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AMERICANS, ISIS, AND SOCIAL MEDIA: HOW THE MATERIAL SUPPORT STATUTE CAN HELP COMBAT AGAINST THEIR COLLISION

MORGAN STACEY*

INTRODUCTION

On February 15, 2015, a video was released showing the beheading of over a dozen Egyptian Christians by ISIS, the Islamic State in Iraq and Syria.¹ The White House immediately condemned the video, noting that ISIS's "barbarity knows no bounds."² This attack is one of several that showcases the dangerous threat that ISIS poses to the global community. Through oil smuggling operations, donations, and other means, ISIS has managed to make an estimated one to two million dollars a day to help support its deadly and lethal arsenal of soldiers and weapons,³ allowing it to push forward and gain significant portions of territory within Iraq and Syria.⁴

ISIS has further created and developed a sophisticated recruitment method through social media devices, using Facebook, Twitter, Instagram, and online websites as an effective means of spreading propaganda, training, and spreading radical messages from jihadists in war-ridden zones to anyone that has access to an Internet connection, such as impressionable teenagers from Denver or Chicago.⁵ The ability of ISIS members to manipulate the Internet has successfully given this terrorist organization a long list of Western recruits, including American citizens. In fact, the number of foreign fighters joining ISIS has spiked to over 25,000 from more than 100 countries, according to a newly

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1. Ben Brumfield, *Officials: 3 Denver Girls Played Hooky from School and Tried to Join ISIS*, CNN (Oct. 22, 2014, 10:28 AM), <http://www.cnn.com/2014/10/22/us/colorado-teens-syria-odyssey/>; Monte Plott et al., *ISIS Video Appears to Show Beheadings of Egyptian Coptic Christians in Libya*, CNN (Feb. 16, 2015, 7:34 AM), <http://www.cnn.com/2015/02/15/middleeast/isis-video-beheadings-christians/>.

2. Plott et al., *supra* note 1.

3. Scott Bronstein & Drew Griffin, *Self-funded and Deep-rooted: How ISIS Makes Its Millions*, CNN (Oct. 7, 2014, 9:54 AM), <http://www.cnn.com/2014/10/06/world/mcast/isis-funding/>.

4. *Battle for Iraq and Syria in Maps*, BBC NEWS (Apr. 1, 2015), <http://www.bbc.com/news/world-middle-east-27838034> (showing maps indicating the amount of land within Syria and Iraq that ISIS has taken control of).

5. Mariano Castillo & Catherine E. Shoichet, *Was Arrested Teen on His Way to Join ISIS?*, CNN (Oct. 7, 2014, 8:25 AM), <http://www.cnn.com/2014/10/06/us/teen-isis-support-arrest/index.html>.

released United Nations report.⁶ As many as 130 American citizens and 488 United Kingdom citizens comprise some of these foreign fighters.⁷ This evidences the grave problem that ISIS poses through its online recruitment strategies. Recently, the Nigerian-based Islamic group known as Boko Haram, responsible for killing at least 13,000 people and displacing millions of others,⁸ pledged allegiance to ISIS in March 2015, fueling further the lethal army that ISIS has created.⁹

The United States now faces a dilemma of tackling ISIS and its enhanced recruitment of Americans, not only when this recruitment is successful, but also when individuals attempt to provide material support to this organization by succumbing to and becoming part of the sophisticated recruitment process.¹⁰ The federal government has attempted to use the material support statute¹¹ against these individuals in order to prevent future terrorist attacks in and against America,¹² but the statute's language and judicial interpretation in *Holder v. Humanitarian Law Project*¹³ have left it unclear as to whether or not individuals who simply encourage others to join the fight for ISIS through social media can be charged with an attempt to violate the material support statute.

For example, imagine an Imam from a mosque who has taken to Facebook to encourage others within the community to leave their homes, fly to Turkey, and cross into the Syrian border to fight with ISIS. Additionally, the Imam encourages those older individuals, who may not have the physical capabilities to provide for themselves, to instead donate finances to ISIS in order to further the cause. This "advocacy plus" style of support may violate the statute as an *attempt* to provide material support, or this Imam who supports ISIS may not be subject to federal prosecution because of First Amendment protection.¹⁴ In this

6. Edith M. Lederer, *UN Report: More than 25,000 Foreigners Fight with Terrorists*, ASSOCIATED PRESS (Apr. 2, 2015, 12:12 AM), <http://bigstory.ap.org/article/cec52a0dbfab4c00b89bc543badf6c20/un-report-more-25000-foreigners-fight-terrorists>.

7. See Gene Thorp, Julie Tate & Swati Sharma, *Foreign Fighters Flow to Syria*, WASH. POST (Oct. 11, 2014), http://www.washingtonpost.com/world/foreign-fighters-flow-to-syria/2014/10/11/3d2549fa-5195-11e4-8c24-487e92bc997b_graphic.html (including a map that indicates the estimated number of people from each country around the world that have joined ISIS in Syria).

8. Jerome Starkey, *Boko Haram Attack: Nigerian Christians Sang Hymns Before Slaughter*, AUSTRALIAN (Apr. 7, 2015, 9:37 AM), <http://www.theaustralian.com.au/news/world/boko-haram-attack-nigerian-christians-sang-hymns-before-slaughter/story-fnb64oi6-1227293961137> (detailing Boko Haram's six-year insurgency within Nigeria and the fear within the Nigerian Christian community of this Islamic group).

9. Nima Elbagir, Paul Cruickshank & Mohammed Tawfeeq, *Boko Haram Purportedly Pledges Allegiance to ISIS*, CNN (Mar. 9, 2015, 10:39 AM), <http://www.cnn.com/2015/03/07/africa/nigeria-boko-haram-isis/index.html>.

10. *Id.*

11. The material support statute will also be interchangeably referred to as section 2339B throughout this Note.

12. Castillo & Shoichet, *supra* note 5 (indicating the police are charging Khan with violations under the material support statute).

13. 561 U.S. 1 (2010).

14. See *id.* (finding that, when determining whether material support is given outside of a financial example, the analysis is all fact dependent and depends on context).

Note, I argue that individuals who support ISIS through encouragement and participation in the recruitment process through social media fall into criminal prosecution under the statute, as they have attempted to provide material support, namely personnel, to the foreign terrorist organization. This support of ISIS through social media is not protected First Amendment speech, as the support turns into an attempt to provide personnel or finances to the group.

Part I will focus on ISIS as an organization, its history, and its recruitment strategies. It will discuss ISIS's innovative use of social media for recruitment and its dangerously overwhelming success in utilizing this methodology to recruit Westerners and, more specifically, Americans. It will also address the problems facing prosecutors today in holding Americans liable for their attempts to provide material support to ISIS through social media outlets when this attempt is done independently. Part II of this Note will focus on the long-winding history and evolution of the material support statute, including its most influential and binding judicial interpretation in *Humanitarian Law Project*. Within this case, this Note will discuss the flaws of the Court's failure to provide a definition for "independent advocacy" in its interpretation of the statute and how independent advocacy may be distinguishable from "attempt to provide material support." Part III will address how the statute should apply and should encompass the Americans who attempt to provide material support to ISIS without being under the command and control of the organization, and how these individuals have taken a "substantial step" necessary to subject themselves to criminal prosecution for attempting to provide material support to ISIS. Prosecution of these Americans will optimistically combat the success of ISIS's recruitment from the very beginning as opposed to when it is too late.

I. ISIS¹⁵

In order to understand ISIS's use of social media, a brief explanation of who and what this organization is may be helpful.

A. *History of the Organization*

ISIS developed in 2004 in Iraq as Jama'at al-Tawhid wal-Jihad by a Jordanian jihadist, Abu Mus'ab al-Zarqawi,¹⁶ but had existed under various names since the 1990s.¹⁷ The group was originally made up of mostly non-Iraqis, despite being created in Iraq, and began by targeting

15. ISIS is also referred to as ISIL, or the Islamic State of Iraq and the Levant. For purposes of this Note, however, ISIL will be referred to as ISIS.

16. Robert G. Rabil, *The ISIS Chronicles: A History*, NAT'L INTEREST (July 17, 2014), <http://nationalinterest.org/feature/the-isis-chronicles-history-10895?page=2>.

