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## The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists

Emily Goldberg Knox

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## *Notes*

# The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists

EMILY GOLDBERG KNOX\*

*On September 21, 2013, a group of al-Shabaab gunmen attacked the Westgate Shopping Mall in Nairobi, Kenya, killing nearly seventy civilians. In conjunction with this attack, al-Shabaab's media wing, HSM Press, launched a public relations campaign on Twitter claiming responsibility for the attack, posting live information and pictures, and taunting Kenyan and global security forces with threats of future action. More recently, the Islamic State of Iraq and the Levant's social media campaign has drawn much international attention. This Note discusses whether the U.S. government could successfully pursue material support to terrorist charges against social media companies for allowing designated foreign terrorist organizations to use their services and, if so, the constitutional and policy implications.*

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## INTRODUCTION

On September 21, 2013, a group of al-Shabaab<sup>1</sup> gunmen attacked the Westgate Shopping Mall in Nairobi, Kenya, killing nearly seventy civilians. Al-Shabaab’s media wing, HSM Press, launched a public relations campaign on Twitter claiming responsibility for the attack, posting live information and pictures, and taunting Kenyan and global

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1. Al-Shabaab is a Somali jihadist group that has sworn allegiance to al-Qaeda. See BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2011 256, 264 (2012), available at <http://www.state.gov/documents/organization/195768.pdf>.

security forces with threats of future action.<sup>2</sup> Although Twitter suspended several al-Shabaab accounts after receiving reports of abuse,<sup>3</sup> the incident caused a spike in public discussion about preventing terrorist groups from using social media to capture the public's attention with sensational attacks, recruit new members, fundraise, and spread their message.

More recently, the Islamic State of Iraq and the Levant ("ISIL")<sup>4</sup> has used social media to advance its cause, leading to attempts to diminish the group's social media capacity.<sup>5</sup> As of late August 2014, ISIL controlled between 12,000 and 35,000 square miles of territory in Iraq and Syria.<sup>6</sup> At least some of the group's success can be linked to its massive public relations campaign.<sup>7</sup> Not only has the group used social media to post pictures of their violent deeds—including an alleged mass killing of Iraqi government soldiers—but ISIL also created an Arabic language mobile application called "The Dawn of Glad Tidings."<sup>8</sup> The application posts tweets to the Twitter accounts of those who have signed up, with content dictated by ISIL.<sup>9</sup> Several hundred users purchased the app through the Google Play store, but the app is only one indication of ISIL's online success.<sup>10</sup> According to J.M. Berger, ISIL regularly "employs social-media strategies [to] inflate and control its message."<sup>11</sup>

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2. Erik Ortiz, *Al Shabab's Alleged Twitter Account Taunts Kenyan Officials Following Mall Rampage*, N.Y. DAILY NEWS (Sept. 24, 2013, 12:54 PM), <http://www.nydailynews.com/news/world/terrorists-tweeting-new-account-claims-kenyan-mall-militants-article-1.1465961>.

3. J.M. Berger, *Twitter's Week of Reckoning*, FOREIGN POLICY MAG. (Oct. 1, 2013), [http://www.foreignpolicy.com/articles/2013/10/01/twitters\\_week\\_of\\_reckoning](http://www.foreignpolicy.com/articles/2013/10/01/twitters_week_of_reckoning).

4. This group is also commonly referred to as the Islamic State in Iraq and Syria ("ISIS") or Islamic State ("IS"), but I use ISIL in conformity with the State Department. See Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://go.usa.gov/m9xG> (last visited Dec. 14, 2014).

5. Hannah Jane Parkinson, *James Foley: How Social Media is Fighting Back Against Isis Propaganda*, GUARDIAN (Aug. 20, 2014, 11:06 AM), <http://www.theguardian.com/technology/2014/aug/20/james-foley-how-social-media-is-fighting-back-against-isis-propaganda>.

6. Kathy Gilsinan, *The Many Ways to Map the Islamic 'State'*, ATLANTIC (Aug. 27, 2014, 3:39 PM), <http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-theislamic-state/379196>. Despite recent airstrikes on ISIL targets, the group continued to make gains, particularly in Syria. Daren Butler & Oliver Holmes, *Islamic State Seizes Large Areas of Syrian Town Despite Airstrikes*, REUTERS, Oct. 9, 2014, available at <http://www.reuters.com/article/2014/10/09/us-mideast-crisis-idUSKCN0HXoXF20141009>. Only time will tell whether the airstrikes will be effective in reversing this trend.

7. See Natalie Andrews & Felicia Schwartz, *Islamic State Pushes Social-Media Battle With West*, WALL ST. J. (Aug. 22, 2014, 12:40 PM), <http://online.wsj.com/articles/isis-pushes-social-media-battle-with-west-1408725614>.

8. J.M. Berger, *How ISIS Games Twitter*, ATLANTIC (June 16, 2014, 2:00 PM), <http://www.theatlantic.com/international/archive/2014/06/isis-iraq-twitter-social-media-strategy/372856>.

9. *Id.*

10. *Id.*

11. *Id.*

Consistent with this discussion of al-Shabaab and ISIL, this Note focuses only on social media accounts of Foreign Terrorist Organizations (“FTOs”) or of their known affiliates.<sup>12</sup> For example, Andalus Media, the media wing of al-Qaeda in the Islamic Maghreb (“AQIM”), had an account on Twitter with over 13,000 followers,<sup>13</sup> as well as a page on Facebook with over 11,000 “likes.”<sup>14</sup> Although it is impossible to know for certain whether these accounts do indeed belong to Andalus Media, the content posted suggests they are affiliated with AQIM.

The dangers that can flow from terrorists using social media, discussed in Part II, are real and not limited to ISIL and al-Shabaab. Counterterrorism officials have sought to mitigate the effect of these dangers, but one very real option is to shut terrorist groups out of social media.<sup>15</sup> The material support statutes, 18 U.S.C. § 2339A and § 2339B, may be a ready tool for the Department of Justice (“DOJ”) to force social media companies to remove terrorist groups from their services. As discussed below, § 2339B, which prohibits providing material support or resources to terrorist organizations, could be interpreted to reach social media companies. The Supreme Court’s decision in *Holder v. Humanitarian Law Project* (“HLP”),<sup>16</sup> the first First Amendment challenge to a national security law since 2001,<sup>17</sup> could arguably support such an interpretation. Indeed, in 2011, Glenn Greenwald speculated that the DOJ “could consider Twitter’s providing of a forum to a designated Terrorist organization to constitute the crime of ‘material support of Terrorism.’”<sup>18</sup> The following year, the pro-Israel group

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12. For an explanation of FTOs, see *infra* note 51. This Note only addresses FTOs because the government specifically designates them as terrorist organizations and publishes this information. This Note does not consider accounts belonging to, or purporting to belong to, individuals.

13. *Andalus Media*, TWITTER, [https://twitter.com/Andalus\\_Media](https://twitter.com/Andalus_Media) (last visited Oct. 9, 2013). This account has since been suspended. The account profile claimed to belong to al-Qaeda in the Islamic Maghreb. The account picture—one of Andalus Media’s logos—and the content of the account suggest the account was authentic.

14. *Islamic Maghreb*, FACEBOOK, <https://www.facebook.com/Maghreb.Islamic> (last visited Oct. 9, 2013). The administrators of this account posted various jihadist press releases and pictures, and the profile picture was one of the group’s logos, suggesting the account was authentic. This account was suspended as of Nov. 13, 2013.

15. This Note focuses specifically on social media given its increasing attractiveness to terrorist groups. See generally Aaron Y. Zelin, *#Jihad’s Social Media Trend*, FOREIGN POLICY (Feb. 5, 2013, 2:26 PM), [http://afpak.foreignpolicy.com/posts/2013/02/05/jihad\\_social\\_media\\_trend](http://afpak.foreignpolicy.com/posts/2013/02/05/jihad_social_media_trend) (claiming that jihadi propaganda is increasingly migrating from web forums to social media); AARON Y. ZELIN, THE STATE OF GLOBAL JIHAD ONLINE, NEW AM. FOUND. 5–6 (2013), available at [http://www.newamerica.net/sites/newamerica.net/files/policydocs/Zelin\\_Global%20Jihad%20Online\\_NAF.pdf](http://www.newamerica.net/sites/newamerica.net/files/policydocs/Zelin_Global%20Jihad%20Online_NAF.pdf) (providing a history of terrorist use of social media platforms).

16. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

17. Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT’L L. REV. 519, 520 (2011).

18. Glenn Greenwald, *Can the U.S. Government Close Social Media Accounts?*, SALON (Dec. 20, 2011, 1:15 AM), [http://www.salon.com/2011/12/20/the\\_u\\_s\\_government\\_targets\\_twitter\\_terrorism/](http://www.salon.com/2011/12/20/the_u_s_government_targets_twitter_terrorism/).

Christians United for Israel began a petition campaign demanding that the U.S. government pursue charges against Twitter, under 18 U.S.C. § 2339A, for providing services to Hamas.<sup>19</sup>

Pursuing criminal charges against the social media companies that terrorist organizations use in an “official” capacity would be one way to force them off of social media. This Note argues, however, that the U.S. government should not avail itself of this option, and if it does, that courts should not permit it.<sup>20</sup> This Note argues that the law should not be interpreted to allow for a finding of criminal liability in such instances for two reasons: (1) courts should construe the Supreme Court’s requirement of “coordination” in *HLP* narrowly, in conformity with the rule of lenity,<sup>21</sup> and (2) even if courts interpret “coordination” broadly, social media companies should have a valid First Amendment defense. Additionally, this Note urges Congress to amend the law to require specific intent.

Part I of this Note details the dangers presented by terrorists using social media. Part II discusses the material support statutes and the Supreme Court’s interpretation of these statutes in *HLP*. Part II also explains why and on what grounds the prosecution of social media companies could be a tool in the Executive Branch’s counterterrorism toolbox. Part III analyzes some questions left unanswered by *HLP*, including the viability of adopting a broad “coordination” requirement to convict under § 2339B. Finally, Part IV proposes recommendations: a narrow reading of § 2339B, the availability of a First Amendment defense, and the addition of a specific intent requirement to § 2339B.

## I. THE DANGERS OF TERRORISTS USING SOCIAL MEDIA

The Westgate attack, which al-Shabaab live-tweeted, is perhaps the most notorious example to date of a terrorist group using social media to spread its message, but it is not the first to raise concerns about the use of social media to promote terrorism. Given the widespread focus on Twitter, one might think it is the only social media company terrorist organizations use, but these groups use nearly all forms of social media. A 2010 Department of Homeland Security report announced that extremists were focusing on Facebook as a way to identify sympathizers

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19. Daniel Halper, *Christian Group Petitions Twitter to Ban Terrorist Group Hamas*, WEEKLY STANDARD (Nov. 19, 2012, 4:12 PM), [http://www.weeklystandard.com/blogs/christian-group-petitions-twitter-ban-terrorist-group-hamas\\_663678.html](http://www.weeklystandard.com/blogs/christian-group-petitions-twitter-ban-terrorist-group-hamas_663678.html). As explained in Part II.C, §2339A would not provide the legal authority to prosecute social media sites because it requires specific intent to further the organization’s terrorist activities.

