The organization continued to pursue eviction suits against other families in Karm al-Ja'ouni, obtaining favorable rulings from Israeli courts in proceedings against seven other families: the al-Sabbagh, el-Kurd, Skafi, al-Qasim, al-Ja'ouni,

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336. THE CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, THE COAL. FOR JERUSALEM, & THE SOC'Y OF ST. YVES, CATH. CTR. FOR HUM. RTS., OCCUPIED EAST JERUSALEM: "DE-PALESTINIZATION" AND FORCIBLE TRANSFER OF PALESTINIANS 30 n.1 (2014), http://www.saintyves.org/uploads/478c319dfbc0b6abd807b7377c485182.pdf [https://perma.cc/QM24-ME7H].

337. *Money Trail*, *supra* note 291.

338. *See generally* Uri Blau, *Haaretz Probe: The Settler Behind Shadowy Purchases of Palestinian Land in the West Bank*, HAARETZ (June 8, 2012) https://www.haaretz.com/2012-06-08/ty-article/.premium/the-settler-behind-shadowy-purchases-of-palestinian-land-in-the-west-bank/0000017f-f5fc-d044-adff-f7fdbdb70000 [https://www.perma.cc/4Q9Z-VQ57].

339. *Id.*

340. Mamo's former colleague explained, "[o]f course there are collaborators who do not want their names to be known . . . a great deal of secrecy and confidentiality is involved. There are all sorts of methods, but we do not talk about such things." *Id.* (omission in original). Another *Haaretz* source specified that the "name of the game" for Nahalat Shimon is to hide the fact that the ultimate buyer is an Israeli settler organization. *Id.* To assist with this obfuscation, Mamo created a company called Al Wattan ("the homeland" in Arabic). *Id.* Nahalat Shimon works through non-Jewish "middlemen" who locate and purchase land or property from Palestinians. *Id.* The middlemen then transfer the property to Al Wattan. *Id.*

341. Joint Urgent Appeal, *supra* note 321, at 8–9.

342. *Id.* at 5, 8.

343. *Id.* at 8.

344. *Id.*

345. *Id.*

346. *Id.*

Hammad, Dajani, and Daoudi families, totaling 87 people and 28 children.[347] These families face imminent risk of being forcibly expelled from their homes.[348]

Beyond the eviction suits, Nahalat Shimon, with the support of the ILF, has also made public its plans to build an Israeli settlement in Sheikh Jarrah.[349] Nahalat Shimon submitted Town Planning Scheme (TPS) 12705 to the local planning committee of the Jerusalem Municipality in 2005 and again in 2008.[350] TPS 12705 is a proposal to construct a 200-unit settlement in Sheikh Jarrah.[351] The settlement would be built on the land of the 28 Palestinian families against whom Nahalat Shimon has pursued legal battles. The plan would require the removal of 500 Palestinian residents.[352] In 2017, the Jerusalem Building Committee advanced four settlement building projects in Sheikh Jarrah, including Nahalat Shimon's TPS 12705.[353]

A 2021 *VICE News* documentary with over 7.8 million views evinces the close relationship between NSI and Israeli settlers' efforts to dispossess the el-Kurd family in Sheikh Jarrah.[354] The video includes interviews with Muna el-Kurd and Yaacov (Justin) Fauci, an American-Israeli settler originally from Long Island, NY, who is occupying part of the el-Kurd family's home.[355] The interviewer describes Fauci as having been "recruited by a U.S.-based company called Nahalat Shimon International, which owns the property under Israeli law."[356] Fauci elaborated in the *VICE* interview, explaining:

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347. *Id.*

348. *Id.*

349. Press Release, Amnesty Int'l, Israel/OPT: End Brutal Repression of Palestinians Protesting Forced Displacement in Occupied East Jerusalem (May 10, 2021), https://www.amnesty.org/en/latest/news/2021/05/israel-opt-end-brutal-repression-of-palestinians-protesting-forced-displacement-in-occupied-east-jerusalem [https://perma.cc/2E9Y-TJ4Y]; IR AMIM, EVICTIONS AND SETTLEMENT PLANS IN SHEIKH JARRAH: THE CASE OF SHIMON HATZADIK 1–2, 13 (2009), https://www.ir-amim.org.il/sites/default/files/SheikhJarrahEngnew.pdf [https://perma.cc/9RCP-PKYJ].

350. DAVID HUGHES, NATHAN DEREJKO, & ALAA MAHAJNA, CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, DISPOSSESSION AND EVICTION IN JERUSALEM: THE CASES AND STORIES OF SHEIKH JARRAH 12, 17–18, 20 (2009), https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb10/docs/Sheikh_Jarrah_Report-Final.pdf [https://perma.cc/Y5TU-NA2J].

351. *Id.* at 12 n.15, 17, 18.

352. *Id.* at 17.

353. Nigel Wilson, *Sheikh Jarrah Family Faces Eviction to Benefit Settlers*, AL-JAZEERA (Aug. 7, 2017), https://www.aljazeera.com/features/2017/8/7/sheikh-jarrah-family-faces-eviction-to-benefit-settlers [https://perma.cc/ERK7-S4JR]; *New Settlement in Sheikh Jarrah, 1,800 Housing Units in East Jerusalem to Be Discussed by Regional Committee*, PEACE NOW (July 3, 2017), https://peacenow.org.il/en/new-settlement-sheikh-jarrah-1800-housing-units-east-jerusalem-discussed-regional-committee [https://perma.cc/4RAQ-TXGT].

354. VICE News, *supra* note 313, at 06:55–07:30.

355. *Id.*; Rayhan Uddin, *Who is Yaakov Fauci, the New Yorker Squatting in Sheikh Jarrah?*, MIDDLE E. EYE (May 26, 2021, 9:38 AM), https://www.middleeasteye.net/news/yaakov-fauci-israeli-settler-new-york-sheikh-jarrah [https://perma.cc/S7FF-SSPB].

356. VICE News, *supra* note 313, at 07:18–07:30.

> "I have an arrangement with the owners of the house . . . I have no ownership over this property . . . The right I have is that the owner of the house wants me to live here. And he wants there to be Jews living in his house . . . If I leave, I will be replaced immediately, and I venture to think that whoever comes here is not going to be as easy going as I am."[357]

Fauci refused to confirm whether he was paying rent,[358] leading to speculation that NSI was paying Fauci to occupy the el-Kurd family's land.[359]

The entities linked to Nahalat Shimon include the U.S. corporation Nahalat Shimon International (NSI) and the Israeli corporation Shimon Hazadik Holdings Ltd.[360] Both list Seymour Braun, a U.S. attorney with law offices in New Jersey, as their director.[361] Nahalat Shimon appears to have created successive shell organizations to obfuscate its ownership and funding sources. Shimon Hazadik Holdings controls all of Nahalat Shimon's shares.[362] It was initially owned by a trust that was in turn managed by a Liberian company.[363] The management company later relocated to the Marshall Islands.[364] Shimon Hazadik Holdings then transferred its shares to Shimon Hazadik Portfolio C.V. L.P.[365] This partnership is registered in Delaware and represents a reincarnation of Shimon Hazadik C.V., a Dutch company established to "invest in real-estate projects in Jerusalem."[366] Braun is listed as an official for most of these companies.[367]

3. American Friends of Ateret Cohanim & Ateret Cohanim

American Friends of Ateret Cohanim (AFAC) is the U.S. nonprofit fundraising arm of the Israeli settler organization Ateret Cohanim.[368] Ateret Cohanim self-identifies as "the leading urban land reclamation organization in Jerusalem" and has been active for over 40 years.[369] The organization engages in what its director,

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357. *Id.* at 07:39–08:13, 09:14–09:21.

358. *Id.* at 07:39–07:47.

359. Chris Menahan, *VICE Interviews American-Israeli Settler Jacob Fauci of "If I Don't Steal It Someone Else Is Going to" Fame*, INFORMATIONLIBERATION (May 24, 2021), https://www.informationliberation.com/?id=62255 [https://perma.cc/W3V2-TX9E].

360. *Money Trail*, *supra* note 291.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *American Friends of Ateret Cohanem Inc*, GUIDESTAR, https://www.guidestar.org/profile/11-2706563 [https://perma.cc/X2DL-MTXF] (last visited Feb. 21, 2023).

369. ATERET COHANIM, https://www.ateretcohanim.org/ [https://perma.cc/FG38-TTDN] (last visited Feb. 21, 2023).

Daniel Luria, calls "ideological real estate"[370] to install Jewish settlers in East Jerusalem.[371] Ateret Cohanim describes its work in militarized terms. In a video embedded on the home page of the organization's website, Luria states that "Ateret Cohanim, ever since the Six Day War [in 1967], has been fighting the Seventh Day War."[372] The organization offers tours of the "frontlines of urban pioneering in Jerusalem."[373]

Ateret Cohanim has concentrated the brunt of its land expropriation efforts outside of Sheikh Jarrah, in other parts of occupied East Jerusalem, particularly in the Old City[374] and Silwan.[375] These efforts include eviction suits against 87 Palestinians in the Batan al-Hawa neighborhood of Silwan.[376]

A YouTube video from 2011, documenting Mohammed and Muna el-Kurd's story, features a bus of Israeli tourists led by Luria onto the el-Kurd family's property, in what appears to be an official Ateret Cohanim tour.[377] During this tour, Luria taunts the camera,[378] and a man announces to the crowd via megaphone: "Soon it will all be ours. Then we can get them out. It will happen. I will gladly update you."[379]

Ateret Cohanim entered into a "covert and controversial" agreement with the Israel Land Administration to buy Karm al-Mufti, a ten-acre acre olive grove in Sheikh Jarrah.[380] This agreement took place notwithstanding "acknowledgment by Israeli authorities" that the Arab Hotel Company owns Karm al-Mufti.[381] Ateret Cohanim reportedly intends to build a 250-unit Israeli settlement on the property, despite the Arab Hotel Company's documented ownership and previous

370. Pierre Klochendler, *The Battle for Real Estate in Jerusalem's Old City - Part 2*, I24NEWS (Sept. 3, 2022, 9:00 AM), https://www.i24news.tv/en/news/israel/politics/1661967535-the-battle-for-real-estate-in-jerusalem-s-old-city-part-2 [https://perma.cc/52ZG-W3YH].

371. Caridi, *supra* note 5 ("Ateret Cohanim is involved in the restitution claims of old Jewish properties. They buy properties that they claim were formerly owned by Jews, and restructure apartments" and "seek to 'redeem' as many houses as possible in the Palestinian districts of Jerusalem.").

