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MATERIAL SUPPORT FOR TERRORISM AS SEDITIOUS LIBEL? A REVIEW OF THE LAW AFTER *HUMANITARIAN LAW PROJECT* WITH ATTENTION TO ORIGINALIST PRINCIPLES

Elliott R. Hamilton*

* J.D. 2019, Boston College Law School; M.P.H. 2019, Tufts University School of Medicine; B.A. 2015, Pitzer College. I want to thank former U.S. Attorney for the District of Massachusetts, Carmen Ortiz, for her guidance and encouragement as I explored this topic. I am deeply grateful to the staff of the *NYU Journal of Law & Liberty*, particularly Nicholas Gallagher and William Gillis, for affording me the privilege to have this Note published in this esteemed journal. Finally, I dedicate this Note to Loretta Wieczner, Dr. Stephen Simons, Mark Canner (z"l), and Marta Rivas for teaching me to put good words in careful order and for helping me reach this point in my career. But-for these exceptional teachers, I would not be where I am today.

INTRODUCTION

Federal statutes criminalizing the provision of material support to foreign terrorist organizations have become an important part of the U.S. government's domestic effort to fight the global war on terror. And in a rapidly-evolving information age, the statutory prohibition of material support to terrorist organizations can often implicate constitutional free speech protections. The collision of government efforts to combat terrorism and fundamental free speech protections raises important questions about the scope of the government's authority to regulate seditious speech and the original understanding of First Amendment rights. Focusing on the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project* (hereafter "*HLP*"),[1] this Note surveys First Amendment jurisprudence related to the material support statute while drawing historical parallels to common law seditious libel.

Amended as a part of the U.S.A. Patriot Act in 2001, 18 USC §2339B (hereafter the "Material Support Statute") criminalizes those who "knowingly provide[] material support or resources to a foreign terrorist organization,"[2] and further defines "material support" as "any property, tangible or intangible, or service."[3] This capacious

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

[2] Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C.A. § 2339B (West 2015) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. 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 or engages in terrorism").

[3] Providing Material Support to Terrorists, 18 U.S.C.A. § 2339A (West 2009) ("[T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial

definition of material support gave rise to the central First Amendment question in *HLP*: where does one's constitutionally protected speech in support of terrorism end and criminal material support for terrorism begin? The Court held that the Material Support Statute did not violate the First Amendment since it served a compelling government interest in protecting national security by barring coordinated activity with foreign terrorist organizations.[4] *HLP*, which seeks to balance the interests of preserving public welfare in the face of foreign terrorist threats and protecting the individual right to free speech, represents a potential fork-in-the-road in First Amendment law. Following *HLP*, First Amendment scholars Alexander Tsesis and Eugene Volokh articulated strikingly divergent views of how the decision could alter First Amendment jurisprudence.[5] *HLP* could, on one hand, continue a long-standing policy of barring speech that harms public welfare,[6] or, on the other

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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…").

[4] *Humanitarian Law Project*, 561 U.S. at 40 ("The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to 'provide for the common defence.' As Madison explained, '[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union.' The Federalist No. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.").

[5] See Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 Minn. L. Rev. 1145, 1189 (2013); Eugene Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (The Volokh Conspiracy, June 21, 2010, 5:43 PM), archived at https://perma.cc/54S3-5ZBG.

[6] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1189–90 (cited in note 5).

hand, open the door to a *per se* test[7] that could further constrain the government's ability to enact content-based restrictions on speech.[8]

Though it is not entirely clear which path post-*HLP* First Amendment jurisprudence will follow, this Note highlights that the *HLP* decision potentially invites a restoration of the original understanding that common law seditious libel is *not* constitutionally protected.[9] This is significant because over the past half-century, the Supreme Court has constructed a more libertarian conception of free speech that leaves little room for free speech restrictions like seditious libel laws and material support prohibitions.[10] Because *HLP* makes room for an originalist turn in First Amendment law, it is important first to situate the decision in its proper historical context.

This Note is divided into four parts. Part I outlines the original public meaning of the First Amendment with respect to seditious libel as well as the shift to the Madisonian conception of free speech with respect to content-based restrictions. Part II analyzes the facts and the Court's decision in *HLP*. Part III compares the reactions to *HLP* from Professors Volokh and Tsesis. Finally, Part IV examines the ways the lower federal courts have begun to address a few key questions left open by *HLP*.

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[7] Volokh, Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny (cited in note 5).
[8] See text accompanying notes 59–70.
[9] See Part I.A.
[10] See Part I.B.

I. THE CONFLICTING INTERPRETATIONS OF PROTECTED "FREE SPEECH"

Speaking at New York University in 1960, Justice Hugo Black argued that "there are 'absolutes' in our Bill of Rights [] that [] were put there on purpose by men who knew what words meant and meant their prohibitions to be 'absolute.'" [11] While the First Amendment may provide an absolute right to free speech on Justice Black's reading, the Framers had a different understanding of what forms of speech fell within the ambit of constitutional protection.[12] For instance, contrary to the views expressed in modern First Amendment jurisprudence, it is not clear that the Framers understood the First Amendment to displace certain English common law doctrines that restricted free speech.[13]

A. THE FRAMERS' UNDERSTANDING OF FREE SPEECH AND SEDITIOUS LIBEL

For the Framers, the First Amendment did not protect absolute rights of speech and the press.[14] Free speech protections were, after all, not so much products of a unified theory but rather the result of disparate ideological currents and particular historical contingencies.[15] Evidence from the pre-ratification period suggests

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[11] Everette E. Dennis, Donald M. Gillmor, & David L. Grey, *Justice Hugo Black and the First Amendment: "'No Law' Means No Law"* 30 (Iowa State University Press 1978).

[12] Stephen M. Feldman, *Free Expression and Democracy in America: A History* 50 (University of Chicago Press 2008) ("Not only did the Americans actively suppress Tory speech, they also continued to accept the propriety of the long-standing British law on seditious libel.").

[13] See Leonard W. Levy, *Emergence of a Free Press* 268 (1985).

[14] Id. at 274–75.

