JASTA IN AN ERA OF FAKE NEWS, PUBLICITY INFUSED TERROR, AND A DIRECTIVE FROM CONGRESS

Note

"Always ask what your enemy most wants you to do. We always answer terrorism with what they most want us to do. . . . It's not our job to do their job for them."[1]

ABSTRACT

While scholars have addressed the implications surrounding the Justice Against Sponsors of Terrorism Act (JASTA), particularly on financial entities such as banks that frequently engage in international affairs, no academic publication has addressed the potential for secondary liability by members of the media. This Note discusses the interconnection between terrorism and publicity, a relationship that is largely cause-and-effect in nature. This Note discusses how a JASTA suit claiming secondary liability against the media would function considering the outcome of Holder v. Humanitarian Law Project, *where the Supreme Court suppressed speech in the name of national security. Moreover, this Note considers the constitutional influences on a suit of this nature in an era where free speech has arguably never been more revered, as evidenced in the monumental case* Snyder v. Phelps. *In sum, this Note narrows in on a compelling issue under a controversial provision in an effort to bring attention to the troublesome nature of both the law and the current state of our nation's media outlets.*

I. INTRODUCTION

The coverage on the television reflects the tragic incident that occurred five days before; the press declares it an act of terror, carried out by a renowned foreign terrorist operation. The suspects at the scene—later deemed perpetrators—are subject to grave consequences. But does guilt truly confine itself to those detonating the bomb?

Similarly, consider an exclusive interview with former CIA Acting Director Michael Morrell in October 2017.[2] Kim Dozier, a longtime foreign correspondent for multiple news organizations, explained that during the course of her work she had discovered a drone base in Saudi Arabia operating over Yemen.[3] The White House and the CIA explicitly communicated to Dozier's editors that if she published information revealing the location of the base, she would "be threatening the lives of the people who are operating out of there . . . ."[4] Dozier stated that she did not "want to be responsible for stopping an intelligence operation . . . . but oh, it gets me a great headline."[5] This scenario begs the question: what is the result when someone values the headline over the operation?

These concerns are largely determined by an overarching and ubiquitous

1. INTELLIGENCE SQUARED, *Don't Give Them What They Want: Terrorists Should Be Starved of the Oxygen of Publicity*, YOUTUBE, at 22:37 (Mar. 13, 2017), https://www.youtube.com/watch?v=aKTyWXVvp_0.

2. *Executive Editor Kim Dozier Talks About Dedicating Her Life to Journalism*, INTELLIGENCE MATTERS, at 41:19–22 (Oct. 10, 2017) (downloaded using iTunes).

3. *Id.*

4. *Id.*

5. *Id.* at 41:44–53.

venture: the media. Mass media in the United States has the crucial responsibility of keeping the public informed.[6] Information pertaining to events, dangers, weather, and any subject that may have an effect on a person's livelihood is rapidly, and often repetitively, disseminated to the public. This is especially true of reports that involve foreign sovereigns because the importance of the global network is indisputable.[7] Economies affect other economies;[8] times of war disrupt others' eras of peace. History has proven that for every action there is potential for reaction.[9] Today, technological improvements, political divisiveness, and heightened media dependency create an environment that augments the global network and intensifies international reverberations.[10] Thus, as illustrated in this Note, there is true potential for unrestricted dissemination and circulation of information to convolute a network of interdependencies that exists both within and among nations. This is especially true regarding terrorism.

Thus, this Note analyzes a potential cause of action for victims who suffer as a result of the causal nexus that exists between mass communication and terrorism. The initial discussion pertains to the Antiterrorism Act of 1990 ("ATA"),[11] a federal statute that provides any victim of international terrorism "injured in his or her person, property, or business" a civil cause of action against those who aid and abet or conspire with terrorists.[12] Thereafter, the discussion turns to the constitutional implications generated in a suit against the "institutional press."[13] The constitutional analysis begins by exploring the interplay of today's world with the constitutional principle of free speech. The discussion examines the Supreme Court's conflicting analysis in several cases grounded in free expression. Specifically, this Note compares the Court's ap-

6. *See* Tina C. Touitou, *Mass Media: Veritable Tool in Curbing Corruption for Sustainable Peace and Development in Nigeria?*, INT'L J. MGMT. SCI. & BUS. RES., Sept. 2016, at 51.

7. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 348 (1964) ("[T]he electric age . . . establishe[d] a global network that has much of the character of our central nervous system.").

8. *See Impact of the World Economy*, THEUSAONLINE.COM, http://www.theusaonline.com/economy/world-economy.htm (last visited Feb. 11, 2019).

9. *See* INTELLIGENCE MATTERS, *supra* note 2, at 4:50–56 ("[I]t matters. What we do overseas creates actions that affect us back here—actions and reactions."); *see also* NEVILLE BROWN, GLOBAL INSTABILITY AND STRATEGIC CRISIS 13 (2004) ("Attention should more systematically be paid . . . to action-reaction between nations . . . . The persecution of American liberals by Joseph McCarthy and his acolytes has been viewed . . . as a reaction to Josef Stalin . . . Moderated action-reaction is the warp and woof of parliamentary democracies, multinational alliances and, indeed, the resolution of warlike crises.").

10. *See* Nicholas Carr, *How Tech Created a Global Village — And Put Us at Each Other's Throats*, BOS. GLOBE (Apr. 21, 2017), https://www.bostonglobe.com/ideas/2017/04/21/how-technology-created-global-village-and-put-each-other-throats/pu7MyoAkdyVComb9aKyu6K/story.html ("[F]ree-flowing information makes personal and cultural differences more salient . . . .").

11. 18 U.S.C. §§ 2331–2338 (2012).

12. 18 U.S.C. § 2333.

13. Any reference in this Note to the "institutional press" is intended to encompass television stations, newspapers, and any other entity in the business of publishing material for public consumption.

proach to what constitutes "terrorist speech" cloaked in an obligation to adhere to the call of national security with the long-established protections afforded to nearly all other speech under the First Amendment. This discussion encompasses a plaintiff's burden to overcome the looming sense of constitutional protections the Court has afforded to civil defendants despite the absence of state action. Consequently, the probe into the Court's rationales—in the context of today—is then utilized to evaluate and predict the likelihood of recovery in a civil case involving speech and modern terrorist activity.

II. BACKGROUND

A. Media and Reaction

Mass media often performs the role of a pendulum by inciting action or responses from individuals, groups, bodies, and nations that consume the material dispersed to the public. The cause-and-effect nature has been characterized as an "issue-attention cycle,"[14] an "agenda-setting function,"[15] "framing,"[16] a "knowledge gap hypothesis,"[17] and a "cultivation theory."[18] Despite the countless studies performed on the sociological, psychological, and behavioral interplays that exist in the relationship between the mass dissemination of information and consumer response, perhaps the most simplistic yet renowned illustration of this phenomena lies within modern folklore. Orson Welles's performance of H.G. Wells's *War of the Worlds* is a tale that portrays

14. Anthony Downs, *Up and Down with Ecology—The "Issue-Attention Cycle,"* 28 PUB. INT. 38, 38 (1972) ("[A] systematic 'issue-attention cycle' seems strongly to influence public attitudes and behavior concerning most key domestic problems.").

15. Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 176–77 (1972) ("Readers learn not only about a given issue, but also how much importance to attach to that issue from the amount of information in a news story and its position.").

16. *See* Gregory Bateson, *A Theory of Play and Fantasy*, APA PSYCHIATRIC RES. REP. 39 (1955), *reprinted in* GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 177, 191 (1972) (describing a frame as "a spatial and temporal bounding of a set of interactive messages"); *see also* JIM A. KUYPERS, BUSH'S WAR: MEDIA BIAS AND JUSTIFICATIONS FOR WAR IN A TERRORIST AGE 8 (2006) (using a rhetorical framing analysis on the War on Terror between the Bush administration and mass media and finding the media framing in direct conflict with themes offered in presidential speeches); Thomas E. Nelson, Rosalee A. Clawson & Zoe M. Oxley, *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567, 567–77 (1997) (studying emphasis framing on the issue of whether a Ku Klux Klan rally should take place and finding that those participants exposed to a public safety frame carried the same concern, while those subject to publications concerning free speech were inclined to afford more consideration to First Amendment implications).

17. *See* P.J. Tichenor, G.A. Donohue & C.N. Olien, *Mass Media Flow and Differential Growth in Knowledge*, 34 PUB. OPINION Q. 159, 160 (1970).

18. *See* Karyn Riddle, Cultivation Theory Revisited: The Impact of Childhood Television Viewing Levels on Social Reality Beliefs and Construct Accessibility in Adulthood (May 21, 2009) (unpublished manuscript), http://research.allacademic.com/index.php?click_key=2&PHPSESSID=805koctvks6g12034g77958p00.

the fascinating relationship between the media and its beneficiaries.[19] On October 30, 1938, Welles broadcasted fictional reports that extraterrestrial life was advancing on New York City.[20] Multiple accounts indicated that listeners stormed the streets, resulting in mass chaos.[21] While there is debate that these reports were exaggerative, the idea that such a broadcast could indeed produce such effects is realistic and chilling.[22]

Just as Welles's broadcast could have fueled public reaction in the form of utter chaos, the same causal nexus exists in the criminal context. The issue has long been discussed in the context of juror bias.[23] Similarly, consider a case involving the effects that newspaper distribution had on those not even directly involved in a trial. In 1993, two ten-year-old boys took a two-year-old from a shopping center in Liverpool, beat him, and left him on a set of train tracks where he was subsequently run over by a train.[24] In the eyes of the media, the horrific incident contained all the requisite elements of a "good story."[25] The photos of the boys appeared on the front page of the *Daily Star* with the captions "Killer Bobby Thompson—Boy A" and "Killer Jon Venables—Boy B," and the article explicitly referred to the boys as "bastards."[26] One observer compared the subsequent vilification to "the kind of outbreak of moral condemnation that is usually reserved for the enemy in times of war."[27] Angry mobs drove the families of the boys out of their homes, threw stones at them while traveling in a van, and chanted "hang 'em" outside the

19. A. Brad Schwartz, *The Infamous "War of the Worlds" Radio Broadcast Was a Magnificent Fluke*, SMITHSONIAN.COM (May 6, 2015), https://www.smithsonianmag.com/history/infamous-war-worlds-radio-broadcast-was-magnificent-fluke-180955180/.