372. Ateret Cohanim, *Ateret Cohanim Virtual Tours - An Introduction*, VIMEO, at 01:27–01:29 (Aug. 26, 2020, 9:47 AM), https://vimeo.com/451856218 [https://perma.cc/T4GH-EZXT].

373. *Tours*, ATERET COHANIM, https://www.ateretcohanim.org/tours-2/ [https://perma.cc/BWK6-2F9Z] (last visited Feb. 21, 2023).

374. Caridi, *supra* note 5.

375. *Settlers Took Over 3 New Houses in Silwan*, PEACE NOW (Apr. 8, 2021), https://peacenow.org.il/en/settlers-took-over-3-new-houses-in-silwan [https://perma.cc/292Y-3HY4].

376. Kane, *supra* note 5.

377. The Guardian, *East Jerusalem: Sharing Our House with Israeli Settlers in Sheikh Jarrah*, YOUTUBE, at 04:37–06:15 (June 8, 2011), https://www.youtube.com/watch?v=ksnLom8OD9E [https://perma.cc/X5L8-J9DU].

378. *Id.* at 04:59–05:10.

379. *Id.* at 05:26–05:31.

380. HUGHES, DEREJKO, & MAHAJNA, CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, *supra* note 350, at 17.

381. *Id.*

requests to begin commercial development on the site.[382] Ateret Cohanim is also backing construction of a complex for Israeli settlers consisting of 100 housing units, a synagogue, and a day care center, following the expropriation and 2011 demolition of the Shepherd Hotel in Sheikh Jarrah.[383]

Ateret Cohanim's "Donate" page directs contributions via AFAC, providing AFAC's Woodmere, NY address and its U.S. tax ID number.[384] The page specifies that donations "enable American Friends of Ateret Cohanim" to support Ateret Cohanim's projects, including providing "increased security" to settlers.[385] AFAC's current director, Chaim Leibtag, is listed on Ateret Cohanim's "Meet the Team" page.[386] According to Luria, AFAC's fundraising "activity in New York goes solely toward land redemption."[387] Luria has stated that Ateret Cohanim receives 60% of its budget from U.S. donations via AFAC.[388] AFAC gave Ateret Cohanim over $525,000 in 2017.[389] The Cherna Moskowitz Foundation gave $50,000 to AFAC in 2018.[390]

4. Friends of Ir David & Elad

U.S. nonprofit Friends of Ir David (FID) has provided funding to Elad (also known as the Ir David Foundation).[391] Elad is a prominent far-right Israeli settler organization operating in East Jerusalem.[392] The organization's stated objective is to "Judaize" East Jerusalem by transferring in as many Israeli settlers as possible.[393] Elad has focused on establishing and expanding settlers' presence in the East Jerusalem neighborhood of Silwan, including by seeking the demolition of

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382. MA'AN DEV. CTR., MEANS OF DISPLACEMENT: CHARTING ISRAEL'S COLONISATION OF EAST JERUSALEM 46 (2010), https://www.maan-ctr.org/old/pdfs/JerusalemReport4Web.pdf [https://perma.cc/PD5P-HSRQ].

383. *Israeli Plans Targeted the East Jerusalem News Settlement Neighborhood in Ash-Sheikh Jarrah*, PALESTINIAN OBSERVATORY ISRAELI COLONIZATION ACTIVITIES (May 26, 2016), http://poica.org/2016/05/israeli-plans-targeted-the-east-jerusalem-news-settlement-neighborhood-in-ash-sheikh-jarrah/ [https://perma.cc/VL3V-MGUC].

384. *Partner with Us*, ATERET COHANIM, https://www.ateretcohanim.org/donate/ [https://perma.cc/DZC2-25U4] (last visited Feb. 21, 2023).

385. *Id.*

386. *Meet the Team*, ATERET COHANIM, https://www.ateretcohanim.org/the-ateret-cohanim-team/ [https://perma.cc/6V68-89LA] (last visited Feb. 21, 2023).

387. Blau, *supra* note 294.

388. *Id.*

389. Kane, *supra* note 5.

390. Lowry, *supra* note 290.

391. *Id.*

392. Yarden Skop & Nir Hasson, *Israel to Give Highest Honor to Leader of Group That Settles Jews in Arab Jerusalem*, HAARETZ (Mar. 16, 2017), https://www.haaretz.com/israel-news/2017-03-16/ty-article/.premium/israel-to-give-highest-honor-to-leader-of-group-that-settles-jews-in-arab-jerusalem/0000017f-da77-d432-a77f-df7fab630000 [https://perma.cc/LLX3-Z7JQ].

393. Joel Greenberg, *Settlers Move into 4 Homes in East Jerusalem*, N.Y. TIMES (June 9, 1998), https://www.nytimes.com/1998/06/09/world/settlers-move-into-4-homes-in-east-jerusalem.html [https://perma.cc/PA7L-LKK4].

Palestinians' homes to make way for an archaeological theme park.[394] The organization has engaged in dispossession efforts in Sheikh Jarrah as well, however. Elad took over half of the El-Kurd family home in Sheikh Jarrah in 2009.[395]

Elad's U.S. fundraising arm, FID, gave the organization $36 million between 2006 and 2013.[396] Some of FID's largest contributions come from the Cherna Moskowitz Foundation and the Koum Family Foundation, the philanthropic arm of Jan Koum, one of the co-founders of the messaging application WhatsApp.[397] The Koum Family Foundation donated $3 million to Friends of Ir David in 2018.[398] In addition to disclosed funding from FID, Elad received over $115 million from companies registered in tax havens like the Virgin Islands, Bahamas, and Seychelles.[399] These countries do not require donor organizations to disclose their contributions;[400] some of this funding may have come from FID or other U.S. entities.

U.S. entities are coordinating with Israeli settler organizations to systematically dispossess Palestinians in Sheikh Jarrah. The next section applies the evidential grouping principles detailed in Section II(D) to these harms to illustrate how practitioners can establish causation in tort claims against U.S. entities in state court and under state law.

C. Applying Evidential Grouping

Evidential grouping principles translate well to the context of U.S. actors facilitating harms in Sheikh Jarrah. This analysis proves relevant both for U.S. practitioners working to support Palestinians harmed by the Israeli settlement enterprise and, more broadly, for those seeking post-ATS paths toward redress for communities harmed by U.S. actors' support for international human rights violations. As discussed in *supra* Section II, state-law tort claims against U.S.-based entities facilitating violations by other actors can be framed as standard torts (such as aiding and abetting assault and battery, wrongful death, trespass, seizure, or other torts). Liability is straightforwardly available for legal persons like corporations and nonprofits in the context of standard tort claims.

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394. Mel Frykberg, *Anger Rises over U.S. Tax Dollars for Settlements*, INTER PRESS SERV. (July 24, 2010), http://www.ipsnews.net/2010/07/anger-rises-over-us-tax-dollars-for-settlements/ [https://perma.cc/PC33-B4UU].

395. Tamara Nassar, *The Ongoing Nakba in Jerusalem*, ELEC. INTIFADA (Mar. 28, 2021), https://electronicintifada.net/blogs/tamara-nassar/ongoing-nakba-jerusalem [https://perma.cc/8K74-JDAJ].

396. Kane, *supra* note 5.

397. Lowry, *supra* note 290.

398. *Id.*

399. Uri Blau & Nir Hasson, *Right-Wing Israeli Group Elad Received Millions from Shadowy Private Donors*, HAARETZ (Mar. 6, 2016), https://www.haaretz.com/2016-03-06/ty-article/.premium/right-wing-israeli-group-elad-received-millions-from-shadowy-private-donors/0000017f-e696-df2c-a1ff-fed709090000 [https://perma.cc/M9Z4-WXJ2].

400. *Id.*

1. General Applicability of Evidential Grouping

Funding from U.S. entities has, as intended, facilitated and contributed to great harm to Palestinian families in Sheikh Jarrah, including home expulsions, illegal expropriations, and population transfers. This harm constitutes grave violations of international law.[401] U.S. financiers are culpable since they are funding and enabling this harm: these U.S.-based entities have been funneling money to illegal settlements for decades, with intent to commit (or, at the very least, knowledge of) the violations they enable.[402] The causal links between and among multiple actors pose a challenge for establishing but-for causation. Requiring standard but-for causation for an individual defendant U.S. financier would foreclose liability because of the number of actors involved in the Israeli settlement enterprise in Sheikh Jarrah, including multiple U.S.-based financiers and Israeli settler organizations.[403] This would leave Palestinian individuals and families in Sheikh Jarrah remediless, despite abundant evidence of past and ongoing harm, and U.S. entities' role in that harm.[404] Finally, U.S. entities have strategically limited the availability of information pertinent to showing causation and stand to benefit from these evidentiary limitations.[405]

Applying a strict but-for causation test would defeat liability for state tort claims against U.S. entities for their role funding Palestinian dispossession by Israeli settler organizations in Sheikh Jarrah. Many actors—including multiple U.S.-based financiers, settler organizations, multinational corporations and banks, and Israeli institutions—are involved in the settlement enterprise in Sheikh Jarrah. This gives rise to causal over-determination (where the harm would still have occurred absent the specific U.S. actor's conduct, making it sufficient but not necessary) and under-determination (where a U.S. actor's conduct was neither necessary nor sufficient to bring about the harm, considered in isolation). Any single

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401. *See supra* notes 6–8, 24–26, 221–223.

402. This context is distinct from typical human rights lender liability claims. In those cases, plaintiffs have often been unable to recover from banks or other lenders in circumstances where the lender's only causal involvement was the provision of broad, non-targeted funding. These lenders are often multinational development banks with colossal portfolios that fund dozens or hundreds of projects at a time. *See generally* PETER BIRGHOFFER, PHILIP DALGARNO, SAI SIMRITA DHAMODARAN, ITAI THALER, CHER HUIYAN ZHANG, & CELINE YAN WANG, N.Y. Univ. Sch. of L. INT'L ORGS. CLINIC, LENDER LIABILITY AND DUE DILIGENCE FOR ENVIRONMENTAL AND SOCIAL HARM: A COMPARATIVE ANALYSIS 9–12, 24–28, 31 (Itai Thaler ed., 2021) https://www.iilj.org/wp-content/uploads/2021/12/Lender-Liability-and-Due-Diligence-Final-April-22-1.pdf [https://perma.cc/R85Q-UY4Y] (providing an overview of U.S. lender liability in the context of human rights violations). Here, however, U.S. financiers of Israeli settler organizations are supplying—not lending—funds that are intentionally and specifically targeted toward illegally settling Palestinian territory and displacing Palestinian communities living there. In some cases, these U.S. entities' central mission is to facilitate this type of harm; many such actors have made public admissions to that effect. *See supra* Section III(B).