17. Bobby Ghosh, *A Short Political History of the Terrorists Who Call Themselves the "Islamic State"*, QUARTZ (Aug. 13, 2014), <http://qz.com/248787/a-short-political-history-of-the-barbaric-terrorists-who-call-themselves-the-islamic-state/>.

Iraq's majority Shia Muslim population.¹⁸ After receiving endorsement by Osama bin Laden for his jihadi tactics, Zarqawi associated his group with bin Laden's, and by 2006, was insisting that his Iraqi Sunni hosts comply with his radical interpretation of sharia law.¹⁹ Those who resisted were executed.²⁰ It was this same year that the group joined forces with other Sunni militant groups to form what they later named the Islamic State of Iraq.²¹

Zarqawi was killed in June 2006 by a U.S. air strike, and by 2007 the group began weakening due to U.S. Special Operations Forces' counterterrorism strategy.²² As civil war emerged in Syria, jihadists were drawn into the rebellion, ultimately signing a truce with the Free Syrian Army and establishing a "de facto state" in both Iraq and Syria, against the orders of al-Qa'ida leader Zawahiri.²³ Tensions grew further between Zawahiri and the more radical extremists, ultimately leading al-Qa'ida to formally disassociate itself from the radical group in February 2014, and allow the group to formally declare itself a separate organization, The Islamic State.²⁴ ISIS is currently under the leadership of Abu Bakr al-Baghdadi, who has expanded the group in numbers, territory, and reputation, even developing the organization's staple black flag containing the Arabic words for "There is no God but God," which has become infamous for flying in the back of each video of an ISIS member beheading a non-believer.²⁵ As of August 2014, ISIS controlled between twelve and thirty-five thousand square miles of terri-

18. *Id.* Zarqawi and Osama bin Laden both regarded the Shia as heretics, but Zarqawi believed the Shia were convenient targets whereas bin Laden rarely targeted them. In order to build his reputation as a "superstar" jihadist, Zarqawi began deploying suicide bombers across Iraq to predominately Shia cafes, mosques, schools, and markets. *Id.* His true "malevolence" against the Shia was shown with his bombing of the Imam Ali shrine in Najaf, the "holiest place of Shia worship in Iraq." *Id.* Shia and Sunni are the two main branches of Islam, with a split that stems back to the ancient death of the Prophet Muhammad. *Sunnis and Shias: Islam's Ancient Schism*, BBC News (June 20, 2014, 8:03 PM), <http://www.bbc.com/news/world-middle-east-16047709>. Following his death, the Shia believed Ali, the son-in-law of the Prophet, and his descendants had the right to rule the Islamic community. The Sunni claimed that Abu Bakr, the Prophet's friend, had the right to rule. The two groups share fundamental beliefs, but the Sunni tradition emphasizes a codified system of Islamic law and is the majority sect within the Muslim world total, with somewhere between eighty-five and ninety percent of Muslims identifying as Sunni. *Id.* Iraq, however, has a majority Shia population. *Id.*

19. Ghosh, *supra* note 17.

20. *Id.*

21. Zachary Laub & Jonathan Masters, *The Islamic State*, COUNCIL ON FOREIGN RELATIONS (May 18, 2015), <http://www.cfr.org/iraq/islamic-state-iraq-syria/p14811>.

22. *Id.* In addition to the counterterrorism campaign, the "Sunni Awakening" movement further helped diminish the capabilities of the Islamic State. *Id.*

23. *Id.* Zawahiri ruled that ISIS operations be limited strictly to Iraq. *Id.*

24. Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html.

25. Ghosh, *supra* note 17.

tory in Iraq and Syria, largely due to ISIS's massive campaign through social media that has led to its large and dangerous army.²⁶

B. *What ISIS Hopes to Achieve*

Many misunderstand the concept of "jihadism" and apply the concepts of al-Qa'ida to all proclaimed jihadist groups. Jihadism has, however, evolved in the years since radicalized Muslims tragically hijacked and crashed airplanes into the World Trade Center and unleashed planned attacks on the Pentagon.²⁷ The Islamic State is one example of this evolution from Osama bin Laden's "geographically diffuse network of autonomous cells" into the Islamic State's organized and structured bureaucracy.²⁸ Ultimately, the group has three main goals and strategies: (1) to appeal to individuals about a greater purpose and higher being, namely that a broader Islamic caliphate must be created;²⁹ (2) to spread the message that Westerners and Americans have historically shown aggression toward Islam and must be eliminated; and (3) to glorify all its attacks against the Western world and to use this as a means of recruiting.³⁰

ISIS adheres to what is known as the "Prophetic methodology," meaning a strict following of the Prophet Muhammad.³¹ The group also bases its actions around its most important goal: to restore the caliphate, meaning an Islamic State under the rule of a "caliph," or supreme leader.³² ISIS wants to gain territory and power and to establish its own leadership over Muslim believers—and it wants to do so quickly, killing any and every person that stands in its way that disagrees with its extreme interpretation of Islam.³³ And ISIS is not shy regard-

26. Emily Goldberg Knox, Note, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 297 (2014); Kathy Gilsinan, *The Many Ways to Map the Islamic State*, ATLANTIC (Aug. 27, 2014), <http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-the-islamic-state/379196/>. These large territories have been declared by leader Baghdadi as a "caliphate" in June. This message was declared on ISIS's Twitter account, al-I'tisaam Media Foundation, and was translated into multiple languages by al-Hayat Media Center, further indicating the group's consistent use of social media. Rabil, *supra* note 16.

27. Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/> ("[M]any jihadists disdain [al-Qa'ida's] priorities and current leadership.").

28. *Id.*

29. Anthony Cordesman, *Viewpoint: ISIS Goals and Possible Future Gains*, BBC NEWS (June 12, 2014), <http://www.bbc.com/news/world-middle-east-27801680>.

30. Eric Davis, *ISIS's Strategic Threat: Ideology, Recruitment, Political Economy*, NEW MIDDLE E. (Aug. 17, 2014, 7:24 PM), <http://new-middle-east.blogspot.com/2014/08/isis-strategic-threat-ideology.html>.

31. Wood, *supra* note 27.

32. M. Alex Johnson, *'Deviant and Pathological': What Do ISIS Extremists Really Want?*, NBC NEWS (Sept. 3, 2014, 4:41 AM), <http://www.nbcnews.com/storyline/isis-terror/deviant-pathological-what-do-isis-extremists-really-want-n194136>. The interpretation of caliphate throughout history by past Islamic rulers differs from the interpretation ISIS exercises. This Note will not focus on the history of caliphates but will instead focus on the Islamic State's pursuit of what it believes to be the correct caliphate for Muslims.

33. *See id.* ("In ISIS' view . . . anyone who doesn't believe in its severe interpretation of Islam must convert or die."). *See also* Stephanie Condon, *As ISIS Grows, Questions*

ing these killings. In fact, it publicly displays its slaughters through social media and online devices,³⁴ proving the group is not primitive but rather engages in very sophisticated tactics.³⁵

In June 2014, ISIS began attempting to establish its “rightful” caliphate by declaring its leader, al-Baghdadi, to be a descendant of the Prophet Muhammad and therefore the correct and justified “caliph.”³⁶ ISIS has gained territory in Iraq, Syria, Libya, and Lebanon and has received such a high volume of support that Jordanians are now very worried about ISIS as well.³⁷ The organization has taken in millions of dollars—from donations, selling resources collected from oil refineries and oil fields, and from collecting ransom money from kidnappings—all to help run and implement its caliphate.³⁸ This rapid and unprecedented level of gained support, finances, and territory has allowed ISIS to emerge as a national security threat to not just the United States but to the international community as a whole. In addition, ISIS has developed a sophisticated method of recruitment, especially through online behavior, that has attracted thousands of fighters from around the world to join the cause—including many Americans.³⁹

C. *ISIS Recruiting Tactics and Social Media Uses*

As of February 2014, the Pentagon estimated that ISIS has between twenty and thirty thousand combatants who may fight on its behalf.⁴⁰ Following a sermon delivered by al-Baghdadi in July 2014, it was reported that a steady flow of foreign fighters were streaming into recruitment stations in areas such as Turkey, ready and willing to give up their homes and lives to pursue jihad on behalf of ISIS in territories like Syria and Iraq.⁴¹ It is estimated that these foreigners stem from as

Remain About Its Goals, CBS NEWS (Aug. 13, 2014, 5:54 AM), <http://www.cbsnews.com/news/as-isis-grows-questions-remain-about-its-goals/> (noting ISIS has gained momentum in ways that Osama bin Laden never did).

