JAILING THE TWITTER BIRD: SOCIAL MEDIA, MATERIAL SUPPORT TO TERRORISM, AND MUZZLING THE MODERN PRESS

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Social media companies such as Facebook and Twitter are vulnerable to federal criminal prosecution under 18 U.S.C. § 2339B, the material support to terrorism statute, for providing a means for terrorists and their sympathizers to glorify and pursue their violence on social media. This Article exposes that vulnerability as well as the material support statute's conflicts with the First and Fifth Amendments in this context, such as the statute's chilling effect. In particular, the Article explores how social media providers have responded to threats from the U.S. government by suspending hundreds of thousands of user accounts, effectively censoring constitutionally protected speech. Crucial to this argument is this Article's broader foundational assertion that social media providers should be seen as today's fourth estate, and that what this Article identifies as the First Amendment's "press narrative" should help shield them from this counter-terrorism statute.

This Article contextualizes this issue of social media providers and user speech within the classic struggle of state security versus freedom of press and speech in the age of modern transnational terrorism. The material support statute is currently the federal government's foremost counter-terrorism criminal tool, and its constitutional defects raise concerns about censorship during times of war and national insecurity. Addressing these concerns, this Article wrestles with the growing role of social media providers as news providers, the increasing alarm at terrorists' and their supporters' use of social media, and the tensions resulting from social media's unique attributes such as general anonymity of users. It urges greater attention to questions critical for our liberal democracy: how and when to hold social media companies accountable for the speech they allow on their platforms.

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INTRODUCTION

Clement Llaird Vallandigham, an Ohio politician and lawyer (and this author's ancestor, according to family lore) was convicted in 1863 by a hastily-assembled military commission for violating a general's order prohibiting criticism of the government.[1] He was punished for

[1] Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 106–07, 121–22 (1998). *See generally* SPEECHES, ARGUMENTS, ADDRESSES, AND LETTERS OF CLEMENT L. VALLANDIGHAM 12, 45–46 (J. Walter & Co. ed., 1864) Clement Llaird Vallandigham, a former Democratic Congressman from Ohio, was convicted in 1863 by a military commission convened by General Burnside. He was approved by President Lincoln of being "in violation of Order Thirty-Eight, at Mount Vernon, on the 1st of May, in a public speech to the people, he had declared the war to be cruel and unnecessary . . . and declared that the sooner the people should inform the minions of usurped power, that they would not submit to such restrictions upon their liberties, the better." *Id.*

giving a public speech in Ohio that condemned the Union war effort in the midst of the Civil War, a conviction President Lincoln supported despite the fact that Vallandigham was simply advocating for lawful action.[2] While Vallandigham's town-square public speech would no longer be considered criminal, given the evolution of seditious libel and incitement, a similar act could easily be criminal today if linked to a foreign terrorist group.[3]

In this thought experiment, let us specifically suppose that: Vallandigham's speech is given in 2017 by his female descendant on behalf of a group called the Copperheads (a continuation of the original Vallandigham group); the United States now considers this group a foreign terrorist organization (FTO); and Vallandigham's descendant knows that this group has been so designated.[4] The speech is, like her ancestor's, one of advocacy against war and also one that advocates for her group. Vallandigham's descendant, instead of giving this speech on a public street corner as did the Civil War–era provocateur, turns to the modern public square of Facebook and posts these words on her Facebook page. She also posts it on the Copperheads' website and links to this site on Twitter while describing the speech in 140 characters.

This Article's primary concern is the introduction of social media as a vehicle of this speech's dissemination. Social media represents both a continuity and a disjuncture from the nineteenth century Vallandigham's oratory—words that are today disseminated against the backdrop of federal counter-terrorism law that prohibits certain speech. The site of speech—social media—reflects continuity because in 2017, one's Facebook page and Twitter feed *are* virtual town squares and surely, the wily Vallandigham back in 1863 would have used them instead of shouting in the town square. But social media is different from Vallandigham's venue because of its press nature: as explained in this Article, social media controls what is published on its platforms through its content rules, and in doing so often *acts* like the news and is

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2 *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 94–108, 116 (2004) (detailing Lincoln's reaction to Vallandigham's speech and noting the distinct lack of advocacy of illegal action in the speech as well as Vallandigham's explicit counseling against unlawful conduct); *see also* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 272 (2012) (recounting Vallandigham's speech and subsequent military commission).

3 Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (advocacy must be "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" before it can be criminalized); *see also* 18 U.S.C. § 2384 (2012) (requiring force as an element for federal crime of seditious conspiracy, including, *inter alia*, "conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof").

4 Vallandigham was a prominent member of the Civil War–era Copperheads. *See generally Copperhead,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Copperhead-American-political-faction (last updated May 3, 2017) (describing the Copperheads as a faction of the Democratic Party during the Civil War years that advocated for peaceful negotiation with the secessionist states instead of war).

definitely *relied on* for news.[5] This Article argues that social media may serve essential functions with regard to speech and news dissemination that signal a need for speech protection beyond that held by individual social media users, at least in the criminal realm; such protection emanates from the First Amendment's Press and Speech Clauses and the role of the press in preserving our liberal democracy.[6]

Such protection is needed, this Article argues, because of the nature of today's national security threat and, specifically, the federal government's leading law enforcement response to it. While President Lincoln in 1863 feared the damage Vallandigham's spoken words could wreak on the Union Army's recruiting efforts and morale,[7] today Congress and the executive branch fear any type of support, even mere praise and advocacy in the form of words, that can potentially help terrorist groups. The government's response to this fear,[8] and the statute at issue regarding our thought experiment, is one that touches directly on the nerve of social media and national security: 18 U.S.C. § 2339B, the material support to terrorism statute.[9] It prohibits the willful provision of anything of value to a group designated as an FTO *if* the provider knows that such organization has either been so designated, or knows that it engages in terrorism.[10] This crime does not require intent that such aid be used for terrorism; it is the knowing nexus to a terrorist group that renders almost any type of assistance, even protected speech, criminal.

So returning to our thought experiment and Vallandigham's descendant: her modern speech easily constitutes criminal material support to terrorism. Applying § 2339B, her speech is assistance, in the form of advocacy, to her foreign terrorist group.[11] Since it was provided on behalf of her group, it would therefore run afoul of this statute,

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5 *See infra* Section I.A.

6 *See infra* Section I.B.

7 *See generally* STONE, *supra* note 2, at 111 (finding that Lincoln felt it proper to hold Vallandigham accountable for hypothetical future criminal acts inspired by his words).

8 Such a speech could also constitute the federal crime of treason if made on behalf of a group against whom the United States is engaged in war. *See* Kristen Eichensehr, Comment, *Treason's Return*, 116 YALE L.J. POCKET PART 229, 229 n.3, 232 (2007), http://www.yalelawjournal.org/forum/treasona8217s-return (arguing that a U.S. citizen disseminating propaganda on behalf of an enemy during war is "levying war" using psychological means against the United States in violation of the federal treason statute, 18 U.S.C. § 2381 (2000)).

9 18 U.S.C. § 2339B (2012) criminalizes conduct that supports terrorist groups, such as the provision of funding to terrorist groups' humanitarian or political wings, because of the fungibility of that aid. *See* 18 U.S.C. § 2339A(b)(1); *infra* Section II.B.

10 *See infra* Section II.B.

11 Advocacy is a type of service that is considered material support to terrorism. *See* United States v. Mehanna, 735 F.3d 32, 49 (1st Cir. 2013). *See generally* Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 4–18 (2005) (explaining that Congress deemed advocacy in the form of words as benefitting foreign terrorist groups by lending them legitimacy, recruiting power, etc., and therefore criminalized this speech if performed in coordination with, versus independent of, such a group).

whether the speech is spoken live in a town square in front of a crowd *or* posted online. The key to criminality is that her mere advocacy— speech usually protected by the First Amendment—was knowingly disseminated on behalf of, or in coordination with, an FTO she knew was so designated.[12] This nexus plus knowledge transforms otherwise lawful speech into a crime, with the Supreme Court's imprimatur.[13]

As indicated above, the focus of this Article is not the question of whether or not Vallandigham's descendant violates § 2339B by posting such material on social media; much ink has already been spilled in that regard.[14] This Article instead explores the tougher issue of whether the entities of Facebook and Twitter *themselves* would be criminally liable under this statute for providing a means of disseminating Vallandigham's unlawful speech. It further asks whether they *should* be liable and reveals the potential cost of such liability. This thorough inquiry is needed because the few scholars who have addressed social media's exposure to this statute have straightforwardly assumed such liability, as long as the statute's knowledge component is met, and have overlooked both vagueness and freedom of expression concerns.[15]

There is no scholarly or other treatment that critically dissects § 2339B as applied to social media, nor any that normatively questions such reach; little attention has been paid to the statute's application to publishers of third-party speech in general, and to cyber publishers such as social media in particular.[16] This Article argues that government

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12 The fact that the speaker knew she was giving the speech in coordination with a particular terrorist organization is its criminal linchpin, despite being mere words of advocacy. As Chief Justice Roberts noted in his 2010 majority opinion upholding § 2339B from vagueness and First Amendment challenges, the statute's animating proposition that "aiding a foreign terrorist organization's lawful activity promotes the terrorist organization as a whole" allows a wide swathe of activity, even speech, to be criminalized—*if* it is "coordinated with or under the direction of" an appropriately terrorist-designated group. Holder v. Humanitarian Law Project, 561 U.S. 1, 31 (2010). The Court held that § 2339B "is constitutional *as applied* to the particular activities plaintiffs have told us they wish to pursue." *Id.* at 8 (emphasis added).

13 *See infra* Section II.B.

14 *See infra* note 16.

15 *See* Benjamin Wittes & Zoe Bedell, *Facebook, Hamas, and Why a New Material Support Suit May Have Legs*, LAWFARE (July 12, 2016, 1:23 PM), https://www.lawfareblog.com/facebook-hamas-and-why-new-material-support-suit-may-have-legs; Benjamin Wittes & Zoe Bedell, *Tweeting Terrorists, Part II: Does It Violate the Law for Twitter to Let Terrorist Groups Have Accounts?*, LAWFARE (Feb. 14, 2016, 6:35 PM), https://www.lawfareblog.com/tweeting-terrorists-part-ii-does-it-violate-law-twitter-let-terrorist-groups-have-accounts; Benjamin Wittes & Zoe Bedell, *Tweeting Terrorists, Part III: How Would Twitter Defend Itself Against a Material Support Prosecution?*, LAWFARE (Feb. 14, 2016, 7:16 PM) https://www.lawfareblog.com/tweeting-terrorists-part-iii-how-would-twitter-defend-itself-against-material-support-prosecution [hereinafter Wittes & Bedell, *Tweeting Terrorists*]; Benjamin Wittes & Zoe Bedell, *Twitter, ISIS, and Civil Liability*, LAWFARE (Jan. 14, 2016, 4:15 PM), https://www.lawfareblog.com/twitter-isis-and-civil-liability.

16 Voluminous scholarly debate exists regarding § 2339B's effects on an individual's freedom of speech and association. The legal literature related to the use of social media by terrorists and their supporters has primarily focused on speech and associational concerns

threats of social media liability under § 2339B have consequently suppressed protected speech on such platforms.[17] This suppression is due to the ambiguity of the statute in this context—vagueness that is exacerbated by social media's general attribute of user anonymity; such over-deterrence violates the Fifth Amendment.

This Article goes beyond vagueness due process concerns to highlight that even if such vagueness could be cured, a larger issue is at play: the role of social media as today's fourth estate and potential constitutional protections such characterization may trigger. The material support literature has yet to address this role, nor has it considered how today's First Amendment requires a balancing test when the functioning of a generally-applicable law, such as § 2339B, impacts core press functions.[18] Such a balancing test, emanating from what this Article calls the modern First Amendment press narrative, provides a useful analytical framework to examine the material support statute as applied to social media. It is helpful because this test considers both social media's modern press functions in addition to standard speech concerns and balances both against this statute's national security objective.[19]

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raised by § 2339B's criminalization of users' speech. *See, e.g.*, DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 60–62 (2003) (outlining how § 2339B fails to protect speech and associational rights); *see also* Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SECURITY J. 1 (2011); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203 (1999) (highlighting the associational dangers of material support statute); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012) [hereinafter Margulies, *Advising Terrorism*]; Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4 (2004); Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371 (2012) (analyzing tension between privacy and associational interests on social media); Abigail M. Pierce, Note, *#Tweeting for Terrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support Statute*, 24 WM. & MARY BILL RTS. J. 251 (2015) (generally analyzing how a user's social media communication can qualify as material support to terrorism).

17 This Article is not arguing that the First Amendment should apply directly to social media companies as they are not state actors, nor is the governmental coercion present pervasive enough to consider them as such under the state action doctrine; however, some scholars have so argued. *See, e.g.*, Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121 (2014) (proposing First Amendment regulation to social media platforms as protection against the companies' contractual censorship under an expansive state action doctrine).

18 *See infra* Sections I.B, III.C. The lack of discussion of constitutional protections for the press may be due to the common belief that the U.S. Supreme Court has generally rendered the First Amendment's Press Clause redundant with the Speech Clause, seemingly conferring little affirmative privileges to the press not held by the ordinary citizenry. This Article highlights a jurisprudential narrative that gives the press greater First Amendment protection in particular circumstances.

19 One scholar mentions the First Amendment as potentially protective of a newspaper against material support to terrorism charges in an aside in a blog post, but this theory has never been fully examined using Supreme Court Press Clause jurisprudence, and there is no

This Article does not argue that such balancing should lead to blanket criminal immunity[20] for social media in the material support context.[21] Rather, this Article focuses on making room for social media providers to publish constitutionally protected speech, such as that involving advocacy, recruiting, training, or propaganda, even if that speech has formally lost its legal protection because of a nexus to a terrorist group.[22] There should be no immunity for speech used to commit crimes, as such speech is not constitutionally protected.[23] If Vallandigham's descendant wants to direct a terrorist attack on behalf of her group from her living room by using her Twitter feed to send attack orders, and Twitter has credible information to that effect (through an FBI warning that such communication was planned, for example), and Twitter subsequently fails to suspend her account, Twitter should be criminally liable for material support to terrorism. In contrast, social media providers should be shielded from the threat of prosecution for publishing content that if promulgated without any nexus to a terrorist organization would be constitutionally protected, such as advocacy and propaganda. This immunity should exist even if social media platforms know that the individual users indeed possess the requisite terrorist group nexus, such as in our thought experiment.

To explain why the First Amendment's press narrative more appropriately captures the interests at stake when applying the material support statute to social media, Part I of this Article highlights the press attributes of social media and extracts a balancing test from the jurisprudential thicket of Press and Speech Clause cases for use when

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scholarly treatment applying this jurisprudence to social media as the press. *See* Wittes & Bedell, *Tweeting Terrorists*, *supra* note 15 (Wittes and Bedell concluded without explanation that the First Amendment protects the Washington Post against material support to terrorism charges for publishing an op-ed for a Hamas official).

20 Social media already enjoys immunity from civil liability for platform content through Section 230 of the Communications Decency Act; this statute shields internet providers from liability for their users' content, though with no effect on federal criminal law. 47 U.S.C. § 230 (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."). While the author of this Article believes such blanket immunity may be inappropriate as it provides zero accountability for social media handling of user speech, how such immunity should be limited is beyond the scope of this Article.

21 If a social media provider knows that a terrorist is using its services (either direct messaging or public posting) to coordinate or otherwise assist in terrorist attacks, and fails to subsequently suspend such a user's account, that provider should be criminally liable under either 18 U.S.C. § 2339A or § 2339B. Such liability is similar to a social media provider who knowingly allows a user to share child pornography over its personal messaging service, or knowingly allows such speech to be disseminated on any of its services.

22 This is the type of speech at issue in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). *See infra* Section II.B.

23 *See* Chaplinksy v. New Hampshire, 315 U.S. 568 (1942) (establishing categories of unprotected speech); *see also* David Crump, *Desecration: Is It Protected?*, 46 WAKE FOREST L. REV. 1021, 1023 (2011) (dissecting the Court's approach in *Chaplinsky* to unprotected speech).

laws degrade press functions. Part II outlines the material support statute, highlighting how the Supreme Court has broadened the statute's scope in a manner that is particularly troublesome in the social media context. Part III critically applies this statute's elements to social media, using the example of Vallandigham's descendant's speech on Facebook and Twitter and other examples. This application challenges the statute on Fifth Amendment vagueness grounds. It also demonstrates why the Press Clause in its modern Speech Clause guise, what this Article calls the press narrative, offers additional protection. By applying the test introduced in Part I, this Article balances the statute's interference with social media companies' press functions against the law's national security purpose. It concludes that the First Amendment should tip the scale in favor of the modern fourth estate and protect social media from governmental suppression of expression in this manner.