403. *See supra* Section III(A).

404. *See supra* Section III(B).

405. *See id.*

U.S. entity, considered in isolation, is not responsible by a preponderance of the evidence for causing prospective plaintiffs' injuries. If standard but-for causation were applied in this context, it would leave plaintiffs without a remedy—despite abundant evidence that Palestinians in Sheikh Jarrah are experiencing "concrete and devastating harms" at the hands of settlement organizations financed by U.S. actors.[406]

Palestinians in the neighborhood have been and continue to be subjected to land expropriations, forced home expulsions, coercive property transfers, and rising settler violence.[407] *See supra* Section III(A) for a discussion of how this conduct constitutes grave breaches of international humanitarian law and the law of occupation. Palestinians in Sheikh Jarrah from the al-Ghawi, Shamasneh, and el-Kurd families have described the experience of forced home expulsions and dispossession as "dying a hundred times a day,"[408] "a tragedy that cannot be described in words,"[409] "heartbreaking,"[410] "psychological torture,"[411] and "a wound I feel deep down to my bones."[412] In the 2021 *VICE News* piece, Muna el-Kurd related that she feels "oppressed," "disturbed," and "exhausted" every time she sees the Israeli settlers living in part of her family's home.[413] El-Kurd explained, through tears, that the situation is particularly painful because "[t]his is our land. I was born, raised, and have lived here. How can someone come and take it? . . . This is a war crime. Forced eviction is a war crime."[414]

According to a member of the Hanoun family, forced expulsion "has destroyed our lives."[415] Another member of the Shamasneh family has explained that the threat of imminent forced displacement from their home feels "as though [Israeli settler organizations] are taking all my history, all my life."[416] Maryam al-Ghawi has protested outside her home every day since her family's forced

406. Paroline v. United States, 572 U.S. 434, 452 (2014).

407. *See supra* Section III(A).

408. Rory McCarthy, *Families Evicted from Their East Jerusalem Homes After 50 Years*, GUARDIAN (Aug. 24, 2009, 2:12 PM), https://www.theguardian.com/world/2009/aug/24/west-bank-east-jerusalem-evictions [https://perma.cc/U3WR-MYR5].

409. Budour Youssef Hassan, *Defying Israel's Eviction Orders in East Jerusalem*, ELEC. INTIFADA (Sept. 15, 2017), https://electronicintifada.net/content/defying-israels-eviction-orders-east-jerusalem/21726 [https://perma.cc/Q5FE-8NK8].

410. *Id.*

411. Jaclynn Ashly, *Sheikh Jarrah Palestinians at Mercy of Israeli Court,* NEW FRAME (May 13, 2021), https://www.newframe.com/sheikh-jarrah-palestinians-at-mercy-of-israeli-court/ [https://perma.cc/GCL3-XG8B].

412. *Id.*

413. VICE News, *supra* note 313, at 05:54–06:04.

414. *Id.* at 06:18–06:30.

415. HUGHES, DEREJKO, & MAHAJNA, CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, *supra* note 350, at 10.

416. Wildman, *supra* note 320.

displacement by Israeli settlers in 2009.[417] Despite the passage of time, al-Ghawi has confirmed that the home expulsion "has remained live in my memory as if it happened just a few minutes ago."[418]

This harm is magnified by the profound collective trauma of being subjected to ethnic cleansing. According to a member of the Salehiya family: "We will not flee again. We have nowhere else to go. You expelled us once already in 1948. We either die in our home or we live. We are not leaving."[419] Similarly, members of the Shamasneh family have affirmed that "[w]hat is going on in Sheikh Jarrah has nothing to do with property laws" and is "not a simple conflict over real estate."[420] The Shamasnehs frame their own experience of displacement as part of "a long-term Israeli plan to uproot us from our neighborhood and replace us with Jewish settlers," warning that "evicting us will only be the start of evicting all the families who are under threat."[421]

The harm the Israeli settlement enterprise causes Palestinians in Sheikh Jarrah is a product of complex causal relationships not in existence when historical tort causation jurisprudence emerged. The current political, social, and economic reality differs drastically from that anticipated by traditional tort doctrine. Moreover, the Israeli settlement enterprise—like many situations that have resulted in long-standing human rights violations and other international-law abuses—operates by way of a constellation of actors and transnational financial flows.

Because it is "in a continual state of development and evolution,"[422] tort law is well-positioned to respond to these changes by expanding access to redress, as it has many times before. State courts have long recognized that tort law is dynamic, and that courts play a key role in adapting and expanding tort law to meet the changing needs and demands of an increasingly complex and globalized reality.[423] Courts have observed that circumstances have changed drastically since the initial development of U.S. tort jurisprudence in the eighteenth and nineteenth centuries.[424] As such, courts should not "adhere rigidly to prior doctrine" that

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417. *Israeli Settlers in Sheikh Jarrah Barricade Themselves in Palestinian Home*, NEW ARAB (May 10, 2021), https://english.alaraby.co.uk/news/israeli-settlers-barricade-themselves-sheikh-jarrah-home [https://perma.cc/V9TF-ULVU].

418. Mohammad Shabaan, *Nowhere to Go but the Sidewalk: Sheikh Jarrah Evictions*, FRIENDS OF AL-AQSA (May 6, 2021), https://www.foa.org.uk/20210506-nowhere-to-go-but-the-sidewalk-sheikh-jarrah-evictions/ [https://perma.cc/4Y3R-AHHY].

419. Bethan McKernan, *Israeli Police Demolish Palestinian Family's Sheikh Jarrah Home*, GUARDIAN (Jan. 19, 2022, 7:17 AM), https://www.theguardian.com/world/2022/jan/19/israeli-police-evict-palestinian-family-from-sheikh-jarrah-home [https://perma.cc/7KGY-MRSU].

420. Youssef Hassan, *supra* note 409.

421. *Id.*

422. Lockhart, *supra* note 104, at 122; *see also supra* notes 114–116.

423. Sindell v. Abbott Lab'ys, 607 P.2d 924, 936 (Cal. 1980). The California Supreme Court has emphasized that courts can and should consider the changing needs of a "contemporary complex industrialized society." *Id.*

424. Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 896, 901 (Mass. 2009).

would "deny[] recovery" to deserving plaintiffs.[425] Instead, they "must adapt" and "fashion remedies to meet these changing needs" by extending tort law's protections to the tortious harms Palestinian individuals and communities in Sheikh Jarrah are experiencing.[426] Using evidential grouping would provide an avenue for Palestinian communities in Sheikh Jarrah, who have been harmed by U.S. financiers' role in the Israeli settlement enterprise, to pursue legal redress.

Finally, the limited availability of causation evidence—a void that U.S. entities in many cases have created or exacerbated—further strengthens the argument for evidential grouping in this context. U.S.-based financiers and settler organizations have endeavored to limit available information about their funding, including the precise amounts of money flowing from U.S. entities to settler organizations and what specific activities and human rights violations the donations are used for.[427]

U.S. actors should not be able to "gain the advantage" of outsourcing violative conduct—from expropriations to home takeovers to coercive property transfers—to the settler organizations that they fund, while claiming that they do not have evidence about how their money is used.[428] As in *Summers* and *Haft*, some causation information is likely to remain unavailable to plaintiffs. A complete, publicly available accounting of U.S. actors' financial activities—writ large or taken individually—including all of the settler organizations they are funding and what specific activities the funds are used for, is unavailable. U.S.-based financiers will generally be better positioned than plaintiffs to fill in this information, since they have much more complete access to their own financial records than plaintiffs experiencing downstream harm.[429] Even if these U.S. actors lack specific information about how their donations are being used, *Haft* and *Summers* suggest that this argument will be unavailing: defendants should not be "permit[ted] to gain the advantage of the lack of proof" they create.[430]

Just as it is not possible to trace the specific path of an asbestos fiber,[431] it may not be possible to trace a specific dollar amount from a given U.S. actor to the harm carried out by a settler organization or settlers themselves. Courts have applied evidential grouping even in cases without or with highly limited available direct evidence of causation.[432] Here, U.S. entities have made public statements on their websites and in the media; they have also maintained funding

425. *Sindell*, 607 P.2d at 936. The California Supreme Court observed: "*If* we were confined to [existing tort causation theories], we would be constrained to [foreclose liability]." *Id.* (emphasis added). The court then proceeded to extend a remedy for plaintiffs. *Id.*

426. *Donovan*, 914 N.E.2d at 901; *Sindell*, 607 P.2d at 936.

427. *See supra* notes 295–297.

428. *See* Haft v. Lone Palm Hotel, 478 P.2d 465, 474–75 (Cal. 1970).

429. *See, e.g.*, *Money Trail*, *supra* note 291; Blau, *supra* note 338.

430. *Haft*, 478 P.2d at 474; Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948) (citing Ybarra v. Spangard, 154 P.2d 687, 689 (Cal. 1944)).

431. Rutherford v. Owens-Ill., Inc., 941 P.2d 1203, 1219 (Cal. 1997).

432. *See supra* Section II(D).

relationships with settler organizations in the aftermath of multiple public exposés, investigations, and admissions of intent to expropriate Palestinians' land and take over their homes, with the ultimate goal of ethnically cleansing the West Bank.[433] In comparison with the scientifically unknowable circumstances surrounding causation in a number of successful toxic torts cases, substantial factor causation in the context of U.S. financiers' support for illegal Israeli settlements should be easier to establish. Some causation information likely will be available. Similarly, plaintiffs will likely be able to demonstrate that Israeli settlement actors have played a role in destroying or withholding evidence that could elucidate the causal links between U.S. organizations' funding and specific harms to Palestinians in Sheikh Jarrah.

As described in *supra* Section II(C), evidential grouping contains inherent limiting principles that would ensure that liability for U.S. entities' support for the Israeli settlement enterprise does not sweep beyond what is practicable or just.[434] First, it involves burden-shifting. After a plaintiff meets their *prima facie* burden of causation, defendants will have an opportunity to avoid liability if they can provide particularized evidence that they were not a proximate cause of the harm or could not have caused the harm, or that one or more of the other defendants was a but-for cause of the injury.[435] Second, except in circumstances of concerted action (which carries joint and several liability),[436] defendants are held liable solely for their own conduct through proportional liability.[437]

2. Specific Applicability of Alternative Causation Frameworks

Of the six versions of evidential grouping outlined in Section II(D), increased risk probability, aggregate causation, concerted action, and substantial factor causation prove particularly relevant. All map closely onto the facts and causal relationships presented by U.S. actors funding Israeli settler organizations operating in Sheikh Jarrah.[438] U.S.-based actors funnel hundreds of millions of dollars to Israeli settler organizations. Many U.S.-based entities such as CFI, Nahalat

433. *See supra* Section III(B).