34. CNN Library, *ISIS Fast Facts*, CNN, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/> (last updated Oct. 14, 2015, 2:54 PM) (listing a complete timeline of ISIS activities, including: the decapitation of American journalists James Foley in August 2014 and Steven Sotloff in September 2014; the execution of British aid worker David Haines also in September 2014; the beheading of British citizen Alan Henning in October 2014; the beheading of American citizen Peter Kassig in November 2014; a video of Japanese hostage Kenji Goto holding a photo of beheaded Japanese hostage Haruna Yukawa, followed by a video of Kenji Goto's decapitated body in January 2014; a video of Jordanian hostage and military pilot Moath al-Kassabeth being burned alive while locked inside a cage in February 2015; a photo confirmation sent to American hostage Kayla Mueller's family showing her dead body wrapped in a burial shroud in February 2015; a video of the decapitation of twenty-one Egyptian Christians on a beach in Libya in February 2015; and a video of at least twenty-one Kurdish Peshmerga fighters in cages being paraded down the streets of Iraq in February 2015).

35. Johnson, *supra* note 32 (quoting Leila Hudson, an associate professor at the School of Middle Eastern and North African Studies at the University of Arizona).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. CNN Library, *supra* note 34.

41. Wood, *supra* note 27.

many as ninety countries around the world, with many coming from central Asia. Additionally, a new, increased trend in Western women joining the fight has emerged.⁴² The U.S. State Department said “around a dozen” U.S. citizens are now fighting with ISIS, and recently James Clapper, the Director of National Intelligence, told Congress that he estimates 180 U.S. citizens have traveled or attempted to travel to Syria to fight with ISIS.⁴³ A key strategy that the Islamic State has used to recruit new fighters has been a sophisticated social media center,⁴⁴ which creates issues domestically over how to hold these U.S. nationals legally accountable when it is discovered they have joined or supported ISIS through their use of the Internet and social media.⁴⁵

The Islamic State usually begins its recruitment of Westerners, including U.S. citizens, through social media outlets such as Twitter.⁴⁶ It is on this website, which is open to the public, that ISIS can begin its recruitment process by allowing interested and potential recruits to make initial contact.⁴⁷ Potential recruits can ask ISIS members practical questions, such as what life is like in the organization, whether the borders are difficult to cross into in order to join the group, and whether there are certain requirements that potential recruits must meet in order to be considered.⁴⁸

Following these initial conversations, ISIS members then conduct an interview process in order to determine which potential recruits are serious, usually done over Skype using encryption software and proxy servers in order to avoid detection.⁴⁹ Potential recruits are asked ques-

42. Robert Windrem, *ISIS by the Numbers: Foreign Fighter Total Keeps Growing*, NBC NEWS (Feb. 28, 2015, 8:50 AM), <http://www.nbcnews.com/storyline/isis-terror/isis-numbers-foreign-fighter-total-keeps-growing-n314731> (noting that large numbers of foreign fighters are coming from the Chinese province of Xinjiang and an influx of women, particularly from the West, has become a “new trend”).

43. *Id.*

44. Alessandria Masi, *Here's How ISIS Recruits Westerners*, BUS. INSIDER (Sept. 10, 2014, 2:11 PM), <http://www.businessinsider.com/how-isis-recruits-westerners-2014-9> (calling ISIS's social media center a vital part of spreading its message); Rima Marrouch, *How ISIS Is Growing, and the Fight to Stop It*, CBS NEWS (Sept. 15, 2014, 10:56 AM), <http://www.cbsnews.com/news/isis-focus-on-recruiting-foreigners-and-the-online-drive-to-stop-it/> (“[ISIS has] the most sophisticated and professional communication strategy I’ve seen.”) (quoting Firas Abi Ali, head of Middle East and North Africa Country Risk and Forecasting at IHS, a global security consultancy); Francesca Trianni & Andrew Katz, *Why Westerners Are Fighting for ISIS*, TIME (Sept. 5, 2014), <http://time.com/3270896/isis-iraq-syria-western-fighters/> (noting that social media plays a “significant role” in ISIS recruitment); Holly Yan, *Why Is ISIS So Successful at Luring Westerners?*, CNN (Oct. 7, 2015, 8:01 AM), <http://www.cnn.com/2014/10/07/world/isis-western-draw/> (claiming that ISIS has the “most sophisticated propaganda machine” of any foreign terrorist organization).

45. See Yan, *supra* note 44 (acknowledging that Westerners are concerned that ISIS recruits from foreign countries will return home, bringing with them their ability to launch attacks).

46. Masi, *supra* note 44; Marrouch, *supra* note 44.

47. Marrouch, *supra* note 44.

48. *Id.* Questions posed to ISIS members from interested recruits on initial websites like Twitter include whether spouses can join the fight, if the borders have tight security making entry into Syria difficult, and whether disabilities can prevent a recruit from joining. *Id.*

49. Masi, *supra* note 44.

tions such as what mosques they attend in their area and what scholars they know.⁵⁰ Before long, the vetting process concludes and travel arrangements become the next focus of discussions. The ISIS recruiter typically sets up meeting points on both sides of the border, usually the Turkish-Syrian border, to make sure the final journey is successful for the recruit.⁵¹ Once inside the Syrian border, recruitment continues until the foreign fighter has proved his or her allegiance to the Islamic State.⁵² But one of the most important questions to ask is this: what draws these foreigners, including U.S. citizens, to inquire about ISIS in the first place? What could build their interest? The answer to these questions again revolves around the Islamic State's manipulation of social media and the glorification of its lethal campaign against the West—*before* any contact with recruits is even made.

ISIS utilizes Instagram, Facebook, YouTube, and other various websites to display images that can influence individuals with a weak sense of identity or who are simply searching for somewhere to belong.⁵³ These images show ISIS capturing territory and claiming it as its own, establishing a new community and state within this new territory. They also show ISIS defeating its enemies in brutal ways such as through beheadings, and more generally, through the flexing of its organizational strength.⁵⁴ One scholar describes this tactic as showing "that they are the sexiest jihadi group on the block."⁵⁵

Many members of ISIS take to sites such as ask.fm or Tumblr, in addition to Twitter, and display their lives in a way that makes them appear full of love, brotherhood, and purpose.⁵⁶ These images found on social media sites range from ISIS jihadists posing with baby kittens or Nutella in order to give Westerners a sense of familiarity⁵⁷ to images of corpses or beheaded victims. A fighter said on Twitter, "Got these criminals today. Insha'Allah will be killed tomorrow. Cant wait for that feeling when U just killed some1."⁵⁸ These more brutal images may also include ISIS fighters passing out candy while standing around piles of corpses, in order to send a message that ISIS has the power to turn "the rest of the world into a graveyard" but award its followers with a happy and fruitful life.⁵⁹ ISIS even began creating memes⁶⁰ to appeal

50. *Id.*

51. *Id.*

52. *Id.*

53. Trianni & Katz, *supra* note 44.

54. *Id.*

55. *Id.*

56. Terrence McCoy, *How ISIS and Other Jihadists Persuaded Thousands of Westerners to Fight Their War of Extremism*, WASH. POST (June 17, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/17/how-isis-persuaded-thousands-of-westerners-to-fight-its-war-of-extremism/> ("They often portray their life as warm and important.").

57. *Id.* (displaying an image dated May 30, 2014 of an alleged ISIS member holding a pet kitten with a caption that reads, "My puppacita astutely pointing out that dogs wag, cats wage jihad."); Jacob Siegel, *ISIS Is Using Social Media to Reach You, Its New Audience*, DAILY BEAST (Aug. 31, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/08/31/isis-s-use-of-social-media-to-reach-you-its-new-audience.html>.