[15] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 430–31 (1983) ("The meaning of the words "freedom of speech and of the press" for those who

that those who wrote the freedoms of speech and press into the Bill of Rights would have understood the protections to come with several important gaps in coverage.[16] A poignant example was the common law crime of seditious libel,[17] which many contemporaries viewed as compatible with English constitutional protections designed to allow criticism of the government.[18] Sir William Blackstone described barring libels, or *libelli famosi*, as a necessary means of preserving the public peace by giving those subject to malicious characterizations an alternative to violent retribution.[19] Under English common law, libel could be civilly or criminally enforced. According to Blackstone's *Commentaries*:

> In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the

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adopted the first amendment was the product of many strands of though woven over many centuries and across an ocean. Some of these strands became separate constitutional guarantees while others were mentioned either directly or indirectly in the adoption process. Among the most prominent of these sources for understanding the guarantee of the first amendment are the parliamentary privilege of freedom of debate, the abolition of prior censorship in England, the letters of 'Cato,' the theory of natural rights, the growth of religious toleration, and the limited function of a national government in a federal system.").

[16] Id. at 448 ("Cato's Letters provided intellectual support for criticism of government, yet acknowledged a very broad scope for application of libel laws. The licensing laws had expired less than three decades earlier, and England had little experience with a free press. The furthest Trenchard and Gordon could safely go was to advocate freedom for the type of abstract reflections of their previous essays. Seditious libel, false charges, and personal attacks should be punished.").

[17] William Blackstone, 4 *Commentaries* *151–52 (1769) (The Oxford ed. 2016) ("In this… where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated.").

[18] See Bogen, *The Origins of Freedom of Speech and Press* at 440–41 (cited in note 15).

[19] Blackstone, 4 *Commentaries* at *150 (cited in note 17).

> plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law. And therefore, in such prosecutions, the only facts to be considered are, first, the making or publishing of the book or writing; and secondly, whether the matter be criminal: and if both these points are against the defendant, the offence against the public is complete.[20]

Blackstone distinguished these prohibited libels from the natural right of the individual to say whatever he pleases; he recognized that the interests of preserving the public peace and establishing order are themselves safeguards of civil liberty.[21] According to Blackstone, libel laws result in a net increase in civil liberty by protecting the people from the corruption of those who would abuse free speech rights to incite public unrest.[22]

Though seditious libel laws of the 18th century presented a clear restriction of natural rights, such prohibitions were consistent with

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[20] Id. at *150–51.

[21] Id. at *151–52 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public… But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment.").

[22] Blackstone, 4 *Commentaries* at *153 (cited in note 17) ("So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.").

prevailing political philosophies of the time. John Locke, outlining his views on the social compact, argued that men would only consent to give up some of their natural rights to a political society[23] that wields the power to determine what is best suited for the public good.[24] As long as the majority of the people consented to be governed, the people could submit themselves to the determinations of those charged with their security of their rights in furtherance of the public good.[25] Blackstone himself assented to the Lockean view, suggesting that man does not assume that natural rights are *fully* protected if doing so would be detrimental to the public good.[26] He further argued that the public good requires some constraints on natural liberty if those constraints help to ensure that society's security.[27] Thus, the purposes of common law seditious libel

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[23] John Locke, *Second Treatise of Government* 52 (C.B. MacPherson ed., Hackett Pub. Co., Inc. 1980) (1690) ("The only way whereby any one divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.").

[24] Id. at 8 ("*Political power*, then, I take to be the *right* of making laws… only for the public good") (emphasis added).

[25] Id. at 52 ("And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation, to every one of that society, to submit to the determination of the *majority*, and to be concluded by it; or else this *original compact*, whereby he with others incorporates into *one society*, would signify nothing, and be no compact, if he be left free, and under no other ties than he was in before in the state of nature.").

[26] William Blackstone, 1 *Commentaries* *121 (1769) (The Oxford ed. 2016) ("But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.").

[27] Id. at *121–22 ("For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would

prohibitions, particularly that of protecting the public from possible turmoil and bloodshed, fit comfortably within this strain of political theory that went on to animate the Framers.

And what was true in England was also true in the colonies. During the 17th and early 18th centuries, most Americans did not challenge English limitations on free expression; rather, they supported a penal approach to seditious libel.[28] However, the case against John Peter Zenger in 1735 represented a paradigm shift in how Americans viewed the crime.[29] Following a trial at which the royal government accused Zenger of publishing libel against the governor of New York, the court famously held that truthful statements made about government officials could not be libelous.[30] And throughout the remainder of the 18th century after *Zenger*, some Americans sought to further expand free speech protections to incorporate commentary that would have been considered

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be no security to individuals in any of the enjoyments of life. Political, therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws… as is necessary and expedient for the general advantage of the publick.").

[28] Levy, *Emergence of a Free Press* at 119 (cited in note 13) ("Even in that celebrated case American produced no broad concept of freedom of expression, none that rejected the suppressive idea of the common law that government, religion, or morality can be criminally attacked just by bad opinions… In pre-Zenger America, no one had ever published an essay on the subject, let alone repudiated the concept of seditious libel or condemned its conventional application by the common-law courts…").

[29] Feldman, *Free Expression and Democracy in America* at 51 (cited in note 12) ("Many Americans, though, advocated for a change in the law of seditious libel to correspond with the result of the Zenger case. Truth, it was argued, should be a defense to a charge of libel, and a jury should ultimately resolve whether the defendant had committed a criminal libel").

[30] Levy, *Emergence of a Free Press* at 129 (cited in note 13) ("On this the Zenger defense reached bedrock: truth could not be a libel; truth fixed the bounds of the right to speak, write, and publish opinions on the conduct of men in power.").

"seditious."[31] Despite such attempts to institute reforms, seditious libel remained a part of the early American legal landscape.[32] By the time the Framers drafted and adopted the First Amendment, it was evident that they did not intend to dramatically alter prevailing conceptions of protected free expression, [33] which contained a carve-out for common law seditious libel.

Finally, the language of the First Amendment provides additional evidence that seditious libel was not to be protected.[34] After all, the First Amendment barred *Congress* from making laws abridging freedom of speech,[35] arguably implying that the executive and judicial branches could limit the freedom of speech. [36] The omission of an explicit bar on federal common law crimes regulating

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[31] Feldman, *Free Expression and Democracy in America: A History* at 58 (cited in note 12) ("In sum, by the late 1780s and early 1790s, only one conclusion regarding free expression is possible: it was unclear… Most often, these Americans asserted that a free press protected other liberties as well as free government itself…").