20. *Id.*

21. *See* Martin Chilton, *The War of the Worlds Panic Was a Myth*, TELEGRAPH (May 6, 2016, 11:16 AM), http://www.telegraph.co.uk/radio/what-to-listen-to/the-war-of-the-worlds-panic-was-a-myth/.

22. *Id.*

23. *See* Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 635–37 (1991); *see also* Claire S.H. Lim, *Media Influence on Courts: Evidence from Civil Case Adjudication*, 17 AM. L. & ECON. REV. 87, 87 (2015) (discussing the effect media coverage has on grants of civil awards despite political affiliations); Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 617 (2014) ("The juror who turns to social media and either intentionally seeks, or is inadvertently exposed to information pertaining to the trial no longer relies on just the evidence presented in the courtroom.").

24. Jane Cornwell, *The Boys Who Killed James Bulger*, SYDNEY MORNING HERALD (Feb. 9, 2013, 4:00 AM), http://www.smh.com.au/lifestyle/life-and-relationships/real-life/the-boys-who-killed-james-bulger-20130208-2e2nd.html.

25. *See* Bob Franklin & Julian Petley, *Killing the Age of Innocence: Newspaper Reporting of the Death of James Bulger*, *in* THATCHER'S CHILDREN?: POLITICS, CHILDHOOD AND SOCIETY IN THE 1980S AND 1990S 136, 137 (Jane Pilcher & Stephen Wagg eds., 1996) ("The extensive media reporting of the Bulger case illustrates the dramatic changes in news values and journalism's professional ethics as well as readers' appetites for certain kinds of news—which have transformed the editorial content of newspapers across the last two decades and which reflect the growth of what may be termed for convenience 'tabloid journalism.'").

26. *Id.* at 124.

27. *Id.*

courtroom.[28] The boys received a minimum sentence that was nearly double what was originally recommended, and public opinion was the driving force.[29]

For an empirically based approach, consider a study analyzing the issue-attention cycle on public policy.[30] The study used longitudinal data to study the causal nexus between heightened media coverage of drunk driving and related policy action from the 1970s to the 1990s.[31] Specifically, the study correlated the amount of coverage afforded to the issue in three news sources[32] with "policy making" as the dependent variable,[33] encapsulating both policy action[34] and attention[35] concerning the issue.[36] The results indicated that both policy attention and action to the drunk driving issue directly coincided with the pattern of media coverage over the same period.[37] What's more is that when the coverage was at its peak, the legislative action was short-term oriented.[38] This finding suggests a legislature abruptly responding to the thrust of the media.[39]

Great power lies within the mass media. The institutional press performs a crucial role in society today. However, the foregoing illustrates that the public views information and events through a lens formed by those delivering the message. While reporting matters of public importance is of significant value, the institutional press can sway opinions, taint beliefs, influence legislatures, and most notably, compel action. The repercussions of these effects can be felt both near and far.

B. The Nexus Between Media and Terrorism: An Accessory

Accordingly, the powerful media has great influence on those who con-

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28. CAROLYN HAMILTON & RACHEL HARVEY, *Case Study 2: Bulger and the UK: The Media, the Public and the Government Reaction*, *in* THE ROLE OF STATISTICS AND PUBLIC OPINION IN THE IMPLEMENTATION OF INTERNATIONAL JUVENILE JUSTICE STANDARDS app. at 4–5 (2005), https://www.unicef.org/tdad/roleofstatspublicopinion3uk.doc.

29. *Id.* app. at 1–2, 5–6.

30. *See* Itzhak Yanovitzky, *Effects of News Coverage on Policy Attention and Actions: A Closer Look Into the Media-Policy Connection*, 29 COMM. RES. 422, 424–28 (2002).

31. *Id.* at 428.

32. The study used the *New York Times* and the *Washington Post* for their "intermedia agenda-setting power and the strong relationship that exists between these daily national newspapers and other national news sources, including television networks," as well as their "central[ity] to elites and policy makers." *Id.* The *Associated Press* was also used because it "approximates well the national news environment." *Id.*

33. *Id.* at 430.

34. The study used the annual amount of federal appropriation for preventing drunk driving and the adoption of anti-DD laws in all 50 states and D.C. *Id.* at 432.

35. The study used the number of congressional hearings on the issue as well as the number of bills introduced in the United States Congress. *Id.* at 431.

36. *Id.*

37. *Id.* at 422.

38. *Id.*

39. *Id.*

sume it, often moving people to act. The media's ability to influence, provoke, and accredit bad acts parallels the aid offered by an "accessory" to a crime. For example, an "accessory after the fact" is "one who, knowing a felony to have been committed receives, relieves, comforts, or assists the felon, or in any manner aids him or her to escape arrest or punishment."[40] Therefore, when a media entity attributes responsibility to a foreign terrorist group and that group desires attention, either for recognition or recruitment purposes, that entity is essentially offering aid to said group and should be accountable for such action. In the same vein, the media could also be deemed an accessory before the fact[41] when it reveals information that serves as aid to further terrorists' plans.

Therefore, while the nexus between media and public reaction is well-established, the question remains as to just "what extent does the [media] coverage, the extensive, the overwhelming, the addictive . . . produce certain public reactions," specifically in the context of terroristic activity.[42]

In an exclusive panel discussing the implications publicity has on terroristic activity, Fawaz Gerges, an expert on *jihadi* terrorism, described the media's role in the War on Terror by declaring that the Islamic State was fighting two wars: one on the battlefield and one in our hearts and minds.[43] He described publicity as a "force multiplier."[44] It "feeds into their narrative" that "they matter, they matter greatly."[45] They want to trigger fear, inspire the base, and recruit the masses.[46] In the same panel, Douglas Murray discussed the scheduled execution of a British hostage, Kenneth Bigley, by Iraqi militants in 2004.[47] Video footage of Bigley was funneled through multiple news outlets showing the hostage begging then–British Prime Minister Tony Blair to meet the demands of his captors in order to escape his own execution.[48] The commentator specifically noted the "drip, drip" effect of information that the group allowed to disseminate into the media realm.[49] Bigley blamed Blair and, eventually, so did the British media,[50] so much so that Murray categorized the combination of an extremist group and the British press "effectively helping

40. 22 C.J.S. *Criminal Law: Substantive Principles* § 181, Westlaw (database updated Feb. 2019).

41. "An accessory before the fact is one who, although absent at the time a felony is committed, nevertheless has counseled, procured, or commanded another to commit it." 22 C.J.S. *Criminal Law: Substantive Principles* § 178, Westlaw (database updated Feb. 2019).

42. *See* INTELLIGENCE SQUARED, *supra* note 1, at 30:48.

43. *Id.* at 8:12–24.

44. *Id.* at 8:43.

45. *Id.* at 9:23–26.

46. *Id.* at 8:30.

47. *Id*. at 18:35.

48. *Id.*

49. *Id.*

50. *Id.*

them" as almost resulting in a democratic society overthrowing its prime minister.[51]

Yet the media is a business, and in a world of oversaturation of information and methods of consumption, there is heightened competition to expand audiences across all outlets.[52] "Something happens, we need someone to react to the something."[53] Further, an Administration that consistently directs attention to the American media only serves to highlight the work of the institutional press.[54] The obvious overtone to this entire dilemma is the impossible solution of muting the press. However, something must be done in today's world to attempt to sever the link established between the media and terrorism. If a victim is suffering a direct, concrete injury as a result of the state of modern media, it is a foregone conclusion that these victims will turn to a courtroom to seek recompense. Undoubtedly the press has a duty to inform the public and to keep them abreast of world happenings. Yet certainly a balance exists.[55] While terrorism needs to be reported, the concepts of proportionality, perspective, and resilience cannot be ignored, because otherwise we are "inflating terrorism [and] terrorizing ourselves."[56]

C. First Amendment Implications

Despite the substantial evidence that media coverage could actually produce direct, concrete harm to individuals, speech, press, and expression are nearly indomitable in the United States. In general, the Supreme Court has described extremely narrow categories that fall outside the scope of First Amendment protection. Obscenity,[57] "fighting words,"[58] words that incite imminent violence,[59] and child pornography[60] do not receive the protections

51. *Id.* at 19:12.

52. *See* Douglas Blanks Hindman & Kenneth Wiegand, *The Big Three's Prime-Time Decline: A Technological and Social Context*, J. BROADCASTING & ELECTRONIC MEDIA (2008) (discussing the implications of diverse markets and growing methodologies of consumption on the traditional media framework); *see also* Brian Steinberg & Cynthia Littleton, *Cable News Wars: Inside the Unprecedented Battle for Viewers in Trump Era*, VARIETY MAG. (June 13, 2017), https://variety.com/2017/tv/features/cable-news-wars-cnn-msnbc-fox-news-1202462928/ ("The pervasiveness of headlines and commentary online and on social media platforms has unquestionably stepped up the tempo for cable news. 'We are just working at a different pace now.'").

53. *See* INTELLIGENCE SQUARED, *supra* note 1, at 23:00.

54. *See* Jonathan Berr, *Seems the Competition is Back in Morning News Shows*, CBS NEWS (May 1, 2017, 5:00 AM), https://www.cbsnews.com/news/cbs-evening-news-gains-viewers-at-the-expense-of-rivals/ (calling the uptick in cable television viewership the "Trump Bump").

55. *See* INTELLIGENCE SQUARED, *supra* note 1, at 20:15 (emphasizing the importance of self-censorship).