I. SOCIAL MEDIA AND THE PRESS CLAUSE

> As more social networking sites recognize and adapt to their role in the news environment, each will offer unique features for news users, and these features may foster shifts in news use. Those different uses around news features have implications for how Americans learn about the world and their communities, and for how they take part in the democratic process.[24]

This Article focuses on social media platforms because of their influence, growing importance as a source of news for Americans, and link to national security.[25] Facebook reportedly has over 1.59 billion monthly active users, Instagram has 400 million, and Twitter boasts over 320 million users a month.[26] Such expanse has made these

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24 Michael Barthel, Elisa Shearer, Jeffrey Gottfried & Amy Mitchell, *The Evolving Role of News on Twitter and Facebook,* PEW RESEARCH CENTER (July 14, 2015), http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook [hereinafter *Pew Study*].

25 *ISIL Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media: Hearing Before the Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov*'t *Affairs*, 114th Cong. (2016) [hereinafter *ISIL Online Hearings*] (statement of Michael Steinbach, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation) ("From a Homeland perspective, it is ISIL's widespread reach through the Internet and particularly social media which is most concerning as ISIL has aggressively employed this technology for its nefarious strategy."); *see also* Mike Levine, *FBI: 'We Are Losing the Battle' to Stop ISIS Radicalization Online*, ABC NEWS (Feb. 26, 2015, 2:01 PM), http://abcnews.go.com/News/fbi-losing-battle-stop-isis-radicalization-online/story?id=29241652 (detailing numerous U.S. government officials' warnings of dire threats posed by the extent of "ISIS messaging online, particularly through social media").

26 *Here's How Many People Are on Facebook, Instagram, Twitter and Other Big Social Networks*, ADWEEK (Apr. 4, 2016), http://www.adweek.com/digital/heres-how-many-people-are-on-facebook-instagram-twitter-other-big-social-networks; *see also Percentage of U.S. Population with a Social Media Profile from 2008 to 2017*, STATISTA, http://www.statista.com/

platforms a daily part of most Americans' lives[27] and has prompted scholars from numerous disciplines to take notice.[28] Much has been written about the effects of the growing pervasiveness and power of social media platforms.[29] This attention includes warnings against this medium's growing strength, with calls for First Amendment–type protection of users' speech on these platforms,[30] for example, and for governmental regulation to protect users' privacy and peace of mind.[31] There is also growing interest in holding social media companies accountable for the services they allegedly provide to terrorists and

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statistics/273476/percentage-of-us-population-with-a-social-network-profile (last visited Sept. 1, 2017) ("In 2017, 81 percent of U.S. Americans had a social media profile, representing a five percent growth compared to the previous year.").

27 *See generally* Masuma Ahuja, *Teens Are Spending More Time Consuming Media, on Mobile Devices*, WASH. POST (Mar. 13, 2013), https://www.washingtonpost.com/postlive/teens-are-spending-more-time-consuming-media-on-mobile-devices/2013/03/12/309bb242-8689-11e2-98a3-b3db6b9ac586_story.html; KJ Dell'Antonia, *Teenagers Leading Happy, Connected Lives Online*, N.Y. TIMES (Aug. 6, 2015, 10:34 AM), http://parenting.blogs.nytimes.com/2015/08/06/teenagers-leading-happy-connected-lives-online; Mathew Ingram, *Here's Why We Need a First Amendment for Social Platforms*, FORTUNE (June 3, 2016), http://fortune.com/2016/06/03/social-platforms-free-speech/ ("[A] significant part of our daily lives is spent consuming or generating content of various kinds on social platforms . . . .").

28 *See* CHRISTINE GREENHOW, JULIA SONNEVEND & COLIN AGUR, EDUCATION AND SOCIAL MEDIA: TOWARD A DIGITAL FUTURE (2016); KOEN LEURS, DIGITAL PASSAGES: MIGRANT YOUTH 2.0 (2015); LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM (2012); Daniel Kreiss & Creighton Welch, *Strategic Communication in a Networked Age*, *in* CONTROLLING THE MESSAGE: NEW MEDIA IN AMERICAN POLITICAL CAMPAIGNS 13 (Victoria A. Farrar-Myers & Justin S. Vaughn eds., 2015); Matthew Pittman & Brandon Reich, *Social Media and Loneliness: Why an Instagram Picture May Be Worth More Than a Thousand Twitter Words*, 62 COMPUTERS HUM. BEHAV. 155 (2016).

29 *See* Jackson, *supra* note 17, at 121 (calling attention to the importance of social media as "forums for speech and public discourse"); *see also* Nancy S. Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 728 (2015) ("We use the term 'Internet giants' to refer to those technology companies that dominate the online environment, such as Google, Facebook, Yahoo, and Microsoft. . . . [D]ue to their size and market dominance, these companies exercise quasi-governmental authority and monopoly power that makes consumer consent to data collection meaningless."); Denzil Correa & Ashish Sureka, *Solutions to Detect and Analyze Online Radicalization: A Survey*, IIITD PHD COMPREHENSIVE REP. (Jan. 21, 2013), http://arxiv.org/pdf/1301.4916v1.pdf.

30 *See, e.g.*, Jacquelyn E. Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 950 (2013) (arguing for "a statutory regime requiring more legal process in order for the government to make a take-down request to an Internet speech form provider regarding a private citizen's speech"); *see also* Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 396 (2014) (advocating for First Amendment protection for "thoughtcrimes" expressed on social media); Jackson, *supra* note 17, at 134 (finding that "protecting communications on social network websites would promote core First Amendment values").

31 *See generally* Kim & Telman, *supra* note 29, at 769 (declaring that users' consent is fictitious and hence an improper model for privacy protection online); Alexandra Paslawsky, Note, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 FORDHAM INT'L L.J. 1485, 1542 (2012); Adam R. Pearlman & Erick S. Lee, *National Security, Narcissism, Voyeurism, and* Kyllo*: How Intelligence Programs and Social Norms Are Affecting the Fourth Amendment*, 2 TEX. A&M L. REV. 719, 780 (2015).

terrorist supporters. This Article questions whether the speculative national security benefits outweigh the expressive costs incurred by using federal criminal law as the vehicle for such accountability. To answer this question, the context must be appropriately set by first defining social media itself.

A. *Social Media*

1. Social Media and the News

Social media is popularly defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)."[32] The U.S. Department of Homeland Security defines social media as "web-based and mobile technologies that turn communication into an interactive dialogue in a variety of online fora."[33] The technologies' architecture provides numerous benefits to their users: massive exposure to a large audience, anonymity, ease of publication both technically and in cost, and speedy content dissemination.[34] The companies that maintain and provide such technologies, often referred to as social media platforms,[35] consist of private corporations such as Facebook, Twitter, Snapchat, and Instagram; such "services allow us to connect with family and friends and interesting events from around the world."[36] Image and video sharing websites such as Flickr, Instagram,

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32 *Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media (last visited Sept. 2, 2017).

33 *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec.*, 112th Cong. (2012) (joint prepared statement of Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, and Richard Chávez, Director, Office of Operations Coordination and Planning, Department of Homeland Security).

34 Correa & Sureka, *supra* note 29, at 3 ("The ease of publishing and assimilating content on the Internet via social media and video sharing websites amongst others coupled with high information diffusion rates has led to faster content dissemination and larger audience reach."); *but see* Cristina Archetti, *Terrorism, Communication and the Media*, *in* TERRORISM AND POLITICAL VIOLENCE 134, 140 (Caroline Kennedy-Pipe, Gordon Clubb, Simon Mabon eds., 2015) (cautioning against overblown exceptionalism by highlighting that the Internet as a communication medium has parallels with earlier technological mediums).

35 *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008) (explaining that social media has been further stratified into categories such as social network sites; these have been specifically defined "as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system").

36 Ingram, *supra* note 27.

and YouTube are also considered as falling within the social media rubric.[37] This Article, as demonstrated by its introductory thought experiment, is primarily concerned with social media's online community aspect; that is, its ability to provide instant exposure of ideas to a large audience, and not the personal or "direct messaging" aspect of some platforms.[38]

Social media plays an increasingly powerful role as a news source for millions of users on Facebook, Twitter, and other social media platforms. Empirical studies have led some scholars to conclude that "the most powerful trend in journalism today is full integration with reporting, presentation and distribution of journalism through the social web."[39] They argue that social media companies "have taken over many of the functions of the mainstream media or the free press."[40] Furthermore, "[t]he numbers suggest that these super platforms *are* the free press, taking over many of the functions of the mainstream media. Social networks are now attracting the same pressures and challenges at a much larger scale that journalism and civic media has wrestled with for years."[41]

A 2016 Pew Research Center study found that a "majority of U.S. adults—62%—get news on social media, and 18% do so often."[42] Finding that Facebook's reach of 67% of American adults makes it "by far the largest social networking site," the study concluded that the "two-thirds of Facebook users who get news there" equates to a staggering 44% of the general population of the United States receiving

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37 *See* Correa & Sureka, *supra* note 29, at 10.

38 *See infra* Section III.A. Direct messaging services are similar to the capability to send text messages on one's cell phone using one's cellular plan; that does not make Verizon, for example, a social media provider for purposes of this Article. While direct messaging using a social media platform could convey otherwise First Amendment–protected speech that violates the material support statute, such as direct messages sent from one individual to another to recruit the latter into a foreign terrorist organization at the behest of that organization, whether or not the social media platform should be criminally liable if they knowingly allow this to occur is beyond the scope of this Article (though such liability seems no more problematic than it would be for Verizon in this context). *See generally Instagram Direct*, INSTAGRAM, https://help.instagram.com/400205900081854?helpref=breadcrumb (last visited Sept. 2, 2017) (explaining Instagram's direct messaging service).

39 Emily Bell, *Emily Bell's 2015 Hugh Cudlipp Lecture*, GUARDIAN (Jan. 28, 2015, 3:34 AM), https://www.theguardian.com/media/2015/jan/28/emily-bells-2015-hugh-cudlipp-lecture-full-text.

40 Ingram, *supra* note 27.

41 Bell, *supra* note 39 (emphasis added).

42 Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CENTER (May 26, 2016), http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016 ("News plays a varying role across the social networking sites studied. Two-thirds of Facebook users (66%) get news on the site, nearly six-in-ten Twitter users (59%) get news on Twitter, and seven-in-ten Reddit users get news on that platform. On Tumblr, the figure sits at 31%, while for the other five social networking sites it is true of only about one-fifth or less of their user bases.").

news from Facebook.[43] The Center's 2015 study found that "[o]ne-in-ten U.S. adults get news on Twitter and about four-in-ten (41%) get news on Facebook."[44] The 2015 report further concluded that 63% of both Facebook and Twitter users use those social media platforms "as a source for news about events and issues outside the realm of friends and family." This represents an over 50% increase since 2013.[45] The study also found that "the two social media platforms are increasing their emphasis on news"[46] by hiring those with news experience, employing new filter technologies, and launching live news feeds.[47]

The role of social media as today's "free press" was underscored by the furor over so-called "fake news" on social media influencing the November 2016 U.S. presidential election.[48] The possibility that false news stories on sites such as Twitter and Facebook impacted how Americans viewed national politics subsequently drove at least one major social media site to announce that it is now employing programs to fact-check stories on its platform and will flag those that do not meet certain press standards with warnings about their accuracy.[49] Besides highlighting the growing dominance of social media sites as the source of news in America, this push to eliminate "fake news" from social media platforms demonstrates something even more critical.[50] It dramatically unveils the editorial function social media sites increasingly possess, a function typically associated with the traditional press and one with constitutional significance, as discussed *infra* in Part II.

2. National Security, Governmental Pressure, and Social Media's Response

The link between social media platforms and terrorism competes with privacy concerns as one of the most discussed and most concerning, dynamics emanating from modern society's explosive utilization of these communication technologies.[51] The world was

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43 *Id.*

44 *See Pew Study*, *supra* note 24 (the study focused on "news, defined as information about events and issues beyond just friends and family").

45 *Id.*

46 *Id.*

47 *Id.*

48 Mike Isaac, *Facebook Mounts Effort to Limit Tide of Fake News*, N.Y. TIMES (Dec. 15, 2016), http://www.nytimes.com/2016/12/15/technology/facebook-fake-news.html.

49 *Id.* ("Its experiments on curtailing fake news show that Facebook recognizes it has a deepening responsibility for what is on its site.").

50 It is important to note that even "fake news" is protected by the First Amendment. *See* United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion finding Stolen Valor Act unconstitutional because the Act was a content-based restriction and the false statements of fact it criminalized are protected by the First Amendment).

51 *See* Archetti, *supra* note 34, at 141 (assaying scholarly literature on terrorism and the

shocked when the Islamic State in Iraq and Syria (ISIS) used YouTube to reveal its brutal beheading of reporter James Foley in 2014[52]; that year a noted terrorism expert found that "Al-Qaeda, its affiliates and other terrorist organizations have moved their online presence to YouTube, Twitter, Facebook, Instagram, and other social media outlets."[53] In early 2015, the Brookings Institution concluded that "[t]he Islamic State, known as ISIS or ISIL, has exploited social media, most notoriously Twitter, to send its propaganda and messaging out to the world and to draw in people vulnerable to radicalization."[54] Because of social media platforms' noted attributes such as reach and rapid diffusion rate, experts believe they provide terrorist organizations inexpensive and arguably effective ways to recruit, propagandize, and radicalize.[55]

The U.S. government has seized and expanded upon this reported link between terrorism and social media in its search for effective means to combat foreign terrorist groups. The FBI's top counter-terrorism official believes that social media, distinct from the internet, has performed a "paradigm shift" that has greatly benefitted terrorist recruiting and has allowed terrorist groups to pose a greater threat to the United States.[56] To the FBI, "social media is a critical tool that terror

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media and finding too great an emphasis on the internet and social media's role as a "platform for the spreading of radical content and extremist ideology," one that fails to make the link between radicalization and terrorist acts); *see also* Lisa Blaker, *The Islamic State's Use of Online Social Media*, MIL. CYBER AFF., 2015, at 1 (detailing the utilization of social media by one terrorist group and the effect on American youth in particular); Robin L. Thompson, *Radicalization and the Use of Social Media*, 4 J. STRATEGIC SECURITY 167, 168 (2011) (warning that "terrorists use the Internet to recruit and radicalize members for homegrown terrorism operations").

52 Mark Townsend & Toby Helm, *Jihad in a Social Media Age: How Can the West Win an Online War?*, GUARDIAN (Aug. 23, 2014, 4:00 PM), https://www.theguardian.com/world/2014/aug/23/jihad-social-media-age-west-win-online-war; *see also* Lee Ferran & Rym Momtaz, *ISIS: Trail of Terror*, ABC NEWS, http://abcnews.go.com/WN/fullpage/isis-trail-terror-isis-threat-us-25053190 (last updated Feb. 23, 2015) (outlining the history and ideology of ISIS).

53 GABRIEL WEIMANN, WILSON CTR.: COMMON LABS, NEW TERRORISM AND NEW MEDIA (2014), https://www.wilsoncenter.org/sites/default/files/STIP_140501_new_terrorism_F.pdf.

54 J.M. BERGER & JONATHON MORGAN, BROOKINGS, THE ISIS TWITTER CENSUS: DEFINING AND DESCRIBING THE POPULATION OF ISIS SUPPORTERS ON TWITTER 2 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf.

55 *See* WEIMANN, *supra* note 53, at 3; *see also Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 4 (2015) (statement of Sally Quillian Yates, Deputy Att'y Gen., Department of Justice, and James B. Comey, Director, Federal Bureau of Investigation). Ms. Yates' and Mr. Comey's prepared remarks stated

> With the widespread horizontal distribution of social media, terrorists can spot, assess, recruit, and radicalize vulnerable individuals of all ages in the United States either to travel or to conduct a homeland attack. As a result, foreign terrorist organizations now have direct access into the United States like never before.

Id. at 4.

56 Brian Dodwell, *A View from the CT Foxhole: An Interview with Michael Steinbach, Assistant Director, FBI*, COMBATTING TERRORISM CENTER AT WEST POINT (June 29, 2015),

groups can exploit."[57] FBI Director James Comey testified to Congress in mid-2015 that "ISIL continues to disseminate their terrorist message to all social media users—regardless of age," recounting that the group "released a video, via social media, reiterating the group's encouragement of lone offender attacks in Western countries, specifically advocating for attacks" against government targets.[58]

In late 2015, a Congressman opened a hearing titled "Radicalization: Social Media and the Rise of Terrorism" by stating:

> [T]here are 90,000 pro-ISIS tweets on a daily basis. While others suggest that there may be as many as 200,000 such tweets. Accounts belonging to other foreign terrorist organizations, such as Jabhat al-Nusra, Al Qaeda's branch in Syria, have a total of over 200,000 followers and are thriving. Official Twitter accounts belonging to Jabhat al-Nusra operate much like those belonging to ISIS, tweeting similar extremist content. ISIS' use of platforms like Twitter is highly effective. YouTube videos depicting violent acts against Westerners are used to incite others to take up arms and wage jihad.[59]

This concern about terrorist groups' radicalizing efforts on social media platforms such as Twitter, Facebook, and YouTube has led some U.S. politicians to not only call for these companies to be more aggressive in policing online content,[60] but also to suggest that such

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https://www.ctc.usma.edu/posts/a-view-from-the-ct-foxhole-an-interview-with-michael-steinbach-assistant-director-fbi. Mr. Steinbach stated

> Social media is fundamentally different than the "traditional" internet, because even though the previous sites could be anonymous, you still had to go to them, find the sites (some of them password-protected), and reach out, whereas jihadi users of social media, with its horizontal distribution model, actually reach into the United States.