20. See *infra* Part IV.

21. “[T]he rule of lenity indicates that doubts about the ambit of criminal statutes should be resolved against criminal liability.” William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 n.139 (1990).

and to disseminate bomb-making instructions.<sup>22</sup> Additionally, YouTube “has become a significant platform for jihadist groups and supporters, fostering a thriving subculture of jihadists who use YouTube to share propaganda, communicate with each other, and recruit new individuals to the jihadist cause.”<sup>23</sup> This list is not exhaustive, as terrorist groups also use other sites, including Flickr and Instagram.<sup>24</sup>

Terrorist use of social media poses three potentially serious threats to national security. First, social media allows terrorist groups to direct the coverage of their attacks by posting videos, analysis, and commentary. Essentially, the traditional media loses its monopoly on covering and interpreting these incidents and gives terrorist groups the ability to convey their messages directly—an option not generally provided by conventional media sources. Although the traditional media sometimes publishes terrorist media and literature (“propaganda”), the propaganda is generally part of the message rather than *the* message. Though media outlets do have inherent biases, they are (generally) not aiming to further any specific cause. This is an important distinction.

Second, social media provides terrorist organizations with a way to raise money, recruit new members, spread propaganda, and spread their ideology (which sometimes advocates the use of violence) to a larger audience with minimal effort.<sup>25</sup> Although the same can be said of websites and forums operated by terrorists directly, social media is uniquely dangerous because it allows the terrorist group to reach

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22. Nick Allen, *Facebook Emerges as ‘Terrorist Recruiting Ground’*, TELEGRAPH (Dec. 10, 2010, 11:43 PM), <http://www.telegraph.co.uk/technology/facebook/8195214/Facebook-emerges-as-terrorist-recruiting-ground.html>.

23. Rita Katz & Josh Devon, *Jihad on YouTube*, SITE INTEL GROUP (Jan. 15, 2014), <https://news.siteintelgroup.com/Featured-Article/jihad-on-youtube.html>.

24. *SEE* Laura Ryan, *Why Terrorists Love Twitter*, NAT’L J. (June 2, 2014), <http://www.nationaljournal.com/tech/why-terrorists-love-twitter-20140602>. *See also* Alexi Oreskovic & Lesley Wroughton, *Islamic State’s Twitter Silence Raises Questions*, REUTERS, Sept. 13, 2014, available at <http://in.reuters.com/article/2014/09/13/us-iraq-crisis-twitter-idINKBN0H800K20140913> (“Some experts say the militants may have increasingly taken to other online services such as Russia’s VKontakte and Diaspora . . .”).

25. Gregory S. McNeal, *Cyber Embargo: Countering the Internet Jihad*, 39 CASE W. RES. J. INT’L L. 789, 794 (2007–08). *See* Joby Warrick, *Islamist Rebels in Syria Use Faces of the Dead to Lure the Living*, WASH. POST (Nov. 4, 2013), [http://www.washingtonpost.com/world/national-security/islamist-rebels-in-syria-use-faces-of-the-dead-to-lure-the-living/2013/11/04/10d03480-433d-11e3-8b74-d89d714ca4dd\\_story.html](http://www.washingtonpost.com/world/national-security/islamist-rebels-in-syria-use-faces-of-the-dead-to-lure-the-living/2013/11/04/10d03480-433d-11e3-8b74-d89d714ca4dd_story.html) (“Although jihadists have long used the Internet to communicate messages from leaders or spread images of battle, Syrian rebel groups are flocking to Web sites such as Twitter, Instagram and Flickr to create new ways to recruit, train, raise money, debate theology and coordinate strategy . . . . Twitter is not just a communications tool but also an online cash machine, useful for soliciting donations . . . . Still others employ YouTube or Facebook to trumpet their battlefield successes or to document alleged atrocities by their opponents. . . . [Jabhat al-Nusra, which has been labeled a terrorist organization,] use[s] Twitter and Facebook in much the same way that corporations and government agencies in the United States do.”).

individuals who might not otherwise access a terrorist website.<sup>26</sup> Generally, individuals accessing terrorist websites have intentionally located those websites, but with terrorists on social media, individuals may come across the propaganda accidentally, for example, by searching for “moderate” sermons or by simply clicking on links posted by friends or friends of friends. Therefore, social media “lowers the barrier of access” to terrorist propaganda.<sup>27</sup>

Finally, terrorist groups can use social media to search for individuals who might be particularly vulnerable to their ideology, thus making their recruitment efforts more effective.<sup>28</sup> A 2012 report issued by the United Nations Office on Drugs and Crime explains:

Terrorist propaganda is often tailored to appeal to vulnerable and marginalized groups in society. The process of recruitment and radicalization commonly capitalizes on an individual’s sentiments of injustice, exclusion or humiliation. Propaganda may be adapted to account for demographic factors, such as age or gender, as well as social or economic circumstances.<sup>29</sup>

The amount of information available about any given person on social media is astonishing. This information helps the recruiter individualize her efforts.

Recognizing these dangers, American officials have occasionally requested that social media companies shut down accounts affiliated with terrorist organizations.<sup>30</sup> Most recently, after the execution of reporter

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26. Terrorist websites are not as easily accessible as one might think. These websites change often, and as quickly as one goes down, another goes up. Furthermore, many would-be users of these sites fear that counterterror operatives are monitoring the sites.

27. Neal Ungerleider, *Despite Ban, YouTube is Still a Hotbed of Terrorist Group Video Propaganda*, FAST COMPANY (Nov. 12, 2010, 1:05 AM), <http://www.fastcompany.com/1701383/despitem-ban-youtube-still-hotbed-terrorist-group-video-propaganda> (citing and quoting Thomas Hegghammer, Senior Research Fellow at the Norwegian Defense Research Establishment).

28. For example, in 2009, five Americans were arrested in Pakistan, having traveled there to join a terrorist group. The group allegedly recruited them and encouraged them to travel to Pakistan via YouTube. Katz & Devon, *supra* note 23. *SEE* Jesse Paul, *Analyst Group: Colorado Teens Spoke with Top Islamic State Terrorists*, DENVER POST (Oct. 29, 2014, 3:54 PM), [http://www.denverpost.com/news/ci\\_26823939/analyst-group-colorado-teens-spoke-top-islamic-state](http://www.denverpost.com/news/ci_26823939/analyst-group-colorado-teens-spoke-top-islamic-state) (discussing three teenage girls who attempted to join ISIL after being recruited and radicalized on social media).

29. UNITED NATIONS OFFICE ON DRUGS & CRIME, *THE USE OF THE INTERNET FOR TERRORIST PURPOSES 5* (2012) (citation omitted).

30. This Note only addresses efforts by the U.S. government to block multinational terrorists from using social media. Other countries have made similar efforts. Most notable is the Clean IT project, funded by the Prevention of and Fight Against Crime Programme of the European Commission and supported by Germany, Spain, the United Kingdom, the Netherlands, and Belgium. *See* Donna Anderson, *Clean IT Leak Shows Plans for Large-Scale European Internet Surveillance*, INFO WARS.COM (Sept. 25, 2012), <http://www.infowars.com/clean-it-leak-shows-plans-for-large-scale-european-internet-surveillance>. Among other things, the group proposed “that Internet companies use stricter terms of service agreements to ban unwelcome activity.” *Id.* Private actors have also attempted to eliminate terrorist presence on social media through the civil remedy in 18 U.S.C. § 2333. For example, an Israeli NGO, Shurat Hadin, threatened to sue Facebook if it did not “immediately and

James Foley, the State Department acknowledged that, along with the Department of Defense, it “reach[ed] out to social media sites like Twitter and YouTube . . . to highlight for them accounts that may be violating their own usage policy.”<sup>31</sup> Although Twitter attempted to remove tweets embedding the execution video or screenshots taken from it, and YouTube removed the video from its site, it is unclear whether the action was taken in response to the government’s request or because violence violates their terms of service.<sup>32</sup>

This was not the first time that government officials had requested social media sites to suspend or take down accounts affiliated with or related to FTOs. In 2011, American officials announced that they were “looking closely” at al-Shabaab’s use of Twitter and exploring legal options to shut down the account.<sup>33</sup> That same year, then-Senator Joe Lieberman requested that Twitter suspend all Taliban-related accounts.<sup>34</sup> During the 2012 conflict between Israel and Hamas, seven House Republicans asked the FBI to force Twitter to shut down Hamas’s official account, as well as those purported to belong to Hezbollah and al-Shabaab.<sup>35</sup> These requests were rejected. Although none of the reports discusses whether the officials asserted that Twitter had a legal obligation to take action, social media companies would probably comply with a government request to suspend identified terrorist accounts “if the government [had] a legally binding order and [made] it clear that the content in question [was] against the law.”<sup>36</sup>

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permanently take down a social media site provided to ‘15 ministers of Iran.’” Yonah J. Bob, *Israeli NGO Threatens to Sue Facebook for Hosting Iranian Ministers*, JERUSALEM POST (Sept. 16, 2013, 7:52 PM), <http://www.jpost.com/Middle-East/Israeli-NGO-threatens-to-sue-Facebook-for-hosting-Iranian-ministers-326280>.

31. Marie Harf, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (Aug. 21, 2014), transcript available at <http://www.state.gov/r/pa/prs/dpb/2014/08/230798.htm#ISIL>.

32. Parkinson, *supra* note 5. YouTube stated “that it doesn’t allow members of foreign terrorist organisations [sic] to have YouTube accounts, or people affiliated with terrorist organisations [sic].” *Id.*

33. Jeffrey Gettleman, *U.S. Considers Combatting Somali Militants’ Twitter Use*, N.Y. TIMES, Dec. 19, 2011, at A5. In 2012, BBC News reported that “the United States has attempted to close the al-Shabab account [on Twitter], but had lacked the legal means to force Twitter to do so.” *Somalia’s al-Shabab Twitter Account Stopped Again*, BBC NEWS (Sept. 6, 2013, 7:27 AM), <http://www.bbc.co.uk/news/world-africa-23987802>.

34. Ben Farmer, *Congress Calls on Twitter to Block Taliban*, TELEGRAPH (Dec. 25, 2011, 5:07 PM), <http://www.telegraph.co.uk/technology/twitter/8972884/Congress-calls-on-Twitter-to-block-Taliban.html>.