[32] Id. ("Numerous Americans, including Bollan, Cushing, "Candid," "Junius Wilkes," and several Anti-Federalists, had followed "Cato's Letters" by linking free government with free expression, particularly the freedom of the press. Most often, these Americans asserted that a free press protected other liberties as well as free government itself… Nonetheless, the law of seditious libel was still in effect, though many advocated for Zengerian reforms to greater or lesser degrees. There remained the American tradition of dissent, but there also remained the tradition of suppression.").

[33] See Levy, *Emergence of a Free Press* at 220 (cited in note 13) ("The immediate history of the drafting and adoption of the First Amendment's freedom of speech and press clause does not suggest an intent to institute broad reform[.]").

[34] Id. at 274.

[35] U.S. Const. Amend. I.

[36] Levy, *Emergence of a Free Press* at 274–75 (cited in note 13) ("[T]he existence of a federal common law meant that the First Amendment could not possibly have been intended to supersede the common law of seditious libel or other branched of the common law of criminal defamation which delimited freedom of expression… The Congress that framed the amendment and the states that ratified it approved the phrasing that limited only Congress, not the United States and not 'the Government,' thus permitting the possibility that the other branches could do what Congress could not.").

speech—including seditious libel—suggests that the Framers never intended the First Amendment to supersede the common law in this area.[37]

For these reasons the Framers did not view all content-based restrictions on speech as protected expression.[38] Instead, the Framers abided by the Blackstonian notion that collective security interests, and the ultimate preservation of individual rights themselves, could outweigh the individual's natural liberty.[39]

B. THE POST-RATIFICATION EXPANSION OF FREE SPEECH PROTECTIONS

The turmoil in the post-ratification period, particularly surrounding the Sedition Act of 1798, generated opposition to the view that seditious libel laws fit comfortably alongside constitutional free speech protections.[40] The Sedition Act stated that those who "write, print, utter or publish, or shall cause or procure to be written, printed, uttered, or published" writings about the United States that were "false, scandalous and malicious" faced fine or imprisonment.[41] Those who supported the Act believed that it did not run afoul of the First Amendment at all, since it did not create a new form of censorship but merely codified common law seditious libel.[42] Following the passage of the Sedition Act, James Madison vehemently criticized it as a "palpable and alarming infraction" of

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[37] Id. at 274.
[38] Id. at 274–75.
[39] Levy, *Emergence of a Free Press* at 220 (cited in note 13); Blackstone, 4 *Commentaries* at *151–52 (cited in note 17); Blackstone, 1 *Commentaries* at *121 (cited in note 26).
[40] See Bogen, *The Origins of Freedom of Speech and Press* at 461 (cited in note 15).
[41] An Act for the Punishment of Certain Crimes, 1 Stat. 596 (July 14, 1798).
[42] See Bogen, *The Origins of Freedom of Speech and Press* at 460 (cited in note 15).

the Constitution.[43] Madison prefaced his criticism by acknowledging the argument of its proponents that the Sedition Act did not challenge fundamental rights.[44] Alluding to the Zengerian teaching that truth cannot be considered libelous,[45] Madison argued that criminalizing seditious libel opened the door to prosecuting individuals for expressing minority viewpoints;[46] and protecting such viewpoints was, of course, a central motivation for the First Amendment.[47] Madison feared that the Sedition Act established a precedent that would allow the government to circumvent additional First Amendment rights, namely the right to free exercise

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[43] James Madison, *The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws* 233 (1850).

[44] See id. at 226 ("To those who concurred in the act, under the extraordinary belief that the option lay between the passing of such an act, and leaving in force the common law of libels, which punishes truth equally with falsehood, and submits the fine and imprisonment to the indefinite discretion of the court, the merit of good intentions ought surely not to be refused.").

[45] Levy, *Emergence of a Free Press* at 129 (cited in note 13).

[46] See Madison, *The Virginia Report of 1799-1800* at 226–27 (cited in note 43) ("It is no less obvious, that the *intent* to defame or bring into contempt or disrepute, or hatred, which is made a condition of the offence created by the [Sedition] [A]ct, cannot prevent its pernicious influence on the freedom of the press. For, omitting the inquiry, how far the malice of the intent is an inference of the law from the mere publication, it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions, must expect and *intend* to excite these unfavorable sentiments, so far as they may be thought to be deserved") (emphasis in original).

[47] Id. at 228 ("Here is an express and solemn declaration by the convention of the state, that they ratified the Constitution in the sense, that no right of any denomination can be cancelled, abridged, restrained, or modified by the government of the United States or any part of it; except in those instances in which power is given by the Constitution; and in the sense particularly, that among other essential rights, the liberty of conscience and freedom of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States") (internal quotation marks omitted).

of religion, through a reliance on dynamic judicial lawmaking.[48] Thus, Madison warned that codifying seditious libel would be "fatal to liberty of conscience."[49]

While Madison is reliably considered an authority on the meaning of the First Amendment, it is not clear whether his opposition to *statutory* seditious libel reflects his opinions on *common law* seditious libel at the time of the First Amendment's ratification.[50] In any event, because originalism is concerned with the original *public* meaning of the Constitution, for the reasons discussed in Part I.A, this Note is on firm footing arguing that the First Amendment accommodated seditious libel laws notwithstanding the uncertainty about precisely when Madison adopted his more libertarian views.

The original conception of free speech, which comfortably accommodated both First Amendment protections and state libel laws, remained alive for nearly two-hundred years.[51] Then things changed. In the seminal 1964 case *New York Times v. Sullivan*, the Supreme Court expanded free speech protections to politically charged and allegedly libelous statements by reporters,[52] the very

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[48] Id. at 229.

[49] Madison, *The Virginia Report of 1799-1800* at 229 (cited in note 43).

[50] Levy, *Emergence of a Free Press* at 320–21 (cited in note 13) ("Because no one knew better than Madison what the First Amendment was intended to mean, the problem naturally arises whether his exposition of 1800 should be regarded as a reliable account of a prior understanding or as a hindsight interpretation that demonstrated the formulation of a new libertarian theory in response to the Sedition Act.").

[51] Gregory J. Sullivan, "*New York Times v. Sullivan: Fifty Years of a Press Free from Responsibility*" (National Review, Mar. 10, 2014, 3:45 PM), archived at https://perma.cc/F653-SGC3.