56. *Id.* at 12:44–49.

57. Roth v. United States, 354 U.S. 476, 493 (1957).

58. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

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

60. Osborne v. Ohio, 495 U.S. 103, 108–11 (1990).

of the shield of free speech. All other speech largely lies within the purview of shielded freedoms.[61]

An illustration of the veil established by the First Amendment, the Court has analyzed state and federal statutes that regulate speech based on the subject matter, often termed "content-based restrictions."[62] These regulations are subject to strict scrutiny, which requires that the government offer evidence that the restriction is necessary to promote a compelling interest and is the least restrictive means of accomplishing its goals.[63] Thus, this standard is almost conclusively fatal for state actors, and is seemingly less likely to withstand probing under the current regime.[64]

Alternatively, the Court has applied a less exacting standard to "content neutral" regulations.[65] Time, place, and manner restrictions[66] and regulations that incidentally regulate speech[67] have been analyzed under intermediate scrutiny, requiring only an important governmental interest and that the restriction be narrowly tailored. This standard was evidenced in *Clark v. Community for Creative Non-Violence*, a case in which the Court upheld an ordinance that prohibited camping but ended up incidentally prohibiting demonstrators from advocating for the homeless.[68] The Court held that while the law hindered these individuals' self-expression, the ordinance was "content neutral" and promoted a substantial government interest in preserving the parks.[69]

More often than not, the Supreme Court has conveyed its displeasure with state action impeding First Amendment rights.[70] However, the standard applied in civil suits is less clear, and it will likely become even more uncertain.[71] Today's society is enthralled with the evolution of media, and subver-

61. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) (shielding speech based on the "public concern" principle).

62. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

63. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

64. *See, e.g.*, *Snyder*, 562 U.S. at 443.

65. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989) (stating that content-neutral regulations are permissible if "narrowly tailored to serve a substantial government interest").

66. *See* Young v. Am. Mini Theatres, 427 U.S. 50, 71–73 (1976) (permitting zoning on adult bookstores in order to prevent criminal activity); *see also* Frisby v. Schultz, 487 U.S. 474, 487 (1988) (applying "'captive' audience" theory).

67. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (upholding a regulation in a state park that incidentally restricted speech); *see also* Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (allowing regulation of nudity to combat harmful effects, such as prostitution and other criminal actions).

68. *Clark*, 468 U.S. at 288.

69. *Id.* at 299.

70. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011); Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

71. *See* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1655–56 (2009) ("[W]hen private parties sue in tort to remedy injuries resulting from speech, the First Amendment unquestionably provides robust protection to the speaker. On the other hand, when

sive exploitation is certain to occur. Courts have begun to recognize that the black letter law does not always account for the use of electronic communications.[72] Thus, if a statute operates to grant a private party a cause to pursue legal action in the event the provision is violated, a plaintiff should not necessarily be precluded because mass dissemination of speech is at the suit's core. As technology advances and civil litigants continue to climb in number, one notion is clear: an identifiable and consistent standard applied to such speech must be chosen in the court of law, especially when terrorism is at issue.

III. IS THERE CIVIL LEGAL REDRESS FOR A VICTIM OF TERRORISM CAUSED BY SENSATIONAL MASS MEDIA?

A. JASTA: A Victim's Cause of Action?

For years, courts have analyzed the language of 18 U.S.C. § 2333, a provision of the ATA that provides for civil redress for an injury resulting from an act of terror. The great debate primarily concerned whether the ATA provided for a civil cause of action based solely on secondary liability.[73] Few courts have found secondary liability to exist under § 2333.[74] Most others have held that the statutory silence on secondary liability in the civil provision evidences the congressional intent to preclude this form of recovery.[75] Similarly, some courts have declined to find a secondary cause of action, but elected to instead incorporate separate provisions to effectually establish secondary liability under the ATA.[76] Due to the intentionally vague statutory language, courts have also had the burden to discern what actions even establish liability under the provision.[77] Prior to 2016, the ATA read:

(a) Action and Jurisdiction.—

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private parties use contract or property law to restrict speech, the First Amendment provides little to no scrutiny. These longstanding and widely accepted rules, however, are not always congruent.").

72. *See* Commonwealth v. Carter, 52 N.E.3d 1054, 1061 n.13 (2016) (finding a juvenile guilty of manslaughter when her "constant communication with [victim] by text message and by telephone . . . made [her] presence at least virtual").

73. *See, e.g.*, Linde v. Arab Bank, PLC, 97 F. Supp. 3d 287 (E.D.N.Y. 2015), *vacated*, 882 F.3d 314 (2d. Cir. 2018).

74. *But see* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1 (D.D.C. 2010) (allowing a plaintiff to plead secondary liability under the ATA for aiding and abetting terrorism).

75. *See, e.g.*, Rothstein v. UBS AG, 708 F.3d 82 (2d Cir. 2013) (holding the contacts to be too attenuated to establish liability).

76. Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685 (7th Cir. 2008), (finding no secondary liability under § 2333 but incorporating criminal material support provisions that required knowledge or deliberate indifference to establish a theory of primary liability that functions essentially the same as secondary liability), *superseded by statute*, Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222 § 4, 130 Stat. 852, 854 (2016), *as recognized in* Kemper v. Deustche Bank AG, 911 F.3d 383, 396 (2018); *see also Linde*, 97 F. Supp. 3d at 287 (adopting the chain of incorporations theory in *Boim III*).

77. *See* Smith *ex rel.* Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003) (noting the broad nature of the statutory language).

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism,[78] or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.[79]

This version of the statute was subject to years of court interpretations, as judges held differing views as to the type of liability with which one could be charged under the ATA.[80] In 2014, a decision by a federal district court carried important implications for civil litigants wishing to pursue claims under the ATA.[81] The jury found Arab Bank[82] liable under the ATA by knowingly providing financial services for Hamas, a designated foreign terrorist group, absent the specific intent to further an act of terrorism or a direct causal link between the support and the act causing harm.[83] Specifically, the court found Arab Bank's financial services to be in violation of 18 U.S.C. § 2339B, often termed one of three "material support" statutes, and that this violation constituted an "act of international terrorism" under § 2333.[84] The court emphasized that "[c]ompleting a wire transfer generally cannot be described as 'violent' or 'dangerous to human life' in the colloquial sense. But . . . providing material support to a terrorist organization is an act 'dangerous to human life.'"[85] Additionally, the court emphasized the fungible nature of money and held that 'but for' causation is not required under the civil provision.[86] Thus,

78. "International Terrorism" is defined to "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum." 18 U.S.C. § 2331 (2012).

79. *Id.* § 2333(a).

80. *Compare Boim III*, 549 F.3d at 690, *with* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 57 (D.D.C. 2010).

81. *See Linde*, 97 F. Supp. 3d at 287.

82. Arab Bank is based in Jordan but has branches inside the U.S. *See* ARAB BANK, http://www.arabbank.com/en/globalnetwork.aspx (last visited Feb. 13, 2019).

83. *Linde*, 97 F. Supp. 3d at 332 (quoting Weiss v. Nat'l Westminster Bank, PLC, 768 F.3d 202 at 207 (2014)) ("*Weiss* held that '[w]hile § 2333(a) does not include a mental state requirement on its face, it incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of *any* material support to terrorist organizations without regard to the types of activities supported.'").

84. *See id.* at 322. ("I agree with those courts that have held that a violation of 18 U.S.C. § 2339B is itself an act of international terrorism.").

85. *Id.* (citing *Boim III*, 549 F.3d at 690).

86. *See id.* at 326 ("[P]roof of 'but for' causation would make it impossible for the victims of terrorist attacks to hold a terrorist group's "financial angels" liable . . . and thereby eviscerate the civil liability provisions of the ATA." (citation omitted)).

the jury could be instructed to apply the less exacting "substantial factor" analysis.[87]

Linde was the first time a court found a financial institution civilly liable under the ATA.[88] While Arab Bank filed a timely appeal to the Second Circuit on June 22, 2016, at least five cases have been filed in response to the court's judgment against the financial institution.[89] But this is only the beginning for litigants.

On September 28, 2016, the statute was supplemented to

> provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.[90]

Thus, in 2016, Congress sought to eliminate many questions surrounding secondary liability under 18 USC § 2333 by passing the Justice Against Sponsors of Terrorism Act ("JASTA"). JASTA explicitly provides for a civil action against a "person" who "aids and abets" international terrorism:

> [d](2) Liability.—
>
> In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person[91] who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.[92]

1. Implications of the Civil Cause of Action

The conversation surrounding the newly enacted JASTA has primarily been a heightened concern about the relational consequences that the law will

87. *Id.* at 327.

88. *See* Carlos F. Concepción & Johanna Oliver Rousseaux, *Evolution of the ATA and Third-Party Liability for Terrorist Acts*, IN-HOUSE DEFENSE Q., Winter 2017, at 16, http://www.jonesday.com/files/Publication/96762fcf-3cb0-40ee-9ceb-d59e217ca9fb/Presentation/PublicationAttachment/5c394a82-eb45-4a0b-9e86-d9969ac8206d/IDQ-2017-01-Evolution%20of%20the%20ATA.pdf.

89. *Id.* at 20 (collecting recent filings).

90. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 853 (codified as amended at 18 U.S.C. § 2333 (West 2016)).

91. 1 U.S.C. § 1 (2012) defines the words "person" to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

92. 18 U.S.C. § 2333 (West 2016).

create between the United States and Saudi Arabia.[93] Critics also assert that JASTA abrogates sovereign immunity, an international law concept that has operated to prevent litigation brought in foreign courts against a nation.[94] Yet the conversation has uniquely passed over the equally concerning implications for both private companies and individuals.[95] JASTA expressly provides a civil cause of action against corporations and individuals who may be operating in the normal course or scope of employment.[96] Banks have long been subject to litigation alleging they have contributed secondarily by providing financial services to terrorist groups.[97] Prior to the passage of JASTA, families of terrorist victims began to bring claims against social media platforms, alleging that the provider was secondarily liable for operating as a "platform" for terrorist recruitment and communication.[98] Since the legislature's supplement to the statute, indicating secondary liability as clearly actionable, these types of suits against social media providers have become a commonality.[99] Thus, it is not surprising that one article explicitly forecasts a continuing uptick in litigation implicating "communication providers" among the potential defendants under JASTA.[100] Accordingly, a suit of this nature casting blame at the institutional press is far from unthinkable. The question becomes, how far does liability under JASTA extend?