35. Julian Pecquet, *Gaza Violence Leads Lawmakers to Call for Shuttering Terror Groups on Twitter*, HILL (Nov. 23, 2012, 11:00 AM), <http://thehill.com/blogs/global-affairs/terrorism/269141-gaza-violence-leads-lawmakers-to-call-for-twitter-shuttering>.

36. Deana Kjuca, *How Social Networks are Dealing with Terrorists*, RADIO FREE EUROPE RADIO LIBERTY (Feb. 19, 2013), <http://www.rferl.org/content/twitter-facebook-terrorists/24906583.html> (citing and quoting Rebecca MacKinnon, an expert on Internet censorship and a senior fellow at the New America Foundation).

## II. CRIMINALIZING MATERIAL SUPPORT

### A. BACKGROUND AND PURPOSE

Following the first bombing of the World Trade Center in 1993, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which sought to prevent the provision of financial support to terrorist organizations.<sup>37</sup> Based on a finding that certain “foreign organizations known to engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,” Congress prohibited the provision of “material support or resources” to these organizations.<sup>38</sup> The first material support statute, 18 U.S.C. § 2339A, was part of this legislation.

Following the Oklahoma City bombing in 1995, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>39</sup> A second statute prohibiting the provision of material support to terrorists, 18 U.S.C. § 2339B, was included in AEDPA to address criticism that § 2339A left open the possibility that an individual could legally donate money to a terrorist group so long as the donor thought the money would be spent on political or social services provided by the group.<sup>40</sup>

Of the two material support statutes, § 2339B has been at the heart of the DOJ’s terrorism prosecution efforts, though it was rarely used before the September 11 attacks.<sup>41</sup> According to David Cole, the material support statutes “allow for the prosecution and conviction of individuals based more on what the government fears might happen in the future than on the wrongfulness of their past conduct.”<sup>42</sup>

### B. OVERVIEW OF 18 U.S.C. SECTIONS 2339A AND 2339B

Section 2339A prohibits the provision of “*material support or resources*, knowing or intending that they are to be used in preparation for, or in carrying out” an offense identified as a federal crime of

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37. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022–23.

38. Antiterrorism and Effective Death Penalty Act of 1996, Publ. L. No. 104-132, § 301(a)(7)–301(b), 110 Stat. 1214, 1247.

39. *Id.* § 303, 110 Stat. 1214, 1250.

40. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13 (2005) (citation omitted). This criticism was based on congressional findings that “the provision of funds to organizations that engage in terrorism serves to facilitate their terrorist endeavors regardless of whether the funds, in whole or in part, are intended or claimed to be used for non-violent purposes.” *Id.* at 15 (citing S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(a)(1)(G))).

41. CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1, 1 n.1 (2010), available at <http://www.fas.org/sgp/crs/natsec/R41333.pdf>.

42. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 723 (2009).

terrorism.<sup>43</sup> This section outlaws support for the crimes a terrorist has committed or may be planning to commit. Section 2339A requires that a defendant know or intend that the support will assist in the commission of a federal crime of terrorism.<sup>44</sup> Conviction for a violation of § 2339A is punishable by imprisonment for not more than fifteen years and/or a fine of not more than \$250,000.<sup>45</sup>

Section 2339B undoubtedly seeks to extend criminal liability beyond the confines of § 2339A. Section 2339B outlaws “knowingly provid[ing] material support or resources to a foreign terrorist organization.”<sup>46</sup> To violate this statute, an individual or entity<sup>47</sup> “must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.”<sup>48</sup> Therefore, a conviction for providing material support to terrorist organizations under § 2339B requires that the jury find (1) that the accused provided material support, and (2) that the accused knew that the beneficiary of the support was a designated terrorist organization or knew that it engaged in terrorism.<sup>49</sup>

Terrorist organizations, as defined in these statutes, are “foreign organizations that are designated by the Secretary of State in accordance with § 219 of the Immigration and Nationality Act (“INA”).”<sup>50</sup> Section 219 authorizes the Secretary of State to designate an organization as a FTO if she finds that:

[T]he organization is a foreign organization; the organization engages in terrorist activity ( . . . or retains the capability and intent to engage in terrorist activity or terrorism); and the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.<sup>51</sup>

As of July 2014, the State Department had designated approximately fifty organizations as FTOs, including al-Shabaab, al-Qaeda, Hamas, Hezbollah, and the Shining Path.<sup>52</sup> These statutes also reach organizations that have engaged in or currently engage in “terrorist activity,” as defined by § 212(a)(3)(B) of the Immigration and

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43. 18 U.S.C. § 2339A (2014) (emphasis added).

44. DOYLE, *supra* note 41, at 15, 19.

45. *Id.* at 20. Organizational defendants face a fine of not more than \$500,000. *Id.*

46. 18 U.S.C. § 2339B(a).

47. According to the statute, “the term ‘person’ means any individual or entity capable of holding a legal or beneficial interest in property.” *Id.* § 2331(3).

48. *Id.* § 2339B(a)(1).

49. DOYLE, *supra* note 41, at 9.

50. Bureau of Counterterrorism, *supra* note 4.

51. 8 U.S.C. § 1189(a)(1) (2014).

52. For the full list see BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2012, at 244–45 (2013), available at <http://www.state.gov/documents/organization/210204.pdf>.

Nationality Act,<sup>53</sup> or “terrorism,” as defined by § 140(d)(2) of the Foreign Relations Authorization Act.<sup>54</sup> Conviction for a violation of § 2339B is punishable by fine or by imprisonment for not more than fifteen years, or both, and if the death of any person results from the commission of the offense, the offender “shall be imprisoned for any term of years or for life.”<sup>55</sup>

Section 2339A is unlikely to provide the legal authority to prosecute social media companies because it requires specific intent to further the organization’s terrorist activities. Section 2339B, however, could provide the requisite legal authority assuming the inquiry is limited only to accounts that purport to be or are clearly linked to FTOs. As such, the remainder of this Note deals exclusively with § 2339B.

### *I. Statutory Definition of Material Support*

The scope of the term “material support or resources” has been controversial since it was first defined in 1996.<sup>56</sup> As the statute is currently written:

[T]he term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments, or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>57</sup>

This definition applies to the term as used in both § 2339A and § 2339B.<sup>58</sup> Whether the term “material” requires that the support provided be important or of great consequence remains unclear based upon existing judicial precedent.<sup>59</sup> As such, the statutory definition covers a wide range of activities.

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53. “Terrorist activity” is defined as “any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” and includes, among other things, the hijacking or sabotage of any conveyance; hostage taking; assassinations; or the use of biological or chemical agents, or nuclear weapons. 8 U.S.C. § 1182(a)(3)(B)(iii).

54. “Terrorism” is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2014).

55. 18 U.S.C. § 2339B(a)(1) (2014).

56. DOYLE, *supra* note 41, at 4.

57. 18 U.S.C. § 2339A(b)(1); *see* § 2339B(g)(4).

58. *See* 18 U.S.C. § 2339B(g)(4).

59. Justice Breyer reads the term “material” to require support that is of “importance or great consequence.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 57 (2010) (Breyer, J., dissenting). The majority did not address this aspect of the statute.

## 2. *The Decision in Holder v. Humanitarian Law Project*

Soon after § 2339B was enacted, groups seeking to provide support for the humanitarian and political activities of two designated terrorist organizations sought to enjoin enforcement of the criminal ban against their provision of support for these organizations.<sup>60</sup> The Humanitarian Law Project (“HLP”), a U.S. based organization with consultative status to the United Nations, sought to “provide support for the humanitarian and political activities of the PKK [Kurdistan Workers Party] and the LTTE [Liberation Tigers of Tamil Eelam] in the form of monetary contributions, other tangible aid, legal training, and political advocacy.”<sup>61</sup> HLP primarily argued that prohibiting this type of conduct violated their freedom of speech under the First Amendment.<sup>62</sup> The group’s central argument was that the support they sought to provide constituted political speech,<sup>63</sup> the material support statute imposed a content-based restriction on speech,<sup>64</sup> and that the Constitution prohibits content-based restrictions on political speech urging lawful goals, specifically where there is no intent to further the unlawful goals of the group.<sup>65</sup> The DOJ contended that the statute does not target speech, per se, but rather that it regulates the conduct of providing support to designated terrorist organizations, even if the support takes the form of speech.<sup>66</sup>

The Court upheld the constitutionality of the statute as applied to HLP’s desired conduct, but recognized that “the scope of the material-support statute may not be clear in every application.”<sup>67</sup> Writing for the majority, Chief Justice Roberts rejected HLP’s contention that the statute requires proof that a defendant intended to further a foreign terrorist organization’s illegal activities.<sup>68</sup> Instead, the Court held that the necessary mental state for a violation of § 2339B is “knowledge about the organization’s connection to terrorism, *not* specific intent to further the organization’s terrorist activities.”<sup>69</sup>

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60. *Id.* at 11 (majority opinion).

61. *Id.* at 10.

62. *Id.* at 10–11.

63. *Id.* at 25.

64. Brief for the Respondents at 47–50, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89); Reply Brief for Humanitarian Law Project, et al. at 27–30, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89).

65. *Humanitarian Law Project*, 561 U.S. at 10–11.

66. Brief for the Respondents, *supra* note 64, at 44–47 (“Section 2339B regulates conduct without regard to its expressive content . . . Section 2339B does not target expression at all . . . Rather, Section 2339B aims at a certain type of conduct: the provision of material support or resources to foreign terrorist organizations. . . . [I]t aims at the act of giving material support to terrorists—regardless whether accomplished through words . . .”).

67. *Humanitarian Law Project*, 561 U.S. at 21.

68. *Id.* at 16–17.

69. *Id.* (emphasis added).

Additionally, the Court determined that the statute was not impermissibly vague as applied to the particular facts at issue. In so doing, the Court clarified the term “service” found in the statutory definition of “material support and resources.” The Court held that the term “refers to concerted activity, not independent advocacy.”<sup>70</sup> Thus, the term “service” covers only “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.”<sup>71</sup> The Court refused to determine how much direction or coordination would be necessary because it would require “sheer speculation.”<sup>72</sup> However, the Court acknowledged that “‘gradations of fact or charge would make a difference as to criminal liability,’ and so ‘adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation.’”<sup>73</sup>

Finally, the Court determined that the material support statute, as applied to HLP, did not violate the First Amendment.<sup>74</sup> The Court rejected the argument that the statute banned “pure political speech,”<sup>75</sup> instead finding that:

Congress has prohibited “material support,” which most often does not take the form of speech. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.<sup>76</sup>

As a result, our constitutional jurisprudence permits the government to outlaw at least some speech to or with foreign designated groups.<sup>77</sup>

The majority reached this conclusion because material support “helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”<sup>78</sup> The majority did recognize, however, that not all future applications of the statute to speech or advocacy would survive First Amendment scrutiny.<sup>79</sup> The Court implied that because any restriction on speech would be content-based, courts should apply a level of scrutiny more rigorous than

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70. *Id.* at 23–24 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993) (defining “service” to mean “the performance of work commanded or paid for by another: a servant’s duty: attendance on a superior”; or “an act done for the benefit or at the command of another”). Therefore, “independent advocacy . . . is not prohibited by § 2339B.” *Id.* at 24.