434. *See supra* notes 143–159.

435. *See supra* notes 119–126.

436. *See supra* note 197.

437. *See supra* note 156.

438. But-for with burden-shifting proves inapposite to the situation in Sheikh Jarrah because it covers circumstances in which one actor in a group is fully responsible for causing the harm. The remainder are innocent. Insufficient evidence makes it impossible to determine which actor is at fault. *See* Summers v. Tice, 199 P.2d 1, 1–2 (Cal. 1948). Here, there are multiple tortious actors who share culpability for the tortious conduct. Likewise, the multiple sufficient causes theory does not fit because it applies to circumstances where two causes, each of which would have independently caused the full injury, converge. *See* Kingston v. Chi. & Nw. Ry. Co., 211 N.W. 913, 915 (Wis. 1927). U.S. actors and Israeli settler organizations are not independent of one another, and neither would cause the full harm without the other. *See supra* notes 273–297.

Shimon International, AFAC, and Friends of Ir David are funding Israeli settler organizations in Sheikh Jarrah.[439]

The causal relationship of U.S. entities to Israeli settler organizations and the resultant harm to Palestinians in Sheikh Jarrah can be articulated in several ways, depending on the alternative causation framework or frameworks that best fit the facts particular to a given plaintiff and the harm they have experienced.

a. Increased Risk Probability

The causal relationship could first be framed in terms of increased risk probability. Under this alternative causation framework, Palestinian plaintiffs could establish liability by showing that U.S.-based entities have increased the risk of the type of harm that plaintiffs ultimately experienced. Increased risk probability requires plaintiffs to make a *prima facie* showing that (1) defendants tortiously increased the risk of harm; and (2) the resultant harm plaintiffs experienced is of the type one would expect from defendants' risky conduct, after which the burden shifts to defendants to disprove causation.[440] For instance, in *Haft*, hotel defendants failed to station a lifeguard or post safety signs at their pool, increasing the risk that people could drown.[441] This risk bore out when a father and son subsequently drowned in the defendants' pool, and plaintiffs' evidence of the harm and the risk created by defendants was sufficient to shift the causation burden.[442]

Here, U.S. entities are funding Israeli settler organizations that are carrying out home expulsions, illegal expropriations, population transfers, and other international-law and human rights violations in Sheikh Jarrah.[443] This funding, as intended, concretely increases the risk of harm to Palestinian communities in Sheikh Jarrah. There is a clear nexus between the type of risk created by U.S. financiers and the ultimate harms experienced by Palestinians in Sheikh Jarrah.

b. Aggregate Causation

Palestinian plaintiffs could also frame the causation inquiry under an aggregate causation theory, which provides for proportional liability where an actor's cause is neither necessary nor sufficient.[444] Aggregate causation applies where an individual tortfeasor's conduct, though alone "insufficient to cause the plaintiff's harm, is more than sufficient to cause the harm when combined with conduct by others."[445] The Supreme Court has articulated a more specific aggregate causation test: (1) there is evidence that a defendant has participated in causing harm; (2) a

439. *See supra* Section III(B).

440. *See supra* notes 173–179.

441. Haft v. Lone Palm Hotel, 478 P.2d 465, 467–68 (Cal. 1970).

442. *Id.* at 467–69.

443. *See supra* Section III(B).

444. *See supra* notes 180–196.

445. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (AM. LAW INST. 2010).

plaintiff has unremedied losses caused by ongoing harm; and (3) it is not possible to trace a specific amount of the harm to an individual defendant under standard but-for causation.[446] For instance, *Paroline* involved ongoing harm to the victim from the traffic and possession of child pornography that depicted her, yet because there were thousands of possessors of her images, the relative causal responsibility of any one possessor was negligible.[447] The *Paroline* court applied an aggregate causation analysis to satisfy causation and find the defendant possessor liable.

In the context of U.S. entities funding Israeli settler organizations' violations in Sheikh Jarrah, Palestinian plaintiffs would have little trouble satisfying the aggregate causation test. There is evidence of the scale of funding from U.S.-based organizations like CFI, NSI, AFAC, and AFID to Israeli settler organizations operating in Sheikh Jarrah, such as ILF, Nahalat Shimon, Ateret Cohanim, and Elad.[448] Prospective plaintiffs' losses are ongoing and so far unremedied.[449] Finally, given the limited availability of evidence linking specific dollar amounts from U.S. financiers to the harm experienced by Palestinians in Sheikh Jarrah, it is not possible to precisely quantify the causal role of a given U.S. actor under standard but-for causation.[450] As a result, aggregate causation would provide a viable framing for Palestinian plaintiffs to meet their *prima facie* causation burden.

c. Concerted Action

The context of U.S. actors' support for Israeli settler organizations in Sheikh Jarrah also fits a concerted action theory. Under the concerted action doctrine, courts have imposed joint and several liability in the context of multiple actors that "unite or cooperate"[451] or are "jointly engaged"[452] in acts leading to the harm. Express agreement is not necessary; evidence of an implied or tacit understanding is enough.[453] For instance, in *Gritman*, plaintiffs' home burned down after a group of teenagers trespassed onto their property and negligently built, maintained, and left a fire burning on their deck after consuming a substantial amount of alcohol.[454] The Vermont Supreme Court applied a concerted action framework, holding that the evidence of defendants' joint negligence and the circumstantial

446. Paroline v. United States, 572 U.S. 434, 439, 458 (2014).

447. *Id.*

448. *See supra* Section III(B).

449. *See supra* note 194; *supra* Section III(B).

450. *See supra* notes 293, 295–297.

451. Loeb v. Kimmerle, 9 P.2d 199, 201–03 (1932).

452. Agovino v. Kunze, 5 Cal. Rptr. 534, 537–39 (Ct. App. 1960); *see also* Orser v. George, 60 Cal. Rptr. 708, 713–14 (Ct. App. 1967).

453. Prosser, *supra* note 203, at 429–30.

454. Concord Gen. Mut. Ins. Co. v. Gritman, 146 A.3d 882, 884–87 (Vt. 2016).

evidence of their role in the harm (despite a lack of any direct evidence of causation) satisfied plaintiffs' causation burden.[455]

Of the three streams of concerted action liability, the second—actors knowingly providing tortious "substantial assistance or encouragement" to other actors in causing harm—is the most relevant to the facts presented by U.S.-based entities' role in the Israeli settlement enterprise.[456] In the context of Sheikh Jarrah, U.S. entities including CFI, Nahalat Shimon International, and AFAC are providing substantial assistance or encouragement in the form of extensive funding. The U.S. actors have knowledge—and, indeed, intent—with respect to the harm that their assistance is facilitating.[457] Many of these U.S. entities have been bankrolling Israeli settlement organizations for decades and have made public statements about their strategic goals of effectuating Palestinian dispossession and the expansion of illegal Israeli settlements.[458] They also have knowledge that Israeli settler organizations' conduct is tortious, in light of widely known, accessible information that Israel's actions in occupied Palestine are considered illegal under international law.[459] The Israeli settlement enterprise has been the subject of sustained public outcry and critique on this basis, including by leading local and international human rights organizations.[460] As such, Palestinian plaintiffs could use a concerted action theory to meet their causation burden.[461]

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455. *Id.* at 889 (finding causation under concerted action theory where direct evidence of causation was unavailable but there was enough evidence "from which a jury could connect the dots"); *id.* (quoting Am. Fam. Mut. Ins. Co. v. Grim, 440 P.2d 621, 624 (Kan. 1968)) (finding that circumstantial evidence "need not rise to that degree of certainty which will exclude any and every other reasonable conclusion"); *see also* FDIC v. Loudermilk, 826 S.E.2d 116, 124–29 (Ga. 2019) (responding in the negative as to certified question from Eleventh Circuit regarding whether state apportionment statute abrogated state common-law concerted action rule imposing joint and several liability and analyzing state common-law concerted action liability standard); Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983).

456. RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979). Concerted action liability attaches under any of three circumstances: (a) they commit a tortious act in concert with the other tortfeasor or pursuant to a common design with them; (b) they know that the other's conduct constitutes a breach of duty and give substantial assistance or encouragement to them; or (c) they give substantial assistance to the other in accomplishing a tortious result and their own conduct, separately considered, constitutes a breach of duty to the third person. *Id.*

457. *See supra* Section III(B).

458. *See id.*

459. *See, e.g.*, *International Law and Israeli Settlements*, WIKIPEDIA (Feb. 2, 2023, 8:50 PM), https://en.wikipedia.org/wiki/International_law_and_Israeli_settlements [https://perma.cc/L4NY-DAKJ]; *see also supra* notes 6–8, 24–26, 221–223.

460. *See* sources cited *supra* note 10.

461. This Article sets aside jurisdictional issues that would arise in the context of holding Israeli settler organizations jointly and severally liable under a concerted action theory, noting only that liability might not be available against these non-U.S.-based actors.

d. Substantial Factor

Finally, substantial factor causation could also apply to the causal relationships involved in U.S. entities' support for Israeli settler organizations in Sheikh Jarrah. Substantial factor causation has typically been invoked in toxic torts and products liability cases, where injuries from exposure to toxic substances raise epistemic problems of causation, as detailed in Sections II(C) and (D).[462] This framework requires plaintiffs to make a *prima facie* showing that defendants' tortious conduct was a "substantial factor" in causing their injury, before shifting the burden to defendants.[463] No precise quantification is required. Courts have instead found conduct to be a substantial factor when its causal role contributed less than an estimated 50 percent but more than about 30 percent of a plaintiff's injury.[464]

Prospective plaintiffs from Sheikh Jarrah would be able to make a showing that U.S.-based actors, including the Central Fund for Israel, Nahalat Shimon International, American Friends of Ateret Cohanim, and Friends of Ir David are a "substantial factor" in the harm caused to them by Israeli settler organizations such as the Israel Land Fund, Nahalat Shimon, Ateret Cohanim, and Elad.[465] This presents a different context from typical toxic torts cases, where direct evidence of causation is scientifically unavailable and plaintiffs often must rely on statistical evidence and testimony of scientific experts. The availability of causation information in the context of Sheikh Jarrah exceeds that available in typical substantial factor claims. Plaintiffs can use financial information obtained by investigative journalists[466] as well as promotional information and public statements made by U.S. financiers and Israeli settler organizations[467] to demonstrate that U.S. actors' contributions and support play a substantial causal role in the harm experienced by Palestinians in Sheikh Jarrah. Even with incomplete financial information, publicly available data establish that some settler organizations receive more than 30% of their funding (and in some cases, the vast majority of their funding, as with CFI's relationship to ILF) from U.S. entities.[468]

CONCLUSION

This Article is animated by solidarity with Palestinian communities resisting Israeli apartheid and with the interconnected struggles of all communities organizing against oppression. Large-scale or long-standing human rights violations often involve complex, multi-actor relationships, including state/private-actor and transnational collaborations. Claims against private, non-state actors often

462. *See supra* note 110.