[52] See *New York Times v. Sullivan*, 376 U.S. 254, 272–73 (1964) ("Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision… This is true even though

conduct that many Founders would have considered to be outside the reach of the First Amendment.[53] The *Sullivan* case involved a Montgomery City Commissioner who sued the New York Times for civil libel under an Alabama law that allowed public officials to recover damages in a libel action if they demanded a public retraction and the press failed to comply.[54] The Supreme Court held that the Alabama law was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[55]

In his concurring opinion, Justice Black used the occasion to condemn the Sedition Act of 1798's criminalization of seditious libel, calling it "a wholly unjustifiable and much to be regretted violation of the First Amendment."[56] Justice Black's concurrence further demonstrated that the Madisonian view of seditious libel continued to find purchase in the 20th century notwithstanding the original

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the utterance contains 'half-truths' and 'misinformation'… If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.").

[53] See Bogen, *The Origins of Freedom of Speech and Press* at 460 (cited in note 15) ("Proponents of the Sedition Act pointed out that the Act did not facially violate any of the universally understood limits of the first amendment. It did not establish prior censorship. It permitted a jury to decide whether the statements were libelous. It punished malicious statements that harmed the government by bringing it into disrepute, but truth was a defense"); but see *Sullivan*, 376 U.S. at 276 (concluding based on a handful of historical sources that there was a "broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

[54] *Sullivan*, 376 U.S. at 256–61.

[55] Id. at 264.

[56] Id. at 296.

views of the Framers prior to the Sedition Act.[57] Using *Sullivan* as a doctrinal foundation, federal courts have expanded the scope of the First Amendment consistent with Madison's articulated vision.[58]

It is well understood that *New York Times v. Sullivan* is a cornerstone of modern First Amendment jurisprudence. [59] Specifically, the decision paved the way for later cases enlarging protections for expressive conduct by enshrining a commitment to unfettered public debate and the marketplace of ideas. [60] This libertarian view of the First Amendment inaugurated in *Sullivan* then spread to other areas of First Amendment jurisprudence in a way

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[57] See *Sullivan*, 376 U.S. at 296–97; but see Levy, *Emergence of a Free Press* at 220 (cited in note 13); Blackstone, 4 *Commentaries* at *151–52 (cited in note 17). Justice Black's condemnation of the Sedition Act mirrors a similar view expressed by Justice Oliver Wendell Holmes in dissent 45 years prior. *Abrams v. United States.* 250 U.S. 616, 630–31 (1919) ("I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'").

[58] See Kevin A. Ring, *Scalia's Court: A Legacy of Landmark Opinions and Dissents* 443 (Regnery Publishing 2016) ("The marketplace has grown over the years. The First Amendment has been extended by federal courts to cover nude dancing, shouting obscenities, flag burning, pornography, and even refusing to wear a necktie.").

[59] Howard M. Wasserman, *A Jurisdictional Perspective of New York Times v. Sullivan*, 107 Nw. U. L. Rev. 901, 913 (2013).

[60] See *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas concurring in the denial of cert.) ("From the founding of the Nation until 1964, the law of defamation was almost exclusively the business of state courts and legislatures ... [b]ut beginning with *New York Times*, the Court federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States.") (internal quotation marks and citations omitted); Mary-Rose Papandera, "*The Story of New York Times Co. v. Sullivan*," in First Amendment Stories 229, 262 (Richard W. Garnett & Andrew Koppelman eds., 2012) ("*Sullivan*'s broad influence is evident throughout the Court's First Amendment canon" (citations omitted)).

that would have been foreign to the Framers.[61] The Madisonian ethos embodied in *Sullivan* finds clear doctrinal expression in the Court's framework for evaluating content-based restrictions on expressive conduct.[62] If the restriction is content-based, then it requires the most exacting scrutiny, meaning that the state must show that the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end.[63]

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[61] Id. ("In addition, *Sullivan* was the first of several cases in which the Court carefully examined categories of expression that had historically been considered outside of the First Amendment.").

[62] See *Boos v. Barry*, 485 U.S. 312, 318 (1988) ("We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open…"), citing *Sullivan*, 376 U.S. at 270; see also Madison, *The Virginia Report of 1799-1800 Touching the Alien and Sedition Laws* at 229 (cited in note 43) ("Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction, therefore, that would attack this original security for one, must have the like effect on the other… The General Assembly were governed by the clearest reason, then, in considering the 'sedition act,' which legislates on the freedom of the press, as establishing a precedent that may be fatal to the liberty of conscience; and it will be the duty of all, in proportion as they value the security of the latter, to take the alarm at every encroachment on the former"); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2456 (1996) ("Content-based restrictions are viewed with more skepticism than content-neutral restrictions because (rightly or wrongly) the Court believes that 'above all else, the First Amendment means that government [presumptively] has no power to restrict expression because of its message, its ideas, its subject matter, or its content'" (citation omitted)).

[63] See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Tex. v. Johnson*, 491 US 397, 412 (1989), citing *Boos*, 485 U.S. at 321. However, if the regulation is content-neutral, then the state would only need to demonstrate a substantial interest to allow the regulation of expressive conduct. See *United States v. O'Brien*, 391 U.S. 367, 377, 381 (holding that if the state demonstrates a substantial governmental interest, if that interest is unrelated to the suppression of speech, and if the limitation on speech is not greater than necessary, then it does not violate the First Amendment).

When reviewing a content-based restriction on expressive conduct, the Supreme Court applies the most exacting scrutiny.[64] The Supreme Court announced this test in *Texas v. Johnson,* where it held it unconstitutional to prohibit burning the United States flag.[65] Texas argued that the state interest in criminalizing flag burning was to preserve the status of the flag as a symbol of national unity.[66] The Supreme Court, however, rejected this argument, reasoning that the First Amendment prohibits the government from criminalizing certain expressive conduct even if the majority considers that conduct problematic.[67] Because Texas failed to identify a compelling state interest in criminalizing flag-burning, the statute failed to pass constitutional muster under the Court's analysis of content-based restrictions on speech.[68]

The *Johnson* test for content-based restrictions on speech embodies the modern Madisonian concept of free speech that greatly expands protections beyond the original scope of the First Amendment. [69] *Holder v. Humanitarian Law Project*, a case involving the rights of American citizens and the government's interest in combatting foreign terrorist organizations, probed the boundaries of

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[64] See *Johnson*, 491 U.S. at 411–12; *Boos*, 485 U.S. at 321 ("Our cases indicate that as a content-based restriction on political speech in a public forum, [the statute] must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'").