Id.

57 *ISIL Online Hearings*, *supra* note 25 (statement of Michael Steinbach, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation). James B. Comey Jr., Director of the Federal Bureau of Investigation, stated in December 2015 that, "Twitter works as a way to sell books, as a way to promote movies, and it works as a way to crowdsource terrorism—to sell murder." *See* Mike Isaac, *Twitter Steps Up Efforts to Thwart Terrorists' Tweets*, N.Y. TIMES (Feb. 5, 2016), http://www.nytimes.com/2016/02/06/technology/twitter-account-suspensions-terrorism.html?_r=0.

58 *Counterterrorism, Counterintelligence, and the Challenges of Going Dark: Hearing before the S. Select Comm. on Intelligence*, 114th Cong. (2015) (statement of James B. Comey, Director, Federal Bureau of Investigation) [hereinafter *Going Dark*].

59 *Radicalization: Social Media and the Rise of Terrorism: Hearing Before the Subcomm. on National Security of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. 1 (2015) (statement of Rep. Ron DeSantis, Chairman, Subcomm. on Nat'l Sec.).

60 Senator Diane Feinstein, D-Cal, issued a stern warning in July 2015 to social media companies when she stated, "I believe that United States companies, including many founded and headquartered in my home state, have an obligation to do everything they can to ensure that their products and services are not allowed to be used to foment the evil that ISIL embodies." Eyragon Eidam, *President Calls out Social Media's Role in Evolution of Terrorism*, GOV'T TECH. (Dec. 7, 2015), http://www.govtech.com/President-Calls-Out-Social-Medias-Role-in-Evolution-of-Terrorism.html.

companies are violating federal criminal law.[61] Representative Ted Poe exclaimed during a 2015 speech on the floor of the House of Representatives that "[f]ederal law prohibits giving aid or helping a designated foreign terrorist organization. These FTOs use Twitter, an American company, as a tool and no one is stopping them . . . . Why are American companies and the U.S. government allowing social media platforms to be hijacked by terrorists?"[62] In fact, Congressmen from both sides of the aisle have directly written to Twitter, thinly veiling references to the material support to terrorism statute while urging Twitter to engage in greater self-censorship: "we urge Twitter to treat all terrorist activity in the same way it treats other objectionable content."[63]

Despite such congressional rhetoric tying social media companies to material support to terrorism, to date no social media platform has faced criminal prosecution in the United States for hosting third-party terrorism-related content on their platforms or for allowing particular groups to maintain accounts.[64] This lack of prosecutorial effort is odd at first glance, given the statements by the Assistant Attorney General for National Security at the U.S. Department of Justice suggesting such prosecution.[65] One strong reason for this reticence could be the immense benefit the intelligence community gains by open use of social media by terrorist groups; the U.S. security apparatus prefers to mine social media networks for intelligence, even going so far as asking providers to not suspend specific accounts.[66] Instead of prosecuting

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61 Cristina Marcos, *GOP Lawmaker: ISIS Shouldn't Have Access to Twitter*, HILL (Feb. 24, 2015, 2:21 PM), http://thehill.com/blogs/floor-action/house/233660-gop-lawmaker-isis-shouldnt-have-access-to-twitter.

62 *Id.*; *see also* Press Release, Congressman Brad Sherman, Poe, Sherman, Royce Engel: Shut Down Terrorists on Twitter (Mar. 12, 2015), https://sherman.house.gov/media-center/press-releases/poe-sherman-royce-engel-shut-down-terrorists-on-twitter [hereinafter *Sherman Press Release*].

63 *See Sherman Press Release*, *supra* note 62 (excerpting content from a bipartisan letter to Twitter CEO Dick Costolo stating, "We are concerned that designated Foreign Terrorist Organizations (FTOs) and their supporters actively use Twitter to disseminate propaganda, drive fundraising, and recruit new members—even posting graphic content depicting the murder of individuals they have captured. . . . [W]e urge Twitter to treat all terrorist activity in the same way it treats other objectionable content").

64 The Assistant Attorney General for National Security at the Department of Justice has publically suggested that the United States could prosecute "propagandists" who spread terrorist messages online for groups, such as ISIS, under 18 U.S.C. § 2339B. *See* Shane Harris, *Justice Department: We'll Go After ISIS's Twitter Army*, DAILY BEAST (Feb. 23, 2015, 9:07 PM), http://www.thedailybeast.com/articles/2015/02/23/justice-department-we-ll-go-after-isis-twitter-army.html. *But see* Tim Cushing, *Twitter, Facebook & Google Sued for 'Material Support for Terrorism' over Paris Attacks*, TECHDIRT (June 15, 2016, 9:36 AM), https://www.techdirt.com/articles/20160615/07235434714/twitter-facebook-google-sued-material-support-terrorism-over-paris-attacks.shtml.

65 *See supra* note 64.

66 Matt Egan, *Does Twitter Have a Terrorism Problem?*, FOXBUSINESS (Oct. 9, 2013), http://www.foxbusiness.com/features/2013/10/09/does-twitter-have-terrorism-problem.html (citing U.S. counter-terrorism officials as confirming that "[l]aw-enforcement agencies occasionally

social media platforms for terrorism-linked content posted by third-party users, the U.S. government has prosecuted the third parties themselves for their speech, both on and off[67] various social media platforms.[68]

While the prosecutorial focus has been on individual users thus far, the U.S. government's increasingly vocal pressure on social media companies to police their users' accounts for terrorist-related activity has prompted concrete action by several social media companies.[69] Twitter announced in early 2016 that it had suspended over 125,000 accounts since 2015 "for threatening or promoting terrorist acts."[70] Concomitantly, Twitter stated that they "condemn the use of Twitter to promote terrorism" and that it had recently made changes so that its internal review teams could act more quickly.[71] Around the same time, Facebook changed its community standards (its standards of conduct to which users contractually agree to adhere) by adding the category of "dangerous organizations" to its list of groups it would ban from using the platform.[72] This change to Facebook's policy regarding what type of

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ask social-media networks like Twitter and Facebook . . . not to delete the accounts of known terrorists because of the potential to glean valuable intelligence").

67 Holder v. Humanitarian Law Project, 561 U.S. 1, 8, 35–36 (2010) (upholding the as-applied First Amendment challenge to the material support to terrorism statute by treating expert advice as speech that the government can criminalize when knowingly provided to, or coordinated with, a foreign terrorist organization).

68 *See, e.g.*, Press Release, Dep't of Justice: Office of Pub. Affairs, Virginia Man Sentenced to More Than 11 Years for Providing Material Support to ISIL (Aug. 28, 2015) (on file with author) (following the sentencing of a Virginia teen for using his Twitter account to support terrorism, a U.S. Attorney stated that "[t]oday's sentencing demonstrates that those who use social media as a tool to provide support and resources to ISIL will be identified and prosecuted with no less vigilance than those who travel to take up arms with ISIL"). *See generally* Ryan J. Reilly, *FBI: When It Comes to @ISIS Terror, Retweets = Endorsements*, HUFFINGTON POST (Aug. 7, 2015, 7:58 AM), http://www.huffingtonpost.com/entry/twitter-terrorism-fbi_us_55b7e25de4b0224d8834466e?5r110pb9= (detailing federal prosecutions of Americans for material support to terrorism based on use of social media).

69 *See Going Dark*, *supra* note 58 (detailing Mr. Comey's statement that social media has allowed the "real and growing gap" between internet communication and the laws and technology used to lawfully intercept that communication to expand, and that this needs to be urgently addressed); *see also* Requiring Reporting of Online Terrorist Activity Act, S. 2372, 114th Cong. (2015).

70 *Twitter Suspends 125,000 'Terrorism' Accounts*, BBC NEWS (Feb. 5, 2016), http://www.bbc.com/news/world-us-canada-35505996 [hereinafter *BBC Twitter Suspends*] (also noting that Twitter's announcement came at a time when "[g]overnments around the world—including the US—have been urging social media companies to take more robust measure to tackle online activity aimed at promoting violence"); *see also* Kaveh Waddell, *Twitter's Account Suspensions Are Surprisingly Effective Against ISIS*, ATLANTIC (Feb. 19, 2016), http://www.theatlantic.com/technology/archive/2016/02/twitters-account-suspensions-are-surprisingly-effective-against-the-islamic-state/463440.

71 *BBC Twitter Suspends*, *supra* note 70; *see also Twitter Shuts 235,000 More 'Extremist' Accounts*, BBC NEWS (Aug. 18, 2016), http://www.bbc.com/news/technology-37120932 (shutting down accounts is a form of self-censorship, which Twitter started doing in spades).

72 *BBC Twitter Suspends*, *supra* note 70 (in March 2015, Facebook, after changing its terms, "said it would ban groups promoting 'terrorist activity, organised criminal activity or

content is and is not allowed on its platform both exemplifies the type of editorial control social media companies exercise through their contractual terms with users, and how such editorial control was impacted by the U.S. government's veiled threats to use criminal prosecution of said companies.

This self-censorship by social media companies, which this Article argues is a type of editorial control, accelerated in 2015 likely due to both governmental pressure to limit what it deemed as support to terrorism, as well as due to potential civil litigation seeking to hold social media providers responsible for terrorist attacks.[73] This self-censorship took shape via the terms of service, or user agreements, to which each company mandates users agree prior to providing them access to the respective platform's online services.[74] Simply put, these contracts oblige users to abide by various company policies regarding acceptable content. For example, Facebook's community standards, which changed as of 2015 as noted above, explain that:

> Dangerous Organizations: What types of organizations we prohibit on Facebook. We don't allow any organizations that are engaged in the following to have a presence on Facebook: Terrorist activity, or Organized criminal activity. We also remove content that expresses support for groups that are involved in the violent or criminal

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promoting hate'"); *see also Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards?_rdr=p&hc_location=ufi [hereinafter *Facebook Community Standards*] (last visited Sept. 2, 2016); *see also* Leo Kelion, *Facebook Revamps Its Takedown Guidelines*, BBC NEWS (Mar. 16, 2015), http://www.bbc.com/news/technology-31890521 (quoting a Facebook executive as explaining the changes to clarify that "we now make clear that not only do we not allow terrorist organisations or their members within the Facebook community, but we also don't permit praise or support for terror groups or their acts or their leaders, which wasn't something that was detailed before").

73 Civil litigation against social media for its nexus to terrorism turned from potential to reality by mid-2016. *See, e.g.*, Gwen Ackerman, *Facebook Accused in $1 Billion Suit of Being Hamas Tool*, BLOOMBERG TECH. (July 11, 2016, 8:43 AM), http://www.bloomberg.com/news/articles/2016-07-11/facebook-sued-for-1b-for-alleged-hamas-use-of-medium-for-terror (alleging in the lawsuit, submitted to the U.S. District Court for the Southern District of New York on July 10, 2016, that Facebook has "knowingly provided material support and resources to Hamas," thus making Facebook liable for the resulting violence against five Americans in the West Bank and Jerusalem); *see also* David Z. Morris, *Lawsuit Claims Twitter, Facebook, Google Liable for Terrorism*, FORTUNE (June 18, 2016), http://fortune.com/2016/06/18/lawsuit-tech-giants-terrorism (alleging in a complaint filed by Reynaldo Gonzalez on June 14, 2016, that Facebook, Twitter, and Google are liable for the Paris Attacks because those platforms provided "provision of material support to ISIS"); Michael Bott, *Lawsuit: Twitter 'Knowingly Permitted' Terrorists to Use Social Media Network*, NBC BAY AREA (Jan. 13, 2016, 3:40 PM), http://www.nbcbayarea.com/investigations/Lawsuit-Twitter-Knowingly-Permitted-Terrorists-to-Use-Social-Network-365209861.html (alleging in a complaint filed on January 13, 2016 that Twitter allows extremists to spread their ideology as well as to recruit on its platform); *Social Media Companies 'Undermining' Terror Investigation,* BBC NEWS (Oct. 5, 2015), http://www.bbc.com/news/uk-34448040.

74 *See generally* Kim & Telman, *supra* note 29, at 748–49 (explaining that these private companies use contracts to enforce and establish their own rules, laws, and regulations, the way the government does, as well as exercise their own rights over the platform users).

> behavior mentioned above. Supporting or praising leaders of those same organizations, or condoning their violent activities, is not allowed. We welcome broad discussion and social commentary on these general subjects, but ask that people show sensitivity towards victims of violence and discrimination.[75]

Twitter experienced a similar but even more public and dramatic shift from championing itself as the guardian of free speech to censoring content.[76] From 2009 through 2015, Twitter stated in its Terms of Service that "we do not actively monitor and will not censor user content, except in limited circumstances described below."[77] However, in 2015 Twitter followed Facebook's lead and suddenly (and dramatically) ratcheted up its policies toward offensive speech by explicitly banning "excessively violent media."[78] Additionally, in April 2015, the company also prohibited "threatening or promoting terrorism," as well as banned "promot[ing] violence against others . . . on the basis of race, ethnicity, national origin, religion, sexual orientation, gender, gender identity, age, or disability."[79] Though Twitter was originally lauded, in contrast to Facebook, for attempting to preserve free speech through a cautious approach to terrorist propaganda by its users, in August 2016 it declared that it was "applying an even more aggressive strategy to eradicate violent extremism on its platform" by working with law enforcement, among other means.[80]

As these enhanced content restrictions reflect, social media's progressively prohibitive content rules have now exceeded banning speech unprotected by the First Amendment, such as true threats and incitement, to prohibiting wide swaths of First Amendment–protected speech: promoting terrorism, for example.[81] Furthermore, social media companies' enforcement of such oppressive content restrictions through suspension of offending accounts demonstrates the companies' editorial control over types of speech on their platforms. Such control supports

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75 *Facebook Community Standards*, *supra* note 72.

76 *See* Sarah Jeong, *The History of Twitter's Rules*, VICE: MOTHERBOARD (Jan. 14, 2016, 10:00 AM), http://motherboard.vice.com/read/the-history-of-twitters-rules (providing an excellent overview of the changes Twitter has made to its users' content rules since its inception).

77 *Id.*

78 *Id.*

79 *Id.*

80 Davey Alba, *Twitter Says It Suspended 360,000 Suspected Terrorist Accounts in a Year*, WIRED (Aug. 18, 2016, 12:07 PM), https://www.wired.com/2016/08/twitter-says-suspended-360000-suspected-terrorist-accounts-year.

81 *Id.* ("Facebook has taken a hardline stance on terrorism and removes any and all posts that carry even a trace of suspicious content . . . ."). The Supreme Court has identified types of speech categorically unprotected by the First Amendment: obscenity, child pornography, incitement, threats, defamation, fighting words, and fraud. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010).

their qualification as the "press," or media, whose *sine qua non* has long been editorial control, an issue to which this Article now turns.

B. *Press Clause*

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[82]

1. The Many Faces of the Press Clause

The First Amendment prohibits Congress from "abridging the freedom of speech, or of the press."[83] Despite this explicit constitutional carve-out, the Supreme Court has been reluctant to find that this amendment provides the press with any special protection that is not granted to every speaker.[84] It has instead generally grounded protections of the press in the First Amendment's Speech Clause, seemingly treating the press as it would the general public. Simply put, "the Court treats press claims as speech claims,"[85] thus superficially conflating these textually distinct constitutional categories.[86] Most recently, in *Citizens United v FEC* the Court reiterated that it has "consistently rejected the

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82 Citizens United v. FEC, 558 U.S. 310, 356 (2010).

83 U.S. CONST. amend. I.

84 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1234–36 (5th ed. 2015) (reviewing precedence for the Supreme Court's steadfast opposition to the theory that "the protection of freedom of the press entitles it to exemptions from the general regulatory laws"); s*ee also* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (noting that "[m]ost of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause"); *see generally* Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 730 (2014) [hereinafter West*, Stealth Press*] (citing cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) as jurisprudence extending constitutional protection beyond the press).