463. *See supra* notes 212–219.

464. *See supra* note 217.

465. *See supra* Section III(B).

466. Blau, *supra* note 293; Blau, *supra* note 294; Blau, *supra* note 338; Kane, *supra* note 5; Lowry, *supra* note 290.

467. *See supra* Section III(B).

468. *See supra* notes 332, 360–367.

represent the only available legal remedy in these multiple-actor scenarios due to foreign state immunities bars that shield state actors from liability for abuses. This Article hopes to provide one more tool for impacted communities, advocates, and legal practitioners engaging in principled struggle toward collective liberation.

The Article offers two contributions in response to the sharp curtailment of legal remedies for international human rights violations in federal court. Tort claims in state courts or under state law could be a powerful new vehicle for international human rights litigation against U.S.-based actors in a post-ATS world. The Article first presents an original proposal for using alternative tort causation theories—all variations on the same principle of evidential grouping—to establish causation in state-law tort claims against U.S. actors contributing to grave international harms. Causation is one area where tort law has been particularly open to accommodating plaintiffs who have experienced harm but who would be unable to access legal redress under existing tort doctrines. Tort law is inherently flexible and has proven doctrinally responsive to the "practical unfairness" of denying relief to plaintiffs in circumstances where standard but-for causation falls short.[469]

The process of building up state common-law tort jurisprudence may move slowly, at least initially. Hoffman & Stephens note that ATS claims took "many years and many decisions" to gain widespread traction and to familiarize judges with the statute's underlying international-law principles.[470] International human rights claims under state tort law will likely undergo a similar iterative process.[471] This expectation accords with the overall arc of tort law's development, which has depended upon both the accumulation of case-by-case decisions by independent state courts[472] and social pressure[473] exerted by shifting public norms and opinions. While U.S.-based litigation related to Palestinian rights faces context-specific challenges,[474] evidential grouping causation theories can make this litigation more effective.

The Article also provides a roadmap for practitioners, showing how alternative tort causation could work in practice to establish liability against U.S. entities that funnel money to Israeli settler organizations operating in Sheikh Jarrah. Thus far, these actors have not been held legally or materially accountable for funding

469. Summers v. Tice, 199 P.2d 1, 3, 5 (Cal. 1948).

470. HOFFMAN & STEPHENS, *supra* note 40, at 22.

471. *Id.*

472. Kenneth S. Abraham, *The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law*, 6 U. PA. J.L. & PUB. AFFS. 347, 352 (2021), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1079&context=jlpa [https://perma.cc/SS3Z-QF66].

473. Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2092 (2019), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2109&context=aulr [https://perma.cc/AN33-Y6NT].

474. *See generally* LIZ JACKSON, DIMA KHALIDI, MARIA LAHOOD, RADHIKA SAINATH, & OMAR SHAKIR, PALESTINE LEGAL & THE CTR. FOR CONST. RTS., THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE U.S. (Sarah Grey ed., 2015), https://palestinelegal.org/s/Palestine-Exception-Report-Final-jpjy.pdf [https://perma.cc/35K8-NZ3S].

and enabling human rights abuses. Marshalling evidential grouping causation principles to bring state-law tort claims against U.S.-based financiers could provide an avenue for long-overdue legal accountability for Palestinian communities impacted by the Israeli settlement enterprise. More broadly, legal practitioners working alongside impacted communities can apply and refine the causation theories proposed by this Article as part of a new phase of post-ATS litigation seeking to hold U.S. actors accountable for contributing to human rights and international-law violations.

APPENDIX I: TIMELINE OF DISPOSSESSION IN SHEIKH JARRAH

1956 – 28 Palestinian families, who had been expelled from their homes in 1948 by Zionist militias, receive homes in Sheikh Jarrah as part of agreement between Jordan and the United Nations (U.N.) Relief and Works Agency for Palestine Refugees in the Near East.[1] Agreement provides that the families will receive title after three years' nominal rent payments and completion of other conditions.[2] Legal title is not transferred to the families before the start of the 1967 Six Day War.[3]

1967 – Israel illegally annexes East Jerusalem following the Six Day War and places the Sheikh Jarrah homes under the control of the Israeli General Custodian.[4]

1972 – Two Israeli settler trusts, the Sephardic Community Committee and the Knesset Israel Committee, claim ownership of the properties.[5] Israeli authorities register the settler trusts as the properties' owners under Israeli law.[6]

1982 – Settler trusts bring eviction suits against 23 of the Palestinian families in Sheikh Jarrah, claiming that the families are squatting on the properties. Yitzhak Toussia-Cohen, attorney for 17 of the families, assents—without their consent—to an agreement by which the families would receive "protected tenant" status in exchange for recognizing the trusts' legal ownership of their properties, paying rent to the settler trusts, and agreeing to strict limitations on modifying or renovating the properties.[7]

1990s – Settler trusts sell their ownership claims to Israeli settler organization **Nahalat Shimon**, which takes over legal battles against Palestinian families in Sheikh Jarrah. Nahalat Shimon seeks to forcibly expel the families for

1. DAVID HUGHES, NATHAN DEREJKO, & ALAA MAHAJNA, CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, DISPOSSESSION AND EVICTION IN JERUSALEM: THE CASES AND STORIES OF SHEIKH JARRAH 10, 17 (2009), https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb10/docs/Sheikh_Jarrah_Report-Final.pdf [https://perma.cc/Y5TU-NA2J][hereinafter "CCPRJ REPORT"]; FORENSIC ARCHITECTURE, *Sheikh Jarrah: Ethnic Cleansing in Jerusalem*, https://forensic-architecture.org/investigation/sheikh-jarrah [https://perma.cc/3CJ6-MYJ3] (last visited Nov. 13, 2023).

2. CCPRJ REPORT, *supra* note 1, at 10.

3. *Id.*

4. *Id.*; *see also* NORWEGIAN REFUGEE COUNCIL, THE ABSENTEE PROPERTY LAW AND ITS APPLICATION TO EAST JERUSALEM 5 n.19, 6 (Feb. 15, 2017), https://www.nrc.no/globalassets/pdf/legal-opinions/absentee_law_memo.pdf [https://perma.cc/75AH-8L3D].

5. CCPRJ REPORT, *supra* note 1, at 17.

6. *Id.* at 11 n.7, 12.

7. *Id.* at 13.

nonpayment of rent and/or unauthorized building or repairs under the 1982 Toussia-Cohen agreement.[8]

1999 – Rifqa al-Kurd family forcibly expelled from part of their home that they had renovated.[9]

2001 – Israeli settlers forcibly occupy part of the **Kamel al-Kurd** family home.[10]

2004 – Israeli municipality plan, **Jerusalem Local Master Plan 2000**, specifies "Maintaining a Solid Jewish Majority in the City" as one of its "main policy goals."[11] The municipality plan proposes building new Jewish neighborhoods in Jerusalem to help maintain a Jewish majority.[12]

2005 – Nahalat Shimon introduces **Town Planning Scheme 12705** to the local planning commission of the Jerusalem Municipality. The plan would authorize construction of a 200-unit settlement in Sheikh Jarrah, and would require the forced expulsion of 500 Palestinian residents.[13]

August 2008 – Nahalat Shimon resubmits **Town Planning Scheme 12705** to the local planning commission of the Jerusalem Municipality.[14]

November 2008 – Israeli police forcibly expel from their home the **Kamel al-Kurd family**, including Mohammed Kamel al-Kurd, a disabled man and

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8. *See* Letter from The Palestinian Hum. Rts. Org. Council; The Civic Coal. for Palestinian Rts. in Jerusalem; Cmty. Action Ctr., Al-Quds Univ.; & Cairo Inst. for Hum. Rts. Stud. to S. Michael Lynk, Special Rapporteur on the Situation of Hum. Rts. in the Palestinian Territory Occupied Since 1967, United Nations et al., Joint Urgent Appeal to the United Nations Special Procedures on Forced Evictions in East Jerusalem 7–9 (Mar. 10, 2021), https://www.alhaq.org/cached_uploads/download/2021/03/10/joint-urgent-appeal-to-the-united-nations-special-procedures-on-forced-evictions-in-east-jerusalem-1615372889.pdf [https://perma.cc/VLR2-N2VQ]

9. THE CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, THE COAL. FOR JERUSALEM, & THE SOC'Y OF ST. YVES, CATH. CTR. FOR HUM. RTS., OCCUPIED EAST JERUSALEM: "DE-PALESTINIZATION" AND FORCIBLE TRANSFER OF PALESTINIANS 31 (2014), http://www.saintyves.org/uploads/478c319dfbc0b6abd807b7377c485182.pdf [https://perma.cc/QM24-ME7H].

10. ECUMENICAL ACCOMPANIMENT PROGRAMME IN PALESTINE AND ISRAEL (EAPPI), SILENTLY DISPLACED IN THE WEST BANK 37 (2009), https://eappi.org/en/resources/publications/silently-displaced-in-the-west-bank-part-1-2009 [https://perma.cc/ZR3K-BGDS][hereinafter "EEAPPI REPORT"].

11. JERUSALEM MUN. PLAN. ADMIN., LOCAL OUTLINE PLAN JERUSALEM 2000, REP. NO. 4: THE PROPOSED PLAN AND THE MAIN PLANNING POLICIES 32 (2004), https://www.alhaq.org/cached_uploads/download/alhaq_files/en/wp-content/uploads/2018/03/LocalOutlinePlanJerusalem2000.pdf [https://perma.cc/JX3B-MPBG]; *see also* NUR ARAFEH, AL-SHABAKA, WHICH JERUSALEM? ISRAEL'S LITTLE-KNOWN MASTER PLANS 4–7 (2016), https://al-shabaka.org/briefs/jerusalem-israels-little-known-master-plans/ [https://perma.cc/B973-UMYT].