58. McCoy, *supra* note 56 (internal quotation marks omitted).

59. Siegel, *supra* note 57.

directly to Americans—one, for example, being an image of two ISIS fighters posed, holding machine guns, over a caption that reads “This is Our Call of Duty,” a reference to Call of Duty, a popular video game in America.⁶¹ This range of images and propaganda shows that ISIS not only wishes to boast about their power over Americans, but also to inspire them to join the fight.⁶²

In addition to images through online engines such as Instagram and Facebook, ISIS fighters also utilize and exploit Twitter to send their propagandist messages to Westerners. It creates what are known as “hashtag campaigns,” where thousands of activists repeatedly tweet the same hashtags throughout the day to commandeer social media.⁶³ For example, during the World Cup in 2014, ISIS members began using the hashtag #WorldCup2014 when tweeting photos and phrases.⁶⁴ This allowed ISIS to infiltrate and exploit the hashtag, so any and all soccer fans who viewed the Twitter messages associated with the hashtag #WorldCup2014 were met with a mix of soccer photos and ISIS propaganda.⁶⁵

ISIS even has its own Arabic language Twitter app, known as “The Dawn of Glad Tidings,” or “Dawn” for short.⁶⁶ It is on this app that ISIS has methodically and successfully employed an operation of posting tweets to each user’s account, which include links, hashtags, and images, which are then re-tweeted out by each user that has the app.⁶⁷ ISIS has even organized this operation to send out the messages sporadically to avoid Twitter’s spam-detection algorithms.⁶⁸ It is recorded that in late June 2014, this app allowed ISIS activists to reach an all-time

60. A meme is defined as “a cultural item in the form of an image, video, phrase, etc., that is spread via the Internet and often altered in a creative or humorous way.” *Meme*, DICTIONARY.COM, <http://dictionary.reference.com/browse/meme> (last visited Oct. 14, 2015).

61. Siegel, *supra* note 57; see also Aris Roussinos, *The Social Media Updates of British Jihadis in Syria Just Got a Lot More Distressing*, VICE (Apr. 15, 2014), http://www.vice.com/en_uk/read/british-jihadis-beheading-prisoners-syria-isis-terrorism. This website displays many of the social media posts of ISIS fighters, specifically the ones known to be British. It includes an Instagram post with a photo of two fighters under a caption referencing the video game Call of Duty. The photo had seventy-two likes at the time it was taken. *Id.*

62. Siegel, *supra* note 57.

63. J.M. Berger, *How ISIS Games Twitter*, ATLANTIC (June 16, 2014, 2:00 PM), <http://www.theatlantic.com/international/archive/2014/06/isis-iraq-twitter-social-media-strategy/372856/>. These hashtag campaigns can alter the results on a popular Arabic Twitter account known as @ActiveHashtags, which shows the top trending tweet tags per day. Once these results are skewed and ISIS gets its own hashtags into the stream on @ActiveHashtags, more individuals are exposed to the ISIS tweets and it ultimately results in an average of seventy-two retweets per tweet. *Id.* This tactic by ISIS allows it to constantly outperform all other foreign terrorist organizations, including its main competitor in Syria, Jabhat al-Nusra. *Id.*

64. Siegel, *supra* note 57.

65. *Id.*

66. Berger, *supra* note 63.

67. *Id.*

68. *Id.* See also KURT THOMAS ET AL., SUSPENDED ACCOUNTS IN RETROSPECT: AN ANALYSIS OF TWITTER SPAM (2011), <http://www.icir.org/vern/papers/twitter-susp-accounts.imc.2011.pdf> (indicating the exact implementation of this detection algorithm is not available or known to the public).

high of forty thousand tweets in one day, indicating their strength through this social media device as well as each and every other app or online engine it chooses to use.⁶⁹

D. *Americans Supporting ISIS Through Social Media*

Because of the Islamic State's sophisticated and successful social media recruitment, it has managed to attract what United States officials now estimate to be roughly 3,400 Westerner fighters.⁷⁰ Of these Westerners, it is estimated that possibly 180 American citizens have traveled or attempted to travel to Syria to fight alongside this radical Islamic group.⁷¹ These Americans not only pose a threat abroad as they form alliances with ISIS and carry out brutal attacks, but they also pose significant risks to the United States' war against terrorism. For those individuals who attempt to join ISIS and are apprehended before they succeed in joining the forces, and for those who join and find themselves returning to America with the capability of carrying out attacks, there is a question of how to punish these citizens and mitigate the risks that they pose to America. There is also the question of how to stop these individuals before they physically try to join the fight with ISIS.

Teenagers as young as fifteen have attempted to join ISIS forces and wage a war against what appears to be the rest of the world.⁷² Often times, these individuals express their support for ISIS through social media—the first step in making the decision to join the organization.⁷³ The material support statute could be used to stop the progression of ISIS support by Americans before more individuals get on planes headed towards the Turkish-Syrian border, but the statute has only been used in a few extreme cases thus far.

A New York store owner, for example, was arrested on May 31, 2014 and charged with three counts of trying "to provide material support to a terrorist organization."⁷⁴ Tweets recovered from Mufid A. Elfgeeh's Twitter account read, "Al Qaeda said it loud and clear: we are fighting the American invasion and their hegemony over the earth and

69. Berger, *supra* note 63.

70. Windrem, *supra* note 42.

71. *Id.* James Clapper, the Director of National Intelligence, estimates that the number of Americans that have tried to or succeeded in entering Syria and joining ISIS has increased from 100 to 150, and most recently to 180. *Id.*

72. See Shimon Prokupecz, *Denver Teens Set Out for Syria to Join Extremists; Parents, FBI Bring Them Back*, CNN (Oct. 23, 2014, 6:14 PM), <http://www.cnn.com/2014/10/21/us/colorado-teens-syria-odyssey/> (discussing three teenage girls in Denver who were apprehended in Germany after trying to board a flight into Istanbul and sneak into the Syrian border to fight with ISIS).

73. See *supra* notes 40–62 and accompanying text (discussing the recruitment strategy ISIS implements).

74. Greg Botelho, *Feds: NY Store Owner Plotted to Send Jihadists to Syria, Kill U.S. Troops Himself*, CNN (Sept. 17, 2014, 7:18 PM), <http://www.cnn.com/2014/09/16/justice/suspected-isis-supporter-ny/> (noting Mufid A. Elfgeeh was additionally charged with "one count of attempting to kill officers and employees of the United States, two counts of having an unregistered firearm silencer and one for possessing guns or silencers . . .").

the people” and that ISIS “will one day rule the world with the will of Allah.”⁷⁵ The affidavit against Elfgeeh alleges he urged people to donate one-third of their salary or “#Five_thousand_dollars_from_every_household” to ISIS.⁷⁶ He also recruited FBI informants whom he believed to be ISIS sympathizers, helped pay for their passport costs, helped plan their travel arrangements, and put them in contact with additional members of the terror group for the ultimate goal of sending them to join the organization.⁷⁷ Elfgeeh not only urged people to donate money to ISIS to help further their cause, but also actively recruited for ISIS in order to “export” those Americans that wanted to join jihad.⁷⁸ He therefore falls easily into the category of people providing material support to a foreign terrorist organization.

On the other hand, federal authorities also apprehended a twenty-nine year old Virginian woman named Heather Coffman after supporting ISIS on social media websites in 2014.⁷⁹ Coffman’s Facebook revealed posts reading, “I love ISIS” and photos of ISIS fighters with captions such as “Allah has preferred the Mujahideen over those who remain [behind] with great reward.”⁸⁰ Coffman had told an undercover FBI agent that she made pro-ISIS statements because she loves ISIS and hates all gays and Zionists—even wishing that all gays and Zionists would die.⁸¹ Her social media activity does not indicate that she made any financial contributions to ISIS, or communicated with ISIS members.⁸² It appears that Coffman was acting as a lone wolf. She did not make any financial contributions to ISIS, nor was she in communication with ISIS,⁸³ thus not violating the material support statute. However, the statute does criminalize the *attempt* to provide material support, and if further investigation into Coffman’s social media activity reveals attempts to promote and recruit individuals to join ISIS or any other attempts to support the organization, prosecutors have no clear answer as to whether she may be charged with a violation of the material support statute. The gap between those who act under the command and control of ISIS to provide personnel through social media recruitment, such as Mufid A. Elfgeeh, and those who independently advocate for the recruitment and purpose of ISIS, such as the hypothetical Imam or potential Heather Coffman, must be filled in order to fulfill the statute’s purpose.