[65] See *Johnson*, 491 US at 420.

[66] Id. at 413.

[67] Id. at 414.

[68] *Johnson*, 491 US at 420.

[69] See id.; Ring, *Scalia's Court: A Legacy of Landmark Opinions and Dissents* at 443 (cited at 58) ("Many Americans cherish the First Amendment's protection of freedom of speech more than any other liberty in the Bill of Rights. It was written into the Constitution by a generation of Americans that did not always permit or enjoy the full exercise of that freedom.").

the *Johnson* framework.[70] In deciding *HLP*, the Court left open significant questions about the precise applicability of the *Johnson* test in national security cases. Specifically, the decision raised an important question of whether the Court seeks to remain in the post-*Sullivan* libertarian jurisprudential paradigm, or if the door is now open for a resurgence of the original understanding of what constitutes prohibited speech for the benefit of public safety.

II. *HOLDER V. HUMANITARIAN LAW PROJECT*

Humanitarian Law Project (hereafter "HLP") was a human rights organization that sought to provide dispute resolution and advocacy training to the humanitarian and political arms of international organizations that the U.S. government designated as terrorist organizations,[71] specifically the Kurdistan Workers' Party (hereafter "PKK") and the Liberation Tigers of Tamil Eelam (hereafter "LTTE").[72] Despite the fact that these organizations engaged in "political and humanitarian activities," the U.S. Secretary of State recognized that they had committed numerous terrorist attacks and thus designated them terrorist organizations.[73] HLP sought to engage in direct advocacy on behalf of minority groups supported by these organizations.[74] Fearing criminal liability under the Material Support Statute, HLP sought a series of pre-enforcement injunctions barring the enforcement of the statute on the grounds it was impermissibly vague and an unconstitutional abridgement of

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[70] See *Holder v. Humanitarian Law Project*, 561 U.S. 1 at 27 (2010).
[71] Id. at 36-37.
[72] Id. at 9.
[73] Id. at 9.
[74] *Humanitarian Law Project*, 561 U.S. at 37.

the right to free speech.[75] After twelve years of litigation and several appeals, the Ninth Circuit finally held that the operative provisions of the statute including "training," "expert advice or assistance, and "service" were unconstitutionally vague and in violation of the First Amendment.[76] The Supreme Court then granted the government's petition for certiorari.

HLP maintained *inter alia* that the Material Support Statute violated its freedom of speech by criminalizing the provision of material support to designated terrorist organizations without requiring the government to prove that HLP intended to further terrorist activity.[77] In a 6-3 opinion, the Court reversed on the relevant speech claims.[78]

Writing for the Court, Chief Justice Roberts rejected each of the "extreme positions" taken by parties.[79] The Court first dismissed HLP's assertion that the Material Support Statute banned "pure political speech," noting that the organization could continue to say anything about PKK and LTTE since the statute only prohibited "material support."[80] The Court next rejected the Government's claim that the Material Support Statute was content-neutral and therefore required analysis under the *O'Brien* test.[81] The Court found

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[75] Id. at 11–14.
[76] See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928–30 (9th Cir. 2009).
[77] *Holder v. Humanitarian Law Project*, 561 U.S. at 14 ("[P]laintiffs claim that § 2339B violates the Due Process Clause of the Fifth Amendment…their freedom of speech under the First Amendment…[and] their First Amendment freedom of association").
[78] Id. at 39–40.
[79] Id. at 25.
[80] Id. 25–26 ("Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all.").
[81] *Humanitarian Law Project*, 561 U.S. at 26. See also *Johnson*, 491 U.S. at 420 (cited in note 63).

the Material Support Statute to be content-based and thus *O'Brien* was inapplicable.[82] Citing *Texas v. Johnson*, the Court determined that the Material Support Statute required the more demanding standard of strict scrutiny.[83]

Chief Justice Roberts framed the First Amendment issue narrowly: namely, whether the Government could prohibit HLP from providing material support to PKK and LTTE in the form of speech.[84] The Court first acknowledged the uncontested point that the government has an "urgent objective" to combat terrorism.[85] And while HLP contended that the "legitimate activities" of PKK and LTTE could be distinguished from terrorism, the Court noted that Congress explicitly made no distinction between these types of activities.[86] The Court likewise rejected the premise that any sharp distinction between terrorist and non-terrorist activities could, in principle, be made.[87] Material support in the form of training can, the Court contended, free up funds for terrorist activity, help foster the legitimacy of the organization, and aid in recruiting new members.[88] And even if terrorist and legitimate activities could be separated in theory, the evidence suggests that this does not happen in practice.[89]

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[82] Id. at 27 ("O'Brien does not provide the applicable standard for reviewing a content-based regulation of speech… and § 2339B regulates speech on the basis of its content").
[83] Id at 28 ("'If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of non-communicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard'"), quoting *Johnson*, 491 U.S. at 403.
[84] See id.
[85] *Humanitarian Law Project*, 561 U.S. at 28.
[86] Id. at 29.
[87] Id. at 36.
[88] Id. at 30.
[89] *Humanitarian Law Project*, 561 U.S. at 31 ("Money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put'…There is evidence

Furthermore, because the Material Support Statute advances foreign policy interests in combatting terrorism and achieving good relations with international partners by barring Americans from supporting terrorist organizations, the Court reasoned that the government had a compelling interest in prohibiting material support for terrorist organizations.[90]

On the central question of whether the law recognizes a line between material support for terrorist activities and material support for humanitarian activities within the same organization, the Court gave considerable deference to the political branches.[91] In an affidavit provided to the Court, the State Department expressed its view that it is "highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions--regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities."[92] The Court emphasized that while it does not defer to the government's interpretation of the First Amendment as a general rule, it is best to respect the government's concerns in areas where the courts lack competence.[93] Congress and the executive branch are positioned to make judgments on issues of national security and foreign policy, and the Material Support Statute is the democratic

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that the PKK and the LTTE, in particular, have not 'respected the line between humanitarian and violent activities'.").

[90] Id. at 32.

[91] See id. at 33.

[92] Id.