85 David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 73 (2006) (describing the Court's broad interpretation of the Speech Clause, which has gradually divested the Press Clause of separate utility); *see, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 517–18 (2001) (holding that the First Amendment protects the media representative's right to publish a telephone conversation despite that its interception occurred in violation of federal and state statutes); *see also* West, *Stealth Press*, *supra* note 84, at 731 ("When it comes to the cases that most affect the press, the Court seems to be taking a one-for-all-and-all-for-one stance."); Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that imposing damages on news media, because of a statute that forbids the publishing of rape victims' names, "violates the First Amendment" when the information came from a police report).

86 *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1040 (2011).

proposition that the institutional press has any constitutional privilege beyond that of other speakers."[87]

There are several theories behind why the Court has seemingly treated the Press Clause as "complementary to and a natural extension of Speech Clause liberty."[88] Some scholars argue that the Framers treated the words "press" and "speech" synonymously, and that both the text and original intent support treating the Press Clause as "securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry."[89] In addition to this historical premise, as well as the theoretical debate between views of the press as mere technology versus the press as an industry, the Court and others[90] have pragmatically noted the definitional difficulties posed by special press protections: just who or what qualifies?[91] Further fueling a seemingly hollow Press Clause is the resentment Americans (or at least American politicians) have long-harbored against the press. Even before the rise of the "crooked media,"[92] scholars have noted that "long-standing hostility to the media in American society" has contributed to the jurisprudential conflation of the Press and Speech Clauses.[93]

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87 Citizens United v. FEC, 558 U.S. 310, 352 (2010) (internal quotation marks and citation omitted). *See generally* Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013) (criticizing the *Citizens United* majority for ignoring the Press Clause; specifically, for failing to analyze "whether the protections of the Press Clause apply to corporations that are not regularly engaged in the business of journalism"; McConnell thinks they clearly do, thereby endorsing the press-as-technology viewpoint).

88 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, J., concurring).

89 Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463–64 (2012) (finding that freedom of the press "was generally seen as the right to publish using mass technology, as opposed to the freedom of speech, which was seen at the time as focusing more on in-person speech"). In this seminal Article, Professor Volokh comprehensively reviews the meaning of "the press" at the time of the Framers as well as through the modern era, concluding that freedom of the press per "text, original meaning, tradition, and precedent" offers no more constitutional protection to the media as an industry than that offered to others who use technology to spread their thoughts. *Id.* at 464–65.

90 West, *supra* note 86, at 1047–48 (asking "[d]o we identify the press based on who they are, what they are doing, how they go about it, or why they want to?").

91 CHEMERINSKY, *supra* note 84, at 1231; *see also* Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972) (Justice White refused to allow the Court to "embark . . . on a long and difficult journey" to define the press because of the "practical and conceptual difficulties of a high order" that such an exercise would present); RonNell Anderson Jones, *Press Definition and the Religion Analogy*, 127 HARV. L. REV. FORUM 362 (2014). Others such as Chief Justice Burger have echoed this definitional concern, fearing that the act of defining who constitutes the press could establish the very licensing system that the First Amendment was meant to abolish. *See Bellotti*, 435 U.S. at 801.

92 Brian Stelter, *Donald Trump Continues His Campaign Against 'Crooked Media'*, CNN (Aug. 15, 2016, 2:59 PM), http://money.cnn.com/2016/08/15/media/donald-trump-media-bias.

93 CHEMERINSKY, *supra* note 84, at 1231; *see also* Anderson, *supra* note 85, at 66 (noting that by extending constitutional protections to all instead of the press, the Court can "deflect the resentments that the latter might generate").

Such theories fail to account for the strand of press exceptionalism that has waxed and waned throughout the Court's First Amendment jurisprudence. The conventional view of the Press Clause as extending no further than the Speech Clause and instead acting simply as a reminder that prior restraints are held in strong disregard is a superficial one that ignores the judicial gloss that almost a century of Supreme Court opinion has given the Press Clause.[94] Common law waves of expansion and contraction have given the Press Clause a much richer, more nuanced and contextual meaning,[95] one this Article argues should extend to today's social media, even if such protective meaning remains cloaked in the Speech Clause.

This gloss, or press narrative, emerged early in the Supreme Court's wrestling match with the First Amendment, beginning with the Court's express Press Clause reliance to find pre-publication governmental restrictions unconstitutional.[96] In *Near v. Minnesota* ex rel. *Olson*, the Court concluded in 1931 that the "liberty of the press" prohibited prior restraints on publication, which in that case took the form of a state law that permitted court-issued injunctions against newspapers and periodicals.[97] The *Near* Court concluded that one of the primary purposes of the Press Clause was to prevent prior restraints; the Press Clause, in this view, was a reaction to various British licensing schemes as articulated by Blackstone and Madison.[98] The *Near* majority was careful to note that the "liberty of the press" was greater than a proscription against actual prior restraints[99] and expressed concern that

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94 *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1257 (2005).

95 *See* West, *Stealth Press*, *supra* note 84, at 731 (concluding that the Supreme Court has in fact treated the press as "constitutionally unique").

96 The Supreme Court's variegated First Amendment doctrine began in 1919 with its endorsement of the suppression of speech in *Schenck v. United States*, 249 U.S. 47 (1919); the first free speech claim upheld by the Court was not until 1931 in *Stromberg v. California*, 283 U.S. 359 (1931), followed the next month by *Near v. Minnesota* ex rel. *Olson*, 283 U.S. 697 (1931). *See* Volokh, *supra* note 89, at 505 n.212 (distinguishing *Fiske v. Kansas* as decided on due process grounds).

97 Regarding "liberty of the press," the Court concluded that it "has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

98 *Near*, 283 U.S. at 713–14 (quoting Blackstone's observation that "[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published"); *cf.* David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 33-59 (Lee C. Bollinger & Geoffrey R. Stone eds., 2003) 32, 51 (noting that *Near* is more important for its articulation that protection of political dissent is at the core of the First Amendment, versus its defense of prohibitions against prior restraints).

99 *Near*, 283 U.S. at 716 (the "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally *although not exclusively*, immunity from previous restraints or censorship") (emphasis added). The Court also found that even the Press Clause's prohibition against prior restraints was not unlimited, albeit such restraints are

if publishers could be criminally punished after publication, the absence of prior restraints would be relatively meaningless.[100] It provided a short list of post-publication criminal punishment of the press that would be appropriate, such as that punishing wartime publication of military secrets.[101]

In these early Press Clause decisions, in addition to banning prior restraints on the press, the Court "prevented discriminatory taxation of newspapers, allowed pamphleteers to distribute their writings without a permit, and protected editors' freedom to editorialize about elections."[102] In its primary taxation case, the *Grosjean* majority in 1936 introduced a functional test for qualification as a prior restraint: "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[103]

The Court later replaced this early reliance on the Press Clause with a more generic "freedom of expression" based on both free speech and press rights.[104] In 1938 it began to treat the press the same as the public,[105] and perhaps more as technology than an institution, when it found that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[106] This widening press

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exceptional. *See id.* (citing as examples injunctions against incitement and obscene publications).

100 *Id.* at 715.

101 The *Near* Court found criminal punishment of the press appropriate in cases of libel, interference with judicial proceedings, wartime publication of military secrets, and wartime interference with military recruiting. *See Near*, 283 U.S. at 715.

102 Anderson, *supra* note 85, at 69 (citing, respectively, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); and *Mills v. Alabama*, 384 U.S. 214 (1966)).

103 *Grosjean*, 297 U.S. at 249–50 (quoting 2 THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 886 (8th ed.) (1927)). The Court found that the tax in question functioned as a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties" and hence degraded the press's roles "as one of the great interpreters between the government and the people." *Grosjean*, 297 U.S. at 250.

104 Anderson, *supra* note 85, at 69–70; *see, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939) (striking down ordinances prohibiting the distribution of handbills because, citing both the freedom of speech and of the press, they "abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion"); *see also* Anderson, *supra* note 85, at 70 (describing this shift as an "abandonment of the Press Clause as a specific source of constitutional authority").

105 *See generally* West, *Stealth Press*, *supra* note 84, at 733 (noting that "the parity view of the Expression Clauses appears in a variety of cases involving access rights, tort violations, intellectual property, and criminal law").

106 Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938) (characterizing as impermissible

aperture continued in 1948 in *Winters v. New York*, as seen in the Court's conclusion that "[t]he principle of a free press covers distribution as well as publication" and a finding that the magazines in question were "entitled to the protection of free speech."[107]

This apparent merger of the protections of the Speech and Press Clauses was also apparent in the Court's refusal to exempt the press from general regulatory laws.[108] In the 1945 case *Associated Press v. NLRB*, it declared that "[t]he publisher of a newspaper has no special immunity from the application of general laws."[109] Critically, however, the Court was careful to note that unionizing had "no relation whatever" to Associated Press's news distributing function.[110] This emphasis exposes a balancing test that the Court has frequently applied when press entities are impacted by governmental regulation—does the regulation affect a press function, and if so, is this interference outweighed by the regulatory goal? Using such a test, the Court declined to exempt the press from federal antitrust laws, emphasizing that the core functions of the press, such as "news gathering" and "news dissemination," remained undisturbed by such application.[111]

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censorship city ordinance that required written permission prior to distributing pamphlets).

107 Winters v. New York, 333 U.S. 507, 509–10 (1948) ("We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas."); *see also* Thornill v. Alabama, 310 U.S. 88, 101–02 (1940) (seemingly equating the clauses when, in a case lacking any press participant, it struck down Alabama law criminalizing picketing, finding that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment" and finding that the law violated a generic "liberty of expression"). Similarly, in 1941 the Court painted contempt charges against both a newspaper and a private individual with the broad brush of "freedom of expression." Bridges v. California, 314 U.S. 252, 262–66, 272 (1941) (invalidating contempt citations issued by a California state court against a newspaper and a private individual for published comments (three editorials and a telegram, respectively) regarding pending litigation). The Court similarly analyzed contempt citations against a newspaper and its editor for editorials and a cartoon as contrary to "freedom of public comment" and "freedom of discussion." Pennekamp v. Florida, 328 U.S. 331, 336–47 (1946) (treating the issues as one searching for "a balance between the desirability of free discussion and the necessity for fair adjudication"); *cf. Schneider*, 308 U.S. at 162 (finding unconstitutional a city ordinance that prohibited leaflet distribution on the streets; the Court held that the purpose of the ordinance was not sufficient to justify prohibiting defendants from distributing leaflets to people who would take them).

108 *See generally* CHEMERINSKY, *supra* note 84, at 1234–36 (outlining the Court's maintenance of the application of general regulatory laws to the press).

109 Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (applying the National Labor Relations Act to the press despite arguments that the Press Clause shielded the Associated Press from its reach); *see also* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946) (upholding application of the Fair Labor Standards Act to the press).

110 *Associated Press*, 301 U.S. at 133. The Court harmonized this applicability rule with its holding in *Grosjean* by highlighting that the taxes in *Grosjean* were aimed specifically at the press, and were not generally applicable. *Id.* at 135.

111 Associated Press v. United States, 326 U.S. 1, 19–20 (1945) ("Freedom to publish means freedom for all and not for some."); *see also* Citizens Publ'g Co. v. United States, 394 U.S. 131, 139 (1969) (upholding antitrust violations against several newspapers because newspapers' core

This subtle narrative, that the press is subject to generally applicable regulations except when press core functions are impacted, surfaces again in the Court's revolutionary libel case of 1964. In *New York Times Co. v. Sullivan*, the Court found that a libel charge against those who criticize public officials regarding their official conduct "abridges the freedom of speech and of the press."[112] While the Court did not distinguish the claims against the newspaper from those against four individual, non-press defendants, treating them all under a generic "freedom of expression"[113] mantle, the *Sullivan* Court did show a special concern for newspapers when it found that libel awards against newspapers based on negligence or strict liability standards would inappropriately deter them from giving "voice to public criticism."[114] This Court's concern for newspapers' fundamental press functions in a democratic society resonates with its implied test regarding generally applicable laws—they are suspect once they impact core press functions.

2. The 1970s and Beyond: A Definite Press Narrative

The Supreme Court signaled in 1972 that it was poised to move this undercurrent of concern for press functions into the open; that is, that it was contemplating granting independent meaning once again to the Press Clause.[115] In *Branzburg v. Hayes*, another case in which the press sought exemption from a generally applicable statute,[116] the Court utilized a balancing test to ultimately refuse the press exemption from grand jury subpoenas.[117] However, similar to the earlier notes of

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functions of "news gathering" and "news dissemination" were not affected by the antitrust action in question).

112 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964). This opinion changed the approach it took to the First Amendment by broadening its scope. It quoted *Roth v. United States*, 354 U.S. 476, 484 (1957) for the proposition that the First Amendment's freedom of expression "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *See generally* ETHICS & PUB. POLICY CTR., FREEDOM OF EXPRESSION IN THE SUPREME COURT: THE DEFINING CASES 159 (Terry Eastland ed., 2000).

113 *Sullivan*, 376 U.S. at 256, 268–69 ("freedom of expression upon public questions is secured by the First Amendment."). *See generally* Anderson, *supra* note 85, at 70 (highlighting the Court's failure to analyze the Press and Speech Clauses separately).

114 *Sullivan*, 376 U.S. at 277–78.

115 *See* Branzburg v. Hayes, 408 U.S. 665, 726–37 (1972) (Stewart, J., dissenting); Anderson, *supra* note 85, at 70–71.

116 In *Branzburg*, reporters sought to be shielded from grand jury subpoenas in order to preserve confidential sources. The Court rejected that argument, concluding that "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." *Branzburg*, 408 U.S. at 682.

117 *Id.* at 681, 701; *see also id.* at 710 (Powell, J., concurring) (emphasizing balancing by stating, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct").

concern for press functions, the majority emphasized that "without some protection for seeking out the news, freedom of the press could be eviscerated" and "news gathering is not without its First Amendment protections."[118] The dissent argued this perspective forcefully by calling for a qualified testimonial privilege for reporters,[119] protections distinct from those provided to the general public.[120] The dissent highlighted the "continuing need for an independent press to disseminate a robust variety of information" as "central to the First Amendment and basic to the existence of constitutional democracy."[121]

Justice Stewart subsequently grounded his *Branzburg* dissent's right to publish and its corollary news-gathering right expressly in the Press Clause.[122] In a speech, he characterized the Press Clause as one providing a structural versus individual right, one that protects the "publishing business" as an institution—one included in the Constitution as a check against the three primary branches of government.[123] Believing that the Framers envisioned a fourth estate to ensure the robust exchange of ideas, he also argued that the First Amendment prohibits the government from regulating the press even if the regulatory goal was to make it a neutral "marketplace of ideas," though such a marketplace was the Framers' hope.[124]

The Supreme Court subsequently agreed with Justice Stewart's institutional interpretation of an independent Press Clause in 1974 in *Miami Herald Publishing Co. v. Tornillo*, where it struck down a law requiring newspapers to publish responses to political editorials.[125]

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118 *Id.* at 681, 707 (majority opinion); *see also id.* at 709–10 (Powell, J., concurring) (emphasizing that the nature of the majority's opinion is limited, and that it is necessary to balance the freedom of the press and the obligation of citizens to provide relevant information and testimony in regard to criminal conduct).

119 *Id.* at 742–43 (Stewart, J., dissenting) (grounding the need for a reporters' privilege in the First Amendment freedom of the press: "the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information and of the general public to receive them").

120 Anderson, *supra* note 85, at 71 (highlighting that while the *Branzburg* dissent placed its suggested reporters' privilege in a diffuse First Amendment paradigm versus the Press Clause explicitly, the message conveyed was that the press should be treated differently).

121 *Branzburg*, 408 U.S. at 726–27 (Stewart, J., dissenting) ("Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.").

122 Potter Stewart, Assoc. Justice, U.S. Supreme Court, *Or of the Press*, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L.J. 631, 633–34 (1975).

123 *Id.* at 633–34 (noting that the British Crown well before America's founding believed that "a free press was not just a neutral vehicle for the balanced discussion of diverse ideas" but rather served as an important check on the Crown itself through its "organized, expert scrutiny of government").

124 *Id.* at 634.

125 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that a Florida statute

While the holding treated the statute as content-based,[126] hence typically anathema to basic First Amendment speech doctrine regardless of speaker, the Court expressly found that the statute in question "violate[ed] the First Amendment's guarantee of a free press."[127] The Court held that the statute in question "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors," noting that such governmental regulation was inconsistent with "First Amendment guarantees of a free press as they have evolved to this time."[128]

This 1974 *Miami Herald* decision was the Court's last express reliance on the Press Clause,[129] sounding the retreat that same year by holding that the press does not enjoy any "special access to information not shared by members of the public generally."[130] However, the Court has continued to pay special attention to the impact generally applicable laws have on press ability to disseminate the news, upholding the laws at issue when their effect on the latter was seemingly small.[131] In 2001 the Court in *Bartnicki v. Vopper* upheld defendant radio station's right to broadcast information that it lawfully obtained, despite the information being private conversation unlawfully wiretapped by a third party. The Court concluded that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."[132] Here, the Court went out of its way to avoid resting its decision on special protection for

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requiring a newspaper to publish a political candidate's reply to an editorial violated the First Amendment).