93. *See* James Zogby, *JASTA: Irresponsible and Dangerous*, HUFFINGTON POST (Oct. 1, 2016, 7:53 AM) https://www.huffingtonpost.com/james-zogby/jasta-irresponsible-and-d_b_12269448.html.

94. *See* Mark Joseph Stern, *Why the Push to Let 9/11 Victims and Families Sue Saudi Arabia in America Is So Controversial*, THE SLATE (April 19, 2016), http://www.slate.com/blogs/the_slatest/2016/04/19/_9_11_victim_bill_is_controversial_over_sovereign_immunity.html.

95. *See* Peter J. Anderson, W. Scott Sorrels, Ronald W. Zdrojeski & Mary Beth Martinez, *Legal Alert: A Subtle Snare of the Justice Against Sponsors of Terrorism Act for Businesses Indirectly Supporting International Terrorism*, EVERSHEDS SUTHERLAND (US), LLP (Oct. 24, 2016), https://www.lexology.com/library/detail.aspx?g=ac6e93e3-7422-4399-94ab-db0c95a6da13.

96. *Id.*

97. *See* Linde v. Arab Bank, PLC, 353 F. Supp. 2d 327, 328 (E.D.N.Y. 2004) (claiming that the bank aided and abetted the terrorist group responsible for the attacks by providing financial services and support to the group).

98. *See* Fields v. Twitter, Inc., 200 F. Supp. 3d 964, 970 (N.D. Cal. 2016); *see also* Klayman v. Zuckerberg, 753 F.3d 1354, 1359–60 (D.C. Cir. 2014) (barring a claim of civil assault based on the defendant's status as "publisher" under the Communications Decency Act, 47 U.S.C. § 230(c) (2012)).

99. *See, e.g.*, Pennie v. Twitter, Inc., 281 F. Supp. 3d 874 (N.D. Cal 2017); Cain v. Twitter, Inc. No. 17 Civ. 122, 2017 WL 1489220 (S.D.N.Y. Apr. 25, 2017); Cohen v. Facebook, Inc., 252 F. Supp. 3d 140 (E.D.N.Y 2017).

100. Anderson et al., *supra* note 95 ("Consequently, JASTA opens the door to potential suits against, to name a few, manufacturers of weapons or other materials used in terrorist attacks, communication providers that facilitate coordination among perpetrators of terrorist attacks, and financial institutions that house the coffers used to fund terrorist groups.").

2. The Development that Illustrates the Legislature's Intent to Broaden Liability

In 1981, as a result of the "Coastal Road massacre"[101] in Israel, a group of plaintiffs sought to hold both nonstate organizations and Libya responsible by suing under various international law provisions.[102] The district court did not even assess the merits, and found that allowing the civil action to proceed "notwithstanding the absence of private rights of action—express or implied—sanctions judicial interference with foreign affairs and international relations."[103] Thus, the plaintiffs were unable to recover because the court found no private right of action under the asserted laws.[104]

Ten years later, a district court again looked to determine whether a plaintiff could seek civil redress for injuries resulting from international acts of terrorism.[105] The action arose from the seizure of an Italian passenger liner in the Mediterranean sea by the Palestine Liberation Organization ("PLO").[106] An American citizen, Leon Klinghoffer, was killed during the raid.[107] His estate brought suit against the PLO under "state law, general maritime law and the Death on the High Seas Act."[108] The court declared that the case could be heard only because the action took place in navigable waters; thus, federal admiralty jurisdiction applied.[109] However, this factual scenario unveiled a gap in a victim's opportunity for redress in an action involving international terrorism.[110]

In 1992, Congress enacted the civil provision of the ATA.[111] Legislative history indicates the congressional aim to provide broad measures of redress for victims, citing "the Klinghoffer family" as an illustration of a "gap in congressional efforts to develop *comprehensive* legal response to international

101. *See* AL J. VENTER, LEBANON: LEVANTINE CALVARY 1958–1990, at 87 (2017) ("On 11 March 1978, eleven PLO militants made a sea landing in Haifi, Israel, where they hijacked a bus full of people, killing those on board in what is still referred to as the Coastal Road massacre. At the end of it, there were nine hijackers and thirty-seven Israeli civilians killed.").

102. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 544 (D.D.C. 1981).

103. *Id.* at 548.

104. *Id.*

105. *See* Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854, 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991).

106. *Id.* at 856.

107. *Id.* at 858–59.

108. *Id*. at 857.

109. *Id*. at 858.

110. *See* Alison Bitterly, Note, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3398 n.61 (2015) (quoting Boim v. Quranic Literacy Inst. & Holy Land Found. (*Boim I*), 291 F.3d 1000, 1010 (7th Cir. 2002)) ("The district court found that [Klinghoffer's] survivors' claims were cognizable in federal court under federal admiralty jurisdiction and the Death on the High Seas Act because the tort occurred in navigable waters.").

111. S. REP. No. 102-342, at 22 (1992) (wishing to allow "the imposition of liability at any point along the causal chain of terrorism . . ."); *see also* H.R. REP. NO. 102-1040, at 10–11 (1992).

terrorism."[112] Further, in enacting the civil provision, Congress noted that "[a] similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."[113]

In 2016, over a presidential veto, Congress passed JASTA.[114] The provision allows "nations [to] be sued in federal court if they are found to have played any role in terrorist attacks that killed Americans on United States soil."[115] Thus, JASTA essentially abrogates foreign sovereign immunity, the effect of which remains to be seen. In large part, the provision was enacted as an attempt to provide victims of the terrorist attacks of September 11, 2001 ("9/11"), a legal route to sue Saudi Arabia in its complicit activities that seemingly link it to several 9/11 hijackers.[116] Despite being newly enacted, plaintiffs have already utilized the civil ATA provision in an attempt to recover, precisely as Congress intended.[117] Thus, 18 U.S.C. § 2333 provides not only a broad private cause of action but also a civil aiding-and-abetting provision, indicating express permission from Congress to hammer defendants on a lesser evidentiary standard.

In sum, Congress has repeatedly indicated its displeasure with providing any room to those even remotely supporting a foreign terrorist organization.[118] The historical expansion of the ATA indicates a legislature concerned with providing terrorist victims the upmost opportunity for redress.[119] The enactment of JASTA, an intentionally broad provision that abrogates sovereign immunity and has the capacity to implicate countless defendants, indi-

112. H.R. REP. NO. 102-1040, at 5 (1992) (emphasis added); *Civil Remedies for Terror Victims*, OSEN LLC (alteration in original), https://www.osenlaw.com/content/civil-remedies-terror-victims (last visited Feb. 15, 2019) ("Testifying before Congress that year regarding this law's importance, U.S. State Department Deputy General Counsel Alan Kreczko explained: 'This bill . . . will provide general jurisdiction to our Federal courts and a cause of action for cases in which an American has been injured by an act of terrorism overseas. This bill is a welcome addition to our arsenal against terrorists.'").

113. *Id.*

114. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 18 U.S.C. § 2333 (West 2016)); Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016).

115. Steinhauer, Mazzetti & Davis, *supra* note 114.

116. *See* Seung Min Kim, *Congress Hands Obama First Veto Override*, POLITICO (Sept 28, 2016, 1:45 PM), http://www.politico.com/story/2016/09/senate-jasta-228841 ("But it was important in this case that the families of the victims of 9/11 be allowed to pursue justice. Even if that pursuit causes some diplomatic discomforts." (quoting Sen. Chuck Schumer)).

117. *See* Complaint ¶ 38, Ashton v. Kingdom of Saudi Arabia, No: 1:17-cv-02003 (S.D.N.Y. Mar. 20 2017), 2017 WL 1056908 (alleging that "Saudi Arabia knowingly provided al Qaeda with support, financing and resources that were material, substantial and critical to the success of the September 11th Attacks").

118. *See* Austin Wright, *Graham, McCain Unveil 'Fix' to 9/11 Saudi Law*, POLITICO MAG. (Nov. 30, 2016, 5:48 PM), https://www.politico.com/story/2016/11/graham-mccain-saudi-arabia-911-232026 (discussing the vote to override the presidential veto, the first override; discussing Senator McCain's proposal "to narrow the law's scope"; and discussing the visit from Saudi foreign minister Adel Al-Jubeir in which he tried to persuade US lawmakers to amend the law).

119. *See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before Subomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2016).

cates a legislature willing to risk much to condemn little. Congress has spoken, but it remains to be seen if courts will listen.[120]

3. Analysis of the Institutional Press Under the Act: Largely Dependent on a Judicially Defined Scope

Prior to the 2016 amendment, courts relied on general tort principles to analyze a civil cause of action under the ATA.[121] Notably, many courts failed to find that the statutory language provided for a secondary liability cause of action.[122] JASTA abolishes the idea that secondary liability does not exist under the ATA.[123] JASTA establishes that a person, entity, or corporation may be liable if they provide "substantial assistance" to a Foreign Terrorist Organization or to a Specially Designated Global Terrorist.[124]

Because "private businesses face the risk of being forced to expend significant resources defending aiding[-]and[-]abetting claims asserted under ATA as amended by JASTA,"[125] it follows that mass communication providers will likely also play a substantial role in the controversial litigation to follow JASTA.[126] Yet, in cases where a plaintiff asserted liability against a financial institution or a social media enterprise, courts were mostly reluctant to declare such attenuated contacts sufficient to establish liability under the Antiterrorism Act.[127] Thus, with more clarity from Congress that a civil claim may be asserted on the basis of secondary liability under JASTA combined with the documented congressional intent to broaden the scope of liability, the fate of "speakers" across mass communication mediums could fall squarely within a judicial interpretation of the statutory language.