[93] See *Humanitarian Law Project*, 561 U.S. at 34 ("We do not defer to the Government's reading of the First Amendment, even when such interests are at stake.…But when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked' … and respect for the Government's conclusions is appropriate.").

result of a process that has adequately balanced the interests of First Amendment rights and national security.[94]

Finally, and perhaps most importantly, the Court placed several limitations on the holding. It stated that the Material Support Statute avoids any restrictions on independent advocacy.[95] The holding of *HLP*, rather, narrowly defines particular forms of support for foreign terrorist organizations, distinguishing "independent advocacy" from "any activities… directed to, coordinated with, or controlled by foreign terrorist groups."[96]

The Chief Justice further acknowledged the possibility of future First Amendment challenges, saying "we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."[97] Roberts specifically stated that "in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, [the Material Support Statute] does not violate the freedom of speech."[98] Ultimately, in this case, the government had a compelling national security interest in preventing Americans from providing financial assistance to U.S.-designated terrorist organizations, ensuring that the Material Support Statute survived strict scrutiny.[99]

In his dissenting opinion, Justice Breyer expressed his concern that the majority had failed to hold the government to the necessary standard to justify the criminalization of activities that "the First

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[94] Id. at 35–36.
[95] Id. at 36.
[96] Id.
[97] *Humanitarian Law Project*, 561 U.S. at 39.
[98] Id.
[99] See id. at 40.

Amendment ordinarily protects."[100] Citing *Sullivan*, Justice Breyer likened the political advocacy that HLP sought to engage in as being "the *kind* of activity to which the First Amendment ordinarily offers its strongest protection."[101] Furthermore, Justice Breyer suggested that while the government *did* identify a compelling countervailing interest in criminalizing otherwise protected speech in the name of combatting foreign terrorist organizations, he *did not* see how the Material Support Statute addressed that interest.[102]

Finally, Justice Breyer expressed skepticism that the coordination and independent advocacy distinction relied upon by the majority is sufficient to fully protect First Amendment rights.[103] He believed that

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[100] Id. at 41–42. ("The plaintiffs…now seek an injunction and declaration providing that, without violating the statute, they can (1) 'train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes'; (2) 'engage in political advocacy on behalf of Kurds who live in Turkey'; (3) 'teach PKK members how to petition various representative bodies such as the United Nations for relief'; and (4) 'engage in political advocacy on behalf of the Tamils who live in Sri Lanka.'… All these activities are of a kind that the First Amendment ordinarily protects. In my view, the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in these activities.").

[101] *Humanitarian Law Project*, 561 U.S. at 42 (emphasis added), citing *Sullivan*, 376 U.S. at 269.

[102] See id. at 46 ("The Government does identify a compelling countervailing interest, namely, the interest in protecting the security of the United States and its nationals from the threats that foreign terrorist organizations pose by denying those organizations financial and other fungible resources. I do not dispute the importance of this interest. But I do dispute whether the interest can justify the statute's criminal prohibition. To put the matter more specifically, precisely how does application of the statute to the protected activities before us *help achieve* that important security-related end?").

[103] See id. at 49 ("The Court… emphasizes that activities not "*coordinated with*" the terrorist groups are not banned… And it argues that speaking, writing, and teaching aimed at furthering a terrorist organization's peaceful political ends could "mak[e] it easier for those groups to persist, to recruit members, and to raise funds… But this "legitimacy justification cannot by itself warrant suppression of political speech, advocacy, and association.").

the government will find difficulty in drawing the lines between "independent advocacy" and "coordinated activity."[104] Thus, the majority's lack of clarity on the specific test utilized to determine the Material Support Statute's constitutionality forced Justice Breyer's hand in concluding that the Court "deprived the individuals before us of the protection that the First Amendment demands."[105]

III. KEY SCHOLARLY DEBATES POST-*HLP*

The writings of two prominent scholars, Eugene Volokh and Alexander Tsesis, bring into focus significant questions in First Amendment jurisprudence after *HLP* and help to frame the challenges faced by lower courts and litigants in its wake.[106] Most importantly, *HLP* raised questions about the exact line between coordinated activity and independent advocacy; and it intimated, although did not explicitly state, that the Supreme Court may be open to categorical rules in this area.

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[104] Id. at 51–52 ("Nor can the Government overcome these considerations simply by narrowing the covered activities to those that involve *coordinated*, rather than *independent* advocacy. Conversations, discussions, or logistical arrangements might well prove necessary to carry out the speech-related activities here at issue… The Government does not distinguish this kind of "coordination" from any other. I am not aware of any form of words that might be used to describe "coordination" that would not, at a minimum, seriously chill not only the kind of activities the plaintiffs raise before us, but also the "independent advocacy" the Government purports to permit. And, as for the Government's willingness to distinguish *independent* advocacy from *coordinated* advocacy, the former is *more* likely, not *less* likely, to confer legitimacy than the latter.").

[105] *Humanitarian Law Project*, 561 U.S. at 62.

[106] See Leah K. Brady, Note, *Lawn Sign Litigation: What Makes A Statute Content-Based For First Amendment Purposes?*, 21 Suffolk J. Trial & App. Adv. 320, 343 (2016) ("When navigating the framework of First Amendment analysis, litigators must pay careful heed to many exceptions and distinctions.").

Previously, First Amendment scholars have launched powerful critiques against the modern test for reviewing content-based restrictions on free speech.[107] Volokh, in particular, has long argued that "some content-based restrictions on speech are unconstitutional even though they are narrowly tailored to a compelling state interest."[108] Following the *HLP* decision, Volokh noted that Court, in a rare move, upheld a content-based restriction and potentially created a new avenue for providing constitutional protection to laws barring "independent advocacy."[109] He suggested that the holding could give the Supreme Court the tools to strike down additional content-based restrictions.[110] Later, Volokh alternatively hypothesized that *HLP* may do just the opposite: set out a new, less protective test for analyzing content-based restrictions on speech.[111]

On Volokh's first reading, the Material Support Statute's content-based restriction could be *per se invalid* rather than valid if it can pass strict scrutiny.[112] The fact that the *HLP* majority "repeated[ly] stress[es] that the law doesn't restrict independent advocacy suggests that the Court would indeed strike down [] a ban that

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[107] Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny* at 2417 (cited in note 62) ("It is wrong descriptively: There are restrictions the Court would strike down - of which I'll give examples - even though they are narrowly tailored to serve a compelling state interest. It is wrong normatively: In striking these restrictions down, the Court would, in my view, be correct. And the official test is not just wrong but pernicious. It risks leading courts and legislators to the wrong conclusions, it causes courts to apply the test disingenuously, and it distracts us from looking for a better approach.").