12. JERUSALEM MUN. PLAN. ADMIN., *supra* note 11, at 32.

13. CCPRJ REPORT, *supra* note 1, at 12 n.15, 17.

14. *Id.* at 17–18.

wheelchair user with severe kidney disease.[15] The forced expulsion is carried out in the middle of the night. Israeli settlers likely associated with **Nahalat Shimon** immediately move into the al-Kurd home.[16] Mohammed dies from a heart attack less than two weeks after the home expulsion. The settlers occupying the al-Kurd home deny the family's request to bring Mohammed's body back to visit the house for a last goodbye.[17]

2009 – Israel Land Fund begins coordinating legal battle against the **Shamasneh family**.[18]

June 2009 – Nahalat Shimon begins eviction suit against **Sabbagh family**.[19]

August 2009 – Israeli police in riot gear forcibly expel the **al-Ghawi family** and the **Hanoun family** from their homes at gunpoint and before dawn. Fifty-three people are displaced in total, including 19 children.[20] Police and private security assist Israeli settlers in moving into the homes within hours.[21]

Late 2009 – A group of Israeli settlers occupies part of the **Rifqa al-Kurd family's** home, accompanied by private armed security and Israeli police.[22] The settlers set fire to three-year-old Maha al-Kurd's bed and throw the family's furniture and belongings out on the street.[23] **Nahalat Shimon** requests further court order to forcibly expel the family from the rest of their home.[24]

15. EAPPI REPORT, *supra* note 10, at 38, 40.

16. IR AMIM, EVICTIONS AND SETTLEMENT PLANS IN SHEIKH JARRAH: THE CASE OF SHIMON HATZADIK 13 (2009), https://www.ir-amim.org.il/sites/default/files/SheikhJarrahEngnew.pdf [https://perma.cc/9RCP-PKYJ].

17. EAPPI REPORT, *supra* note 10, at 40.

18. Ylenia Gostoli, *Expelled on Eid by Israel: The Shamasnehs' Last Days in Sheikh Jarrah, Occupied Jerusalem*, NEW ARAB (Sept. 6, 2017), https://www.newarab.com/analysis/palestinian-familys-last-days-their-jerusalem-home [https://perma.cc/44NM-VGKR].

19. CCPRJ REPORT, *supra* note 1, at 25–26.

20. EAPPI REPORT, *supra* note 10, at 40; *see also Israel Evicts Palestinian Families*, AL-JAZEERA (Aug. 2, 2009), https://www.aljazeera.com/news/2009/8/2/israel-evicts-palestinian-families [https://perma.cc/AEX2-DJR8].

21. *Id.*

22. U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS. (OCHA), EAST JERUSALEM: KEY HUMANITARIAN CONCERNS 61 (2011), https://www.ochaopt.org/sites/default/files/ocha_opt_jerusalem_report_2011_03_23_web_english.pdf [https://perma.cc/L3VA-TSHU] [hereinafter "OCHA REPORT"]; CCPRJ REPORT, *supra* note 1, at 45.

23. Jaclynn Ashly, *Sheikh Jarrah: When My Enemy Is My Neighbour*, AL-JAZEERA (Oct. 3, 2016), https://www.aljazeera.com/news/2016/10/3/sheikh-jarrah-when-my-enemy-is-my-neighbour [https://perma.cc/3GGK-J4DW]; OCHA Report, *supra* note 22, at 61.

24. CCPRJ REPORT, *supra* note 1, at 16;

2017 – Jerusalem Building Committee advances four settlement building projects in Sheikh Jarrah, including **Nahalat Shimon's Town Planning Scheme 12705**.[25] In September 2017, Israeli police forcibly expel the **Shamasneh family** after they lose their protracted legal battle against the **Israel Land Fund**. Israeli settlers move in the same day.[26] Approximately 200 Israelis march in protest against the home expulsion. Israeli settlers pepper spray and throw stones at the protestors; Israeli police arrest four protestors.[27]

2020 – Israeli courts uphold eviction orders against **al-Kurd, Abu Hasaneh, Dajani, Daoudi, Hammad, Jaouni, Sabbagh,** and **Skafi families**. The courts also order the families to pay **Nahalat Shimon** fees for legal expenses incurred during the eviction suits.[28]

May 2021 – Hundreds of Palestinians and Israelis gather for "freedom march" in Sheikh Jarrah to protest forced home expulsions and call for an end to the Israeli occupation.[29]

January 2022 – A member of the **Salhiya family** states that he will set himself and the family's home on fire if Israeli authorities carry out the eviction order.[30] While the family's appeal is pending before the Israeli Supreme Court, Israeli police forcibly expel the family and demolish their two homes, storage sheds, and a plant nursery.[31] During the forced expulsion, Israeli police arrest 26 people, including Salhiya family members, community members, and activists. Family files

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25. *Id.* at 12 n.15, 18; *New Settlement in Sheikh Jarrah, 1,800 Housing Units in East Jerusalem to Be Discussed by Regional Committee*, PEACE NOW (July 3, 2017), https://peacenow.org.il/en/new-settlement-sheikh-jarrah-1800-housing-units-east-jerusalem-discussed-regional-committee [https://perma.cc/55A7-SJF9].

26. *Forced Eviction in Sheikh Jarrah*, AL-HAQ (Sept. 9, 2017), https://www.alhaq.org/advocacy/6320.html [https://perma.cc/5B6Z-3ULX].

27. Yali (Yael) Marom, *Four Arrested in Jerusalem March Against Eviction of Palestinian Family*, +972 MAG. (Sept. 8, 2017), https://www.972mag.com/four-arrested-in-jerusalem-march-against-eviction-of-palestinian-family/ [https://perma.cc/N8YS-NFVC].

28. *Palestinian Family Evicted from Its Home in East Jerusalem*, U.N. OFF. COORDINATOR FOR HUMANITARIAN AFFS. (OCHA) (Dec. 10, 2020), https://www.ochaopt.org/content/palestinian-family-evicted-its-home-east-jerusalem [https://perma.cc/5LA8-UDJP].

29. Shira Silkoff, *Hundreds of Jews, Arabs Gather to Protest in Sheikh Jarrah and West Bank*, JERUSALEM POST (May 22, 2021), https://www.jpost.com/israel-news/hundreds-of-jews-arabs-gather-to-protest-in-sheikh-jarrah-and-west-bank-668781 [https://perma.cc/W4F7-QUDV].

30. Bethan McKernan, *Israeli Police Demolish Palestinian Family's Sheikh Jarrah Home*, GUARDIAN (Jan. 19, 2022, 7:17 AM), https://www.theguardian.com/world/2022/jan/19/israeli-police-evict-palestinian-family-from-sheikh-jarrah-home [https://perma.cc/7KGY-MRSU].

31. MIDDLE EAST EYE, *Palestinians Submit War Crimes Complaint Against Israel in the ICC* (Aug. 17, 2022), https://www.middleeasteye.net/news/palestinians-submit-war-crimes-complaint-against-israel-icc [https://perma.cc/D5ZG-7AGC].

lawsuit in Jerusalem municipal court seeking to return and rebuild their home. Court rejects appeal, asserting that "the demolition is a reality on the ground."[32]

February 2022 – Far-right Knesset Member Itamar Ben Gvir opens a makeshift office in Sheikh Jarrah, in the **Salem family's** front yard, claiming that he is in the neighborhood there to "look[] after the security" of the settlers amid purported police passivity.[33] Jerusalem Magistrate Court temporarily suspends eviction proceeding of the **Salem family**.[34]

March 2022 –

- Israeli Supreme Court issues order temporarily halting eviction proceedings against **al-Kurd, al-Jaouni, Skafi,** and **Qassem families.** The Court's order includes the condition that the families pay annual rent into a bank account, with the rent monies to be released to **Nahalat Shimon** should the Israeli Justice Ministry rule in favor of the settler organization.[35]
- Palestinian Return Centre delivers oral statement before the U.N. Human Rights Council, calling on the Council to pressure Israel to cease the forced displacement of Palestinians in Sheikh Jarrah.[36] Separately, during a U.N. Security Council (U.N.S.C.) Meeting on the 21st report on U.N.S.C. Resolution 2334 (calling for an end to Israeli settlement activities in occupied Palestine, including in East Jerusalem), U.N. Special Coordinator for the Middle East Peace Process, Tor Wennesland, and multiple member states' representatives condemn ongoing, illegal Israeli settlement activity in Sheikh Jarrah.[37]

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32. MIDDLE EAST MONITOR, *Israel: Court Refuses to Rule on Return of Family to Sheikh Jarrah Home* (Jan. 24, 2022), https://www.middleeastmonitor.com/20220124-israel-court-refuses-to-rule-on-return-of-family-to-sheikh-jarrah-home/ [https://perma.cc/6D2B-ZGNW].

33. *Arrests Made as Israeli Lawmaker Visits East Jerusalem Flashpoint*, AL-JAZEERA (Feb. 13, 2022), https://www.aljazeera.com/news/2022/2/13/arrests-as-israeli-lawmaker-visits-east-jerusalem-flashpoint [https://perma.cc/R2C5-ESWT].

34. Nir Hasson, *Israeli Court Freezes Sheikh Jarrah Eviction amid Jerusalem Tensions*, HAARETZ (Feb. 22, 2022), https://www.haaretz.com/israel-news/.premium-israeli-court-freezes-palestinian-family-s-eviction-from-sheikh-jarrah-home-1.10627636 [https://perma.cc/BLT4-UTR3].

35. Mai Abu Hasaneen, *Israeli Court Cancels Eviction of Palestinian Families in Sheikh Jarrah*, AL-MONITOR (Mar. 10, 2022), https://www.al-monitor.com/originals/2022/03/israeli-court-cancels-eviction-palestinian-families-sheikh-jarrah [https://perma.cc/UR9F-ETUZ]; Aaron Boxerman, *High Court Says 4 Palestinian Families Can Stay in Sheikh Jarrah Homes, for Now*, TIMES OF ISRAEL (Mar. 1, 2022), https://www.timesofisrael.com/high-court-says-4-palestinian-families-can-stay-in-sheikh-jarrah-homes-for-now/ [https://perma.cc/LBD9-BJJE].

36. *PRC Calls on UNHRC to Take Action Against Israel's Forced Eviction of Palestinians in Sheikh Jarrah*, PALESTINIAN RETURN CENTRE (Mar. 29, 2022), https://prc.org.uk/en/post/4378/ [https://perma.cc/G84X-DN7Y].

37. Meetings Coverage, Security Council, Settlement Expansion Fuelling Violence in Occupied Palestinian Territory, Middle East Peace Process Special Coordinator Warns Security Council, SC/14836 (Mar. 22, 2022), https://www.un.org/press/en/2022/sc14836.doc.htm [https://perma.cc/KQ75-QU96].