126 *Id.* at 256 ("The Florida statute exacts a penalty on the basis of the content of a newspaper.").

127 *Id.* at 241.

128 *Id.* at 258 ("A newspaper is more than a passive receptacle or conduit . . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment.").

129 *See generally* Anderson, *supra* note 85, at 73 (explaining that the Court since *Tornillo* has "gone out of its way" to avoid developing an independent Press Clause jurisprudence).

130 Pell v. Procunier, 417 U.S. 817, 834 (1974) (finding that California regulation restricting members of the press from choosing which prison inmates to interview did not run afoul of the First and Fourteenth Amendments because there exists no special right for the press nor a general public access right regarding prisons and prisoners).

131 Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (finding that the interests preserved by contract law outweighed those supporting dissemination of information to the public by that newspaper; it contrasted the contract law at issue with the context of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in which the newspaper defendant obtained a rape victim's name lawfully from a police report; there, the Court found that the state could not punish a newspaper for publishing lawfully-obtained data). Similarly, the Court in *Zacchini v. Scripps–Howard Broadcasting Co.* pitted the state's interest in protecting a performer's "right of publicity" for incentive purposes against the level of intrusion such an interest had "on dissemination of information to the public" and upheld the performer's action against the news station. Zacchini v. Scripps–Howard Broad. Co., 433 U.S. 562, 573 (1977).

132 Bartnicki v. Vopper, 532 U.S. 514, 529–30 (2001).

the press, instead applying strict scrutiny[133] to content-neutral federal and state laws that criminalized intentional disclosure of illegally-intercepted conversations, concluding that "the interest in publishing matters of public importance" outweighed the privacy and deterrence issues at stake.[134]

Hence, cases such as *Bartnicki* show that despite the line of cases flowing from *Associated Press v. NLRB* that uphold the general rule denying the press immunity from generally applicable laws, "[i]f the press [can] prove in a particular case that the application of a general law significantly burdened its ability to function, the Court would need to consider whether an exemption from a general law is appropriate."[135] As Professor Chemerinsky has noted, the generally applicable laws the Court has upheld thus far do not seriously threaten values that the Court has attached to the Press Clause, such as the robust exchange of ideas and dissemination of information.[136] In a case in which they are threatened, such as *Bartnicki*, and such as in the application of the criminal material support statute to social media, the Court should find limited press immunity.[137] This Article now turns to that application.

II. § 2339B: THE FUNGIBILITY CRIME

The above discussion underscores the Supreme Court's conclusion that the Press Clause will typically not shield the press from a generally applicable statute, such as the federal material support crime. However, this discussion also highlights the Court's narrative that such a statute may be constitutionally problematic under the First Amendment if it burdens the press entity's ability to function as the press, such as by impeding the robust exchange of ideas or by acting as a type of prior restraint—if these impediments are not outweighed by the government's

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133 While defamation cases such as *Sullivan* by their nature involve content-based regulations and therefore are naturally suited to what has evolved as the strict scrutiny balancing test, the wiretapping laws at issue in *Bartnicki* did not turn on content—yet, the Court utilized a strict scrutiny-type balancing test. This indicates that, despite its statement in *Cowles* in 1991 that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations," in reality the Court utilizes more exacting standards. *Cowles*, 501 U.S. at 670. *See generally* Anderson, *supra* note 85, at 78.

134 *Bartnicki*, 532 U.S. at 526, 534.

135 CHEMERINSKY, *supra* note 84, at 1236.

136 Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); CHEMERINSKY, *supra* note 84, at 1236.

137 The Court has seemingly performed this exact type of carve-out with the Free Exercise Clause. While declaring no special exemption from neutral laws of general applicability, *see, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990), it has seemingly created such an exemption by reading "neutrality" with extra scrutiny. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

interests. This Article argues that § 2339B produces such effects when applied to social media, and therefore providers such as Facebook and Twitter should be exempt from much of this statute's reach. To successfully make such an argument, one must understand § 2339B itself.

A. *Why § 2339B?*

Violent acts of terrorism have long been criminally prohibited by U.S. federal law. Traditionally such opprobrium manifested in bans against piracy on the high sea, and in common law crimes of murder, assault, arson, etc. in U.S. domestic law. In the 1980s, specific federal criminal statutes began targeting international terrorism in response to growing terrorist incidents and to implement various international conventions attempting to address such violence.[138] These statutes, while penalizing actual or attempted acts of terrorism, failed to punish those who provided support to such acts; they lacked traditional aiding and abetting crimes.[139] Gradually, Congressional focus turned to such assistance, as well as widened from direct terrorist activity itself to the broader goal of disabling terrorist groups' sustaining activities, such as fund-raising and arms acquisition.[140]

Congress created traditional aiding and abetting liability for terrorist acts in 1994 in 18 U.S.C. § 2339A, following the 1993 bombing of the World Trade Center in New York City.[141] This statute criminalized the intentional support of specific terrorist acts, regardless

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138 The United States has exercised extraterritorial jurisdiction since at least 1819 over acts of piracy on the high seas per 18 U.S.C. § 1651, the federal piracy statute. *See* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 9, https://www.justice.gov/usam/criminal-resource-manual-9-sea-piracy-18-usc-1651 (last visited Sept. 4, 2017). In 1984, hostage taking was criminalized in 18 U.S.C. § 1203. *See id.* at § 11. In 1995 Congress passed the International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its accompanying Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (18 U.S.C. §§ 2280, 2281) in response to the 1985 hijacking in the Mediterranean Sea of the cruise ship *Achille Lauro*. *See id.* at § 10.

139 *See generally* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 6 (2005) (describing the so-called "gap" in existing law that precluded prosecution of former U.S. special forces members for their training of Libyan commandos).

140 Robert Chesney, *The Supreme Court, Material Support, and the Lasting Impact of* Holder v. Humanitarian Law Project, 2010 WAKE FOREST L. REV. FORUM 13, 13–14 (2010).

141 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 120005, 108 Stat. 1796, 2022 (1994). Originally, § 2339 was born from unrelated legislation focusing on DNA identification and crime victims' rights; terrorism-specific language was added following the World Trade Center bombing in 1993. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B 1 n.2 (2016); U.S. DEP'T OF STATE, PUB. 10136, PATTERNS OF GLOBAL TERRORISM, 1993: THE YEAR IN REVIEW (1994), http://www.fas.org/irp/threat/terror_93/year.html.

of to whom the support was provided: "[t]he support must be given in furtherance of the [terrorist act] . . . . [such as] provid[ing] lodging to airplane saboteurs, in furtherance of their escape . . . ."[142] However, this statute proved insufficient to combat terrorism due to its narrow focus on contributions to actual terrorist acts; it did nothing regarding the provision of resources needed by terrorist organizations to commit such acts.

In order to broaden criminal sanctions against those who supplied such resources, and in reaction to the Murrah Building bombing in Oklahoma City in 1995,[143] Congress enacted 18 U.S.C. § 2339B in the Antiterrorism and Effective Death Penalty Act (AEDPA).[144] Congress recognized that terrorist organizations often "operate under the cloak of a humanitarian or charitable exercise, or are wrapped in the blanket of religion"[145] and originally designed the statute to target terrorist organizations' general fundraising efforts in the United States.[146] However, § 2339B went well beyond simply prohibiting the provision of funds to terrorist groups. Today, it prohibits the provision (actual, attempted, or conspired) of material support or resources to a group designated by the U.S. government as a FTO, knowing that such organization has either been so designated or knowing that it either engages or has engaged in terrorism or terrorist activity.[147] There are

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142 H.R. REP. NO. 104–383, pt. 2, at 82 (1995).

143 Ironically the Oklahoma City bombing was not the work of any foreign terrorist organization. *Oklahoma City Bombing*, FBI, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing (last visited Sept. 4, 2017). But, this terrorist act is cited in the House Report justifying the need for § 2339B. H.R. REP. 104–383, pt. 1, at 37. The statute was meant to have a preventive function. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 301, 110 Stat. 1214, 1247 (1996) [hereinafter *ATEDPA Act*]; Chesney, *supra* note 140, at 14; *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010) (stating that this statute is "a preventive measure" which criminalizes "aid that makes the attacks more likely to occur").

144 *See ATEDPA Act*, *supra* note 143, at § 303; *id.* at § 323; DOYLE, *supra* note 141, at 1. The original version of 18 U.S.C. § 2339B as enacted by the ATEDPA Act in 1996 defined "material support and resources" via reference to § 2339A's definition, which the ATEDPA also amended. *See ATEDPA Act*, *supra* note 143, at § 303. As such, "material support and resources," as originally criminalized by § 2339B when knowingly provided to foreign terrorist organizations, included: "(b) Definition.—In this section, the term 'material support or resources' means currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *See ATEDPA Act*, *supra* note 143, at § 323.

145 H.R. REP. NO. 104–383, pt. 1, at 43.

146 *Id.* at 38.

147 The Secretary of State has the authority to designate a foreign organization an FTO if it either engages in terrorist activity or retains "the capability and intent to engage in terrorist activity or terrorism; and . . . the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189 (2012).

currently sixty organizations so designated, including groups like Al-Qaeda, Hezbollah, and ISIS.[148]

18 U.S.C. § 2339B adopts § 2339A's definition of material support or resources, which today reads in relevant part:

> [T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[149]

Regarding personnel, § 2339B specifically limits its reach to only those individuals working under an FTO's "direction or control," and furthermore specifically provides that "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."[150]

B. *The Supreme Court Defends and Broadens § 2339B*

In 2010, in *Holder v. Humanitarian Law Project* (*HLP*), the Supreme Court found § 2339B constitutional as applied[151] to several

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148 *Foreign Terrorist Organizations*, U.S. DEP'T STATE, http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Sept. 4, 2017).

149 18 U.S.C. § 2339A (2012). "Expert advice or assistance" was added in 2001 via the USA Patriot Act, which also lengthened the maximum imprisonment to fifteen years or life imprisonment if death results from commission of the offense. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107–56, §§ 805(a), 810(c)–(d), 115 Stat. 272, 377, 380 (2001) [hereinafter *USA Patriot Act*]. Congress further modified the statute via the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) to include "any property, tangible or intangible, or service," with definitions added for training, expert advice or assistance, as well as for personnel. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 6603(b), 118 Stat. 3638, 3762 (2004). The amendments became permanent in the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 104, 120 Stat. 192, 195 (2006). The statute clarifies that training "means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and (3) the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A. Additionally, § 2339B requires the *mens rea* of knowledge of either the foreign group's designation as a terrorist organization or the group's commission of terrorist acts. 18 U.S.C. § 2339B. This clarification of the scienter requirement was added in response to a ruling in the Ninth Circuit, which had affirmed a district court's finding that the statute was unconstitutionally vague. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137–38 (9th Cir. 2000).

150 18 U.S.C. § 2339B.

151 The Court held that § 2339B "is constitutional *as applied* to the particular activities plaintiffs have told us they wish to pursue." Holder v. Humanitarian Law Project, 561 U.S. 1, 8

domestic organizations and U.S. citizens who wanted to assist the lawful political and humanitarian ends of two designated FTOs.[152] The *HLP* majority addressed three constitutional claims: whether § 2339B's prohibition of specific types of material support violated the Fifth Amendment Due Process Clause due to the terms' impermissible vagueness; whether the statute violated plaintiffs' First Amendment freedom of association; and whether it violated plaintiffs' First Amendment freedom of speech.[153]

Chief Justice Roberts, writing for the majority, dispensed with plaintiffs' claim that § 2339B criminalized mere association with particular groups[154] by finding that the statute criminalized specific types of conduct instead of membership itself and was therefore sufficiently protective of associational rights.[155] In dealing with this claim, the majority also emphasized that the required *mens rea* was solely knowledge of an organization's ties to terrorism, without any additional intent to further the group's terrorist conduct.[156] By refusing to read a specific intent requirement into the statute, almost any activity of value (except the statutorily-exempted provision of medical and religious materials) is prohibited if done in knowing association with a designated group.[157]

(2010) (emphasis added). Scholars have noted that the Court's as-applied approach is "the key to understanding" Chief Justice Roberts's opinion. Chesney, *supra* note 140, at 15.

152 *Humanitarian Law Project*, 561 U.S. at 9. The Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam were designated FTOs in 1997. *See* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52650 (Oct. 8, 1997).

153 *Humanitarian Law Project*, 561 U.S. at 14. The activities plaintiffs claimed were unconstitutionally prohibited by § 2339B included: "(1) training members of the PKK on how to use humanitarian and international law to peacefully resolve disputes; (2) engaging in political advocacy on behalf of Kurds who live in Turkey; and (3) teaching PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 14–15 (internal quotation marks omitted).

154 *Id.* at 39. The Court, quoting the Ninth Circuit, stated that "the statute does not penalize mere association with a foreign terrorist organization . . . . The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group." *Id.*

155 *Id.*

156 *Id.* at 16–17. The majority pointed to the plain language of the statute, as well as the fact that both Sections 2339A and C do in fact require intent to further terrorist activity in support of this rejection. The plaintiffs had argued that, based on the seminal associational case of *Scales v. United States*, 367 U.S. 203 (1961), § 2339B unconstitutionally prohibited membership without meeting the requirements of *Scales*: active membership, knowledge of a group's illegal objectives, and specific intent to further those objectives. *See* Rachel VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 83–100 (2013) (analyzing the inability of formal membership to serve as proxy for military threat with regards to terrorist organizations).

157 *See generally* 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, 147–50 (2012) (attempting to reconcile the *Humanitarian Law Project* decision with First Amendment precedent regarding speech and association); Owen Fiss, *The World We Live in*, 83 TEMP. L. REV. 295 (2011) (lamenting *Humanitarian Law Project*'s effects on advocacy). *But see*

In responding to the plaintiffs' vagueness challenge, the Court emphasized that its analysis was an as-applied one[158] and utilized its test that requires a statute to "provide a person of ordinary intelligence fair notice of what is prohibited."[159] While conceding that a heightened standard of vagueness should apply because of the speech and association implications, the majority found the statute's terms sufficiently clear.[160] The terms "training" and "expert advice or assistance" clearly encompassed most of plaintiffs' desired activity, such as their proposals to help FTOs learn to petition international bodies as well as train them in international law, thereby providing fair notice.[161]

Critically, regarding the vagueness challenge to the term "service," the Court concluded that service requires some type of concerted activity, despite the statute's lack of a service definition.[162] Using the dictionary, Chief Justice Roberts found that the term "service" ordinarily includes "work commanded or paid for by another," or is an "act done for the benefit or at the command of another."[163] He highlighted that § 2339B prohibits the knowing provision of a service "to" a particular group, and concluded that the use of the word "to" indicates a required connection between the FTO and the service provided.[164] He also noted that outside of personnel and services, none of the prohibited types of material support can logically be supplied independently of a recipient group; therefore, the type of service criminalized by the statute must include only that performed with a nexus to an FTO.[165] The Court then stepped outside the text of the statute to conclude that this connection includes acting "under the foreign terrorist organization's direction and control" as well as services "performed *in coordination with*, or at the direction of" such a group; the phrase "in coordination with" does not appear in the statute.[166]

Margulies, *Advising Terrorism*, *supra* note 16, at 455–64 (framing the Court's decision as establishing a hybrid scrutiny, which allows breathing room for activities by scholars, journalists, and others despite affiliation with designated groups).

158 *Humanitarian Law Project*, 561 U.S. at 18. Chief Justice Roberts concluded that the Ninth Circuit conflated plaintiffs' First Amendment claims with their vagueness challenge and that despite meeting the fair notice requirement, parts of Section 2339B remained vague "because they applied to protected speech." *Id.* at 19.

159 *Humanitarian Law Project*, 561 U.S. at 18; United States v. Williams, 553 U.S. 285, 304 (2008).

160 *Humanitarian Law Project*, 561 U.S. at 19.

161 *Id.* at 20–22. The majority did acknowledge that situations may exist in which the scope of the statute would not be clear, but such "hypothetical situations" as argued by the plaintiffs were not presented in the as-applied challenge. *Id.* at 22. There have been no such follow-up challenges in lower courts making different as-applied challenges.

162 *Id.* at 23.

163 *Id.* at 23–24 (using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993) to define service).

164 *Id.* at 24.

165 *Id.*

166 *Id.* (emphasis added). The statute does not define control or coordination. Webster's

Though Chief Justice Roberts refused to answer how much coordination is sufficient to constitute the required criminal nexus,[167] the Court extended the same safe harbor provision provided by the statute regarding the provision of personnel to the provision of services. The majority found that the statute's explanation of personnel—that the term does not include individuals working "entirely independently" of the group—applies to services as well, reasoning that services cannot be considered to be supplied "to" an FTO if performed independently, that is, not under the FTO's direction or control.[168] Applied to the facts, the advice petitioners wanted to provide on its face was not criminal and could have been supplied independently of the target groups.