[108] Id. at 2460.

[109] Eugene Volokh, *Humanitarian Law Project and Strict Scrutiny* (The Volokh Conspiracy, June 21, 2010, 1:28 PM), archived at https://perma.cc/HZ36-DMY4.

[110] Id.

[111] Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5).

[112] Id.

applied to independent advocacy" even if "such a ban might be necessary to serve a compelling government interest."[113] According to Volokh, the suggestion that restrictions on independent advocacy may be *per se* invalid independent of the strict scrutiny analysis indicates that the Court may be willing to expand free speech protections to other content-based regulations. [114] The Court suggested, but did not precisely define, such a test, but nevertheless Volokh cautions that *HLP* should not be read to stand for the simple proposition that content-based speech restrictions are constitutional if the statute is "narrowly tailored to a compelling government interest." [115] In this way, Volokh sees the Court picking up his argument from 1996, when he argued that the Court should consider rejecting strict scrutiny and should instead operate through categorical rules and exceptions as applied to individual cases.[116]

The challenge, however, is that the Court did not explicitly define this seemingly more protective test.[117] And for Volokh, the

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[113] Id.
[114] Id.
[115] Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5)
[116] Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny* at 2460 (cited in note 62) ("The Court, though, already has the power to create new categorical rules and to carve out new exceptions, whether or not the strict scrutiny framework is retained… And if I am correct, strict scrutiny as the Court applies it – and as strict scrutiny must be applied in order to avoid results that many would condemn as clearly incorrect – must contain an equally indeterminate and subjective 'permissible tailoring' component.").
[117] Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5) ("Is the test that content-based speech restrictions are constitutional if they are both narrowly tailored to a compelling government interest and at the same time leave open ample alternative channels for expressing the same message (a prong borrowed from the test for content-neutral restrictions), so that bans on speech coordinated with terrorist groups are generally constitutional because they leave open the alternative for independent advocacy?").

uncertainty created by the Court not only leaves room for a more free speech-protective, categorical approach to these cases,[118] but also could allow the Court to narrow free speech protections. Predicting the challenges of applying *HLP*'s holding, Volokh reasoned that the Court's failure to provide a test to distinguish criminal conduct from independent advocacy risks the possibility that *any* speech in defense of foreign terrorist organizations could be construed as unprotected under the First Amendment.[119] Thus, Volokh interprets the *HLP* holding as representing two distinct pathways for future application. In one way, *HLP* represents a reformation of the current doctrine testing the constitutionality of content-based restrictions on speech.[120] However, if it is not a reformation of how content-based restrictions are scrutinized, then Volokh views *HLP* as a vector toward allowing the government to bar expressive conduct that would otherwise be protected under the First Amendment.[121]

Professor Alexander Tsesis took an entirely different view of the holding in *HLP*.[122] For Tsesis, the Court was right to reject HLP's First Amendment challenge because the government possessed a strong interest in protecting the public, which was sufficient to outweigh the expressive interest of HLP.[123] Tsesis observes that the government

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[118] Id.
[119] Id.
[120] See id.
[121] See Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5).
[122] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1188 (cited at note 5).
[123] Id. at 1189 ("In *HLP*, as with true threats and group defamations decisions I assessed earlier, the public welfare concerns were grave enough to counterbalance the interest in self-expression.").

has the authority to regulate speech that threatens public safety,[124] including true threats and providing advice to terrorists. [125] Specifically with regard to provocative speech, Tsesis notes that the Supreme Court already distinguishes offensive private speech from speech and expressive conduct that interferes with civil order.[126] For example, Tsesis argues that *Virginia v. Black*, [127] which upheld Virginia's prohibition on cross-burning, could readily be extended to other symbols, such as the Hamas flag and the swastika if such symbols are intentionally displayed to promote a true threat to others.[128] In *Black*, the plurality of the Court held that the government "may punish those words which by their very utterance inflict injury

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[124] Id. at 1148 ("Although the liberty interest of non-violent groups is protected by the First Amendment even when it crosses into indecency, state and federal governments can regulate speech that threatens the safety of others.").
[125] Id. at 1145, citing *Humanitarian Law Project*, 561 U.S. at 40.
[126] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1155–56 (cited in note 5) ("The constitutional right to unencumbered private speech outweighs hurt feelings and moralistic concerns. The Court distinguishes this form of communication from intentionally intimidating statements; with regulations of the latter, it is the civic interest in safety that outweighs expressive liberty… While criminal regulation of incitement requires proof of intent, the Court recognizes the social interest in protecting civil order against public disturbances likely to instigate fist fights… The extent to which states can restrict individuals from… advising terrorists has caused a great deal of academic and judicial controversy"); see also *Brandenberg v. Ohio,* 395 U.S. 444, 448 (overturning a criminal syndicalism statute on First Amendment grounds since it failed to distinguish between "mere abstract teaching… of the moral propriety or even moral necessity for a resort of violence" and "preparing a group for violent action and steeling it to such action"); but see *Watts v. U.S.*, 394 U.S. 705, 705–08 (1969) (declaring a statute prohibiting persons from "knowingly and willfully" making threats to harm the President of the United States was constitutional, distinguishing "threats" from what is "constitutionally protected speech.").
[127] 538 U.S. 343, 363 (2003) (upholding a state cross burning statute due to the symbol's link to the KKK).
[128] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1177–78 (citing note 5).

or tend to incite an immediate breach of peace."[129] Applying the true threats doctrine, the Court reaffirmed that prohibiting true threats "protects individuals from the fear of violence" and "from the disruption that fear engenders." [130] The Court then held that Virginia's prohibition of cross-burning fell within the true threats doctrine and upheld its constitutionality under the First Amendment.[131]

Tsesis suggests that the Supreme Court in *HLP* applied the same logic as it holds for true threats to bar conduct that harms the public.[132] Thus, according to Tsesis, the result reached by the Court in *HLP* is justified because the "criminalization of material support to designated terrorist organizations is a constitutionally justifiable means of preventing threats to general welfare." [133] Interestingly, Tsesis's argument that the First Amendment should not protect specific conduct or speech that threatens public safety echoes sentiments expressed prior to the ratification of the First Amendment, particularly Blackstone. [134] As discussed above, Blackstone expressed the view that seditious libel laws were