75. *Id.* (internal quotation marks omitted).

76. *Id.*

77. *Id.*

78. *Id.*

79. David Kravets, *Woman Posts “Love” of ISIS on Facebook, Charged with “Promoting” Terrorism*, ARS TECHNICA (Nov. 18, 2014, 2:10 PM), <http://arstechnica.com/tech-policy/2014/11/woman-posts-love-of-isis-on-facebook-charged-with-promoting-terrorism/>.

80. *Id.*

81. *Id.*

82. *See generally id.* An inference can be made from the article that no financial contributions were made, and rather, the only social media activity that Coffman conducted was verbal and written support.

83. Kravets, *supra* note 79.

II. MATERIAL SUPPORT STATUTE

A. *Creation of the Material Support Statute*

In 1993, the World Trade Center was bombed for the first time by a group of terrorists wishing to kill thousands of innocent Americans.⁸⁴ This prompted Congress to pass the Violent Crime Control and Law Enforcement Act of 1994, which included the first modern material support statute in 18 U.S.C. § 2339A,⁸⁵ in order to prevent financial support to terrorist organizations.⁸⁶ Additionally, Congress prohibited the provision of “material support or resources” to any foreign terrorist organization because “foreign organizations known to engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”⁸⁷

Two years later, Timothy McVeigh, an ex-Army soldier and security guard, set off a powerful bomb in front of the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring hundreds more.⁸⁸ In response, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) which included a second and more broadly sweeping material support statute,⁸⁹ 18 U.S.C. § 2339B, terminating any possibility that an individual could legally provide donations to a terrorist group if the donor intended the money be spent on something other than violence, even political or social services provided by the terrorist group.⁹⁰

The material support statute has now been referred to as the “heart” of the Department of Justice’s terrorism prosecution efforts, especially since the September 11th attacks.⁹¹ The provision makes it a federal crime to “knowingly provide material support or resources to a foreign terrorist organization,” or attempt or conspire to do so.⁹² And although it has been said by some attorneys that “[a]s the first major

84. Knox, *supra* note 26, at 303.

85. 18 U.S.C. § 2339A criminalizes the provision of material support with the knowledge or intent that the support will be used to carry out an act of terrorism.

86. Knox, *supra* note 26, at 303 (citing the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022-23).

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

88. *Terror Hits Home: The Oklahoma City Bombing*, FBI, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Mar. 3, 2016); Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT’L & COMP. L. REV. 1, 77 (2013).

89. The first material support statute is found at 18 U.S.C. § 2339A, which outlaws support for the crimes a terrorist has or may be planning to commit. See CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1 n.1 (2010), <https://fas.org/sgp/crs/natsec/R41333.pdf>. For purposes of this Note, the focus will remain on 18 U.S.C. § 2339B only.

90. Knox, *supra* note 26, at 303; Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13 (2005); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1247; Hollywood, *supra* note 88, at 77.

91. Knox, *supra* note 26, at 303; DOYLE, *supra* note 89, at 1.

92. 18 U.S.C. § 2339B(a)(1) (2012); Holder v. Humanitarian Law Project, 561 U.S. 1, 8 (2010).

anti-terrorism legislation after a large-scale domestic terrorist attack in the United States, [§ 2339B] represented an unprecedented broadening of U.S. anti-terror laws,”⁹³ the Act does contain statutory definitions intentionally drafted by Congress to address issues of vagueness.⁹⁴

B. Organization Structure

To violate the material support statute, a person must: (1) provide or *attempt to provide* “material support or resources” to a “foreign terrorist organization” with knowledge that (2) either the organization is a designated terrorist organization or has engaged or engages in terrorist activity.⁹⁵ The Act further contains various definitions that provide clarity to these terms and has a *mens rea* requirement, preventing the Act from being “vague.”⁹⁶

1. “Material Support or Resources”

The Act expressly states that the definition for “material support or resources” has the same meaning given to that term in section 2339A.⁹⁷ Therefore, “material support or resources” is defined as:

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.⁹⁸

Despite this lengthy definition, it is clear that the term “material” within the statute does not mean that the support be substantial; therefore, the Act covers a broad range of “activities.”⁹⁹ Congress did, however, exercise diligence in adding narrower definitions for some of the activities within the “material support or resources” list that helped to

93. Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POL'Y 297, 320 (2008); Hollywood, *supra* note 88, at 77.

94. Jason B. Binimow, Annotation, *Constitutional Validity of Terrorism Prosecutions, Statutes, and Enemy Combatant Detention and Proceedings—Supreme Court Cases*, 49 A.L.R. Fed. 2d Art. 5, § 10 (2010).

95. 18 U.S.C. § 2339B(a)(1) (2012); Jason Binimow, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 2339B, Which Criminally Prohibits Provision of Material Support or Resources to Foreign Terrorist Organization*, 184 A.L.R. Fed. 545 Art. 1, § 2.2 (2003).

96. Binimow, *supra* note 94, at § 10; *Humanitarian Law Project*, 561 U.S. at 21 (holding that the material support statute was not vague because the definition of “material support” within the statute included “training,” “service,” “personnel,” and “expert advice or assistance.” Additional definitions of these terms, and the knowledge requirement, increased the clarity of the Act).

97. 18 U.S.C. § 2339B(g)(4) (2012).

98. 18 U.S.C. § 2339A(b)(1) (2012) (emphasis added); see also Knox, *supra* note 26, at 305; Andrew V. Moshirnia, *Valuing Speech and Open Source Intelligence in the Face of Judicial Deference*, 4 HARV. NAT'L SECURITY J. 385, 414 (2013).

99. Knox, *supra* note 26, at 305.

increase the clarity of terms used within the definition for “material support.”¹⁰⁰

Training is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”¹⁰¹ *Expert advice or assistance* is defined as “advice or assistance derived from scientific, technical or other specialized knowledge.”¹⁰² And finally, the statute clarifies the provision of *personnel*, stating it requires one or more individuals to work under a terrorist organization’s control or direction or to “organize, manage, supervise, or otherwise direct the operation” of the organization.¹⁰³ This definition further provides a troublesome and inconsistent clarification: that individuals who act entirely independent of the foreign terrorist organization (“FTO”), yet still act with the purpose of advancing the FTO’s goals or objectives, must be considered to be working under the FTO’s direction or control.¹⁰⁴

2. “Terrorist Organizations,” “Terrorist Activity,” and “Terrorism”

Foreign Terrorist Organization means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act (“INA”).¹⁰⁵ Under section 219 of the INA, the Secretary of State has the power to designate an entity a “foreign terrorist organization” if he or she finds that an organization is foreign, engages in “terrorist activity” or “terrorism,” and threatens the security of the United States or the nationals of the United States.¹⁰⁶

Terrorist activity is defined as “any activity which is unlawful under the laws of the place where it is committed (or which, if it has been committed in the United States, would be unlawful under the laws of the United States or any State).”¹⁰⁷ *Terrorism* is defined as “premedi-

100. Binimow, *supra* note 94, at § 10.

101. 18 U.S.C. § 2339A(b)(2) (2012) (defining the term “training” for purposes of 18 U.S.C. § 2339B as well).

102. 18 U.S.C. § 2339A(b)(3) (2012).

103. 18 U.S.C. § 2339B(h) (2012). The statute states that:

No person may be prosecuted under this section in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals 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.

104. 18 U.S.C. § 2339A(b)(3) (2012).

105. 18 U.S.C. § 2339B(g)(6) (2012).

106. Holder v. Humanitarian Law Project, 561 U.S. 1, 9 (2010); Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295, 297 (2011).

107. 8 U.S.C. § 1182(a)(3)(B)(iii) (2012). This definition includes activities such as hijacking or sabotage of any conveyance; hostage taking; threatening to kill, injure, or detain another individual in order to compel a third person from doing or abstaining from a specific act; assassinations; or the use of biological or chemical agents or nuclear weapons. *Id.*

tated, politically motivated, violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹⁰⁸

Despite these narrow and concise definitions, many Americans remained puzzled by what they considered to be a broad-sweeping Act that infringes upon various constitutional rights, such as freedom of speech and association.¹⁰⁹ Thus emerged the leading and most crucial interpretation of the Act, *Humanitarian Law Project*,¹¹⁰ giving some insight into the Act but leaving a binding precedent that unsatisfactorily explains the Act’s potential application.