71. *Id.*

72. *Id.* at 25.

73. *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

74. *Id.*

75. *Id.*

76. *Id.* at 26.

77. Shanor, *supra* note 17, at 519–20. The Court’s holding suggested that the material support statute could not be applied to speech constituting the provision of a service to domestic groups. *Id.*

78. *Humanitarian Law Project*, 561 U.S. at 30.

79. *Id.* at 39.

intermediate scrutiny, but did not explicitly state whether that should be strict scrutiny or something in between.<sup>80</sup>

### C. PROSECUTING SOCIAL MEDIA COMPANIES UNDER SECTION 2339B

As mentioned above, § 2339A is not a viable option as applied to the activities of social media companies because of the specific intent requirement. Section 2339B, however, which requires only “knowledge about the organization’s connection to terrorism,”<sup>81</sup> could conceivably be applied to social media websites used by designated FTOs who claim on their account profile to be acting on behalf of such an organization. This is in line with the DOJ’s approach to terrorism prosecutions over the past decade.<sup>82</sup>

Section 2339B would provide the most viable means of prosecuting social media companies for allowing FTOs to use their product because the statute does not require intent to further the goals of the supported organization. Section 2339A outlaws “support for the crimes a terrorist has committed or may be planning to commit,”<sup>83</sup> and requires that the offense be committed with the intent of promoting a federal crime of terrorism.<sup>84</sup> Without direct evidence, it would be far-fetched to assert that legitimate businesses, such as social media companies, act intending to promote federal terrorism crimes. The Supreme Court’s elimination of a specific intent requirement reinforces this interpretation.<sup>85</sup>

Although the material support statute has never been used against a social media company,<sup>86</sup> the DOJ has used the statute to prosecute those responsible for hosting terrorist content on their websites. For example, in the aftermath of the September 11 attacks, the DOJ suggested that website administrators would be held criminally liable for terrorist activity on their websites.<sup>87</sup> In accordance with this policy, Sami Al-Hussayen was prosecuted under the material support statutes for establishing a series of Internet sites, some of which recruited members and instigated “acts of violence and terrorism.”<sup>88</sup>

The DOJ has continued prosecuting founders and administrators of websites known to have links to terrorism.<sup>89</sup> In 2010, the DOJ charged

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80. *Id.* at 27–28.

81. *Id.* at 16–17.

82. DOYLE, *supra* note 41, at 1.

83. *Id.* at 15.

84. *United States v. Awan*, 607 F.3d 306, 316 (2d Cir. 2010).

85. *See supra* note 69 and accompanying text.

86. *See McNeal, supra* note 25, at 818–19.

87. Eric Lipton & Eric Lichtblau, *Online and Even Near Home, A New Front Is Opening in the Global Terror Battle*, N.Y. TIMES, Sept. 23, 2004, at A12.

88. *Id.*

89. *See* Press Release, FBI, Leader of Revolution Muslim Pleads Guilty to Using Internet to Solicit Murder and Encourage Violent Extremism (Feb. 9, 2012), *available at*

Zachary Chesser, the founder of a radical website, with attempting to provide material support to a designated FTO.<sup>90</sup> Two years later, the FBI arrested Jesse Curtis Morton, the leader and founder of the Revolution Muslim Organization's website. Morton later pled guilty "to using his position as a leader of Revolution Muslim Organization's Internet sites to conspire to solicit murder, make threatening communications, and using the Internet to place others in fear."<sup>91</sup> While discussing Morton's plea, James W. McJunkin, Assistant Director in Charge of the FBI's Washington Field Office, stated that "[i]ndividuals such as Morton who encourage violence and create fear over the internet are a danger to our society and to the freedoms we enjoy as citizens," and therefore, "the FBI will continue to pursue those who promulgate violent extremism and promote the radicalization of others."<sup>92</sup>

President Barack Obama's policy on countering online radicalization could be one reason why the material support statutes have been used against website hosts and founders, but not against social media companies. Although the Obama administration "investigate[s] and prosecute[s] those who use the Internet to recruit others to plan or carry out acts of violence,"<sup>93</sup> the administration does not attempt to remove them from the web.<sup>94</sup> President Obama's approach stands in contrast to that of President George W. Bush's administration, which "[sought] to deny the Internet to our terrorist enemies as an effective safe haven for their recruitment, fund-raising, training, and operational planning."<sup>95</sup> To that end, President Bush proposed closing any gaps in the U.S. legal system that would allow terrorists to exploit virtual safe havens and worked to ensure that law enforcement had "the necessary

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<http://www.fbi.gov/washingtondc/press-releases/2012/leader-of-revolution-muslim-pleads-guilty-to-using-internet-to-solicit-murder-and-encourage-violent-extremism> [hereinafter Press Release, Leader Pleads Guilty to Using Internet to Solicit Murder]; Press Release, FBI, Leader of 'Revolution Muslim' Websites Pleads Guilty to Using Internet to Threaten Jewish Organizations (Oct. 31, 2013), available at <http://www.fbi.gov/washingtondc/press-releases/2013/leader-of-revolution-muslim-website-pleads-guilty-to-using-internet-to-threaten-jewish-organizations>.

90. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, ZACHARY CHESSER: A CASE STUDY IN ONLINE ISLAMIST RADICALIZATION AND ITS MEANING FOR THE THREAT OF HOMEGROWN TERRORISM 5-6 (2012), available at <http://www.hsgac.senate.gov/download/zachary-chesser-a-case-study-in-online-radicalization>. Chesser founded *themujahidblog.com*, which was "intended to be 'a website dedicated to those who give their lives for this religion.'" *Id.* at 5.

91. Press Release, Leader Pleads Guilty to Using Internet to Solicit Murder, *supra* note 89.

92. *Id.*

93. Quintan Wiktorowicz, *Working to Counter Online Radicalization to Violence in the United States*, WHITE HOUSE BLOG (Feb. 5, 2013, 10:02 AM), <http://www.whitehouse.gov/blog/2013/02/05/working-counter-online-radicalization-violence-united-states>.

94. *Id.*

95. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 21 (2007), available at [http://www.dhs.gov/xlibrary/assets/nat\\_strat\\_homelandsecurity\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf).

and proper mix of tools and authorities to defeat the threats of the 21st century.”<sup>96</sup>

The difference in counterterrorism policies and approaches between the two administrations demonstrates that a future president or Attorney General could support prosecuting social media corporations that provide a safe-haven to terrorist groups. Only time will tell how future administrations will address the problem of terrorists on the social media.<sup>97</sup>

### III. THE AMBIGUITY OF THE “COORDINATION” REQUIREMENT

The Supreme Court’s interpretation of the material support statute in *HLP* has substantially impacted the executive branch’s ability to prosecute social media companies. The Court’s vague reference to a “coordination” requirement has caused more problems than it likely envisioned.

During oral argument, counsel for HLP, David Cole, expressed concern that a broad application of the statute would extend it too far. Cole posed the question of whether newspapers publishing op-eds by Hamas spokespersons could be found liable for providing material support to Hamas, a designated foreign terrorist organization. Justice Scalia responded that the Court could “cross that bridge” when necessary to do so.<sup>98</sup> Cole’s comment concerned whether the traditional media could be held liable under the material support statute, and the question remains unanswered.

The Court’s analysis in *HLP* suggests there are three elements the government must prove for a defendant social media company to be found liable for providing material support: (1) that the social media company is providing a service to an FTO; (2) that the service is being performed “in coordination with, or at the direction of, a foreign terrorist organization;”<sup>99</sup> and (3) that the social media company has the requisite intent. Each of these elements is addressed below in turn.

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96. *Id.* at 22.

97. In 2004, the U.S. Attorney in the Southern District of New York argued that merely using communications equipment in furtherance of a designated terrorist organization’s goals constituted criminal conduct. *United States v. Sattar*, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003). This argument was ultimately unsuccessful. *Id.* However, the argument used in *Sattar* suggests that it is not so far-fetched to believe that the DOJ would endorse a policy of prosecuting social media companies under the material support statute.

98. Transcript of Oral Argument at 14, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (Nos. 08-1498, 09-89).

99. *Humanitarian Law Project*, 561 U.S. at 24.

#### A. SOCIAL NETWORKING AS A SERVICE

This Subpart addresses whether social media companies are providing a “service” as envisioned by Congress in the material support statute. As a reminder,

[T]he term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments, or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>100</sup>

Looking at the plain language, the use of the word “or” indicates that the statute prohibits the provision of property, service, financial securities, financial services, lodging, training, expert advice, etc. Currency or monetary instruments, which are listed after “service,” are merely a list of what might be found to be a service, but it is not exclusive—the use of the word “including” indicates the list is merely illustrative.<sup>101</sup> Indeed, in *HLP*, the Supreme Court found that advocacy was a prohibited “service” under the statute.<sup>102</sup> Then-Solicitor General Elena Kagan’s statement as to the government’s view of the term’s breadth supports a broad interpretation of the term. At oral argument, Kagan asserted that a true service is “something that will help the foreign organization in whatever it does.”<sup>103</sup> From all of this, it becomes clear that § 2339B and the definition of material support or resources covers a broad range of activities.

The legislative history, while sparse, also supports a broad interpretation of the term “service.” “Service” was added to the definition of “material support or resources” in the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>104</sup> Congressman Mark Green from Wisconsin, who ultimately voted against the bill, praised the clarification and breadth of the definition of “material support,” stating:

Every terrorist act is really the result of a terrorist chain made of many links—from those evil figures who pull the trigger or drive the rigged truck to those who provide “material support” to terrorists. . . . If we are going to be successful in the long run in our fight against terrorism, we must attack every link in that chain. As the author of this session’s

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100. 18 U.S.C. § 2339A(b)(1) (2014); *see also id.* § 2339B(g)(4).

101. The use of “the participle *including* typically indicates a partial list.” BLACK’S LAW DICTIONARY 831 (9th ed. 2009).

102. *See generally Humanitarian Law Project*, 561 U.S. 1.