Furthermore, in addressing the First Amendment challenge, the majority found that § 2339B is a content-based regulation because whether plaintiffs could speak with FTOs without being prosecuted was contingent on what they said.[169] Content mattered because the speech, to be criminal under the statute, had to convey a specific skill or impart advice based upon specialized knowledge.[170] Furthermore, while the *HLP* Court agreed that § 2339B was likely "directed at conduct," the triggering conduct at issue was the communication of a valuable message.[171] Finding that this expression was analogous to the communicative conduct at issue in *Cohen v. California* (wearing a jacket bearing an epithet), the majority concluded that heightened scrutiny was appropriate.[172] It then found that combating terrorism, the government interest behind § 2339B, easily met strict scrutiny's first prong.[173]

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defines control as "the act or fact of controlling . . . power or authority to guide or manage." *Control*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 496 (1993). Webster's defines coordination as "to bring into a common action, movement, or condition." *Id.* at 501. Justice Breyer points out in the dissent that "'[c]oordination' with a political group, like membership, involves association." *Humanitarian Law Project*, 561 U.S. at 43.

167 *Humanitarian Law Project*, 561 U.S. at 24–25. Chief Justice Roberts refused to answer the plaintiffs' question of how much coordination with, or direction from, an FTO is required for advocacy to qualify as a criminal and stated he was waiting for a situation which would offer a 'concrete fact situation.' *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

168 *Id.* at 23–24.

169 *Id.* at 27. Congress, in its report supporting the passage of 18 U.S.C. § 2339B as part of the ATEDPA Act, originally concluded that § 2339B was content-neutral and therefore *United States v. O'Brien* provided the proper test when reviewing its First Amendment implications. H.R. REP. NO. 104–383, pt. 1, at 41–62.

170 *Humanitarian Law Project*, 561 U.S. at 27; *see also* 18 U.S.C. § 2339B (showing that the terms in § 2339B are defined in 18 U.S.C. § 2339A).

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

172 *See id.* at 27–28 (showing although the opinion does not use the phrase "strict scrutiny" per se, it states that "we are outside of *O'Brien*'s test, and we must apply a more demanding standard").

173 *Id.* at 29–30. Strict scrutiny's first question, stated simply, requires that any "content discrimination" be "reasonably necessary" to achieve the "compelling [state] interest." R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992); *see also* Texas v. Johnson, 491 U.S. 397, 401–05 (1989).

Chief Justice Roberts then addressed the question of whether § 2339B was narrowly tailored or used the least restrictive means—a question he found to be empirical.[174] He pointed to the congressional finding that non-terrorism-related assistance is fungible: "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct."[175] The Court found that "[m]aterial support meant 'to promote peaceable, lawful conduct' . . . can further terrorism by foreign groups in multiple ways."[176] Since material support as applied to the plaintiff's activities could contribute indirectly to terrorism, the Court concluded that the statute was sufficiently tailored to the government's compelling objective of combating terrorism to pass constitutional muster, despite the result of prohibiting otherwise protected speech.[177]

The majority agreed with Congress on the merits that regardless how innocuous support to FTOs seems to be, such as the plaintiffs' international law training, "working in coordination with or at the command of" such groups benefits the group by, among other things, conferring legitimacy.[178] Therefore, even speech that is nowhere near incitement nor a true threat becomes criminal when uttered on the behalf of, to, or even simply in coordination with a foreign terrorist group. Despite Justice Breyer's strong critique of this destruction of longstanding, calibrated First Amendment categories of speech, the majority's conclusion remains the law: the knowing coordination of value-providing speech, or other such conduct, with a terrorist group is sufficient to criminalize it.[179] When applied to social media providers, this raises constitutional issues, as this Article now demonstrates.

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174 *Humanitarian Law Project*, 561 U.S. at 29.

175 *Id.* at 47 (quoting 18 U.S.C. § 2339B when dealing with the statute's findings and purposes).

176 *Id.* at 30.

177 *Id.* at 29. Chief Justice Roberts discussed four concepts (fungibility of money, legitimacy to terrorist operations, international cooperation with regulation, and deference to the other branches) to support the material support statute's premise that any contribution to a terrorist group is harmful and therefore demonstrate that it was not over-inclusive. *Id.* at 30–34.

178 *Id.* at 30. The Court found that not only does material support allow an organization to repurpose existing resources, such support also provides legitimacy that can ease a group's recruiting and fundraising efforts. Ignoring the fact that independent support can have the same effect, the Court concluded that even seemingly benign assistance to foreign terrorist organizations can have an indirect beneficial effect on the group's terrorist activities—and therefore the statute appropriately prohibits such assistance within the limits set by the First Amendment. *Id.* at 36.

179 *Id.* at 43 (Breyer, J., dissenting) ("[T]he simple fact of 'coordination' alone cannot readily remove protection that the First Amendment would otherwise grant.").

III. § 2339B APPLIED TO SOCIAL MEDIA

18 U.S.C. § 2339B works in interesting ways when it comes to social media providers and their users. It is lawful to unilaterally tweet about one's love for an FTO such as ISIS, and to urge other Twitter users to join that terrorist organization—because if done without any coordination with the group itself, such advocacy falls within the statute's safe harbor of independent activity, as expanded by the *HLP* majority.[180] So Vallandigham's descendant can tweet or post on her Facebook page[181] as much as she would like about the virtues of her fictional Copperheads group, as long as she is not doing so on their behalf.[182] But one *is* providing material support if one tweets recruiting or advocacy messages in coordination with or at the behest of one's terrorist group, whether the too-real ISIS or the fictional Copperheads, making one vulnerable to criminal prosecution and significant prison time.[183] How would a social media provider know whether such coordination has occurred? Or should a provider, as this Article argues is occurring, simply utilize user content as a proxy for such coordination, and suspend accounts that engage in such advocacy, though such content (speech) may very well be protected because it falls into the statute's safe harbor? This is one of the key issues this Article explores as it turns below to the central analysis of whether Twitter and Facebook are or should be liable under this statute for publishing such tweets and posts.

A. *Elemental Analysis*

Using Twitter and Facebook as examples, this Article now applies the statute's elements to a hypothetical social media defendant. In the context of social media companies: (1) the *actus reus* is the provision of

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180 Per Twitter's support website, "Twitter is an information network made up of 140-character messages called Tweets. It's an easy way to discover the latest news related to subjects you care about." *Getting Started with Twitter*, TWITTER, https://support.twitter.com/articles/215585 (last visited Aug. 12, 2016).

181 Facebook describes one's profile page as "your collection of the photos, stories and experiences that tell your story. Your profile also includes your Timeline." *How Do I Use My Profile?*, FACEBOOK, https://touch.facebook.com/help/133986550032744?_rdr (last visited Sept. 4, 2017).

182 To remain lawful, such independent advocacy would not constitute criminal incitement as long as such advocacy is not intended to nor has the likelihood of inciting imminent lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the government could only criminalize advocacy of the use of force only when such speech is both directed to producing "imminent lawless action" and "likely to incite or produce such action").

183 *See* 18 U.S.C. § 2339B (2012). *See generally* Margulies, *Advising Terrorism*, *supra* note 16, at 485-86 (explaining how § 2339B criminalizes speech when uttered in particular relationships).

a service to an FTO, which breaks down into both a service element and a coordination element, since the "to" preposition requires concerted activity, not independent conduct, that is, coordination; and (2) the *mens rea* is knowledge that the recipient of the service is either a designated FTO or a group that has engaged in terrorist activity.[184]

The following comprehensive elemental analysis is the linchpin to this Article's vagueness challenge: that it is quite difficult for social media providers to distinguish users who are either FTOs or who are providing material support to FTOs through their online speech, from those who are advocating for an FTO independently and hence lawfully. Because of this ambiguity, social media companies are incentivized by § 2339B to enact and enforce onerous user content policies, suspending thousands of user accounts based almost solely on user content, without sufficient data to show the required connection to an FTO. That is, the statute results in over-deterrence due to the ambiguity of who represents an FTO for purposes of the statute, as well as the indeterminacy of when such knowledge is gained by the provider.

1. Social Media as a "Service"

The *actus reus* of § 2339B involves the provision of property or service to a designated FTO. The statute's list of non-exhaustive[185] exemplars include facilities, communications equipment, financial services, and expert advice or assistance, the latter defined as "advice or assistance derived from scientific, technical, or other specialized knowledge."[186] Social media companies such as Twitter and Facebook fall into the statute's services category. As discussed in Part I, all social media websites, by definition, allow users to connect with others in order to post content.[187] These companies provide "web-based and mobile technologies that turn communication into an interactive dialogue in a variety of online fora."[188] Indeed, the corporations

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184 *See supra* Part I.

185 Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POL'Y 297, 305 (2008) (proposing that 18 U.S.C. § 2339B's list, drawn from § 2339A, is an exemplar, and not an exhaustive list).

186 18 U.S.C. § 2339A (2012) (Section 2339B uses Section 2339A's definition of material support or resources). The statute's use of the term "including" indicates an expansive interpretation of both services and property. *See* Peterson, *supra* note 185, at 305.

187 *See generally* Nicole B. Ellison & Danah M. Boyd, *Sociality Through Social Networking Sites*, *in* THE OXFORD HANDBOOK OF INTERNET SERIES 151, 158 (William H. Dutton ed., 2013) (defining a social network site as "a networked communication platform in which participants 1) have uniquely identifiable profiles that consist of user-supplied content, content provided by other users, and/or system-provided data; 2) can publicly articulate connections that can be viewed and traversed by others; and 3) can consume, produce, and/or interact with streams of user-generated content provided by their connections on the site"); Part I.

188 *See DHS Monitoring of Social Networking and Media*, *supra* note 33.

providing such technology consider themselves as providing a suite of services: "[w]e offer Twitter and other services in order to give everyone the power to create and share ideas and information instantly, without barriers."[189] Facebook similarly states that "Facebook offers a wide variety of products and services, including communications and advertising platforms. Many of these products and services—such as the Facebook mobile app, Messenger, and Paper—are part of your Facebook experience."[190]

In contrast to a generic website that offers content to whomever opens its site, social media platforms' services are provided to specific users contingent on users' agreements to abide by the platforms' respective terms of service. For example, the "Twitter User Agreement," Twitter's contractual agreement with users, includes its "Terms of Service," its "Privacy Policy," and the "Twitter Rules."[191] The Twitter Terms of Service agreement states that it governs a suite of services known as the "Twitter Services," and that "access to and use of our Services" hinges on one's "acceptance of and compliance with" its terms.[192] Facebook also contractually limits its users as a condition for use through its "Statement of Rights and Responsibilities," likewise conditioning use of its platform and services on user consent: "[b]y using or accessing the Facebook Services, you agree to this Statement . . . ."[193] While some content on these platforms is available to non-users, the ability to post content (for example, to tweet on Twitter) is limited to users only, and to qualify as a user one must agree to abide by the contractual terms the respective social media site requires.

The communication services these social media platforms provide to their users constitute prohibited services under § 2339B because the *HLP* majority outlined that *any* service, except those exempted by the

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189 *Twitter, Our Services, and Corporate Affiliates*, TWITTER, https://support.twitter.com/articles/20172501 (last visited Sept. 4, 2017) (using the term "services" six times to describe its products).

190 *See What Are the Facebook Services?*, FACEBOOK, https://www.facebook.com/help/1561485474074139 (last visited Sept. 4, 2017); *see also Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/terms (last visited Sept. 4, 2017) [hereinafter *Facebook Statement of Rights and Responsibilities*] ("By 'Facebook' or 'Facebook Services' we mean the features and services we make available, including through (a) our website at www.facebook.com and any other Facebook branded or co-branded websites (including sub-domains, international versions, widgets, and mobile versions); (b) our Platform; (c) social plugins such as the Like button, the Share button and other similar offerings; and (d) other media, brands, products, services, software (such as a toolbar), devices, or networks now existing or later developed.").

191 *Twitter Terms of Service*, TWITTER (Aug. 30, 2016), https://twitter.com/tos?lang=en.

192 *Id.* Such terms of service "establish the rules that govern each site. . . . Internet giants use wrap contracts and a constructed notion of consent to become private regulators and private legislators whose rules trump those arrived at through democratic processes." Kim & Telman, *supra* note 29, at 765.

193 *Facebook Statement of Rights and Responsibilities*, *supra* note 190.

statute as medical or religious, is covered by the statute.[194] Lower courts have also, albeit infrequently, addressed whether particular conduct qualifies as a § 2339B service. For example, the First Circuit in *United States v. Mehanna* found that the translation of religious texts at the behest of organizations affiliated with Al Qaeda constituted such a service.[195] The United States Court of Appeals, District of Columbia similarly found that a security personnel's compliance with a terrorist's request to look the other way while the terrorist planted a bomb constituted a service.[196] In this vein, the "act" Twitter, Facebook, and other social media platforms perform "for the benefit of another" is, generally, the provision of a means of communicating with others.[197]

2. Social Media as a "Service *To*"

The court further recognized that "the statute prohibits providing a service '*to* a foreign terrorist organization.' The use of the word 'to' indicates a connection between the service and the foreign group."[198] Facebook's and Twitter's communication services are supplied "to" a user based on a contractual agreement governing the terms of the provider-user relationship[199]; such a formal relationship represents one of the clearest types of material support relationships that are prohibited by § 2339B. The Court addressed this in *HLP* when the petitioners, distinct from their concerns regarding their provision of international law training to the terrorist groups in question, also asked the Court to clarify whether hypothetical "advoca[cy] on behalf of the rights of the Kurdish people" before Congress and the United Nations violated the

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194 *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 30 (2010) ("'Material support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends."). The Court even found that advocacy, as long as performed in coordination with an FTO and even if otherwise constitutionally protected speech, constitutes a statutorily prohibited service. *Id.* at 24.

195 United States v. Mehanna, 735 F.3d 32, 49 (1st Cir. 2013) ("The context made clear that the government's 'translations-as-material-support' theory was premised on the concept that the translations comprised a 'service,' which is a form of material support within the purview of the statute.").

196 Estate of Parsons v. Palestinian Auth., 651 F.3d 118 (D.C. Cir. 2011) (finding that security personnel's compliance with a terrorist's request to look the other way while the terrorist planted a bomb constituted a service under Sections 2339A and 2339B).

197 Brief for the Student Press Law Center, et al. as Amici Curiae Supporting Petitioner at 8, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) ("Social networks are online communication platforms that enable individuals to join and create networks of users. Typically, these services require the creation of profiles by users, in order for others to view and to provide invitations to join various networks and groups. Well-known examples are Facebook, Twitter, and LinkedIn.").

198 *Humanitarian Law Project*, 561 U.S. at 24 (citation omitted).

199 *See* Kim & Telman, *supra* note 29, at 734 (describing the wrap contracts utilized by social media companies to govern the relationship between the companies and their users).

statute.[200] The petitioners specifically asked, "[m]ust the 'relationship' have any formal elements, such as an employment or contractual relationship? What about a relationship through an intermediary?"[201]

The Court's answer was that much less of a relationship qualifies, and that the statute's term "to" even encompasses mere coordination.[202] Clearly, a formal, contractual relationship such as that between Twitter and their users far exceeds the Court's lowest eligible level of coordination to indicate a sufficient connection between the social media's communication services and FTO users to constitute the statute's prohibited conduct, but only *if* the user actually represents the prohibited group.

3. "To" Whom: Defining a Foreign Terrorist Organization

Whether or not a social media company's provision of its service to a particular user violates § 2339B depends on the identity of the user. The statute only prohibits provision of services to *foreign terrorist organizations*. The related statute that defines FTOs does not define who represents such groups. It is unclear who qualifies as a member or other such constituent part of the group, such that their individual contract with Twitter, for example, would qualify as providing Twitter services *to* an FTO. The *HLP* Court did not address this identity issue because the parties agreed that the recipients of the challenged services indeed were FTOs.[203]

It is clear that a social media company does not fulfill the statute's act requirement of provision of services to an FTO merely because an individual utilizes the name "Al Qaeda" when contracting to use the company's services, or "Copperheads," to use our thought experiment. Since there is no authentication process involved in registering as a user on the major social media sites, anyone can utilize such a name regardless of actual affiliation with that group.[204] While social media platforms such as Facebook and Twitter require that "users provide their real names and information," the prospective user is not required to provide proof of their identity.[205] Instead, they must only provide a name and either an email address or a phone number, and then devise a

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200 *Humanitarian Law Project*, 561 U.S. at 25.

201 *Id.* at 24.

202 *Id.* at 24–25.