March 2023 – Protest against imminent forced expulsion of the **Salem family**; Israeli police injure four and arrest eight protestors.[38] Israeli municipality posts demolition notice on the **Salem family's** house.[39] The following day, 17 European governments issue joint statement calling on Israel to reverse its decisions on evictions that would forcibly displace Palestinian families in East Jerusalem.[40] Israeli Supreme Court conducts hearing on the appeals of eviction orders by the **Dajani, Daoud,** and **Hammadfamilies**.[41]

38. Josh Breiner & Nir Hasson, HAARETZ (Mar. 3, 2023), https://www.haaretz.com/israel-news/2023-03-03/ty-article/.premium/four-wounded-eight-arrested-in-protest-against-eviction-of-sheikh-jarrah-palestinians/00000186-a81c-d3d5-a7e7-aa1de80f0000 [https://perma.cc/XP5H-AX9Y].

39. *Israel Orders Palestinian House in Sheikh Jarrah to Be Demolished*, MIDDLE EAST MONITOR (Mar. 14, 2023), https://www.middleeastmonitor.com/20230314-israel-orders-palestinian-house-in-sheikh-jarrah-to-be-demolished/ [https://perma.cc/W6CP-9TMX].

40. *U.K., France and Dozen Other EU Members Call on Israel to Halt East Jerusalem Dispossession*, HAARETZ (Mar. 14, 2023), https://www.haaretz.com/israel-news/2023-03-14/ty-article/.premium/u-k-france-and-dozen-other-eu-members-call-on-israel-to-halt-east-jlem-dispossession/00000186-dfe4-d2a3-a1fe-dfec8d2f0000 [https://perma.cc/274F-Y8M2].

41. *Multiple Palestinian Families Face Impending Evictions in March Ahead of Ramadan*, IR AMIM (Feb. 15, 2023), https://www.ir-amim.org.il/en/node/2935 [https://perma.cc/R6QW-ACCN].

Appendix II: Statements from Impacted Palestinian Families and Individuals in Sheikh Jarrah

This Appendix contains publicly available statements from some of the Palestinian individuals and families in Sheikh Jarrah who have been directly impacted by the Israeli settlement enterprise. Their testimonies speak to the emotional, psychological, and material harm they have experienced, on both personal and collective levels. The statements are organized by family in alphabetical order.

Dajani Family

***Muna Dajani*:** "If we think of Palestinian families in Sheikh Jarrah or Silwan, **the threat of expulsion is so real, but what happens also the day after? Do we also understand that this is a systematic reality for Palestinians, where we have nowhere else to go?** . . . I always say my grandparents['] house in Sheikh Jarrah is not the most beautiful house or property in the world, but I think of course it's the symbolism of those places and what they mean. And the fact that **Sheikh Jarrah symbolizes how refugees managed to exercise some form of return by establishing roots again, in a place in Palestine, and calling it home, only to be under the threat of losing that refuge** and that place only a few years after moving into it and feeling like we can actually build our lives again. And this is, I think, also what makes the Sheikh Jarrah's story so powerful and how it resonates with all Palestinians.[1]

Samira Dajani-Budeiri: On the political and personal importance of her family's home: "We had to leave the land of our forefathers, and until this day we are seeking unrealized justice . . . Every bit of soil in my neighborhood and Palestine is dear to our hearts . . . The stones remind me of the family, and the memories that we weaved with each other . . . The stones and garden embody the time the family spent together in dignity and freedom."[2]

1. Transcript of *Sheikh Jarrah and Beyond with Muna Dajani*, AL-SHABAKA (June 29, 2021), https://al-shabaka.org/podcasts/sheikh-jarrah-and-beyond-with-muna-dajani/ [https://perma.cc/B98K-QZW3] (emphasis added).

2. *"Every Bit of Soil in My Neighborhood and Palestine Is Dear to Our Hearts"*, WORLD COUNCIL OF CHURCHES (Mar. 21, 2022), https://www.oikoumene.org/news/every-bit-of-soil-in-my-neighborhood-and-palestine-is-dear-to-our-hearts [https://perma.cc/6FVQ-U4LX].

Al-Ghawi Family

Maryam al-Ghawi: Maryam has protested outside her home on a daily basis for the last 13-plus years since her family's forced displacement.[3] "**[The home expulsion] has remained live in my memory as if it happened just a few minutes ago** . . . This is my house in which I lived the most beautiful days of my life. I have the right to return to it, and one day justice will prevail."[4]

Nasser al-Ghawi: On his family's forced home expulsion: "**I am dying a hundred times a day.** This is my house, this is what's left of my furniture. I have no other place to go. This is where I was born."[5]

Hamad Family

Nufuz Hamad: **It's devastating to think that my parents might be forcibly evicted from this house** . . . it keeps me really worried all the time—any time I get a phone call late at night I expect this terrible news that maybe the settlers have invaded . . . When I'm not here, it's even worse, worrying about my parents. I'm watching Instagram. I'm watching people on Facebook. It's just hectic. I can hear the sirens and see them coming but I can't see anything else. **It has caused a lot of psychological pain for me and my kids** . . . [The children in my family have] gone through a lot. For a while, **the children weren't able to sleep. Even today, my two-year-old niece, when she hears the word 'police,' runs to a corner, shaking and scared** . . . **We deserve not to be forcibly vacated. We deserve not to be ethnically cleansed** . . . **The children in this neighborhood are not living the childhood they deserve** like any other child[.]"[6]

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3. *Israeli Settlers in Sheikh Jarrah Barricade Themselves in Palestinian Home*, NEW ARAB (May 10, 2021), https://english.alaraby.co.uk/news/israeli-settlers-barricade-themselves-sheikh-jarrah-home [https://perma.cc/V9TF-ULVU]; *see also* Dina Kraft & Fatima Abdulkarim, '*They Changed Everything': A Central Tension Roiling Jerusalem*, CHRISTIAN SCI. MONITOR (May 5, 2021), https://www.csmonitor.com/World/Middle-East/2021/0505/They-changed-everything-A-central-tension-roiling-Jerusalem [https://perma.cc/QZ2P-NRDQ].

4. Mohammad Shabaan, *Nowhere to Go but the Sidewalk: Sheikh Jarrah Evictions*, FRIENDS OF AL-AQSA (May 6, 2021), https://www.foa.org.uk/20210506-nowhere-to-go-but-the-sidewalk-sheikh-jarrah-evictions/ [https://perma.cc/4Y3R-AHHY] (emphasis added).

5. Rory McCarthy, *Families Evicted from Their East Jerusalem Homes After 50 Years*, GUARDIAN (Aug. 24, 2009, 2:12 PM), https://www.theguardian.com/world/2009/aug/24/west-bank-east-jerusalem-evictions [https://perma.cc/U3WR-MYR5] (emphasis added).

6. *In Sheikh Jarrah: One Mother Speaks "the Children Are not Living the Childhood they Deserve"*, WORLD COUNCIL OF CHURCHES (Aug. 24, 2021), https://www.oikoumene.org/news/in-sheikh-jarrah-one-mother-speaks-the-children-are-not-living-the-childhood-they-deserve [https://perma.cc/K7BG-SQFL] (emphasis added).

Khaled Hamad: "Our families came here as refugees. It's happening all over again."[7]

Hanoun Family

Maher Hanoun: Describing the impact of his family's eviction during a 2009 interview, and remembering when he first learned about the pending eviction case in 1972 at age 13: "I was afraid of the consequences of the occupation. The whole family was worried and scared that we would lose our home . . . I have grown up with the case; it's always been a part of my memory . . . **It is impossible to plan for a future** . . . **The eviction has destroyed our lives**. To live on the street is so hard. It kills my family to watch strange faces living in the home in which we spent our lives . . . It has been impossible for [the children] to study for their exams. We are all so worried for the children, they are afraid; they jump if they hear a loud noise or someone yell. They were removed from their home by force and watched their father get arrested . . . **This same house contains the history, memories, and dreams of my family**."[8]

Kamel Al-Kurd Family

Fawzieh al-Kurd (Umm Kamel): Umm Kamel has lived in a protest tent near her family's home since her family was forcibly expelled from it; Israeli authorities have tried to demolish her tent six times. On her family's forced displacement: "My life was blackened. I lost my home, my husband, my furniture, my future."[9] On her goals: "I have two choices, either to push for a return to my house in Sheikh Jarrah or claim my right to my land in the Palestinian neighbourhood in Talbieh [a West Jerusalem neighborhood that is now part of Israel]. **This is my right and I will claim my right**."[10]

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7. Rami Ayyub, Zainah El-Haroun, & Stephen Farrell, *East Jerusalem's Sheikh Jarrah Becomes Emblem of Palestinian Struggle*, REUTERS (May 10, 2021, 12:45 PM), https://www.reuters.com/world/middle-east/east-jerusalems-sheikh-jarrah-becomes-emblem-palestinian-struggle-2021-05-10/ [https://perma.cc/354F-SWHB].

8. DAVID HUGHES, NATHAN DEREJKO, & ALAA MAHAJNA, CIVIC COAL. FOR PALESTINIAN RTS. IN JERUSALEM, DISPOSSESSION AND EVICTION IN JERUSALEM: THE CASES AND STORIES OF SHEIKH JARRAH 23–24 (2009), https://www.adalah.org/uploads/oldfiles/newsletter/eng/feb10/docs/Sheikh_Jarrah_Report-Final.pdf [https://perma.cc/Y5TU-NA2J] (emphasis added).

9. Marcey Gayer, *Sheikh Jarrah Residents Refuse to Be Displaced*, ELECTRONIC INTIFADA (July 9, 2009), https://electronicintifada.net/content/sheikh-jarrah-residents-refuse-be-displaced/8339 [https://perma.cc/SF4W-9SHP].

10. *Um Kamel al-Kurd Again Claims Her Right of Return*, INTERNATIONAL SOLIDARITY MOVEMENT (Dec. 23, 2008), https://palsolidarity.org/2008/12/um-kamel-al-kurd-again-claims-her-right-of-return/ [https://perma.cc/MC6C-BRV8] (emphasis added).