103. Transcript of Oral Argument, *supra* note 98, at 42.

104. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3762 (codified at 18 U.S.C. § 2339A(b)(3)).

primary bill strengthening material support laws, I'm proud of the work I've done on this front, and glad to see much of it in this bill.<sup>105</sup>

Congressman Rush Holt of New Jersey, who ultimately supported the bill, expressed concern about “the apparently sweeping definition of what ‘providing material support’ to terrorists” meant in the context of this bill.<sup>106</sup> Finally, Senator Russ Feingold of Wisconsin, who also voted in favor of the bill, expressed concern that, although the “material support provision adopted by the conference [was] not as broad as the provision contained in the House bill” members of Congress did not have sufficient time to analyze “its full implications.”<sup>107</sup> While these individuals did not necessarily agree on the final disposition of the bill, it is clear that Congress was aware that the language was broad, and thus, Congress could have modified the language if it had intended the definition to be read more narrowly.

Finally, terrorists on social media present precisely the evil Congress sought to cure in passing the material support statutes. According to the Supreme Court, the prohibition against providing material support stems from the fact that material support “help[s] lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”<sup>108</sup> Al-Shabaab’s online activity during the September 21 attack on the Westgate Shopping Mall is the paradigmatic example. Al-Shabaab, a designated FTO, was able to collect more than 15,000 followers by posting details of the vicious attack.<sup>109</sup> Although the group’s accounts were ultimately suspended, likely for violating Twitter’s terms of service prohibiting specific threats of violence,<sup>110</sup> al-Shabaab’s Twitter activities since 2011 have helped legitimize and strengthen the group. Renowned terrorism expert Bruce Hoffman explains this phenomenon:

[A]ll terrorist groups have one trait in common: they do not commit actions randomly or senselessly. Each wants maximum publicity to be generated by its actions and, moreover, aims at intimidation and subjection to attain its objectives. . . . Only by spreading the terror and outrage to a much larger audience can the terrorists gain the maximum potential leverage that they need to effect fundamental political change.<sup>111</sup>

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105. 150 CONG. REC. H11,017–18 (daily ed. Dec. 7, 2004) (statement of Rep. Green).

106. *Id.* at 11,022 (statement of Rep. Holt).

107. 150 CONG. REC. S11,939, 11,984 (daily ed. Dec. 8, 2004) (statement of Sen. Feingold).

108. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010).

109. Peter Bergen, *Are Mass Murderers Using Twitter as a Tool?*, CNN (Sept. 27, 2013, 5:28 PM), <http://www.cnn.com/2013/09/26/opinion/bergen-twitter-terrorism>.

110. *Id.*

111. BRUCE HOFFMAN, *INSIDE TERRORISM* 173–74 (rev. and expanded ed. 2006).

The plain language, legislative history, and legislative intent provide strong support for a broad understanding of the term “service.” Thus, it is clear that social media companies that allow FTOs to use their websites are providing a “service.” Two questions remain: (1) whether the coordination requirement is satisfied and (2) whether social media companies have the requisite intent.

#### B. WHAT DOES IT MEAN TO COORDINATE?

The *HLP* Court interpreted the material support statute not to prohibit independent advocacy.<sup>112</sup> Instead, the Court concluded that Congress intended to reach only activities “directed to, coordinated with, or controlled by foreign terrorist groups.”<sup>113</sup> The Court, however, did not clarify how the “coordination” requirement should be understood or applied. At oral argument, Justice Scalia recognized the eventual need to define “coordination” in responding to Cole’s hypothetical question regarding the potential liability of newspapers publishing a Hamas op-ed.<sup>114</sup> Justice Scalia responded that the answer “depends on what ‘coordinating’ means, doesn’t it? And we can determine that in the next case.”<sup>115</sup>

Defining coordination in *HLP* would have better served lower courts seeking to apply the *HLP* decision. Although the distinction between speech that is “coordinated with foreign terrorist organizations”—and is thus prohibited by the material support statute—and speech that constitutes independent advocacy may be clear in the abstract, application of the test is more complicated.<sup>116</sup> In determining the liability of social media companies, “the key question would seem to be how far one can stretch the meaning of ‘coordination.’”<sup>117</sup>

##### *1. Application of Coordination in the Prosecution of Tarek Mehanna*

The issue of how to interpret and apply the “coordination” requirement of the material support statute did not garner much

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<sup>112</sup> *Humanitarian Law Project*, 561 U.S. at 25. The Court did not clarify what would qualify as “independent,” and indeed, it is not clear. One would think that an interpretation permitting independent activity would allow an individual to post terrorist propaganda of her own volition on her personal social media account.

<sup>113</sup> *Id.* at 34.

<sup>114</sup> Transcript of Oral Argument, *supra* note 98, at 14.

<sup>115</sup> *Id.*

<sup>116</sup> Indeed, scholars, journalists, and human rights groups were troubled by the fact that the majority declined to specify how much “coordination” would result in a violation of the statute. Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 *HASTINGS L.J.* 455, 498–99 (2011).

<sup>117</sup> George Brown, *Notes on a Terrorism Trial—Preventative Prosecution, “Material Support” and the Role of the Judge after United States v. Mehanna*, 4 *HARV. NAT’L SEC. J.* 1, 25 (2012).

attention until the 2011 prosecution of Tarek Mehanna,<sup>118</sup> “one of the first cases to apply the test established by the Supreme Court in [*HLP*] to an actual prosecution.”<sup>119</sup> The government alleged that Mehanna traveled to Yemen to enroll in a terrorist training camp in 2004.<sup>120</sup> The government also alleged that Mehanna engaged in extensive Internet activities, specifically, that he translated and distributed propaganda supporting jihad and al-Qaeda.<sup>121</sup> The government provided no evidence that Mehanna ever met or communicated with anyone from al-Qaeda or that his translations were sent to al-Qaeda.<sup>122</sup> Rather, the government argued that Mehanna’s desire to aid al-Qaeda was sufficient to establish liability.<sup>123</sup>

The first question the District Court attempted to answer was how a trial court should apply the test for criminalizing advocacy of terrorism set forth by the Supreme Court.<sup>124</sup> In accordance with *HLP*, the trial judge provided the jury with instructions that “a person must be acting in coordination with or at the direction of a designated foreign terrorist organization,” to be convicted under § 2339B.<sup>125</sup> Mehanna was convicted and sentenced to more than seventeen years in federal prison.<sup>126</sup>

In affirming Mehanna’s conviction, the First Circuit held that the trial court adequately instructed the jury.<sup>127</sup> However, the court skirted the need to decide anything about coordination by affirming Mehanna’s conviction on the grounds that his trip to Yemen was sufficient to

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118. See Marty Lederman, *Avoidance of the First Amendment Questions in the Mehanna Case*, Just Security (Nov. 14, 2013, 8:44 AM), <http://justsecurity.org/2013/11/14/avoidance-amendment-questions-mehanna-case>.

119. Brown, *supra* note 117, at 2. In *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011), and *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011), the Second and Eleventh Circuits interpreted the relationship requirement liberally, suggesting that unilateral action on the part of a defendant would be enough to support a material support conviction. Brown, *supra* note 117, at 23–24.

120. *United States v. Mehanna*, 669 F. Supp. 2d 160, 161 (D. Mass. 2011), *aff’d* 735 F.3d 32 (1st Cir. 2013), *and cert. denied*, 82 U.S.L.W. 3589 (U.S. Oct. 6, 2014) (No. 13-1125). According to the government, the trip was unsuccessful because Mehanna was unable to find a terrorist training camp. *Id.*

121. See *id.* at 162–63.

122. David Cole, *39 Ways to Limit Free-Speech*, N.Y. REV. OF BOOKS (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech>.

123. *Id.*

124. Brown, *supra* note 117, at 4. The court also considered how to apply Federal Rule of Evidence 403 to the type of evidence likely to be offered in a material support trial and how to calculate the sentence upon conviction. *Id.* at 4–5.

125. *United States v. Mehanna*, 735 F.3d 32, 48 (1st Cir. 2013), *cert. denied*, 82 U.S.L.W. 3589 (U.S. Oct. 6, 2014) (No. 13-1125).

126. Press Release, Federal Bureau of Investigation, Tarek Mehanna Sentenced in Boston to 17 Years in Prison on Terrorism-Related Charges (Apr. 12, 2012), *available at* <http://www.fbi.gov/boston/press-releases/2012/tarek-mehanna-sentenced-in-boston-to-17-years-in-prison-on-terrorism-related-charges>.

127. *Mehanna*, 735 F.3d at 49–50 (citations omitted).

support a guilty verdict, even if his Internet activities were constitutionally protected.<sup>128</sup>

At least one scholar believes the decision sheds light on how to interpret the coordination requirement articulated in *HLP*. Peter Margulies believes that the statute, as interpreted by *HLP* and *Mehanna*, permits posting, translating, or reporting on terrorist videos “because you happen to agree” with them, but prohibits taking direction from an individual claiming to be acting at the behest of a terrorist organization.<sup>129</sup> Despite Margulies’ interpretation, the uncertainty created by *HLP* persists, as evidenced by the question *Mehanna* hoped to be addressed by the Supreme Court: “[w]hether a citizen’s political and religious speech may constitute a provision of ‘material support or resources’ to an FTO under the ‘coordination’ rubric of *Humanitarian Law Project*.”<sup>130</sup> The Supreme Court’s denial of certiorari only serves to perpetuate the confusion.

## 2. *The Realm of Possible Interpretations as Applied to Social Media Companies*

As previously explained, the Court in *HLP* clarified that Congress intended to reach only activities “directed to, coordinated with, or controlled by foreign terrorist groups.”<sup>131</sup> Additionally, the Court held that the term “refers to concerted activity, not independent advocacy.”<sup>132</sup> There are a number of ways courts could interpret this limitation on material support. This Subpart seeks to address the possible interpretations and whether the activities of social media companies are prohibited, notwithstanding the constitutional limits on what § 2339B prohibits.

### a. “Directed To” and “Controlled By”

The first and last elements of the Supreme Court’s analysis—“directed to” and “controlled by”—can easily be dismissed within the context of terrorist organizations using social media. Using the plain meaning and dictionary meaning of “directed to,” courts should immediately dismiss any theory of liability based on the premise that

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128. *Id.* at 51.

129. Peter Margulies, *The First Circuit and the First Amendment*, LAWFARE BLOG (Nov. 15, 2013, 6:42 AM), <http://www.lawfareblog.com/2013/11/the-first-circuit-and-the-first-amendment>. Margulies did not explain his logic.

130. Petition for Writ of Certiorari at 1, *Mehanna v. United States*, 2014 WL 1090039 (No. 13-1125).

131. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010).

132. *Id.* at 23–24 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993) (defining “service” to mean “the performance of work commanded or paid for by another: a servant’s duty: attendance on a superior”; or “an act done for the benefit or at the command of another”). Therefore, “independent advocacy . . . is not prohibited by § 2339B.” *Id.* at 24.

social media companies are providing a service directed to FTOs. The dictionary definition of “directed to” indicates the phrase means “to say (something) to a particular person or group.”<sup>133</sup> Social media companies aim to serve as many people as possible; this is their business model. Thus, social media does not exist to “speak” to any particular group. This stands in contrast to HLP’s activity, because HLP expressly intended to assist the PKK and LTTE, both designated FTOs.