203 *Id.* at 9–10.

204 *See generally Signing Up with Twitter*, TWITTER, https://support.twitter.com/articles/100990 (last visited Sept. 5, 2017) [hereinafter *Signing Up with Twitter*] (explaining the process involved in establishing a Twitter account).

205 *Facebook Statement of Rights and Responsibilities*, *supra* note 190, at ¶ 4.

username (which Twitter defines as "unique identifiers on Twitter") that has not already been registered by another user.[206]

As an exception to the general rule that a username will not indicate FTO affiliation, if Amaq News Agency signed up for a Twitter account, using that name as its user identity, the name itself conceivably could constitute some indication that the user represents an FTO, given that it is relatively well-known that Amaq News Agency is the informal media wing of ISIS.[207] Yet it seems likely that a review of this user's content would still be needed to help determine whether this user is indeed a representative of Amaq News Agency (since Amaq News Agency is not a living creature that can unilaterally create an account, nor is it a formal corporate entity). For Amaq News Agency to establish a social media account, some individual must be doing so on its behalf, whether as an actual member of ISIS, or someone coordinating with ISIS or Amaq News. Content is helpful to identify the user claiming to be the Islamic State's media wing. If they post nothing but pictures of bunny rabbits, and the phone number and email address linked to the account do not reveal any additional identifying information, it seems unreasonable to conclude based only on the user name that this user is an FTO.[208]

The same evidentiary problem exists regarding user identification when the user does not utilize any name affiliated with an FTO. In this more likely scenario, user content is unlikely to sufficiently indicate whether or not the requisite affiliation with an FTO is present. The content may, and indeed must for a § 2339B violation, demonstrate that it is of the type that is valuable to an FTO, such as recruiting, propaganda, legitimization efforts (advocacy), etc. Critically, these speech activities are constitutionally protected and do not violate § 2339B if conducted independently from the FTO of choice. Yet such independence is typically inscrutable based purely on reviewing the user's content. The user may be coordinating with the group or they may be a troubled individual who sees a path to glory by reposting such content gleaned from other internet sources without the requisite coordination.

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206 *Id.*; *see also How Do I Sign Up for Facebook?*, FACEBOOK (Aug. 19, 2016), https://www.facebook.com/help/188157731232424; *Signing Up with Twitter*, *supra* note 204.

207 *See, e.g.*, Rukmini Callimachi, *A News Agency with Scoops Directly from ISIS, and a Veneer of Objectivity,* N.Y. TIMES (Jan. 14, 2016), http://www.nytimes.com/2016/01/15/world/middleeast/a-news-agency-with-scoops-directly-from-isis-and-a-veneer-of-objectivity.html? _r=0 (calling Amaq the Islamic State's "unacknowledged wire service").

208 The converse is true; if the content of this user's Twitter account is replete with videos of Islamic State activities, particularly those revealing special access instead of merely postings of media found elsewhere on the web, such content would go quite far in showing that the recipient of Twitter's services is in fact an FTO.

Because of § 2339B's safe harbor, it is quite unclear, and rather doubtful, whether user content alone can reliably indicate the requisite affiliation needed for the user to be considered to "be" the FTO for material support purposes that the social media provider is providing a service "to." Content as proxy for identifying material support is problematic because the *HLP* Court made clear that services that benefit an FTO are immune from § 2339B liability if performed independently from the FTO.[209] Yet the difference between two users who are both promoting terrorism and extolling an FTO, though one is working for an FTO and the other is not, is not readily apparent from content reviews alone. This means that the *actus reus* of § 2339B is rarely evident to social media providers, who are privy to user content and little else.

Furthermore, it is unclear what degree of affiliation is needed between a person and an FTO before that person represents the FTO, such that any service provided to that person equals a provision of service to the FTO. If that user is himself providing material support to terrorism, which by definition means acting under the direction or control of the FTO or in coordination with that FTO, is that sufficient for the user to "be" the FTO? What if they are simply in communication with the FTO—that is, with other individuals who claim to be part of the FTO, but not acting on their behalf? This is the coordination dilemma the *HLP* Court declined to address,[210] just once-removed—how much coordination is necessary for a social media user to violate § 2339B, and how much coordination is necessary for that user to then be considered representative of the FTO such that the social media company is considered, under the statute, to be providing services not simply to the individual user, but to the FTO itself?

4. *Mens Rea*: Knowledge That the User Is an FTO

The above problems surrounding § 2339B's conduct element are closely linked to issues regarding this statute's intent requirement. § 2339B requires knowingly providing a service; plus, "to violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged

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209 *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 4, 2726. ("The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered."). Section 2339B(h) provides that "[i]ndividuals who act entirely independently of the [FTO] to advance its goals or objectives shall not be considered to be working under the [FTO]'s direction and control." 18 U.S.C. § 2339B (2012).

210 *Humanitarian Law Project*, 561 U.S. at 39.

or engages in terrorism . . . ."[211] Yet the ambiguity surrounding just who represents an FTO burdens this intent element as much as it casts a pall over the *actus reus* element discussed above. As collective entities with no blood and guts persona, FTOs can only act through their constituent members, employees, and supporters. Yet these terrorist organizations have hazy membership requirements, and one's function in relation to the FTO is often used as a proxy to determine "membership."[212]

So how can a social media company acquire the knowledge that a particular user is actually an FTO or someone working in coordination with such a group? First, the social media company can review the user's content for indications that they are affiliated with an FTO. However, as mentioned above, posting content that advocates for an FTO, recruits for an FTO, extols and praises an FTO, or demands that others kill for the FTO can all be executed with zero coordination with that actual FTO. The user can post such content completely independently of the FTO and hence remain, in theory, constitutionally and statutorily protected from § 2339B's scope. Content alone will not, therefore, reliably reveal this key distinction, which leaves the social media company unable to discern when it itself is violating the statute.[213] Neither will user information utilized to acquire such an account provide this requisite data, as there is no authentication process, as described below.

Because of these challenges, social media companies err on the side of caution and simply use content as proxy for § 2339B territory. Providers seem to have presumed that because of the odious content of a particular user's social media expression, the user is acting in coordination with an FTO to such an extent that the user is an FTO for purposes of § 2339B, which would make the social media's continued provision of its suite of communication services a § 2339B violation. In other words, this assumption has led social media companies to attempt to suppress all content that indicates support of an FTO in order to remain clear of § 2339B's reach. This broad content suppression, which is of course also attributable to public condemnation of terrorist content on social media, is one that has been openly acknowledged. Facebook founder and CEO Mark Zuckerberg has admitted that numerous mistakes have been made regarding account suspensions based on content and has even expressed a goal to use artificial intelligence (AI)

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211 18 U.S.C. § 2339B.

212 *See* VanLandingham, *supra* note 156, at 135.

213 If the U.S. government shares with a social media provider their conclusion that a user is indeed an FTO, then this issue would seemingly be resolved; such information provided by another third-party, however, such as a private group, would not necessarily solve the identity issue, because how would the platform verify the claim? Furthermore, even if user identity as an FTO is confirmed, the provider should be shielded from § 2339B regardless, due to their First Amendment press rights. *See infra* Section III.C.

to review content and "eventually be able to spot terrorism, violence, bullying and even prevent suicide . . . . Right now, we're starting to explore ways to use AI to tell the difference between news stories about terrorism and actual terrorist propaganda."[214]

B. *Fifth Amendment Violation: Vague as Applied*

18 U.S.C. § 2339B is unconstitutionally vague as applied to social media providers. Though such a challenge failed in *HLP*, that Court repeatedly recognized that "the statute may not be clear in every application."[215] An application such as Vallandigham's descendant's social media activity[216] exposes this uncertainty with regard to the providers' liability. While this Article has already argued that § 2339B contributes to social media providers' suppression of protected speech due to uncertainty regarding the statute's online borders, this consequence is insufficient for a Fifth Amendment facial overbreadth challenge.[217] Such a challenge is incapacitated because § 2339B has a plainly legitimate sweep, and a broad one at that.[218]

However, such a chilling effect, or over-deterrence, is not simply prohibited by a statute's overbreadth; it is also one of the rationales behind the void-for-vagueness doctrine. As the Court has long emphasized, a statute is impermissibly vague if "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[219] It is this over-deterrence effect that primarily supports this Article's vagueness concern, as well as the statute's lack of fair notice and potential for arbitrary enforcement in the social media context.[220]

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214 *Facebook Algorithms 'Will Identify Terrorists'*, BBC NEWS (Feb. 16, 2017), http://www.bbc.com/news/technology-38992657 (internal quotation marks omitted).

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

216 This as-applied challenge is generally represented by this Article's introductory hypothetical: Vallandigham's descendant has both a Twitter and Facebook account in her name; she is a well-known leader of the Copperheads, a well-known FTO; and she posts messages advocating for that FTO on these platforms.

217 This Article avoids a facial challenge based on the overbreadth doctrine because of the absence of *substantial* overbreadth; that is, the "plainly legitimate sweep" of the statute, which primarily deals with non-expressive conduct, overshadows the chilling effect that statute has on protected speech. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) ("While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted) (citation omitted)).

218 *Humanitarian Law Project*, 561 U.S. at 28–29.

219 Karlan v. City of Cincinnati, 416 U.S. 924, 925 (1974) (Douglas, J. dissenting).

220 *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (finding loitering law at issue impermissibly vague because it "may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement").

A statute violates the Fifth Amendment Due Process Clause if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[221] As the Court stated in 2008, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[222] This indeterminacy exists in this context in two fatal ways. First, the statute's *actus reus* sub-element term of "to" is uncertain, which also infects the related *mens rea* requirement (knowledge that the recipient of social media services is an FTO). Second, even if the social media user is clearly an FTO, the type of content that would make social media use a prohibited service is unclear. Such ambiguities coupled together exceed mere evidentiary challenges managed by trial-level burdens of proof and taint this statute's constitutionality in an as-applied setting.

Finding two areas of uncertainty in the Armed Career Criminal Act at issue in *Johnson v. United States* in 2015, the Court concluded that "[t]aken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates."[223] Such perniciousness is similarly present in § 2339B. First, platforms such as Facebook and Twitter generally lack the capacity, based on the general anonymity of their millions of users, to determine who represents an FTO or is otherwise coordinating with an FTO, such that a particular user's utilization of their services would expose Facebook or Twitter to criminal liability. While of course there may be situations in which a user's identity is quite clear, simply because there are some clear cases does not make the "to" element less uncertain, nor removes the vagueness taint.[224]

As pointed out in the preceding discussion of § 2339B's act element, just because a user calls himself Abu Bakr al-Baghdadi, the purported leader of ISIS, or Vallandigham, our hypothetical leader of

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221 United States v. Williams, 553 U.S. 285, 304 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); Kolender v. Lawson, 461 U.S. 352, 357 (1983) (holding that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

222 *Williams*, 553 U.S. at 306 (citing *In re* Winship, 397 U.S. 358, 363 (1970) for the conclusion that "[c]lose cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt").

223 Johnson v. United States, 135 S. Ct. 2551, 2554 (2015).

224 *Id.* at 2561 (explaining that "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp").

the Copperheads, does not make it so, and social media platforms do not have the capability to authenticate their planet-wide collective of users. On the other hand, *is* such a username sufficient for § 2339B liability purposes? Should these platforms be denying services to individuals based on their names out of concern that such names could indeed trigger material support liability? The law itself is unclear, and impermissibly so.

Furthermore, while the statute's *mens rea* requirement of knowledge should act to cabin such uncertainty—if the provider cannot tell who is a member of an FTO, then they cannot be said to be *knowingly* providing their services to such a member—it is insufficient because of the uncertainty involved in what they are required to have knowledge of, as well as what counts for knowledge. While these ambiguities are, at their core, manifestations of the same *actus reus* uncertainties in the statute's *mens rea* element, they vary slightly. Here, the vagueness deals with what should suffice as knowledge on the part of the social media *company* that the social media *user* is a designated FTO. Or, tougher yet, this vagueness asks how a company would know that a user is "coordinating" with an FTO in their use of social media, which would also expose the provider to material support liability if they knew of such coordination.

Would the fact that a third party has notified the provider that a particular user represents an FTO be sufficient to give the provider the requisite knowledge? The advocacy and propaganda messages that users working in the statute's safe harbor have a First Amendment right to disseminate may offend and anger other users, giving those third parties incentive to have the offending users banned from the social media platform, perhaps by claiming that such posts are written by those working for FTOs.[225] Due process should prevent this statute from saddling social media providers with such troubling uncertainty.

The second primary area of ambiguity that adds to the first to violate due process deals with content. Using one's Twitter feed to post Mark Twain aphorisms is not the provision of anything of value to an FTO, even if the user is doing so on behalf of an FTO. In this way, for a social media provider, § 2339B is a content-based speech restriction once removed. Simply because a high-ranking leader of ISIS successfully registers a Twitter account does not make Twitter guilty of materially supporting terrorism, even if Twitter knows that the user is such a member. If he does not post anything, or only posts adoring notes to his grandmother, material support does not occur. It does not occur

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225 This is a real phenomenon. *See, e.g.*, Peter Baker, *Facebook Struggles to Put Out Online Fires in Israeli-Palestinian Conflict*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/world/middleeast/facebook-struggles-to-put-out-online-fires-in-israeli-palestinian-conflict.html.

because Twitter has not yet provided anything of value to that group; the support only comes when such a user decides to use their social media account to provide valuable speech on behalf of their FTO.

Specifically, the *HLP* Court highlighted that not all speech benefits an FTO; content matters. Hence it would seem that whether or not the provision of social media services to such an organization is criminal depends on the content (the speech) the user affiliated with such a group places on a social media platform on that group's behalf.[226] What if Vallandigham's descendant, a very public member of the Copperheads FTO, creates a Facebook page but only posts pictures of his garden? Substitute Osama Bin Laden or al-Baghdadi for Vallandigham. Suppose Facebook and Twitter knowingly allow both infamous FTO leaders to open accounts on their platforms, but neither ever uses the account. Would allowing them to open an account constitute material support? While this arguably constitutes the provision of a communications service, such a service is only valuable—or actually a service—if one uses it, and only if the user is using it to provide value to the FTO. What if these terrorists do use their accounts but only to post adoring grandchildren pictures and loving comments about them? Have the social media providers violated § 2339B because they knowingly provided a means of disseminating such messages to these FTO leaders, despite that such means are only being used in innocuous ways? While this author would answer in the negative based on the *HLP* majority's reasoning, this uncertainty is one due process is supposed to prevent.

This brings us back to the conundrum identified earlier: social media use violates § 2339B only if the content provides value to the FTO, and only if the user posting such content is doing so in coordination with or on behalf of an FTO. Because it is quite difficult for the service providers to know who represents an FTO or is in coordination with an FTO based on content and sign-up information alone, the statute is vague as applied. These uncertainties contribute to an over-suppression of otherwise protected speech by service providers who cannot determine which users fall into the statute's safe harbor of independent advocacy and which do not, and therefore suspend accounts that recruit and propagandize FTO themes, but may be operated by individuals working independently and hence lawfully. The statue's vagueness defect when applied to social media also opens the door to abusive enforcement by the government. If a particular social media company does not suspend the accounts of users who advocate for terrorism fast enough, despite the constitutional right of many users to express such repulsive but protected support, the government can

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226 One could argue that simply the act of allowing an FTO to have a Facebook page or a Twitter account lends them legitimacy, even if they never use it.

instead threaten prosecution to force social media companies to suspend even those accounts which fall into the (supposedly) safe harbor provision of the statute.[227]

One could argue that these vagueness issues could be cured through ordinary statutory interpretation methods to avoid such constitutional issues. For example, perhaps a court could require in such cases clear extrinsic or affirmative evidence of coordination, beyond the fact that a user merely links to a website reliably described as authored by an FTO. Yet it is difficult to understand how such a standard would appropriately ameliorate the primary uncertainties in the statute as applied here, unless the court was to narrowly consider that only a certain type of coordination, such as emails or texts between the user and known FTO figures, would suffice. And if such specific coordination is required for linkage to an FTO, it is unlikely that the social media provider would have knowledge of these indicia of coordination. Further, such narrowing seems like an improper legislative re-write of the statute, as well as improbable.

Finally, the above-described over-deterrence or chilling effect highlights a key factor relevant to sustaining a vagueness challenge in this as-applied context: "the Court has made it clear that greater precision is required when laws regulate speech . . . ."[228] Not only does the vagueness doctrine require greater precision in criminal law when speech is at issue, it requires heightened clarity when affecting other fundamental rights as well, such as freedom of the press.[229] Despite the *HLP* Court's chastisement of the Ninth Circuit for "improperly merg[ing] plaintiff's vagueness challenge with their First Amendment claims,"[230] the Court's approach to the vagueness doctrine still requires a greater exactitude when statutes touch upon fundamental rights.