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120. *See supra* Section III.A.1.

121. Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 692–93 (7th Cir. 2008) (noting that mere negligence may be sufficient to establish liability under the ATA), *superseded by statute*, Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222 § 4, 130 Stat. 852, 854 (2016), *as recognized in* Kemper v. Deustche Bank AG, 911 F.3d 383, 396 (2018).

122. *Id.* at 689–90 (finding no secondary liability under § 2333 but incorporating criminal material support provisions that required knowledge of deliberate indifference to establish a theory of primary liability that functions essentially the same as secondary liability); Linde v. Arab Bank, PLC, 97 F. Supp. 3d 287, 324 (E.D.N.Y. 2015) (adopting the chain-of-incorporations theory in *Boim III*), *vacated*, 882 F.3d 314 (2d Cir. 2018).

123. *Contra In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118, 123 (2d Cir. 2013).

124. *See* 18 U.S.C. § 2333(d) (2012).

125. Anderson et al., *supra* note 95.

126. *See* James Doward, *Media Coverage of Terrorism Leads to Further Violence*, GUARDIAN (Aug. 1, 2015), https://www.theguardian.com/media/2015/aug/01/media-coverage-terrorism-further-violence (describing how Michael Jetter, a behavioral economist, studied 60,000 terrorist attacks that were reported in The New York Times between 1970 and 2012 and found that terrorist groups are increasingly seeking in recent years to exploit social and mass media).

127. *See, e.g.*, Fields v. Twitter, Inc., 217 F. Supp. 3d 1116 (N.D. Cal. 2016); *see also Boim III*, 549 F.3d at 690; Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474 (E.D.N.Y. 2012) (declining to permit secondary liability under the civil provision).

i. Halberstam v. Welch[128]

The legislature set the scene for the civil action of secondary liability in JASTA by declaring,

> The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.[129]

In lieu of granting courts complete interpretive power, Congress proceeded to expressly set forth in the text of JASTA that "*Halberstam v. Welch* . . . provides the proper legal framework for how such [secondary] liability should function . . . ."[130]

In *Halberstam*, the court considered the secondary liability of an individual who had long aided her husband in a burglary enterprise that eventually resulted in murder.[131] The court set out elements sufficient to establish a civil claim of aiding and abetting:

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.[132]

The court pointed to the Restatement (Second) of Torts, which summarizes a civil aiding-and-abetting claim: "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance."[133]

ii. Primary Wrongful Act: International Act of Terrorism and the Material Support Statutes

Halberstam requires a primary actor to commit a wrongful act that causes injury.[134] Under JASTA, a wrongful act must equate to an international act of

128. 705 F.2d 472 (D.C. Cir. 1983).

129. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(7), 130 Stat. 852, 852–53 (2016) (codified at 18 U.S.C. § 2333 (West 2016)).

130. Justice Against Sponsors of Terrorism Act § 2(a)(5) (citation omitted).

131. *See Halberstam*, 705 F.2d at 474–76.

132. *Id.* at 477.

133. *Id.* at 478 (quoting RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (AM. LAW INST. 1979)).

134. *Id.* at 477.

terrorism.[135] Specifically, the new provision acts to "impose civil liability on a person who conspires to commit or aids and abets (by knowingly providing substantial assistance) *an act of international terrorism* committed, planned, or authorized by a designated terrorist organization."[136] A primary act of international terrorism is one that equates to "violent acts or acts dangerous to human life."[137] Notably, courts have concluded that violations of §§ 2339A, 2339B, and 2339C, provisions prohibiting "material support" to foreign terrorist organizations, constitute such acts of international terrorism.[138] Section 2339A defines material support as providing any of the following:

> [A]ny 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.[139]

When drafting 18 U.S.C. §§ 2339A, 2339B, and 2339C, Congress plainly declared that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[140] Yet an interpretation that encompasses material support within the parameters of an international act of terrorism in the context of a civil aiding-and-abetting action is troublesome and unlikely. Such an interpretation would essentially establish a cause of action implicating an accomplice to one providing "material support" as defined in 18 U.S.C. § 2339A.[141] This result establishes immense potential for liability. Moreover, silence as to this issue in the recent amendment likely indicates the legislature's intention that an international act of terrorism be confined to the definition

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135. 18 U.S.C. § 2333(d)(2) (2012).

136. CONG. RESEARCH SERV., SUMMARY: S.2040 – JUSTICE AGAINST SPONSORS OF TERRORISM ACT: SUMMARY OF PUBLIC LAW NO: 114-222 (2016) (emphasis added), https://www.congress.gov/bill/114th-congress/senate-bill/2040?q=%7B%22search%22%3A%5B%22S+2040%22%5D%7D&s=3&r=1.

137. 18 U.S.C. § 2331(1)(A).

138. *E.g.*, Boim v. Quranic Literacy Inst. & Holy Land Found. (*Boim I*), 291 F.2d 1000, 1015 (7th Cir. 2002) ("If the plaintiffs could show that [the defendants] violated either section 2339A or section 2339B, that conduct would certainly be sufficient to meet the definition of 'international terrorism' under [the civil provisions]."); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1138 n.5 (analyzing 18 U.S.C. § 2339B and what level of intent is required to establish liability and explaining that the term "knowingly" in § 2339B "modifies the verb 'provides,' meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support").

139. 18. U.S.C. § 2339B(1).

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

141. *See* 18. U.S.C. § 2339A(b)(1).

set out in 18 U.S.C. § 2331.[142] Consequently, the primary violation likely must be in and of itself "violent . . . or . . . dangerous to human life . . . ."[143]

iii. Awareness and Causation

In criminal law, to be liable a secondary actor must intend to assist and encourage a wrongdoer.[144] However, the vast distinctions between civil and criminal liability justify a subordinate mental state in private suits.[145] The *Halberstam* court relied on the Restatement[146] as a guidebook to such concerted actions. The court pointed to § 876 comment (d), which reads: "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is *known to be tortious* it has the same effect upon the liability of the adviser as participation or physical assistance."[147] Notwithstanding this requirement that the aider know the primary action is tortious, the Restatement makes no other mention of a requisite mental state sufficient to establish a civil aiding-and-abetting claim.[148] The mention of knowledge in this sense is frequently referred to as "factual knowledge."[149] The court also imposed the requirements that the defendant be generally aware of his role in the scheme and knowingly assist the primary wrongful act.[150]

In *Halberstam*, the court upheld the civil aiding-and-abetting claim against the defendant by declaring that she had knowingly and substantially assisted her husband in a crime, even though she did not share the purpose or specific intent.[151] Therefore, the case suggests that a common purpose, or specific intent, is not necessary to establish secondary liability and that knowledge can be inferred from the facts.[152] Accordingly, a person who assists, even recklessly, could be deemed liable if the facts offer a justifiable conclusion that the secondary actor likely had knowledge that he or she was assisting the primary

142. *Id.* § 2331(1).

143. *Id.* § 2331(1)(A).

144. *See* Hicks v. United States, 150 U.S. 442, 455 (1893) (allowing liability only if the defendant intended to encourage the primary actor).

145. *See* Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 290 (2005).

146. *See* RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979).

147. *Id.* § 876 cmt. d (emphasis added).

148. *See id.* Comment (b) eludes to the fact that the defendant's mental state will be evaluated when analyzing legal causation but does not expressly declare a level of scienter that would subject a defendant to liability. *Id.* § 876 cmt. b.

149. Combs, *supra* note 145, at 282.

150. Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983).

151. *Id.* at 488.

152. *See id.*

wrongful act. Liability would extend no further, however, as federal jurisdiction does not extend to negligent acts or omissions.[153]

The *Halberstam* holding dictates what is required to establish a civil aiding-and-abetting claim. Thus, JASTA's amendment to the ATA incorporates *Halberstam* and provides the proper framework to bring suit. Nevertheless, the doctrine of civil aiding and abetting remains unsettled.[154] Accordingly, to elude any potential uncertainties, Chairman of the House Judiciary Committee Bob Goodlatte made clear that "[a]iding and abetting liability should only attach under the ATA to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization, in connection with the organization's commission of an act of international terrorism."[155] While Chairman Goodlatte's description of civil aiding and abetting under the ATA initially seems comprehensible, the doctrine in the context of international terror remains unclear. Specifically, when does a form of "assistance" become so remote to the primary act that declaring secondary liability becomes farcical? As directed by Congress, one can only turn to *Halberstam* in an attempt to solve these uncertainties.

The Restatement utilized by the court in *Halberstam* provides several illustrations of instances deemed to constitute a concerted action.[156] Within these examples is an important element needed to establish civil aiding and abetting: proximate cause.[157] It explains that "ordinarily [an encourager] is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him."[158] The *Halberstam* court noted that foreseeability is an abstract line, but still forms the basis of liability in an action for aiding and abetting.[159] For example, in *Halberstam* itself the court found the defendant liable on the basis that murder was a natural and foreseeable consequence

153. CONG. RESEARCH SERV., SUMMARY: S.2040 – JUSTICE AGAINST SPONSORS OF TERRORISM ACT: SUMMARY OF PUBLIC LAW NO: 114-222 (2016) (emphasis added), https://www.congress.gov/bill/114th-congress/senate-bill/2040?q=%7B%22search%22%3A%5B%22S+2040%22%5D%7D&s=3& r=1.

154. *See, e.g.*, Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (stating that the aiding-and-abetting doctrine under 876(b) has had uncertain application).

155. *Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary); *see also id.* ("Aiding and abetting liability should only attach under the ATA to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization, in connection with the organization's commission of an act of international terrorism. JASTA, as revised in the Senate Judiciary Committee, ensures that aiding and abetting liability is limited in this manner.").

156. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 876 cmt. d, illus. 6 (AM. LAW INST. 1979) ("A and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, which is negligent toward persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is subject to liability to C.").

157. *See id.* § 876 (noting that the factors are the same as those used in determining the existence of legal causation when there has been negligence or recklessness).

158. *Id.* § 876 cmt. d.

159. Halberstam v. Welch, 705 F.2d 472, 485 (D.C. Cir. 1983).

of the burglaries that the defendant helped the primary actor undertake.[160] It was not necessary that the defendant knew specifically that the primary actor was committing burglaries.[161] "Rather, when [the defendant] assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—because violence and killing is a foreseeable risk in any of these enterprises."[162]

iv. Substantial Assistance

While acknowledging many factors are at play in the analysis of what assistance amounts to "substantial,"[163] the *Halberstam* court pointed to *Cobb v. Indian Springs, Inc.*[164] as an example of a case where suggestive words amount to substantial assistance if they "plant the seeds of action."[165] Additionally, the court cited *Russell v. Marboro Books*[166] to illustrate that timing and location are not at all determinative in barring liability.[167] The court went on to provide an illustration of acts that provide assistance to the primary actor.[168] For example, in *Keel v. Hainline*, a student was injured by a thrown eraser.[169] Several classmates were engaging in the "horse play," and a non-participant was struck in the eye.[170] The *Keel* court held that a student who merely retrieved and handed the erasers to the throwers was liable to the injured because his assistance was a form of encouragement.[171] The *Halberstam* court noted that in *Keel* "[i]t did not matter that the defendant may not even have given any particular aid to the boy who threw the eraser that hit the plaintiff."[172] The opinion discussed several factors worthy of consideration when determining whether assistance is substantial.[173] However, the court emphasized that "duration" weighed

160. *Id.* at 488.

161. *Id.*

162. *Id.*

163. *Id.* at 484 (evaluating factors such as the nature of the act involved, the amount and kind of assistance, the defendant's relation to the tortfeasor, presence at the time of the tort, the defendant's state of mind, and duration of the assistance).

164. 522 S.W.2d 383 (Ark. 1975).

165. *Halberstam*, 705 F.2d at 482.

166. 183 N.Y.S.2d 8 (Sup. Ct. 1959).

167. *Halberstam*, 705 F.2d at 482.

168. *Id.*

169. *Id.* (citing Keel v. Hainline, 331 P.2d 397 (Okla. 1958)).

170. *Id.*

171. *Keel*, 331 P.2d at 400.

172. *Halberstam*, 705 F.2d at 482.

173. *Id.* at 478 ("The *Restatement* suggests five factors in making this determination: 'the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind.'' (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS 1979 §876 cmt. d (AM. LAW INST. 1979))).

greatly in its own substantial assistance analysis.[174] Ultimately, *Halberstam* declared the linchpin of aiding-and-abetting liability to be knowing and substantial assistance and "not . . . whether the defendant [explicitly] agreed to join the wrongful conduct."[175]

4. Application to the Institutional Press

i. Sensationalism

Hence, a case concerning the institutional press acting in concert with a foreign terrorist group will be dependent upon a judicial interpretation of what primary acts constitute international terror, what type of mental state a defendant is required to have, whether such state can be inferred from the circumstances, when liability terminates by virtue of the doctrine of proximate cause, and what assistance amounts to substantial. Such a case will likely be subject to stringent standards given the substantial protections afforded to the institutional press.[176] For example, a plaintiff in a JASTA suit will have the onerous task of proving actual knowledge by a media outlet with very little negligence. Thus, instinctively, a plaintiff will want to assert a mental state easier to substantiate, such as willful blindness.[177] While some courts could, in theory, equate knowledge with willful blindness due to the nature of the case and the defendants involved, the more probable scenario is that a court will be reluctant to do so.[178] Therefore, *Halberstam*, legislative history, and judicial hesitancy to extend liability in a JASTA case will all play defining roles in shaping the uncertain framework for civil aiding-and-abetting claims under the ATA. Nevertheless, the proper plaintiff with an exemplary case in an agreeable court could set a much-needed precedent, not only for clarity but also for change in an industry that is fundamentally impenetrable.

Recent studies continue to illustrate a nexus between publicity and terroristic acts.[179] A plaintiff may argue that such evidence establishes a standard that news organizations are generally aware that their product provides terrorism with a form of aid. Indeed, because of the rising attention in this area, unforeseeability can hardly be argued by the institutional press. A plaintiff may

174. *Id.* at 488.

175. *Id.* at 478.

176. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

177. *See* Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 774 (2011) (stating that facts that support willful blindness are often probative of actual knowledge).

178. Shawn D. Rodriguez, Comment, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. PA. J. INT'L L. 691, 734–35 (2008) ("[W]illful blindness instructions should be given only rarely, and at a judge's discretion after a specific factual inquiry . . . . [A] judge should only issue a willful blindness instruction where the jury has rejected the government's claim of actual knowledge, or where they could rationally distinguish between actual knowledge and willful blindness.").

179. *See supra* Part II.

argue that a media outlet knows, or willfully refrains from acknowledging, that its sensational reports grant terrorists a helping hand in order to establish the requisite mental state. Further, such reports offer just the type of substantial assistance examined in *Halberstam*. As described previously, the court discussed a child who brought erasers to others who threw them.[180] This act constituted encouragement that aided the primary actors.[181] Similarly, because terrorism is often the result of a group attempting to declare a political stance by creating terror and attracting the attention of the public, a news network continuously airing the horror that is produced from these events serves the terrorists' purpose and provides immense encouragement for terrorist groups to act again.[182] In this sense, the press acts as the child providing erasers.

Along the same vein, the press not only encourages these groups but also legitimizes them, essentially acting as an accessory after the fact.[183] The repetitive nature and duration of the media's news airings operate to retain the public eye. Moreover, the press gives these actors nicknames that gives the public an image to which they can attribute the crime.[184] This image becomes part of a permanent narrative, instilled when the press repetitively attributes calculated disruption to said actors. Importantly, prior to such events, terrorists are humans with skewed thoughts on how to get what they desire. Afterwards, when news circulates and accredits those responsible, these people welcome the publicity as a badge of honor. They have become terrorists.

Likewise, news networks often supply terrorists with information about the current state of events during and after an attack that could, and often does, give these groups further insight that furthers their cause. For example, in 2004, when a hostage called out to the British Prime Minister over nationwide news carriers,[185] these networks were furthering the cause of the captors by airing their demands. The captors took advantage of the media's desire to air events that capture the public's attention and transformed the press into a pawn, furthering their own murderous convictions.

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180. *Halberstam*, 705 F.2d at 482 (citing Keel v. Hailine, 331 P.2d 397 (Okla. 1958)).

181. *Id.*

182. *See supra* Part II.

183. *See* 22 C.J.S. *Criminal Law: Substantive Principles* § 181, Westlaw (database updated Feb. 2019) ("Certain conditions must be met in order to render a person an accessory after the fact, namely, the felony must be complete, the accessory must know that the principal committed the felony, and the accessory must harbor or assist the felon.").

184. *See, e.g.*, Dana Ford & Steve Almasy, *ISIS Confirms Death of 'Jihadi John,'* CNN (Jan. 20, 2016, 6:18 AM), http://www.cnn.com/2016/01/19/middleeast/jihadi-john-dead/index.html.

185. Colin Brown, Kim Sengupta & Danielle Demetriou, *'Mr Blair, Please, You Can Help. I Think This Is My Last Chance,'* INDEPENDENT (Sept. 23, 2004, 12:00 AM), https://www.independent.co.uk/news/world/middle-east/mr-blair-please-you-can-help-i-think-this-is-my-last-chance-547368.html.

ii. Foreign Correspondents and Media in Wartime

Reporters who play a role in documenting military action both at home and abroad may also help establish a viable claim under JASTA. A foreign correspondent discovers and reports information on important international affairs, often during hostile periods and in dangerous regions. Frequently, the material is highly sensitive information and, if revealed, could produce dire consequences.[186]

In a suit under JASTA, a plaintiff will have no trouble asserting the requisite "general awareness" on the part of these journalists. The very nature of their occupation carries with it a constant overtone of danger and sensitivity. It is foreseeable that the disclosure of information could result in violent action. If a reporter is a longtime correspondent and has substantial experience with the innerworkings of international relations, knowledge that confidential information may assist an enemy will certainly be inferred. Further, if a reporter were to be informed of dangerous implications associated with a story but proceeds in pursuit of a coveted headline, the requisite awareness and assistance could hardly be disputed.

iii. Social Media

In the same vein, a federal district court recently considered whether social media that provides a platform for terrorist groups constitutes a form of "material support" under the ATA.[187] The court refused to expand liability based on the immunity afforded Twitter through the Communications Decency Act, which shields defendants who classify as "publishers."[188] The Ninth Circuit affirmed the ruling.[189]

JASTA's amendment to the ATA came into effect after the district court's ruling, and therefore, the Ninth Circuit will have to decide the impact, if any, that the civil aiding-and-abetting provision has on such a case. The general awareness that is needed to pass muster can be established by the recent acknowledgements of social media organizations that their platforms effectually further terrorists' cause.[190] However, for a plaintiff to overcome the substantial assistance element, the complaint will have to characterize Twitter operating as something other than a publisher. Otherwise, this label will shield

186. *See supra* Part I.

187. Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1119 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018).