Similarly, the plain meaning and dictionary definitions of “controlled by” are inapplicable to social media companies. The dictionary defines “controlled by” to mean that the target directs the behavior of a person or causes a person to do what it wants.<sup>134</sup> Barring evidence to the contrary, social media companies are entities controlled by their executives, board members, or even shareholders. Those individuals direct the behavior of social media companies, not FTOs, and therefore cannot be said to be “controlled” by FTOs. Although the messages distributed through social media are indeed “controlled by” the FTO, the service itself—provision of a website through which FTOs spread these messages—is not. As a result, the only possible avenue of liability for social media sites that allow terrorist organizations to use their accounts is if the service is performed “in coordination with” FTOs.

*b. “Coordinated With”*

It is not as simple, however, to dismiss theories of liability based on the proposition that social media companies coordinate with FTOs. *Webster’s Third New International Dictionary* defines “coordinate” as “bring[ing] into a common action, movement or condition: regulat[ing] and combin[ing] in harmonious action.”<sup>135</sup> The government would have several bases for arguing that social media companies coordinate with FTOs. First, the government could argue that social media companies are working in coordination with FTOs by providing these groups a platform from which to spread their message, recruit, and fundraise. Second, social media companies benefit from such use of their product because it brings traffic to the site that might not exist if not for the presence of such groups. Finally, the government could argue that by failing to remove known terrorist organizations from their sites, the social media companies have failed to act, allowing FTOs to work with their supporters in furtherance of their cause. The failure to suspend FTO accounts could be seen as a conscious decision that provides evidence of

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133. WEBSTER’S THIRD NEW INT’L DICTIONARY 640 (1993) (defining “direct”).

134. *Id.* at 496–97 (defining “controlled by”).

135. *Id.* at 501 (defining “coordinate”).

coordination, particularly as social media companies have the ability to monitor and proactively take down these accounts.<sup>136</sup>

Indeed, at least one social media company, YouTube, potentially has the ability to prevent users from posting terrorist propaganda through use of its “Content ID System.”<sup>137</sup> The Content ID System was initially developed to allow copyright users to “easily identify and manage their content on YouTube.”<sup>138</sup> The system works by scanning videos that are uploaded to YouTube against a database of files that content owners have submitted to Google.<sup>139</sup> With terrorist propaganda, YouTube or any other social media company using a similar system could input key words or portions of previously released propaganda images or videos to identify potential terrorist activity on their website.<sup>140</sup>

A similar system may already be in effect, though the Department of Homeland Security (“DHS”) claims the program is “limited to gathering information that would help gain operational awareness about attacks, disasters or other emerging problems.”<sup>141</sup> In 2009, DHS began designing a program to monitor social networking websites for “policy debates related to the department.”<sup>142</sup> The 2011 “Analyst’s Desktop Binder,” a reference guide for DHS analysts working on this program, provides a list of keywords and search terms to be used when monitoring social media websites.<sup>143</sup> Social media companies could use this list to flag suspicious accounts and subsequently review the accounts or take them down.

Social media companies, however, provide their services to hundreds of millions of individuals and entities and would have to allocate a large amount of resources to implement such a system. Further, it would likely require human review of flagged accounts to

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136. See Keith Wagstaff, *Facebook and Instagram Crack Down on Illegal Online Gun Sales*, NBC NEWS (Mar. 5, 2014, 1:59 PM), <http://www.nbcnews.com/tech/social-media/facebook-instagram-crack-down-illegal-online-gun-sales-n45316>.

137. See Katz & Devon, *supra* note 23.

138. *How Content ID Works*, GOOGLE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Dec. 14, 2014).

139. *Id.*

140. The companies could work with the FBI, CIA, or other counterterrorism agencies to come up with these words. This would potentially be problematic because the words chosen would likely include academic articles or news reports discussing terrorism. Indeed, YouTube and Google received a large amount of criticism during the implementation of the Content ID System because of the wide net it cast over legitimate uploads. See, e.g., Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013, 10:00 AM), <http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side>.

141. Charlie Savage, *Homeland Analysts Told to Monitor Policy Debates in Social Media*, N.Y. TIMES (Feb. 22, 2012), <http://www.nytimes.com/2012/02/23/us/house-questions-homeland-security-program-on-social-media.html>.

142. *Id.*

143. DEP’T OF HOMELAND SEC., ANALYST’S DESKTOP BINDER 20–23 (2011), available at <https://www.documentcloud.org/documents/296596-analyst-desktop-binder-redacted.html>.

know whether an account was genuinely connected to an FTO or was merely someone using the organization's name. Therefore, because social media companies have not "made arrangements with" or "worked with the FTO," they should not be seen as having "coordinated" with an FTO, although the statute could be interpreted in this manner. Although social media companies could screen for terrorist accounts on their own, the First Amendment would be implicated if the government directed such screening.<sup>144</sup>

*c. "Concerted Activity"*

It is unclear whether satisfying the coordination requirement is sufficient to satisfy the concerted activity requirement.<sup>145</sup> The text and structure of the Court's decision in *HLP* suggests that proving coordination is all that is required under § 2339B because, once coordination exists, the activity is no longer independent of the FTO. However, if the concerted activity requirement is a separate prong, it is likely to be the biggest obstacle for any hypothetical prosecution. The dictionary defines "concerted" as "plan[ning] together; settl[ing] or adjust[ing] by conference, agreement, or consultation"; "act[ing] in harmony or conjunction: form[ing] combined plans."<sup>146</sup> In accordance with this definition, the government could contend that the social media companies' failure to suspend FTO accounts is deliberate behavior the companies knew would assist the FTO. To rebut this assertion, the companies would contend there is nothing planned or deliberate about the way in which terrorist organizations use their product, at least on their part; rather, it is merely a result of the companies' business models.

It is impossible to predict how courts would react to the question of whether social media companies have acted in coordination with FTOs, or whether they have engaged in concerted activity prohibited by the statute. The dictionary definitions, in addition to the case law, could lead to conflicting, yet equally plausible, results; this Note need not resolve the outcome. This uncertainty, however, suggests it is plausible that social media companies are providing a service prohibited by the material support statute—the social media accounts of terrorist groups benefit the FTO and the activity is, at least arguably, "directed to, coordinated with, or controlled by foreign terrorist groups,"<sup>147</sup> and is therefore not independent of the FTO.

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<sup>144</sup>. See *infra* Part IV.B.

<sup>145</sup>. The Court held that the term "service" "refers to concerted activity, not independent advocacy." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 23 (2010).

<sup>146</sup>. WEBSTER'S THIRD NEW INT'L DICTIONARY 470 (1993).

<sup>147</sup>. *Humanitarian Law Project*, 561 U.S. at 36.

### C. DO SOCIAL MEDIA COMPANIES HAVE THE REQUISITE MENS REA?

The final difficulty of prosecuting of social media companies is whether there is evidence sufficient to support a finding that social media companies possessed knowledge about users' connections to terrorism.<sup>148</sup> The knowledge required to be criminally liable may be clear in some instances, where, for example, the material support provided is recruiting individuals to join al-Qaeda. However, if the support is innocent or neutral on its face, as would seem to be the case with social media websites, the mens rea question is more complicated. *HLP* did not address this question because it was "undisputed that the plaintiffs' support would have been provided directly to two groups that were designated as foreign terrorist organizations by the State Department."<sup>149</sup>

To find the donor liable under § 2339B, "[t]he prosecution [must] prove that a donor provided material support to an organization knowing either that the organization was a designated FTO, or that it engaged or engages in terrorist activity or terrorism."<sup>150</sup> What this means, particularly when knowledge is not overt, is unclear because "defendants in typical material support cases . . . satisf[y] a more stringent intent requirement."<sup>151</sup>

Social media companies will reject any assertion that they knew they were providing a service to designated FTOs, claiming there is no way for them to know who is using their services. For example, approximately one billion people use Facebook<sup>152</sup> in over seventy languages.<sup>153</sup> Twitter, which is offered in over twenty-one languages,<sup>154</sup> has over 200 million users each day.<sup>155</sup> The essential question is whether the sheer number of

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148. See 18 U.S.C. § 2339B(1) (2014). Conviction under § 2339B does not require a specific intent to further the goals of the terrorist organization; it requires only knowledge about the organization's connection to terrorism. *Humanitarian Law Project*, 561 U.S. at 16–17.

149. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 632 (S.D. Tex. 2011).

150. *United States v. Warsame*, 537 F. Supp. 2d 1005, 1021 (D. Minn. 2008) (citation omitted); see also *United States v. Marzook*, 383 F. Supp. 2d 1056, 1070 (N.D. Ill. 2005) (holding that § 2339B requires "proof that [the] Defendant provided material support knowing either that the recipient was a designated FTO or had engaged in terrorist activity").

151. Sam Adelsberg et al., Note, *The Chilling Effect of the "Material Support" Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms*, 4 HARV. NAT'L SEC. J. 282, 290 (2013).

152. Ashlee Vance, *Facebook: The Making of 1 Billion Users*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2012), <http://www.businessweek.com/articles/2012-10-04/facebook-the-making-of-1-billion-users>.

153. *Localization & Translation*, FACEBOOK, <https://developers.facebook.com/docs/internationalization> (last visited Dec. 14, 2014).

154. *Twitter, In Your Language*, TWITTER (Jan. 6, 2012, 5:20 PM), <https://blog.twitter.com/2012/twitter-in-your-language>.

155. Karen Wickre, *Celebrating #Twitter7*, TWITTER (Mar. 21, 2013, 7:42 AM), <https://blog.twitter.com/2013/celebrating-twitter7>.

users and the variety in languages makes it impossible to know the identity of each user as required by the statute.

Until recently, the evidence was inconclusive, as social media companies shuttered some terrorist accounts but not others. For example, although Facebook took down al-Shabaab's English language accounts, it never removed the group's Arabic and Somali accounts even though the accounts posted the same material.<sup>156</sup> Furthermore, after the brutal execution of reporter James Foley, Twitter and YouTube began aggressively cracking down on accounts affiliated with ISIL.<sup>157</sup> This swift and decisive action suggests that these companies have the ability to identify and shut down accounts affiliated with FTOs despite the large number of users. To prove that it is indeed possible for these companies to take down all accounts affiliated with FTOs and that they have the requisite knowledge, the government could rely upon the collective knowledge theory and the notoriety theory.

The collective knowledge theory asserts that the aggregate of compartmentalized knowledge of a corporation's employees constitutes the corporation's knowledge of a particular operation, regardless of whether the employees administering one component know the specific activities of employees administering another.<sup>158</sup> Generally, "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability" because the acts of a corporation are simply the acts of all its employees acting within the scope of their employment.<sup>159</sup> Therefore, if the government puts forward evidence sufficient to support a finding that any employee, within the scope of her employment, knew that FTOs were using the social media site, that knowledge would be sufficient to support a finding of corporate knowledge.