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227 The vagueness doctrine is not only concerned about fairness by requiring appropriate notice of potentially criminal behavior but also safeguards against arbitrary enforcement by the executive branch. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

228 CHEMERINSKY, *supra* note 84, at 989 (further finding that "statutes will be invalidated if a judge concludes that they provide inadequate notice as to what speech is prohibited and what is allowed").

229 *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (implicating freedom of speech, association, and right to liberty and property); Winters v. New York, 333 U.S. 507 (1948) (implicating freedom of speech and press). *See generally* Jay R. Herman, Comment, *Void-for-Vagueness*, 4 SUFFOLK U. L. REV. 920, 923 (1970) (noting that the void for vagueness doctrine "has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms").

230 Holder v. Humanitarian Law Project, 561 U.S. 1, 3. *See generally* NAACP v. Button, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

C. *First Amendment Violation*

Even if such vagueness issues could be completely cured, social media platforms should be recognized as a modern form of the press and as such, be generally protected by the First Amendment from § 2339B criminal prosecution.[231] By denying the press the ability to publish ideas—even if these are odious ideas such as propaganda for ISIS—this statute contravenes the First Amendment by inhibiting legitimate democratic discourse and denying "voice to public criticism."[232] If the First Amendment's freedom of expression was truly "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," denying the press, whether social media or the New York Times, the ability to publish an op-ed, for example, by an FTO leader fetters such exchange.[233] While the Court has allowed the government to suppress individual speech per operation of § 2339B, suppressing the ability of the press to publish what it deems necessary for robust democracy simply goes too far. It ultimately threatens press independence and therefore the ability of the press to act as a check on the government itself.

As the introductory disclaimer noted at the beginning of this Article, this author does not argue for blanket immunity. If social media (or any press entity) knowingly allows its platform or pages to be used to coordinate or direct a terrorist attack on behalf of an FTO, § 2339B liability should be available, just as criminal liability exists for media that knowingly allow child pornography to be distributed on their platforms. However, if a press entity knowingly allows publication of propaganda and advocacy by an FTO or someone on behalf of an FTO, even if such ideas are designed to recruit or inspire more adherents, such a decision by that press entity should be constitutionally protected.

Such protection should accrue for the following two reasons. First and foremost, social media providers should be largely immune because of the jurisprudential press narrative outlined in Section I.B. This framework reveals that the statute's interference with social media's editorial discretion and ability to disseminate the news outweighs the statute's contribution to counter-terrorism in this context.[234] Second,

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231 While not the focus of this Article, traditional press such as the Washington Post and CNN should also be shielded by the First Amendment from § 2339B prosecution in most instances.

232 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).

233 *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476 (1957)).

234 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (finding that, regarding content-based restrictions on speech, such "provisions can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting Ariz. Free Enter. Club's Freedom PAC v.

and similarly, social media platforms' content restrictions enacted out of fear of government prosecution echo the Founders' abhorred prior restraints, and should therefore be suspect. The *de facto* prior restraint at play in § 2339B's application to social media prevents such platforms, one of the primary sources of the average American's news, from providing a full exchange of ideas; furthermore, the statute's broad aperture is much wider than the few laws with similar prior restraint effect that the Court has upheld in the past.

1. 18 U.S.C. § 2339B Erodes Press Functions

As noted in Part II, the Supreme Court has generally refused to exempt the press from generally applicable regulatory laws, finding that newspapers have no special immunity.[235] Yet it has simultaneously hinted at exceptions if the law impinges on what is special about the press, such as their news distributing function.[236] Quite relevant to this Article's social media focus is the Court's famous characterization of a law as unconstitutional because "of its intrusion into the function of editors."[237] Analogously, the material support statute impedes social media platforms' ability to distribute news and interferes with their editorial discretion.

That social media entities, particularly platforms such as Facebook and Twitter, distribute the news is beyond dispute. And § 2339B degrades that function because social media providers suspend accounts dealing with or simply mentioning certain terrorist groups, hence impeding these platforms' ability to distribute the information connected to such groups, in other words: the news. Even Mark Zuckerberg has noted the difficulty in separating news about terrorism from terrorism propaganda[238]; the fear of spreading the latter has limited the ability to report the former.

As argued by Twitter in federal court, social media's editorial control is exercised through their community standards and rules,

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Bennett, 131 S. Ct. 2806, 2817 (2011))).

235 *See supra* Section II.B (discussing this thread).

236 Associated Press v. NLRB, 301 U.S. 103, 133 (1937) (upholding the National Labor Relations Act against the press but noting that the statute did not impede the press defendant's ability to distribute the news).

237 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit . . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment.").

238 Stephen Overly, *Facebook Plans to Use AI to Identify Terrorist Propaganda*, WASH. POST (Feb. 2017), https://www.washingtonpost.com/news/innovations/wp/2017/02/16/facebook-plans-to-use-ai-to-identify-terrorist-propaganda/?utm_term=.1799ab27cccb (describing a speech by Zuckerberg, the head of Facebook, in which he outlines social media challenges such as discriminating between terrorist group recruiting efforts and legitimate news stories).

through their initial approval of accounts, and through the suspension of accounts.[239] While the content standards are fully within social media platform's discretion, the 2015 addition by both Facebook and Twitter prohibiting the promotion of terrorism seems a direct result of § 2339B. Social media's exercise of editorial control over the content displayed on their platforms by way of content restrictions is analogous to the Miami Herald newspaper's control over what is published in its pages, and likewise should be shielded from governmental interference.

Furthermore, the Court has, rather incongruously, applied heightened scrutiny to content-neutral federal and state laws applied to press defendants, specifically, those that criminalized intentional disclosure of illegally-intercepted conversations.[240] Characterizing its test as strict scrutiny, the Court balanced the interests at stake, concluding that "the interest in publishing matters of public importance" outweighed the privacy and deterrence issues at stake.[241] Therefore, even if § 2339B as applied to social media could be construed as content-neutral, the Court's opinions support the application of a strict scrutiny test due to the press nature of social media. This test, when utilized to assess the constitutionality of § 2339B as applied to social media, tilts in favor of the interest of publishing matters of public importance (this Article assumes that protected speech such as advocacy for a designated FTO is of public import, otherwise it would not be protected) versus the national security concerns animating the material support statute, as explained below.

Much of this Article's arguments flow from the broad censorial effect § 2339B has on social media content that results from the infeasibility of determining which users have the requisite link to an FTO and which are operating in the independent safe harbor. But what if the FBI alerts Twitter, for example, that a certain Twitter user is indeed working for ISIS, and the user's social media content on Twitter is not cat posters, but messages glorifying ISIS? The First Amendment's press narrative should protect Twitter from material support charges for

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239 Defendant Twitter, Inc.'s Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss the Second Amended Complaint, Fields v. Twitter, 217 F. Supp. 3d 1116 (N.D. Cal. 2016) (No. 16-00213), 2016 WL 6460405 ("Twitter can restrict users from posting Tweets either by blocking them from signing up in the first place, by removing particular Tweets, or by shutting down accounts because of the Tweets they have posted. . . . At any stage, these decisions about what may be posted are publishing decisions . . . .").

240 While defamation cases such as *Sullivan* by their nature involve content-based regulations and therefore are naturally suited to what has evolved as the strict scrutiny balancing test, the wiretapping laws at issue in *Bartnicki* did not turn on content—yet, the Court utilized a strict scrutiny–type balancing test in the latter as well. This indicates that, despite its statement in *Cowles* in 1991 that "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations," in actuality the Court does utilize more exacting standards. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991). *See generally* Anderson, *supra* note 85, at 77–78.

241 Bartnicki v. Vopper, 532 U.S. 514, 534 (2001).

exercising its editorial judgment to allow the publication of such content on its platform despite the FBI's entreaty otherwise. Twitter should be immune because the statute fails the Court's 2001 test outlined in *Bartnicki* regarding the constitutionality of generally applicable laws to the press: the interest of social media as the press in publishing matters of political and public interest outweighs the speculative, third-order assistance such publication provides to an FTO.[242]

In other words, dissemination of ideas by the fourth estate trumps national security concerns in this context.[243] Similarly, the press narrative would protect the New York Times from § 2339B's reach if that entity decided to run an op-ed they knew was written by our fictional Vallandigham, or by the very real leader of ISIS, and was an advocacy piece for an FTO to boot. Social media's decision to maintain user accounts that publish similar items should be similarly shielded due to the press nature of such platforms.[244] Fundamentally, they should be protected because of the critical importance of allowing an unfettered marketplace of ideas, ideas that the press is pivotal in sharing and dissecting.

2. 18 U.S.C. § 2339B as Prior Restraint

The Supreme Court stated in *Miami Herald* that: "[t]he clear implication has been that any such compulsion to publish that which reason tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[245]

Regarding § 2339B's application to Facebook and Twitter, the opposite holds true: the statute's prohibition of publication of that which their editorial judgment tells them should be published is unconstitutional, even if such publication is characterized as detrimental to national security.[246] While this law does not operate as a *de jure* prior restraint, it seems a *de facto* one, a dynamic similarly

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242 While the *HLP* majority seemed ready to defer to Congress on the weight of these competing values, the press was not involved in that case.

243 Many social media platforms include direct messaging capabilities, in which users can privately communicate with each other using the platforms; this Article deals with the public posting and not direct messaging aspect of these services.

244 *But see* Wittes & Zedell, *Tweeting Terrorists*, *supra* note 15 (remarking that while the First Amendment would protect a newspaper from prosecution for publication of a terrorist's op-ed, such protection does not extend to social media because they lack editorial judgment).

245 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (internal quotation marks omitted).

246 Unless such publication is one of knowing publication of military secrets in time of war, or other exceptional category.

acknowledged by the *Miami Herald* Court before the age of the internet and social media in 1974.[247] As that Court stated, "governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."[248]

This effect is amplified when it comes to social media because of the vagueness of this crime in this cyber context. Unlike the relative ease of determining who is posting a criminal threat on their Facebook page, or who is tweeting images of child pornography or obscenity, material support is not as easily discernible within the social media context; far from it, as Section III.A, *infra*, demonstrates. The material support statute's as-applied ambiguity leaves social media companies little choice but to react by censoring a huge swath of twice-protected speech (protected under the First Amendment plus uttered independently of any FTO so protected under § 2339B), potentially out of fear they are otherwise violating the statute.[249] They censor speech that is both classically protected under the 1969 *Brandenburg* decision and other standards (not obscene or a true threat, etc.) *and* protected under § 2339B because the user lacks coordination with an FTO.[250]

The Court has utilized a functional test for determining what qualifies as a prohibited prior restraint: "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[251] While expressions of support for terrorist groups may seem odious, it is not the U.S. government's role to decide what is essential thought needed by Americans to exercise their democratic rights. Recall that at one point in the not too distant past, quite a few Irish-Americans vociferously expressed their support for the Irish Republican Army in word as well as

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247 One could argue that § 2339B does not preclude publication; instead, it only precludes provision of services to particular individuals. Such a characterization ignores the actual effect of the statute, which is a wide prohibition of content placed on Twitter despite its legality under § 2339B.

248 *Miami Herald*, 418 U.S. at 256 (citing Grosjean v. Am. Press Co., 297 U.S. 233, 244–45 (1936)).

249 This chilling effect resulting from the statute's ban on publishing advocacy and recruiting material on behalf of or in coordination with an FTO sweeps so widely and impacts so much protected speech that it simply fails to meet strict scrutiny's narrowly-tailored prong of the Court's First Amendment analysis as applied to social media companies.

250 The *Brandenburg* Court required that for speech (advocacy) to constitute criminal incitement, it must be both intended to produce imminent lawless action and be likely to produce such action. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

251 *Grosjean*, 297 U.S. at 249–50 (quoting Judge Cooley and citing 2 THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 886 (8th ed.) (1927)) (the Court interpreted *Near* as finding that "the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it").

by pocketbook, and the IRA was a terrorist group that intentionally killed innocent civilians, though such support was not criminalized.[252]

Section 2339B hinders free and general discussion of public matters of terrorism on social media platforms and hence functions as an impermissible prior restraint. And while a few exceptional prior restraints have been deemed lawful by the Court, if against *otherwise unprotected speech* such as threats, defamation, or *Brandenburg* incitement, the provision of expression as material support reaches classically protected speech and hence demands protection for the publisher.[253] Material support per § 2339B is vastly broader than anything the Court has exempted from the prohibition against prior restraints.

Furthermore, while the Supreme Court has admitted that there is constitutional room for some criminal prosecution of publication after the fact, despite that such prosecution operates as a *de facto* prior restraint, its initial exemptions have been limited. Speech interfering with military recruiting in wartime would now be allowed in light of the subsequent *Brandenburg* decision.[254] If one compares another category of criminal prosecution for publication that the *Near* Court found copacetic—wartime publication of military secrets—one sees that this is a far narrower category than § 2339B. It is far smaller both because of the limiting effect of "wartime" compared with § 2339B's FTOs (they need not be organizations with which the United States is at war), and because of the prohibited speech itself: military secrets presumably constitute a much smaller category than advocacy, propaganda, training, and other types of speech that are criminalized under the material support statute because of the value they potentially provide to such groups. This incredibly wide reach of § 2339B in the speech arena makes its prior restraint effect an intolerable one for press publishers such as Twitter and Facebook.

Even regarding libel laws, another exception to the prohibition against prior restraints, the Court later noted that, in the civil context, too low of a standard for libel awards against the press (newspapers in that case) could inappropriately deter such entities from giving "voice to public criticism."[255] Section 2339B inappropriately deters Twitter, Facebook, and similar social media publishers from giving voice to public criticism in the form of advocating for groups such as Hamas, etc.—groups the American public needs to, like the IRA in the 1970s,

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252 *See generally* Kevin Cullen, *The IRA & Sinn Fein*, PBS: FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/ira/reports/america.html (last visited Sept. 5, 2017).

253 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 715–16 (1931) (finding press criminal punishment appropriate in cases of libel, interference with judicial proceedings, wartime publication of military secrets, and wartime interference with military recruiting).

254 *See* STONE, *supra* note 2.

255 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964).

discuss through legitimate democratic discourse that the modern fourth estate hopefully facilitates.[256]

CONCLUSION

The charge in the Civil War military commission against Clement Vallandigham that this Article opened with characterized his wartime speech this way: "All of which opinions and sentiments he well knew did aid, comfort and encourage those in arms against the Government, and could but induce in his hearers a distrust of their own Government and sympathy for those in arms against it . . . ."[257]

While the speech on social media today that supports terrorist groups is usually more chilling, the fear driving both Vallandigham's prosecution and the material support statute today remains similar. Just as in the Civil War, we must be mindful to ensure prosecution and hence suppression of ideas do not impede the very democratic discourse our nation is based upon, and this is even more critical when it comes to shackling the press, as it is relied upon to disseminate as well as analyze ideas. In the words of Justice Stewart, "not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government."[258]

While the Court has ruled that the constitutionality of § 2339B in relation to an individual's speech of this type is defensible in relation to the national security interest at stake, the much broader application of this same statute to social media platforms, our modern fourth estate, is not. Not only does this statute suffer grave vagueness issues when applied to a social media provider, contributing to an over-deterrence effect on these platforms, it runs afoul of the First Amendment's press narrative. Facebook, Twitter, and other social media companies should be shielded from criminal prosecution for material support to terrorism in most instances by the First Amendment's aegis of expression. This shield protects the press from statutes that burden its ability to exercise editorial discretion and to disseminate ideas, even ideas that seem

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256 Additionally, the troublesome speech at issue here cannot be banned by the government if the requisite link to a terrorist group is not present, at least according to current First Amendment law. This makes the application of the material support statute to social media providers a broad interference with their core press functions that cannot be reconciled with the statute's ultimate objective. If the objective is to remove such speech because it provides support to terrorist groups, that objective can never be fully met, since the Court has clarified the statute's safe harbor. So this statute fails a test requiring narrow tailoring.

257 The *Court Martial of Hon C. L. Vallandigham*, HOLMES COUNTY FARMER, May 28, 1863, http://chroniclingamerica.loc.gov/lccn/sn84028822/1863-05-28/ed-1/seq-1.pdf.

258 Branzburg v. Hayes, 408 U.S. 665, 726–27 (Stewart, J., dissenting).

odious because of what they advocate or, critically, for whom they advocate. This statute does both.

Finally, it is highly doubtful that the vagueness issues that exist due to the difficulty in determining which social media users possess the requisite criminal link to an FTO can be cured in the near future. Separating which individual social media users are advocating for an FTO on social media and are in coordination with such a group from those posting similar advocacy messages yet are not coordinating, seems a near-impossible task given the vast number of social media users and the low threshold for user entry. However, even if such vagueness is eliminated, the press simply should not be punished for otherwise-protected speech it chooses to publish, absent extraordinary circumstances, if freedom of expression is to remain robust.