188. *Id.*

189. Fields v. Twitter, Inc., 881 F.3d 739 (9th Cir. 2018).

190. *See Twitter Suspends 125,0000 'Terrorism' Accounts*, BBC NEWS (Feb. 5, 2016), http://www.bbc.com/news/world-us-canada-35505996.

the defendant under the Communications Decency Act.[191] As an example, plaintiffs have recently filed a suit alleging Facebook is liable instead for profiting off of terrorism through advertising.[192] Thus, pending litigation will reveal whether a court is willing to establish a nexus between social media and international acts of terrorism.[193]

IV. COULD A CIVIL ACTION AGAINST THE PRESS SURVIVE CONSTITUTIONAL SCRUTINY?

A. Why Even Raise the Issue?

In the event that a victim of terrorism seeks to establish a claim against mass communication providers on the basis that the information alone or the sensational nature of the dissemination aided and abetted an international act of terrorism, the outcome of the case will turn largely on constitutional applications. Specifically, if a claimant is able to establish the requisite elements delineated in *Halberstam* to allege that a member of the media's actions constituted secondary liability as provided in 18 U.S.C. § 2333, only half the battle is won. The plaintiff's heaviest burden will be circumventing doctrinal limitations presented by the First Amendment. Seemingly, a *private* suit utilizing JASTA's supplement to the ATA would escape the scrutinizing eye of the First Amendment. However, over the past half century, the Supreme Court has allowed traces of these long-established principles to drift into their judgment in instances that, from the outset, appeared to require a determination confined to private action criterion. For example, under the unsettled "matters of public concern" doctrine, speech has been deemed within the purview of protections delineated by the Framers.[194] Even so, under what circumstances the Court invokes the doctrine remains unpredictable and seemingly erratic.[195]

191. *See* 47 U.S.C. § 230(c)(1) (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

192. *See* Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017).

193. Nina Iacono Brown, *Should Social Networks Be Held Liable for Terrorism?*, SLATE (June 16, 2017, 7:14 AM), https://slate.com/technology/2017/06/a-new-legal-theory-for-holding-social-networks-liable-for-terrorism.html ("These plaintiffs argue that social media companies are liable not for allowing terrorists to use their platforms but for *profiting* from that use. Many social media companies—including Facebook, Twitter, and YouTube—draw revenue from advertising. The ads target specific viewers based on the content of the pages they visit.").

194. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011).

195. *See* Clay Calvert, *Defining "Public Concern" After* Snyder v. Phelps*: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 44 (2012) (noting the failed agreement among justices as to what constitutes public concern); *see also* Andrew Meerkins, Note, *Distressing Speech After* Snyder*—What's Left of IIED?*, 107 NW. U. L. REV. 999, 1016–17 (2013) ("First Amendment protections of speech regarding purely private matters 'are often less rigorous.' . . . [T]he nature of the distinction between public and private concern defies a one-size-fits-all test and . . . each case will require a facts- and circumstances-specific analysis.").

1. New York Times Co. v. Sullivan[196]

In a landmark case that provides much of the framework utilized in First Amendment speech cases, the Supreme Court incorporated a new legal standard for defamation suits brought by public officials.[197] In *New York Times Co. v. Sullivan*, Justice Brennan constructed an opinion that carried hearty implications for the freedoms afforded to the press under the First Amendment.[198] Prior to *Sullivan*, the Court had provided limited insight into the relationship between the First Amendment and the tort of defamation, other than the bare idea that the Constitution afforded no protections to defamatory statements.[199]

The facts underlying the suit involved a municipal officer bringing a defamation suit against the New York Times for publishing information that, he argued, libeled him.[200] The officer sued under an Alabama statute that allowed for a presumption of malice if the publication "tend[ed] to injure a person libeled by them," coined as "libelous per se."[201] Upon review, the Supreme Court emphasized the importance of the open debate of public officials and held that an *actual* showing of malice was required in order to inhibit speech.[202] Thus, the Court required nothing short of a showing of recklessness in order to limit the protections afforded under the First Amendment.[203] Justice Brennan took heed to the novel constitutional claim proposed by the New York Times.[204] The Justice turned to the Sedition Act of 1798 and incorporated it into what was then a contemporary analysis.[205] The Court relied heavily on the importance of "public debate" and effectually framed the case to the likeness of state action.[206] Thus, while the tortious suit was, on its face,

196. 376 U.S. 254 (1964).

197. *See* Roy S. Gutterman, *The Landmark Libel Case,* Times v. Sullivan, *Still Resonates 50 Years Later*, FORBES (Mar. 5, 2014, 12:06 AM), https://www.forbes.com/sites/realspin/2014/03/05/the-landmark-libel-case-times-v-sullivan-still-resonates-50-years-later/ ("Times v. Sullivan [sic] has had an impact on just about every free speech and free press case for the past half-century, influencing everything from how we accept debate and tolerate speech we disagree with to our legal definitions of privacy, obscenity and indecency. The case has been integral to forging rules for access to public meetings, public places and commercial speech as well as the free speech rights of just about anyone you care to list – journalists, confidential sources, lawyers, campaign donors, pornographers, comedians, religious zealots and hate-mongers.").

198. *See Sullivan*, 376 U.S. at 283–92.

199. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Beauharnais v. Illinois, 343 U.S. 250, 256 (1952).

200. *Sullivan*, 376 U.S. at 263.

201. *Id.*

202. *Id.* at 288.

203. *Id.* at 279–80.

204. *Id.* at 273.

205. *Id.* at 273–74.

206. *Id.* at 265; *see* Solove & Richards, *supra* note 71, at 1657 ("Justice William Brennan reasoned that where libel actions had the potential to significantly chill public debate, even 'private' actions like defamation could infringe First Amendment rights . . . .").

subject to the guiding principles of a defamation cause of action, the Court declared a novel linkage to the Constitution in order to shield the institutional press.

Sullivan serves as a template for a JASTA case: a civil tort action against a member of the institutional press. The holding illustrates that types of speech are afforded special protections based on subject matter. However, the Court was willing to extend liability in the event that the speech was recklessly false. Accordingly, in a JASTA suit, a court could encapsulate media coverage in much the same way, subjecting a claimant to the guiding principles of the "public concern doctrine." This doctrine would effectually eliminate any chance at recovery for a terrorist victim and shield all press-related material from legal examination. On the other hand, the speech in *Sullivan* constituted a tort, thus escaping criminal scrutiny. A JASTA plaintiff would at least have the additional benefit of arguing that under the ATA a media member's sensational speech could also be deemed criminal. In sum, *Sullivan* is a distinct scenario from that of a JASTA suit. Nonetheless, the case stands for one central idea: the historical willingness of the legal system to shield the institutional press from any action that might operate as a restriction on speech.

2. Snyder v. Phelps[207]

In a similarly fashioned case decided almost half a century later, a public demonstration took place 1,000 feet from a church in which a funeral of a deceased serviceman was being held.[208] The rioters protested to express their belief that God hates homosexuality in the military.[209] The father of the deceased brought suit claiming intentional infliction of emotional distress and intrusion upon seclusion.[210] The Court declared that, while the suit involved private individuals, "[s]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values . . . .'"[211] The Court noted that while the protestors were free to picket, they could still be subject to time, place, and manner restrictions.[212] Nevertheless, the Court held that the protection afforded to this speech could not be disturbed by a jury finding the picketing to be "outrageous" for purposes of establishing intentional infliction of emo-

207. 562 U.S. 443, 443 (2011).

208. *Id.* at 448–49.

209. *Id.*

210. *Id.* at 449–50.

211. *Id.* at 444 (internal quotation marks omitted) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)); *see also id.* ("[S]peech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community . . . .'" (quoting *Connick*, 461 U.S. at 146)).

212. *Id.* at 456–57. Maryland had not yet enacted any such type of restriction to expression, and thus, Westboro was not in violation of any ordinance or statutory scheme. *Id.*

tional distress.[213] The father also asserted a claim of "intrusion upon seclusion" and applied the captive audience theory to the people attending the funeral.[214] The Court declared that the theory did not apply because the picketers stayed at a distance from the funeral with no evidence of actual interference of the funeral itself.[215]

In *Snyder*, the Court referred back to *Sullivan* and specifically conceded that "the boundaries of the public concern test are not well defined."[216] That the speech was "inappropriate or controversial"[217] was not relevant to the issue, but because the protest "spoke to broader public issues,"[218] Westboro Baptist Church was afforded "special protections" under the First Amendment.[219] This holding, yet again, illustrates the rapidly expanding public concern doctrine in private actions, as examined in *Sullivan.* However, *Snyder* incorporated the doctrine into a private suit against a group very much distinct from the institutional press.[220]

From the outset, one might feel comfortable resting the outcome of this case on generic tort law, but the Court again chose to incorporate constitutional scrutiny into its reasoning. Westboro Baptist Church is not a member of the media and, therefore, should not be subject to the revered principles that accompany press freedoms. Nevertheless, the Court utilized the doctrine of public concern to limit any and all potential restrictions on the church's protest. Additionally, there was no overarching statutory authority in *Snyder*, as there was in *Sullivan.*[221] Thus, if *Snyder*, a common law tort case, required incorporation of stringent constitutional principles, one could certainly foresee a court acting to shield defendants pursued under a government enacted provision. Accordingly, a JASTA claimant suing a media member will have the heavy burden of surviving harsh constitutional scrutiny based not only on the nature of the defendant, but also the statutory cause of action.

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213. *Id.* at 458.

214. *Id.* at 459–60.

215. *Id.* at 460.

216. *Id.* at 452 (internal quotation marks omitted) (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam)).

217. *Id.* at 453 (internal quotation marks omitted) (citing Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

218. *Id.* at 454.

219. *Id.* at 453 (citing *Rankin*, 483 U.S. at 387); *see id.* at 454, 458.

220. *See* Calvert, *supra* note 195, at 46 (noting that while newsworthiness and public concern often overlap, the two are not necessarily synonymous).