Finding one employee, or possibly several, with such knowledge would not necessarily be challenging. For example, in October 2013, Twitter suspended twelve known jihadi accounts.<sup>160</sup> A few days later, Twitter reinstated two of the accounts.<sup>161</sup> The reinstatement of the accounts suggests that someone reviewed the accounts and determined

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156. Deana Kjukan, *When Terrorists Take to Social Media*, ATLANTIC (Feb. 20, 2013, 9:15 AM), <http://www.theatlantic.com/international/archive/2013/02/when-terrorists-take-to-social-media/273321>.

157. See Gareth Browne, *Twitter Cracks down on Isil Accounts*, GULF NEWS (Aug. 20, 2014, 1:51 PM), <http://gulfnnews.com/news/region/iraq/twitter-cracks-down-on-isil-accounts-1.1374349>; Jeff Stone, *Blocked on Twitter and YouTube, ISIS Turns to Diaspora and VKontakte to Disseminate Message*, INT'L BUS. TIMES (Aug. 22, 2014, 3:52 PM), <http://www.ibtimes.com/blocked-twitter-youtube-isis-turns-diaspora-vkontakte-disseminate-message-1666758>.

158. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

159. *Id.* (citations omitted).

160. J.M. Berger, TWITTER (Oct. 7, 2013, 11:17 AM), <https://twitter.com/intelwire/status/387280656616538112>.

161. *Id.*

that they did not violate Twitter policy.<sup>162</sup> A collective knowledge instruction would allow for a finding of knowledge as applied to the reinstated accounts.<sup>163</sup> However, without this type of evidence, employee testimony, or evidence gathered by surveillance, it might be difficult to prove the requisite knowledge under the collective knowledge theory.

Use of the “notoriety theory” in tandem with the collective knowledge theory would strengthen the assertion that these companies know the identity of the end user. The notoriety theory proposes that, in some instances, “the fact that an organization engages in terrorist activities may be of such widespread notoriety that the government can [easily] persuade a jury of the defendant’s knowledge.”<sup>164</sup> This theory would be sufficient to prove knowledge because the requirement of knowledge may be established “if a person is aware of a high probability of [the fact’s] existence.”<sup>165</sup> When used with the collective knowledge theory, this would mean that when even one employee becomes aware that an account belongs to an FTO, this knowledge would be imputed to the corporation.

For example, it would be absurd to propose that, as of 2013, not one single employee knows that al-Qaeda is an FTO and that not one single employee knows that al-Qaeda uses that same social media website in an “official” capacity. The notoriety theory combined with the collective knowledge theory would lead to a finding that the social media company knew that it was providing a service to al-Qaeda. This would be sufficient to satisfy the knowledge requirement of the material support statutes. Further, in conjunction with the notice provided by media reports on the issue, and government requests to take down certain accounts presumed to be affiliated with FTOs, it would be difficult to argue the opposite. This may be a more difficult question where less notorious groups are the subject of concern.

Thus, the material support statutes can be read to prohibit allowing terrorist groups to use social media accounts. First, the breadth of the definition of “material support or resources” provides a clear pathway to finding that social media companies are providing a “service” to FTOs. This is reinforced by the Court’s recognition that “material support of a terrorist group’s lawful activities facilitates the group’s ability to attract

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162. *See My Account Is Suspended*, TWITTER, <https://support.twitter.com/articles/15790-my-account-is-suspended> (last visited Dec. 14, 2014) (“Accounts are generally suspended for violation of the Twitter Rules”). The Twitter rules do not *per se* prohibit terrorists from using the website. *See The Twitter Rules*, TWITTER SUPPORT, <https://support.twitter.com/articles/18311-the-twitter-rules> (last visited Dec. 14, 2014).

163. This assumes that the content on the accounts made it fairly obvious they belonged to FTOs.

164. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 28 (2005).

165. MODEL PENAL CODE § 2.02(7) (2001).

‘funds,’ ‘financing,’ and ‘goods’ that will further its terrorist acts.”<sup>166</sup> Second, the coordination requirement can easily be interpreted to cover the activities of social media companies, particularly as they likely have the means to act, but have not done so. Finally, the Court created a lower burden on prosecutors when it rejected a specific intent requirement. Instead, prosecutors only need to prove that a social media company had knowledge (or “knew”) that a terrorist group used an account on the website. All of this is compounded by the fact that, as common sense would suggest, juries are not particularly sympathetic to supporters of terrorism, and Congress intended the material support statutes to cover a wide array of conduct. This result is not advisable for a number of reasons discussed in Part IV, which also provides recommendations moving forward.

#### IV. RECOMMENDATIONS

Courts should not find social media companies liable for providing material support to terrorists for two reasons should such litigation arise: (1) in accordance with the rule of lenity, courts should construe the Supreme Court’s requirement of “coordination” in *HLP* narrowly, and (2) the companies should have a valid First Amendment defense. Additionally, Congress should amend the law to require specific intent to further the goals of the FTO.

##### A. NARROW CONSTRUCTION—JUDICIAL INTERPRETATION

Courts should limit the application of the material support statutes in a way that does not infringe upon rights protected by the First Amendment. As applied to social media, the constitutionality of the material support statute would undoubtedly become an issue. In such circumstances, courts must first “ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided,”<sup>167</sup> and subsequently interpret the statute to avoid the question.<sup>168</sup> Given that overregulation of social media would chill speech, and that the dangers are too speculative to warrant an infringement on the First Amendment, courts should interpret the statute so as not to reach social media companies operating within the bounds of legal activity.<sup>169</sup>

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166. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 n.6 (2010) (quoting Declaration of Kenneth R. McKune, U.S. Dep’t of State, Joint App. at 134–36 (*Humanitarian Law Project*, 561 U.S. 1 (No. 08-1498, 09-89), 2009 WL 3877534, at \*134–36)).

167. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal citations and quotations omitted).

168. *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) (noting “that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions”).

169. For example, a company created with the intent of encouraging individuals to attack the United States or U.S. citizens would not be operating within the bounds of legal activity.

One method of interpreting the statute such that it comports with constitutional demands would be by narrowly defining “coordination.” Not only would this interpretation avoid implicating the First Amendment, but it would also prevent the prosecution of entities that, more likely than not, oppose the unlawful actions of FTOs. One way to narrow the statutory reach would be for courts to interpret “coordination” to require a “meeting of the minds” between the individual providing the service and the FTO, such that the service is made in support of the FTO’s objective. A “meeting of the minds” conveys the idea of “mutual assent” on a bargain between two parties<sup>170</sup> and may be inferred from conduct.<sup>171</sup> In this context, such a theory would essentially impose a stronger intent requirement, thus creating a safe harbor from prosecution for those who do not provide the service for the purpose of supporting the FTO’s objective.

As applied to social media companies, this would raise the bar as to what the government would have to prove. Essentially, this would require the government to prove that by failing to ban FTOs from their sites, the company impliedly supported the FTO’s objective. For example, strong evidence of a meeting of the minds would exist where, after a sufficient time had passed the social media company refused to take down certain accounts the government had requested it to take down. There is no way to predict whether a jury would buy into this theory and this method has downsides. For example, this approach would not address the overregulation and censorship likely to occur as a result of the wide reach of the statute, and would give the government broad discretion to act.

Another approach would be to interpret “coordination” to require an agreement to legitimize and assist the FTO. The requirement of an agreement would still allow the DOJ to prosecute, and thus prevent, a wide array of activities, yet would protect happenstance from appearing to be coordination. For example, in the case of social media, one would be hard pressed to find that a social media company providing a service to an FTO agreed to legitimize and assist the group. The conclusion that social media companies did not agree to legitimize or assist the FTOs using their sites may be inferred from the fact that social media companies provide services to hundreds of millions of users and do not claim to support each and every one of their viewpoints, nor do they claim to support their actions. This would allow the DOJ to reach the

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170. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 107 (1952).

171. See *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) (defining an implied agreement as an agreement “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties”).

intended targets of the service component of the statute—those who, for example, recruit new members on behalf of the FTO.

#### B. FIRST AMENDMENT DEFENSE AND CENSORSHIP BY PROXY

Alternatively, courts should allow social media companies to claim the First Amendment as a defense. The First Amendment guarantees the freedom of speech and association;<sup>172</sup> however, these rights are not unlimited. Powerful state interests can permit the limitation of rights guaranteed by the First Amendment.<sup>173</sup> For this reason, government efforts to restrict speech during wartime are entitled greater deference.<sup>174</sup> Furthermore, the First Amendment does not protect speech that is likely to incite imminent lawless action<sup>175</sup> or speech that creates a clear and present danger of a substantive evil.<sup>176</sup>

In line with decades of First Amendment jurisprudence, and the Court's recognition that "the Government's interest in combating terrorism is an urgent objective of the highest order,"<sup>177</sup> the government could constitutionally punish speech encouraging specific acts of terrorism. FTO activity on social media, however, is too speculative to warrant a general infringement on the corporations' First Amendment rights.<sup>178</sup> Additionally, given the length of the "war on terror," a determination that social media activity warrants censorship—because it is either likely to incite imminent, unlawful action or because it creates a clear and present danger—would quickly lead to the prohibition of other lawful activity. Perhaps David Cole put it best:

History shows us that it is in moments of great fear that governments are most likely to target speech and association. . . . Modern First Amendment doctrine . . . was formulated in response to the excesses of the McCarthy era. But when the Court allows unsupported speculation

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172. U.S. CONST. amend I. Recent Supreme Court decisions establish that corporations have First Amendment rights. See *generally* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

173. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) ("[A] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

174. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right").

175. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

176. *Schenck*, 249 U.S. at 52.

177. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

178. This may not always be the case, but it is more likely than not to be true. An assertion otherwise would require a case-by-case analysis.

about “terrorism” and disapproval of a speaker’s viewpoint . . . we appear to be repeating history rather than learning from it.<sup>179</sup>

Furthermore, prosecuting social media companies under the material support statute would result in censorship by proxy<sup>180</sup> and would have a chilling effect on Internet activity.<sup>181</sup> Fear of prosecution is likely to lead to an overregulation of content on social media sites, which would restrict individual rights and cripple the right to speak freely. However reprehensible we may find the ideology espoused by FTOs, the First Amendment guarantees members, or even nonmembers, the right to freely express their support.<sup>182</sup> Whether speech is “in coordination with” or “under the direction of” an FTO should make no difference.