C. Attempt

The material support statute not only prohibits the actual provision of support to an FTO, but additionally prohibits individuals from *attempting to provide* material support to a foreign terrorist organization. In domestic law, a person is guilty of attempting to aid in the commission of an offense if a “substantial step” is taken, meaning an act or omission which leaves no reasonable doubt as to the defendant’s intention to commit the crime for which he is charged of attempting.¹¹¹ *Substantial step* is defined in the Model Penal Code as conduct that is “strongly corroborative of the actor’s criminal purpose.”¹¹² “Soliciting an innocent agent to engage in conduct constituting an element of the crime,” is sufficient activity to be considered a substantial step.¹¹³ There is no requirement under domestic law that a person be under the direction or control of another during this substantial step, as long as the person has the purpose of promoting or facilitating the commission of the offense and takes the step necessary to eliminate reasonable doubt as to their intention.¹¹⁴

If the material support statute, which includes the criminalization of attempts to provide material support, is interpreted similarly to that of the domestic law, it would provide for many opportunities to prosecute individuals for their attempts to provide material support of ISIS members through social media devices, as opposed to strictly applying to those individuals who act under the control of ISIS fighters. The statute should encompass all those Americans who have expressed and attempted to recruit other individuals to provide themselves (“personnel” under the act) to join the fight with ISIS or to provide funds through social media activity. This solicitation of an innocent agent to engage in an element of the crime constitutes a substantial step and creates an attempt to violate the material support statute. In the case of Americans actively expressing support and attempting to persuade

108. 22 U.S.C. § 2656f(d)(2) (2012).

109. See *Humanitarian Law Project*, 561 U.S. at 10 (detailing plaintiffs’ contention that the support they sought to provide constituted politically protected speech under the Constitution); see also Knox, *supra* note 26, at 306.

110. *Humanitarian Law Project*, 561 U.S. 1 (2010).

111. MODEL PENAL CODE § 5.01(1)(c) (AM. LAW INST. 2014).

112. MODEL PENAL CODE § 5.01(2) (AM. LAW INST. 2014).

113. MODEL PENAL CODE § 5.01(2)(g) (AM. LAW INST. 2014).

114. *Id.*

others through social media outlets to join the fight, the conduct constitutes solicitation of another American to provide personnel to the foreign terrorist organization.

D. *Judicial Interpretation in Humanitarian Law Project*

In 2010, the United States Supreme Court decided a case that confirmed the constitutionality of the material support statute and provided additional clarity to the elements required within the statute.¹¹⁵ In *Humanitarian Law Project*,¹¹⁶ six domestic organizations and two United States citizens ("Plaintiffs")¹¹⁷ filed suit in federal court, challenging the constitutionality of § 2339B on three grounds: first, Plaintiff's alleged that the statute violated their freedom of speech; second, that it violated their freedom of association under the First Amendment; and, third, that the Act was unconstitutionally vague.¹¹⁸ Plaintiffs argued that the prohibitions against "training," "expert advice or assistance," "service," and "personnel" should not prohibit them from engaging in humanitarian activities, arguing the statute should require a specific mens rea.¹¹⁹ Specifically, Plaintiffs wanted to train and teach members of two designated foreign terrorist organizations, the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), how to engage in humanitarian law to resolve disputes and engage in political advocacy, as opposed to violent acts, and believed this intent for the support should prevent them from being criminally prosecuted under the statute.¹²⁰

The Court, therefore, had to decide the following question: whether it should make a difference if the material support was given with the intent to promote the peaceful activities of an organization rather than the violent acts.¹²¹ It is easy to say that money given to a terrorist organization requires a universal ban, despite the intent of the donator that the money be used for peaceful activities, as there would

115. See generally Knox, *supra* note 26, at 306; Fiss, *supra* note 106, at 298–99; Moshirnia, *supra* note 98, at 413–14.

116. Holder v. Humanitarian Law Project, 561 U.S. 1, 10 (2010).

117. *Id.* The plaintiffs included the Humanitarian Law Project ("HLP") (a human rights organization), Ralph Fertig (HLP's president and retired administrative law judge), Nagalingam Jeyalingam (a Tamil physician born in Sri Lanka but a naturalized United States citizen), and five nonprofit groups devoted to the interests of people of Tamil descent. *Id.*

118. *Id.* at 3. The Court further found that the statutory terms within the Act provided a person of ordinary intelligence fair notice of what is prohibited and was "not unconstitutionally vague." *Id.* Congress had taken care to add narrowing definitions to the statute over time, providing clarity to the terms within the Act which therefore gives an ordinary person fair notice about whether their conduct is prohibited. The Court did not say that the scope of the Act is clear in all cases, but that in this particular case the Plaintiff's vagueness claims fail, as the Plaintiff's proposed activities fall into the narrow definitions of the terms. *Id.* See also Binimow, *supra* note 94, at § 10; Moshirnia, *supra* note 98, at 414–15.

119. *Humanitarian Law Project*, 561 U.S. at 2.

120. *Id.* at 10; Moshirnia, *supra* note 98, at 414–15.

121. *Humanitarian Law Project*, 561 U.S. at 29; Fiss, *supra* note 106, at 298.

be no way to confirm what the money was truly spent on.¹²² However, the parties urged the Court to read a specific intent element into § 2339B for the training and education provided to these terrorist groups.¹²³ The Court, however, did not do so.¹²⁴

Chief Justice Roberts delivered the opinion for the Court and declined to interpret the statute as requiring a specific intent element,¹²⁵ instead holding that the necessary “mental state” for a violation of § 2339B is the “knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”¹²⁶

E. Constitutional Challenge

Plaintiffs in *Humanitarian Law Project* additionally challenged the statute under First Amendment grounds, alleging § 2339B violated the rights of freedom of speech and freedom of association guaranteed under the Constitution of the United States.¹²⁷ For purposes of this Note, the focus will be on the freedom of speech argument.

The Court began its analysis of the freedom of speech issue by considering the *type* of speech the statute prohibits.¹²⁸ Chief Justice Roberts’ opinion recognized that the statute had an important limitation—only coordinated advocacy is subject to penalization under the statute.¹²⁹ The Court determined that § 2339B of the statute does not prohibit any independent advocacy or expression.¹³⁰ Because the speech subject to penalization and regulation under the statute is “content-based,” the Court rejected the standard of review applied to facially neutral statutes that regulate expressive conduct and instead held that a strict scrutiny standard of review applied.¹³¹ Under this strict scrutiny standard, the Government must show a compelling governmental interest in order to restrict independent advocacy as opposed to the “coordinated activity” the statute applies to, as posited by the Court.¹³²

122. Fiss, *supra* note 106, at 299.

123. Hollywood, *supra* note 88, at 90.

124. Knox, *supra* note 26, at 306 (noting that Chief Justice Roberts “rejected HLP’s contention that the [material support] statute requires proof that a defendant intended to further” a foreign terrorist organizations violent and illegal terrorist activities); *see also* Fiss, *supra* note 98, at 299 (stating that, “[i]n a crucial turn of the argument, the Chief Justice refused to read the statute in such a way as to allow any compartmentalization” of support).

125. Hollywood, *supra* note 88, at 90.

126. *Humanitarian Law Project*, 561 U.S. at 2; Knox, *supra* note 26, at 306 (quoting Chief Justice Roberts’ opinion).

127. *Humanitarian Law Project*, 561 U.S. at 10.

128. JIMMY GURULÉ & GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW 271 (2011); *see also* *Humanitarian Law Project*, 561 U.S. at 25–28.

129. Fiss, *supra* note 106, at 299; *Humanitarian Law Project*, 561 U.S. at 24 (“We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.”).

130. GURULÉ & CORN, *supra* note 128, at 271.

131. *Id.* at 271–72.

132. *Id.*; *Humanitarian Law Project*, 561 U.S. at 28 (finding that if the regulation by the Government is related to expression, a more demanding standard must be applied).