221. *Compare Snyder*, 562 U.S. at 443, *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

B. The Blurry Dividing Line: When does the First Amendment Assert Its Authority?

1. Holder v. Humanitarian Law Project[222]*: Terrorist Speech*

While a private party who attempts to impinge speech circumvents some First Amendment scrutiny, state actors have a more burdensome task when a case involves free speech restrictions.[223] The result of such a case is almost always fatal for a state actor.[224] However, early in 2010, the Supreme Court exhibited an unusual departure from precedent by allowing the "criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing."[225] In *Holder v. Humanitarian Law Project*, the plaintiffs challenged 18 U.S.C. § 2339B as an impingement on their constitutional rights.[226] Specifically, the plaintiffs[227] claimed that they wished to "provide support for the humanitarian and political activities of the [Kurdistan Workers' Party] and [Liberation Tigers of Tamil Eelam] in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B."[228] The Supreme Court conceded that the material support provisions operated as a content-based restriction on speech.[229] The Court required the government satisfy a "demanding standard"[230] and found that

> Congress [had] prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction

222. 561 U.S. 1 (2010).

223. *See* Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561 n.5 (2008) ("For example, shopping malls are privately owned and as such have the ability to restrict speech on their premises while public parks are state-controlled and therefore cannot arbitrarily restrict speech on its grounds.").

224. *See* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1293 (2014) ("In 97% of district court cases and 87% of court of appeals cases, a determination of content discrimination resulted in invalidation.").

225. David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 149 (2012).

226. 561 U.S. at 10.

227. Plaintiffs in this case were two U.S. citizens and six domestic organizations, one of which was the Humanitarian Law Project, a human rights organization with consultative status to the United Nations. *Id.*

228. *Id.*; *see also id.* at 9 ("In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. Two of those groups are the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE)." (citations omitted)).

229. *See* 18 U.S.C. § 2339 (2012). "Training" is defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id.* § 2339A(b)(2). "Expert advice or assistance" is defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* § 2339A(b)(3).

230. *Humanitarian Law Project*, 561 U.S. at 28.

> of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[231]

Thus, the Court surprisingly found the Government's interest to be entitled to deference.[232] The Court went so far to state that

> respect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on *informed judgment rather than concrete evidence*.[233]

Thus, the Court allowed the criminal statute to stand and stated plainly that, "when it comes to collecting evidence and drawing factual inferences in [national security and foreign relations], 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate."[234]

The reception of the holding in *Humanitarian Law Project* has churned the already great debate between those who adhere to the protections afforded under the First Amendment and those who advocate for resilience in national security.[235] Many regard the case as a significant departure from the jurisprudence of the *Brandenburg* standard.[236] What is clear, however, is the Court's reluctance to impinge upon national security measures, no matter the scope, even in the name of one of the country's most precious safeguards.[237] In light of the escalation in political tension both intranationally and internationally, the controversy surrounding the nation's media, as well as the unprecedented strides made in the way information is delivered, received, and utilized, time only advances the relevance of the Court's methodology in *Humanitarian Law Project.*[238] Therefore, "[i]f these doctrinal developments are generally applicable, *Humanitarian Law Project* has dramatically expanded government authority

231. *See id.* at 26.

232. *Id.* at 5 ("It is not difficult to conclude, as Congress did, that the taint of their violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means. Moreover, material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways.").

233. *Id.* (emphasis added).

234. *Id.* at 34 (citation omitted) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

235. *See* Cole, *supra* note 225.

236. *Id.* at 149 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)) (doubting the continuing validity of the Brandenburg incitement test).

237. *Id.* ("If this is the type of scrutiny that content-based laws enacted in the name of national security are to receive in the future, the scope of political freedom has been significantly narrowed.").

238. *See* Stephen J.A. Ward, THE INVENTION OF JOURNALISM ETHICS, SECOND EDITION: THE PATH TO OBJECTIVITY AND BEYOND 373 (2015) ("The need for a global [journalism] ethics is due not only to technological innovation and new ownership patterns; it is due to changes in the world that journalism inhabits.").

to suppress political expression and association in the name of national security."[239]

In sum, *Humanitarian Law Project* represents the powerful notion that a less exacting standard is applied to speech in cases when national security is at issue. The Supreme Court found that the challenged material support statutes encompass words, no matter the purpose of such words, so long as the speech could serve to "legitimize" a foreign terrorist operation. The Court even specifically noted that the restrictions in the statute were content-based.[240] Thus, it is an aberration that these provisions could survive, in light of one of the pillars of fundamental rights: speech.[241] Such "terrorist speech"[242] generates an interesting dilemma in cases that involve operations of an individual that may indirectly be tied to a foreign terrorist organization, no matter the intent. Now, with the passage of JASTA and the legislature's express goal to expand liability in cases like *Humanitarian Law Project*, it is imperative to determine the scope of the ATA and what speech is encompassed when a private action is instituted.

i. The Balancing Act Between Two Interests: Speech and National Security

The holdings in *Sullivan*[243] and *Snyder*[244] differ strikingly from the governmental deference that the Supreme Court more recently afforded in *Humanitarian Law Project*. A quick reading of the two earlier cases would likely grant the reader assurance that the Court in *Humanitarian Law Project* would be reluctant to suppress speech and yet again find a way to designate its speech as worthy of constitutional refuge. Indeed, *Sullivan* and *Snyder* are not unaccompanied cases under the purviews of the public concern doctrine, many of which are deemed to have been decided questionably.[245] Accordingly, given the murky precedent, one might wonder how the Humanitarian Law Project's desire to teach groups ways to petition for humanitarian relief before the

239. *See* Cole, *supra* note 225, at 149.

240. Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010).

241. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301 (1964) ("[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)) (internal quotation marks omitted)).

242. *See* Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 653 (2017) ("Arguably the most pressing question in the free speech area today is whether and to what extent terrorist speech is protected by the First Amendment.").

243. *See supra* Section IV.A.1.

244. *See supra* Section IV.A.2.

245. *See, e.g.*, Lane v. Franks, 573 U.S. 28 (2014); Hill v. Colorado, 530 U.S. 703 (2000); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

United Nations does not invoke the doctrine as being "fairly considered as relating to any matter of political, social, or other concern."[246] Thus, while two of the most renowned First Amendment cases in the Court's history demonstrate its willingness to allow fundamental principles of state action scrutiny into a private action, the Court clearly applies different standards in its assessment of what is and what is not considered matters of public concern.[247]

In an attempt to resolve the discrepancy, a decisive factor could very well be the group the claimant chooses to pursue in court. Specifically, despite the private litigants, the New York Times and Westboro Baptist Church essentially embody the First Amendment freedoms of press and religion, respectively, which could explain why the Court deferred to both. Thus, the inconsistency could be coined as a simple acquiescence to the strongholds of First Amendment ideals. Accordingly, while national security was not at issue in *Sullivan*, one could argue that the rationale provided by the Court would have differed if the newspaper had committed similar acts to those performed by the Humanitarian Law Project. Would the Court have termed the New York Times's acts as "legitimizing" a foreign terrorist organization in the same way it characterized the acts of the Humanitarian Law Project? The antithesis of this question could be applied to *Snyder*. Does the outcome of *Snyder* change if the Humanitarian Law Project is the group protesting outside the funeral of a young deceased serviceman rather than what is essentially a collective embodiment of core liberties?

Therefore, the foregoing illustrates that the future cannot be readily determined when individuals claiming an injury inflicted by a form of speech choose to have their cases heard. The choice of defendant for a suit might very well bear on national security in a given case and essentially predetermine the outcome of such litigation. While a claimant should not be denied recovery on such a volatile basis, *Sullivan* and *Snyder* indicate that the defendant chosen may very well be the only thing sure to be "fatal in fact."

246. Snyder v. Phelps, 562 U.S. 443, 453 (2011).

247. *See* Transcript of Oral Argument at 6, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (No. 08-1498) ("This Court has never upheld the criminal prohibition of lawful speech on issues of public concern."); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); Calvert, *supra* note 195, at 70 ("The [public concern] test is, in a nutshell, riddled with ambiguities. . . ."); Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083, 1118 (2012) (noting that over the years the Supreme Court has "offered an inconsistent approach regarding what constitutes a matter of public concern, both with respect to what qualifies and with respect to how much protection such discussions should be afforded").

V. CONCLUSION

"[T]he law isn't static . . . ."[248] Because the world has become infiltrated with technological advancements that allow for immediate and far-reaching communications, an alteration in the method we afford protections to speech should not automatically be deemed unworkable. The judicial system could take such a step by recognizing that a victim of international terrorism has a civil action against the mass media for aiding and abetting terrorist groups by way of the inattentive methods by which it often distributes information.

Under JASTA, a victim could assert a sufficient claim alleging that the media is generally aware that its actions are providing assistance to terrorists and that such assistance is substantial. That victim will need to point to the legislature's intent under JASTA to broaden all liability in the form of terrorist support, even if there is no shared purpose between the media and the terrorist group. Even if a victim is able to establish the requisite elements of a civil action, the First Amendment comes into play. The Supreme Court has incorporated the doctrine of public concern in private actions so as to prohibit any impingement on speech. Yet, *Holder v. Humanitarian Law Project* provides an outlet for all plaintiffs in terrorist speech cases. Under *Humanitarian Law Project*, the Court specifically recognizes the importance of narrowing any and all aid to foreign terrorist groups, even if speech is restrained as a result. However, as seen in *New York Times Co. v. Sullivan* and *Snyder v. Phelps*, when press and religion stand on the opposing side, this result is not so easily reached.

Thus, a victim of international terrorism will have to ward off all First Amendment persuasion in a court of law and call the court's attention to the importance of national security, careful reporting, and the interlaced relationship between the media and terrorist groups. This feat will not be easily done, but action must be taken to circumvent terrorist groups' frequent exploitation of media outlets. Such action by dangerous individuals poses far more perils than holding the media accountable in a court of law. The legislature has recognized the need. The judicial system must establish the solution.

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248. Mark Arsenaut, *Experts Say Michelle Carter Case Revolved Around Concept that Words Can Kill*, BOSTON GLOBE (June 16, 2017), https://www.bostonglobe.com/metro/2017/06/16/carteranalysis/VNeJVBH6phBlzfUNlsR07J/story.html (quoting Timothy M. Burke, a Needham defense lawyer and former Suffolk County prosecutor).

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