Additionally, overregulation would adversely affect the free flow of information we have come to value from the Internet. Forcing social media companies to choose between serving as a medium in which individuals can freely express their opinions and committing a crime or prohibiting the free expression of ideas is no choice at all. Such a threat would severely restrict the ability of social media companies to do what they set out to do, “to give people the power to share and make the world more open and connected.”<sup>183</sup> Although censorship by private actors is not unconstitutional,<sup>184</sup> it is nonetheless problematic when done at the behest of the government. Therefore, courts should allow social media companies to assert their First Amendment rights as an affirmative defense to any prosecution.

Social media companies should be able to successfully defend their “failure” to shut down these accounts by arguing that forcing them to do so would amount to censorship by proxy<sup>185</sup> and impermissibly implicate the Constitution. Although we may not feel any compunction in criminalizing Tarek Mehanna’s speech, or even the actions at issue in *HLP*, extending the doctrine to more questionable cases should cause us to consider the protections that we are willing to forfeit in the name of national security. Indeed, if “the U.S. were to pressure [social media companies] to censor [posts] by organizations it opposes, even those on

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179. David Cole, *The Roberts Court vs. Free Speech*, 57 N.Y. REV. BOOKS 80, 81 (Aug. 19, 2010), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1423&context=facpub>.

180. Censorship by proxy occurs when governments enlist private actors “as proxy censors to control the flow of information.” Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 11 (2006).

181. Twitter’s and YouTube’s recent act of essentially censoring ISIL from their websites may suggest that the companies can effectively ban FTOs from having accounts without chilling speech. See *supra* note 157 and accompanying text. The impact of this action, however, remains unknown.

182. See generally *Schenck v. United States*, 249 U.S. 47 (1919).

183. *About*, FACEBOOK, <https://www.facebook.com/facebook?v=info> (last visited Dec. 14, 2014).

184. See *What is Censorship?*, AM. CIVIL LIBERTIES UNION (Aug. 30, 2006), <https://www.aclu.org/free-speech/what-censorship>.

185. See *supra* note 180 and accompanying text.

the terrorist list, it would join the ranks of countries like India, Azerbaijan, Bahrain, Syria, and Uzbekistan, all of which have censored online speech in the name of ‘national security.’”<sup>186</sup> Ensuring national security is essential to the continued existence of the United States, but safeguarding our liberties is equally necessary to further the Framers’ intent.<sup>187</sup>

### C. LEGISLATIVE FIXES

In the event that courts fail to limit the statutory reach of § 2339B and the defense of the First Amendment is unsuccessful, the legislature should intervene and amend the statute. While this is unlikely, given the fear of being perceived as soft on terrorism, a statutory amendment clarifying the intended reach of the statute would be beneficial and ultimately in line with counterterrorism policy concerns. Furthermore, the legislative history of the statute suggests that at least some members of Congress were opposed to the breadth of the definition of “material support or resources,” but expediency and national security fears warranted against any substantial narrowing.<sup>188</sup>

#### *1. Policy Argument in Favor of Narrowing Section 2339B’s Reach*

Narrowing the reach of the material support statute is in line with U.S. policy concerns. First, the law enforcement and intelligence communities can monitor FTO accounts and gather actionable intelligence regarding future activities.<sup>189</sup> Second, attempting to target all purported FTO accounts may be a waste of valuable resources. When accounts are shuttered, new accounts often sprout up in their stead. For example, in the wake of the Westgate attack in Nairobi, Twitter shut down al-Shabaab’s official account.<sup>190</sup> However, “[Shabaab] quickly

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<sup>186</sup> Trevor Timm & Jillian York, *U.S. Government Threatens Free Speech With Calls for Twitter Censorship*, ELEC. FRONTIER FOUND. (Jan. 6, 2012), <https://www.eff.org/deeplinks/2012/01/us-government-calls-censor-twitter-threaten-free-speech>. Freedom House ranks these countries as either “partially free” or not free. *Freedom on the Net: 2013 Global Scores*, FREEDOM HOUSE, <http://freedomhouse.org/report/freedom-net-2013-global-scores> (last visited Dec. 14, 2014).

<sup>187</sup> Joseph Postell, *Securing Liberty: The Purpose and Importance of the Bill of Rights*, HERITAGE FOUND. (Dec. 14, 2007), <http://www.heritage.org/research/reports/2007/12/securing-liberty-the-purpose-and-importance-of-the-bill-of-rights> (The Framers signed the Bill of Rights to “assist citizens in the task of defending their liberties.”).

<sup>188</sup> See *supra* notes 105–107 and accompanying text.

<sup>189</sup> See Mary Noble, *Why Doesn’t The US Government Destroy Terrorist Websites*, POLITIX (May 15, 2013), <http://politix.topix.com/homepage/6017-why-doesnt-the-us-government-destroy-terrorist-websites>. Others disagree, opining that shutting down these accounts can provide more intelligence than allowing them to persist. *Id.* Monitoring accounts may raise other constitutional concerns that need not be resolved by this Note.

<sup>190</sup> David Barnett, *Are You Looking At An Official Shabaab Twitter Account?*, LONG WAR J. (Sept. 25, 2013, 9:36 AM), [http://www.longwarjournal.org/threat-matrix/archives/2013/09/are\\_you\\_looking\\_at\\_an\\_official.php](http://www.longwarjournal.org/threat-matrix/archives/2013/09/are_you_looking_at_an_official.php).

returned to the social media platform.”<sup>191</sup> This pattern is not unique. Experts have found that when “[a] Facebook or Twitter account affiliated or run by a terrorist organization is thrown into the spotlight, activists and the media buzz about it, [and] it is suspended by the social network . . . a new account [usually] emerges [soon thereafter].”<sup>192</sup> Moreover, “[t]he loss of an official . . . account would by no means silence terrorist groups. Instead, it would make them go through the inconvenience of relying on less centrally-accessible sock puppet accounts or fanboys to repost messages and links from other outlets.”<sup>193</sup> Though this could be a positive outcome in the minds of some because it would potentially redirect terrorist resources, it would also redirect U.S. counterterrorism resources to chasing after these websites. These patterns suggest that the law enforcement and intelligence communities might be better served by monitoring the more readily apparent social media accounts than continuing to play a “high-tech game of whack-a-mole.”<sup>194</sup>

Finally, a policy of closing accounts has been used as propaganda against the United States and may be counterproductive. In 2012, in response to a *New York Times* article suggesting that the U.S. government was considering legal options to prevent al-Shabaab from using social media, the group’s spokesperson tweeted, “How many accounts would #US government be able to close before realizing the futility of their attempt? They need a team now to monitor HSM!”<sup>195</sup> Instead of achieving the intended result of condemning Twitter and al-Shabaab, an additional 3000 people began to follow the al-Shabaab account.<sup>196</sup> This incident suggests it may be better to leave the accounts in place and use them as a source of intelligence.<sup>197</sup>

## 2. Suggested Congressional Changes

In line with the foregoing policy reasons, Congress should amend the definition of “material support and resources.” One option is for Congress to require materiality in the support proffered, particularly where speech is concerned. In his *HLP* dissent, Justice Breyer stated

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191. *Id.*

192. Kjuka, *supra* note 156.

193. Adam Rawnsley, *Twitterfight! Group Threatens Lawsuit Over Terror Tweets*, WIRED (Jan. 2, 2012, 8:52 AM), <http://www.wired.com/dangerroom/2012/01/twitterfight-group-threatens-lawsuit-over-terror-tweets>.

194. J.M. Berger, *#Unfollow: The Case for Kicking Terrorists Off Twitter*, FOREIGN POLICY (Feb. 20, 2013), <http://www.foreignpolicy.com/articles/2013/02/20/unfollow>.

195. *Id.* (quoting al-Shabaab’s media wing’s Twitter handle @HSMPress).

196. *Id.*

197. Another option is the creation of government accounts designed to engage with the FTO, challenge their portrayal of information, and try to reach the hearts and minds of the FTO’s followers. The State Department is currently employing this tactic with its Twitter handle @ThinkAgain\_DOS.

“where support consists of pure speech or association . . . the Government [should] have to prove that the defendant knew he was providing support *significantly* likely to help the organization pursue its unlawful terrorist aims.”<sup>198</sup> Mere suspicion that the proffered service *could* help the FTO would not be sufficient to render a conviction. This amendment might not exculpate social media companies, as there is no question that social media use can greatly increase the legitimacy of an FTO.

Congress could instead require that an individual providing a service have the specific intent to further the illegal ends of the FTO in order to be convicted. The *HLP* court rejected this approach to effectuate what they understood to be congressional intent to require only “knowledge about the organization’s connection to terrorism, not specific intent.”<sup>199</sup> A congressional amendment would serve the dual purpose of overruling the Supreme Court’s decision and providing a safeguard against a potentially unconstitutional application of the statute. An amendment requiring specific intent would protect social media companies, researchers, and journalists, among others, who might be convicted for illegally providing material support to an FTO, even though that provision of support was not intended to actually assist the FTO. According to Justice Breyer,

This reading of the statute protects those who engage in pure speech and association ordinarily affected by the First Amendment. But it does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism.<sup>200</sup>

Alternatively, Congress could enact a statute that specifically addresses the dangers posed by FTO use of the Internet. At least one scholar has proposed an internet-specific material support statute that would criminalize the establishment and maintenance of Internet websites or posts with the specific intent to perpetrate acts of terrorism.<sup>201</sup> Alan Williams suggests that the government can and should “prosecute certain Internet activities that tend to support terrorists,” which requires an Internet-specific statute to address the implicated constitutional concerns.<sup>202</sup> Although this is a viable alternative to construing the material support statute more narrowly, improving the existing statute is a better alternative given the complexities involved in

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198. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 58–59 (2010) (Breyer, J., dissenting) (emphasis added).

199. *Id.* at 16–17 (majority opinion).

200. *Id.* at 56 (Breyer, J., dissenting).

201. Alan Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 383–84 (2007).

202. *Id.* at 367, 383–84.

interpreting newly enacted statutes and the difficulty in getting Congress to take action.

#### CONCLUSION

Judge Selya on the First Circuit compared terrorism to the bubonic plague, insisting it is an existential threat that warrants “fierce” enforcement of criminal laws and requires “court[s] to patrol the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedoms of speech and association.”<sup>203</sup>

It is one thing to provide weapons and currency to an FTO, but it is quite another to provide an FTO with access to a large group of people who may or may not be susceptible to its message. Although social media may increase an FTO’s legitimacy, that danger does not warrant Internet censorship or a violation of decades of First Amendment jurisprudence. Policy concerns equally advise against such a broad interpretation of the statute. Both the judiciary and the legislature have a responsibility to protect the Constitution and should take that responsibility seriously. One can hope that we do not come to view our actions in the war on terror with the same regret as we do McCarthyism.

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203. *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013), *cert. denied*, 82 U.S.L.W. 3589 (U.S. Oct. 6, 2014) (No. 13-1125).

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