"Coordinated activity," as explained by Chief Justice Roberts, is activity done under the direction of, or in coordination with, the designated terrorist group.¹³³ Notably, the Court failed to determine how much direction or control would be necessary to constitute "coordinated" activity.¹³⁴ "[G]radations of fact or charge would make a difference as to criminal liability," said the Chief Justice.¹³⁵ Therefore, "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation," indicating the Court's belief that the distinction between independent and coordinated activity is not a bright line, and instead requires a very fact-dependent analysis.¹³⁶ Further, the Court did not address the issue of *attempts* to provide material support through independent actions and the extent to which coordination or direction of the FTO is required. This limitation and the failure to address the difference between independent free speech and independently taken attempts to provide material support were not addressed in *Humanitarian Law Project* and remain blurred.

F. Post-Humanitarian Law Project World

Following the September 11th attacks on United States soil, the Department of Justice used the material support statute to implement a new counterterrorism strategy: prevention as opposed to punishment.¹³⁷ Because of the statute's preventative nature, it has received a large number of legal challenges.¹³⁸ After the decision in *Humanitarian Law Project*, it appeared that all government prosecutions under the statute would stand, as the opinion appeared to grant tremendous deference to the government even over what many allege is constitutionally protected political speech.¹³⁹ But, the Court left open the protection of *independent* advocacy that takes the form of an attempt to provide material support.¹⁴⁰ The line between independent advocacy through

133. Fiss, *supra* note 106, at 299.

134. *Humanitarian Law Project*, 561 U.S. at 24; *see also* Knox, *supra* note 26, at 307.

135. *Humanitarian Law Project*, 561 U.S. at 25 (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)); Knox, *supra* note 26, at 307.

136. *Humanitarian Law Project*, 561 U.S. at 25 (quoting *Zemel*, 381 U.S. at 20).

137. Peterson, *supra* note 93, at 327.

138. *See Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004). In that case, Singh-Kaur challenged a decision by the Board of Immigration Appeals when his application for a change of status to a lawful permanent United States citizen was denied because he had provided "material support" to an FTO by providing food and tents for a religious meeting of Babbar Khalsa. *See also* *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008). There, Ali Asad Chandia appealed his jury trial conviction of three counts of providing material support to terrorists in violation of 18 U.S.C. § 2339B by participating in a "training program" that used the game of paintball as a means to prepare for activities done in violent jihad. For more, *see* Peterson, *supra* note 93, at 327; Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 894-901 (2007) (including an appendix listing prosecutions under 18 U.S.C. § 2339B from 2001 to 2007).

139. Robert M. Chesney, *The Supreme Court, Material Support, and the Lasting Impact of Holder v. Humanitarian Law Project*, 1 WAKE FOREST L. REV. 13, 18 (2010).

140. 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, 165-66 (2012) (not-

social media and independent attempts to provide material support to an FTO is one that is crucial to present-day problems given the incredible amount of Americans supporting ISIS and encouraging, or attempting to encourage, others to do so through social media.¹⁴¹

1. Applying the Act to Social Media Activity

Today's world is largely run through social media—Facebook, Instagram Twitter, and blogs are easily accessible to most individuals that can find an Internet connection anywhere around the world, including terrorist organizations.¹⁴² Section 2339B can be used against those American nationals that use social media to attempt to provide material support to members of these terrorist organizations, as long as the activity is “coordinated.”¹⁴³ The Supreme Court had to address an issue similar to this in *United States v. Mehanna*.

2. *United States v. Mehanna*

In *United States v. Mehanna*,¹⁴⁴ defendant Tarek Mehanna was charged with a “barrage of terrorism-related” crimes, including providing material support to terrorists and conspiracy to provide material support to terrorists.¹⁴⁵ These charges were brought against Mehanna because of a trip he had taken to Yemen in 2004 in search of a training camp and additionally because of online activity that Mehanna had been engaging in.¹⁴⁶

In 2005, Mehanna began translating Arab-language materials into English and posting these translations onto at-Tibyan, an online website that provided a “community” for individuals sympathetic to al-Qa’ida and Salafi-Jihadi perspectives.¹⁴⁷ The government alleged that al-Qa’ida solicited these translations from Mehanna and additionally that Mehanna responded to al-Qa’ida leaders’ “calls” for individuals to come

ing that “in theory there is no reason why independent speech could not also offer the group substantial benefits”).

141. See *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013). This Note will focus on the issues that are arising in the social media context and how the Act requires further interpretation in order to fulfill its purpose of prevention in Part III.

142. Knox, *supra* note 26, at 298 (discussing the social media accounts of foreign terrorist organizations, including the media wing of al-Qa’ida and its Twitter account with over 13,000 followers).

143. *Id.* at 308 (hypothesizing that because section 2339B only requires knowledge that the organization is connected to terrorism, it may conceivably be applied to social media websites that are used by FTOs who make it clear on their websites that they are acting on behalf of the FTO).

144. See *Mehanna*, 735 F.3d 32.

145. *Id.* at 40–41. Tarek Mehanna was officially charged with four counts: (1) conspiracy to provide material support to al-Qa’ida; (2) conspiracy to provide material support to terrorists; (3) providing or attempting to provide material support to terrorist; and (4) conspiracy to kill persons in a foreign country. The first three counts were based on two separate groups of activities. The first was a trip to Yemen and the second was translation centric. This analysis focuses on the translation. *Id.*

146. *Id.* at 41.

147. *Id.*

join jihad.¹⁴⁸ The translations at issue included the translation of a religious text and subtitles to a video, most of which were materials supportive of al-Qa'ida and jihad.¹⁴⁹

Mehanna argued that this speech was independent advocacy of the terrorist organization and political speech, thus protected under the First Amendment and parallel to the protections established by the Court in *Humanitarian Law Project*.¹⁵⁰ In an amicus brief filed by the Center for Constitutional Rights on behalf of Mehanna, the Center argued, "[n]or by placing materials on the Internet for the English-speaking world to see did Mehanna provide any support 'to' that organization in the way the material support statute contemplates or the First Amendment tolerates."¹⁵¹

The First Circuit, however, affirmed the district court's conviction of Mehanna under the Act.¹⁵² The First Circuit found that the district court committed no error when it determined that Mehanna had, through his online translations, provided a "service" to al-Qa'ida, which, according to the court in *Humanitarian Law Project*, refers to support that is "concerted activity, not independent advocacy."¹⁵³ The First Circuit further found that speech is not protected under the First Amendment if it is advocacy done at the direction of, or in coordination with, the foreign terrorist organization. In this case the district court treated the level of coordination that went into Mehanna's translations as a question of fact to be determined by the jury.¹⁵⁴

Mehanna then appealed to the Supreme Court following the First Circuit's affirmation, hoping his case was the sort of "concrete fact situation"¹⁵⁵ the Court meant when it refused to draw a line between free speech and violations of the statute in *Humanitarian Law Project*.¹⁵⁶ Optimistically, Mehanna hoped the justices would address his case and add some consistency to their mixed record in applying legal principles to technology.¹⁵⁷ Unfortunately for Mehanna, his petition for a writ of certiorari was denied.¹⁵⁸ Because the Supreme Court failed to grant

148. *Id.* at 58. The court did not issue a dispositive decision regarding the translations because the Yemen trip alone was enough to support a conviction.

149. *Id.* at 41.

150. *Id.* at 44.

151. Brief for Center of Constitutional Rights as Amicus Curiae Supporting Defendant-Appellant, Tarek Mehanna at 18–19, *Mehanna*, 735 F.3d 32 (No. 12-1461).

152. *Mehanna*, 735 F.3d at 69 (noting that the jury found Mehanna guilty of a violation of the Act and that the decision is supported by the clear weight of the evidence and "untainted by legal error").

153. *Id.* at 49.

154. *Id.*

155. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010).

156. Mark Joseph Stern, *Translating Terrorism: Is Publishing Radical Islamic Texts on the Internet a Crime?*, SLATE (Sept. 3, 2014, 6:49 AM), http://www.slate.com/articles/tech_nology/future_tense/2014/09/mehanna_at_the_supreme_court_is_translating_jihad_texts_a_crime.html.

157. *Id.* (arguing that the justices do a "decent job" in deciding cell phone cases but get confused over cases involving GPS trackers).

158. *Mehanna v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mehanna-v-united-states/> (last visited Mar. 3, 2016).