El-Kurd Family

Rifqa el-Kurd: "**I will only agree to leave Sheikh Jarrah to go back to my Haifa house that I was forced to flee in 1948.**"[11] As told by Rifqa's grandson, Mohammed el-Kurd: "During the 1948 Nakba, she left her Haifa home meticulously cleaned, not knowing she would be readying it for its colonizers. A refugee, cast with her children from city to city, she finally settled in Jerusalem, only to be confronted with the *Naksa*—Israel's occupation of Arab lands following the 1967 War—followed by the annexation of Jerusalem, and, in her last days of life, the imminent annexation of the West Bank . . . Even in the face of eviction, monetary punishment, tens of trials, and threats of imprisonment, she persisted."[12]

Mohammed el-Kurd: "I feel less and less able to articulate my feelings, the more real these expulsions become . . . **There's this level of psychological torture. This is a wound I feel deep down to my bones. It's like a terrible heartbreak.** I'm worried about the loss of property. But I also worry about the loss of my own sanity. This is absolutely criminal, what they are doing to us."[13]

Sabbagh Family

Hidaya al-Sabbagh: On her repeated displacements and the impact of imminent forced expulsion from her home: "My family was forced to flee from Jaffa to Gaza as a result of the 1948 war. I left Gaza in the mid-1980s and got married to Usama Al Sabbagh. Since then, I have been living in this house in Sheikh Jarrah. This has been my home for 34years and it's where I gave birth to my four sons and three daughters . . . My health has been deteriorating due to the anxiety, sadness, and stress I live under all the time . . . But I cannot leave my house, not now. I cannot go to the hospital, only to come back and find my family out on the street. What can I say? I am speechless."[14]

Mohammad as-Sabbagh: On the impact of previous forced displacement of Sheikh Jarrah residents: "All of us here are afraid of being evicted **too** . . . . We

11. Mohammed el-Kurd, *My Grandmother, Icon of Palestinian Resilience*, THE NATION (July 1, 2020), https://www.thenation.com/article/world/palestinian-grandmother-resistance/ [https://perma.cc/ZM43-GAHD] (emphasis added).

12. *Id.*

13. Jaclynn Ashly, *Sheikh Jarrah Palestinians at Mercy of Israeli Court,* NEW FRAME (May 13, 2021), https://www.newframe.com/sheikh-jarrah-palestinians-at-mercy-of-israeli-court/ [https://perma.cc/GCL3-XG8B] (emphasis added).

14. *Occupied Palestinian Territory*, U.N. OCHA, HUMANITARIAN BULL. 7 (Jan. 2019), https://www.ochaopt.org/sites/default/files/hummonitor_jan_2019.pdf [https://perma.cc/4F7S-A8MQ].

could be on the street soon . . . I sit here every day to tell everyone what is going on, about the injustice."[15]

Salhiya Family

Mohammed Salhiya: On his family's impending forced displacement: "We will not flee again. We have nowhere else to go."[16] From the roof of his house in January 2022, Mohammed explained his threat to set himself on fire if Israeli forces evicted the family: "We don't want death. But we have been expelled from our homeland again and again. We are already dead. We are dead inside. We have been dead since 1948 . . . They [the Israeli authorities] can come back whenever they want, I will blow it up if they come again. They think they can scare us but I'm not afraid . . . **this is ethnic cleansing** . . . They will only take [my house] as it burns."[17]

Abdallah Ikermawi: "We've been in this home since the 1950s . . . We don't have anywhere to go."[18]

Salem Family

Fatima Salem: "My parents have lived here since 1951. I was born here, I got married here and I gave birth to all my children here. My three sons, their wives and children all live here now . . . We have no other place to go and we can't afford to rent a new place. We could end up in the street in the cold and rainy winter weather. **The stress is unbearable.** We all struggle to sleep at night and this makes my health problems worse."[19]

Sabreen Salem: On the impact of the threat of forced expulsion on her eight-year-old daughter: "Every time she hears the confrontations outside, or the settlers shouting, she gets very afraid and starts shaking."[20]

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15. Eric Reguly, *'We Will Only Leave Silwan as Dead People': Palestinians Fight to Keep Their East Jerusalem Homes as Evictions Accelerate – and Trigger Violent Confrontations*, GLOBE AND MAIL (June 19, 2021), https://www.theglobeandmail.com/world/article-we-will-only-leave-silwan-as-dead-people-palestinians-fight-to-keep/ [https://perma.cc/9HD5-GVP8] (emphasis added).

16. Bethan McKernan, *Israeli Police Demolish Palestinian Family's Sheikh Jarrah Home*, GUARDIAN (Jan. 19, 2022, 7:17 AM), https://www.theguardian.com/world/2022/jan/19/israeli-police-evict-palestinian-family-from-sheikh-jarrah-home [https://perma.cc/7KGY-MRSU].

17. Mustafa Abu Sneineh, *Sheikh Jarrah: Palestinian Family Threatens to Burn Home as Israel Attempts Expulsion*, MIDDLE EAST EYE (Jan. 17, 2022), https://www.middleeasteye.net/news/sheikh-jarrah-israel-forces-evict-palestinian-family-jerusalem [https://perma.cc/EM4N-PJ4A] (emphasis added).

18. Abu Sneineh, *supra* note 17.

19. *Sheikh Jarrah: Palestinian Family Faces Forced Displacement*, AL-JAZEERA (Jan. 5, 2022), https://www.aljazeera.com/features/2022/1/5/sheikh-jarrah-palestinian-family-faces-forced-displacement [https://perma.cc/4UJF-XXPJ] (emphasis added).

20. *Id.*

Shamasneh Family

Fahamiya Shamasneh (then-75 years old): On her family's forced home expulsion: "What greater injustice is there than this? . . . Maybe we will sleep in the street."[21]

Mohammad Shamasneh (then-45 years old): "What is going on in Sheikh Jarrah **has nothing to do with property laws** . . . **It's not a simple conflict over real estate either**. It is a long-term Israeli plan to uproot us from our neighborhood and replace us with Jewish settlers through legal gymnastics."[22] "We grew up here . . . I have all my memories here. I have all my history here, and for someone to come out of nowhere, and to say that there is an heir to this property, and claim it is their property, **it is as though they are taking all my history, all my life, and cancelling it**."[23] On his family's imminent forced displacement and the question of what they would do afterward: "That's a question you have to ask the government which is throwing out onto the street a family with two elderly people. In the meantime, we aren't thinking about another place. We don't have a replacement. The feeling is absolutely awful. We don't have a place to go to . . . My parents are taking it the hardest. They are here for tens of years. They say there is no justice in this country. If it was a Jewish elderly couple, would they do this to them?"[24]

Amal Shamasneh: "We refused to look for another house because **the case is not simply about housing and it is not just about us** . . . Our home is simple and tiny but it means everything to us. We also know that evicting us will only be the start of evicting all the families who are under threat."[25]

Nizar Shamasneh (then-15 years old): "They took everything: my schoolbag, our clothing, my grandfather's identity card. **It was heartbreaking to be thrown out in the street without being able to defend yourself**."[26]

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21. AFP, *Israeli Police Evict Family of Palestinians from Home of 50 Years*, MIDDLE EAST EYE (Sept. 6, 2017), https://www.middleeasteye.net/news/israeli-police-evict-family-palestinians-home-50-years [https://perma.cc/5HMD-UZ26].

22. Budour Youssef Hassan, *Defying Israel's Eviction Orders in East Jerusalem*, ELECTRONIC INTIFADA (Sept. 15, 2017), https://electronicintifada.net/content/defying-israels-eviction-orders-east-jerusalem/21726 [https://perma.cc/43PP-NLH3] (emphasis added).

23. Sarah Wildman, *Facing Eviction in Sheikh Jarrah*, NEW YORKER (Apr. 9, 2013), https://www.newyorker.com/news/news-desk/facing-eviction-in-sheikh-jarrah [https://perma.cc/5SAX-9KEW] (emphasis added).

24. Ben Lynfield, *Settlers Force East Jerusalem Family from Home of 50 Years*, THE NATIONAL (Aug. 12, 2017), https://www.thenationalnews.com/world/mena/settlers-force-east-jerusalem-family-from-home-of-50-years-1.618950 [https://perma.cc/WGG5-GPW3].

25. Youssef Hassan, *supra* note 22 (emphasis added).

26. *Id.* (emphasis added).

Rabiha Zahran: "My mother has been trying to lift [my father], to give him strength. But for both of them, the loss of this home represents a **tragedy that cannot be described in words**."[27]

Skafi Family

Abdel Fattah Skafi: "The Israeli Supreme Court's decision to keep Palestinians in their homes as tenants is evidence that the Israeli court does not have proof that the land is owned by the Jews. The court's decision was made based on the possibility that the Palestinians could accept the offer and pay the rent, which would mean a recognition of the Jews' ownership of the land . . . We inherited the house from our ancestors and we will pass it on to our children and grandchildren, no matter how long the conflict with the settlers."[28]

Joint Statement from al-Jaouni, el-Kurd, Skafi, and al-Qassem Families

"We rejected the "proposal" by the "Israeli Supreme Court," which would have rendered us 'protected tenants' at the mercy of settler organizations. **We stand firm in our refusal to compromise on our rights** despite the lack of institutional guarantees that would protect our presence as Palestinians in occupied Jerusalem.

The Israeli judiciary is circumventing its duty to adjudicate the case and **is forcing us instead to choose between our own dispossession or submitting to an oppressive agreement.** Naturally, **we refuse to commit someone else's crimes.**

Such "compromises" create the illusion of the ball in our court, fabricating a framing in which we reject a 'generous deal,' in a situation where our dispossession would still be imminent and our homes would still be regarded as someone else's. Such "deals" distract from the crime at hand: ethnic cleansing perpetrated by a settler-colonial judiciary and its settlers . . . **It is time for our Nakba to end. Our families deserve to live in peace without the looming ghost of imminent dispossession**."[29]

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27. *Id.* (emphasis added).

28. Amany Mahmoud, *Palestinian Family Refuses $5 Million Offer by Settlers for Sheikh Jarrah Home*, AL-MONITOR (Dec. 21, 2021), https://www.al-monitor.com/originals/2021/12/palestinian-family-refuses-5-million-offer-settlers-sheikh-jarrah-home [https://perma.cc/V7QT-JAJV].

29. Mohammed El-Kurd (@m7mdkurd), TWITTER (Nov. 2, 2021, 7:34 AM), https://twitter.com/m7mdkurd/status/1455528716935831552 [https://perma.cc/PQW4-YY9B] (presenting statement from "the families of Sheikh Jarrah"); Khaled Abu Toameh & Tovah Lazaroff, *Sheikh Jarrah Residents in Jerusalem Reject High Court Compromise*, JERUSALEM POST (Nov. 2, 2021, 9:45 PM), https://www.jpost.com/breaking-news/sheikh-jarrah-residents-reject-high-court-compromise-683818 [https://perma.cc/2NYV-TBB8] (identifying four families).