Mehanna's petition, the issue of independent advocacy and the level of coordination needed to constitute "support" or "attempt to support" in the context of social media activities is arguably still unclear. This is especially troublesome given the sophistication and success of ISIS recruitment today and its ability to draw support from Americans who turn to social media to attempt to promote the FTO.

III. PROSECUTIONS OF ATTEMPT TO SUPPORT AN FTO THROUGH SOCIAL MEDIA

Following this new trend of Americans supporting ISIS, former Attorney General Eric Holder said in a statement, "We are focused on breaking up these activities on the front end, before supporters of ISI[S] can make good on plans to travel to the region or recruit sympathizers to this cause."¹⁵⁹ But cases of Americans using social media to express support and help recruit for ISIS independently have newly emerged and pose a threat to national security. May the statute encompass much of the support that Americans have projected through social media towards ISIS recently, even when independently done? If an American has taken a "substantial step" to solicit an innocent person to provide personnel, such as themselves, or finances to ISIS, then that American should be subject to criminal prosecution under the material support statute, as they have attempted to provide material support to a foreign terrorist organization. This advocacy and attempt to recruit should not be protected free speech under the *Humanitarian Law Project* holding.

It is time, as former Attorney General Holder stated, to react to stop those who independently attempt to advocate and recruit for ISIS through social media before they ultimately board a flight and leave America or cause others to do so.

A. *Independent Advocacy vs. Attempt*

As of now, the definition of "material support" under the statute is "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[], and transportation, except medicine or religious materials"¹⁶⁰ Thus far, providing money to these organizations has been "support," which creates the slam-dunk prosecutions under the Act.

But with the rise of ISIS and its social media campaigns, prosecutors should focus on pursuing charges against those individuals who embark on social media to attempt to provide material support, most

159. Joe Coscarelli, *All the Americans Who Have Tried (and Failed) to Join ISIS So Far*, N.Y. MAG. (Sept. 17, 2014, 9:34 AM), <http://nymag.com/daily/intelligencer/2014/09/new-york-man-charged-aiding-isis.html>.

160. 18 U.S.C. § 2339A(b)(1) (2009) (defining the term "material support or resources" for purposes of 18 U.S.C. § 2339B as well); see Knox, *supra* note 26.

prominently in the form of personnel or finances. This “attempt” should include independent advocacy that crosses the line between protected First Amendment speech into the criminalized behavior under the statute; additionally, the issue of coordinated activity should be a question of fact left to a fact-finder to determine, as was the case in *Mehanna*.

In *Humanitarian Law Project*, Chief Justice Roberts’ opinion stressed the importance of one key limitation to the application of the material support statute, which impairs the ability of prosecutors to apply the statute to Americans supporting ISIS through social media—that the activity being performed be “coordinated” rather than independent advocacy.¹⁶¹ No determination was made, however, as to how much control or direction is necessary to constitute “coordinated” activity, and no definition of independent advocacy was provided. Therefore, the Court established no bright line test to distinguish independent activity from advanced independent advocacy that crosses into “attempt” to provide material support.¹⁶² Because of this, it has been unclear as to whether or not individuals who support ISIS through social media in extreme ways, such as encouraging others to join the fight or donate money, may be subject to prosecution under the statute unless their activity has been performed under the direction or control of ISIS fighters. The substantial step alone of soliciting an innocent individual through social media to provide support to ISIS should be enough to warrant criminal prosecution, leaving the question of whether or not the activity reached the level of “concerted” or “under the direction of” activity to overcome First Amendment protections to be decided by a fact-finder. Additionally, the courts should look to the First Circuit’s decision in *Mehanna* to conclude that solicitation of an individual may constitute a “concerted activity” just as providing a “service” of online translations for the FTO was in that particular case.

Just like al-Qa’ida, ISIS has an unreasonable and uncompromising mindset that poses a serious threat to national security.¹⁶³ Therefore, although statements made on social media websites encouraging others to donate to ISIS or give up their lives and join the fight may appear to be protected free speech under the First Amendment, the government has a compelling interest to prevent and restrict these statements. Many believe that ISIS has surpassed al-Qa’ida in influence and success,¹⁶⁴ indicating the former’s pending threat upon the United States.

161. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010).

162. *Id.*

163. Daniel W. Sutherland, *Homeland Security and Civil Liberties: Preserving America’s Way of Life*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 289, 291 (2005); see NAT’L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 362 (2004) (“It is not a position with which Americans can bargain or negotiate. With it there is no common ground—not even respect for life—on which to begin a dialogue. It can only be destroyed or utterly isolated.”).

164. Mark Pomerleau, *ISIS vs. al Qaeda: Global Reach and Influence*, HILL (Jan. 19, 2015, 7:00 AM), <http://thehill.com/blogs/pundits-blog/defense/229890-isis-vs-al-qaeda-global-reach-and-influence>.

Because of ISIS's successful recruitment through social media, the restriction of speech that crosses into the threshold of an attempt to provide material support to the organization should be constitutional.

CONCLUSION

In today's world, it can take a person less than three seconds to send out a message that will reach thousands of followers on Twitter. Within moments of uploading a photo on Instagram, hundreds of others will have already seen the picture and, often times, liked it. This global accessibility to one another is a phenomenal way to keep up with current affairs around the world or to stay in touch with your first college roommate, but it has a dark and terrifying side to it as well.

Foreign terrorist organizations have exploited these social media devices and the use of the Internet for years, but none so successfully as The Islamic State.¹⁶⁵ With estimates of foreign fighters joining ISIS reaching into the tens of thousands,¹⁶⁶ America has not emerged unscathed. Hundreds of Americans have been recruited by this violent, heinous terrorist organization—primarily through social media outlets.¹⁶⁷ It is a problem that cannot be overlooked or underestimated. It must instead be combated, preferably as early as possible.

The material support statute under 18 U.S.C. § 2339B provides one option for stopping American nationals, whether they are teenage girls in Denver¹⁶⁸ or young men in Cincinnati,¹⁶⁹ from formulating plots to sneak across the Syrian border, strap themselves to an AK-47, and wage war against all those they are told stand in the way of a new Islamic State. In order to implement the statute in such a way, however, it must become known that an individual who provides an "advocacy plus" style expression through social media by soliciting innocent individuals to provide support to ISIS has indeed taken the substantial step required to amount to "attempt" to violate the material support statute under 18 U.S.C. § 2339B.

Peter Neumann, Director of the International Centre for the Study of Radicalisation and Political Violence, recently stated, "ISIS understands very well that in order for an act of terrorism to be effective, it needs to actually terrorize people. . . . The act of communication that

165. McCoy, *supra* note 56 (discussing the popularity of ISIS on social media and its ability to lure large amounts of Westerners); see Berger, *supra* note 63 (contending that ISIS is "one of the most adept practitioners" of the social media world).

166. Trianni & Katz, *supra* note 44.

167. Windrem, *supra* note 42.

168. Prokupecz, *supra* note 72 (discussing three teenage girls in Denver who were apprehended in Germany after trying to board a flight into Istanbul and sneak into the Syrian border to fight with ISIS).

169. Brian Vitagliano & Dana Ford, *Ohio Man Pleads Not Guilty to Plotting Attack on U.S. Capitol*, CNN (Jan. 22, 2015, 10:19 PM), <http://www.cnn.com/2015/01/22/us/capitol-attack-plot/index.html> (discussing an Ohio man, aged twenty, who was recently charged with attempting to kill government employees, solicitation to commit a crime and possession of a firearm after authorities found several posts on his social media regarding his support for violent jihad and his new alignment with ISIS).

follows the act of violence is almost as important as the act of violence itself.”¹⁷⁰ This act of communication is primarily occurring on social media outlets, and must be combated and prevented.¹⁷¹

170. Michele McPhee & Brian Ross, *Official: American May Be Key in ISIS Social Media Blitz*, ABC NEWS (Sept. 3, 2014, 5:28 PM), <http://abcnews.go.com/blogs/headlines/2014/09/official-american-may-be-key-in-isis-social-media-blitz/>.

171. *Id.* (mentioning Ahmad Abousamra traveled with Tarek Mehanna, who has already been charged and convicted of providing material support to an FTO, and that the two had worked to spread the message of al-Qa’ida through social media).