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[129] *Black*, 538 U.S. at 359 (internal quotation marks omitted), citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).
[130] Id. at 360.
[131] Id. at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").
[132] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1189 (cited in note 5).
[133] See id. at 1166.
[134] See id. at 1194–95; see also Blackstone, 4 *Commentaries* at *150 (cited in note 17).

intended to keep the peace for the benefit of public welfare.[135] Thus, Tsesis's belief that the Supreme Court historically bars speech that disturbs public safety partly suggests a continuation in *HLP* of a Blackstonian tradition of barring seditiously libelous speech.[136]

Additionally, responding directly to Volokh, Tsesis argues that the *HLP* Court did not employ strict scrutiny analysis at all.[137] Tsesis contends that Volokh erroneously read the second prong of the strict scrutiny analysis, narrow tailoring, into the opinion.[138] Rather than employing strict scrutiny, Tsesis suggests that the Court ultimately saw the public danger of legitimizing terrorist organizations to be compelling enough to warrant the prohibition of material support.[139]

The writings of Volokh and Tsesis help to illustrate the significant pressure points in the doctrine following *HLP*. On one hand, Tsesis argues that *HLP* is correct since speech that endangers the public welfare should not be protected by the First Amendment at all.[140] Conversely, Volokh believes that *HLP* could open the door to create a new *per se* test that could protect speech, or it could prohibit otherwise protected speech as a consequence of the Court's failure to adequately distinguish independent advocacy from coordinated activity. [141] Ultimately, Tsesis believes that *HLP*

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[135] Blackstone, 4 *Commentaries* at *151–52 (cited in note 17).
[136] See Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1194–95 (cited in note 5); see also Blackstone, 4 *Commentaries* at *150 (cited in note 17).
[137] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1189 (cited in note 5).
[138] Id. at 1190.
[139] Id. ("Even assuming that Volokh is correct and this is an alternative formulation, albeit an ambiguous one, of strict scrutiny, the majority would likely nevertheless view the public danger of legitimizing terror to be compelling. Criminal liability arises from only 'a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.").
[140] See id. at 1148.
[141] See Volokh, *Inflammatory Speech: Offense Versus Incitement* (cited in note 5).

continued the Supreme Court's long-standing precedent of barring expressive conduct that harms public safety while Volokh views *HLP* as a potential catalyst for one of two developments: more protected speech or more government suppression of political speech.[142]

The following section examines the effects of *HLP* in three important lower court decisions. It will explore whether the courts of appeals have adopted Tsesis' view that public welfare considerations necessarily outweigh liberty interests in the context of material support of terrorism, or whether they have instead traveled down either of Volokh's predicted paths.

IV. A BRIEF SURVEY OF THE LAW FOLLOWING *HUMANITARIAN LAW PROJECT*

This section discusses three circuit court opinions that have attempted to navigate the uncharted doctrinal waters following *HLP*.[143] This limited sample shows that appellate courts have concluded that the conduct underlying each of the challenged material support convictions constituted "coordinated activity" and thus did not violate the protections of the First Amendment.

In *United States v. Farhane*, Rafiq Sabir challenged his conviction under the Material Support Statute for providing material support to al-Qaeda.[144] Sabir, a licensed physician, sought to meet with al-Qaeda terrorists in Saudi Arabia, pledged allegiance to al-Qaeda, and offered to provide medical assistance.[145] Citing *HLP*, the Second

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[142] See Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1166 (cited in note 5); but see Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5); Volokh, *Humanitarian Law Project and Strict Scrutiny* (cited in note 109).
[143] See text accompanying notes 145, 151, and 162.
[144] 634 F3d 127, 136 (2d Cir. 2011).
[145] Id. at 133.

Circuit rejected Sabir's claim that the Material Support Statute was overbroad, distinguishing his criminal conduct in coordination with al-Qaeda from constitutionally protected independent advocacy.[146] Indeed, the Second Circuit explicitly stated that the Material Support Statute "leaves persons free to 'say anything they wish on any topic,' including terrorism."[147] Thus, the Second Circuit panel reaffirmed that the Material Support Statute does not prohibit membership in a terrorist organization, but rather the ability for individuals to provide material support to such an organization.[148] In this way, the Second Circuit explicitly held that *HLP*'s definition of "coordinated activity" applied to Sabir's conduct, therefore rendering the defendant's First Amendment claim meritless.[149]

The Fifth Circuit has similarly maintained *HLP*'s understanding of coordinated activity.[150] In *United States v. El-Mezain*, the Holy Land Foundation, then the largest Muslim charity in the United States, sought to overturn a conviction under the Material Support Statute after the jury found that the organization provided material support to Hamas.[151] The jury found that between 1992 and 2001, the Holy Land Foundation had given $12.4 million to Hamas with the intent

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[146] Id. at 137 ("It does not prohibit independent advocacy of any kind... It does not prohibit or punish mere membership in or association with terrorist organizations.").
[147] Id. at 137, citing *Humanitarian Law Project,* 561 U.S. at 25–6.
[148] *Farhane*, 634 F.3d at 138 ("No such concern arises with respect to § 2339B, however, because, as we have already observed, that statute does not prohibit simple membership in a terrorist organization. Rather, the statute prohibits the knowing provision of material support to a known terrorist organization. Proof of such provision (whether actual, attempted, or conspiratorial) together with the dual knowledge elements of the statute is sufficient to satisfy the personal guilt requirement of due process… In sum, Sabir fails to state a claim — much less demonstrate — that § 2339B is either facially vague in violation of due process or overbroad in violation of the First Amendment.").
[149] See id. at 136–37.
[150] See *United States v. El-Mezain*, 664 F.3d 437, 538–39 (5th Cir. 2011).
[151] See id. at 485.

to contribute funds to the terrorist organization.[152] Its members appealed their convictions.[153] In its instructions, the district court charged that the First Amendment "guarantees to all person in the United States the right to free speech," that "no one can be convicted of a crime simply on the basis of his beliefs, his expression of those beliefs, or his associations," but that it does not "provide a defense of a criminal charge simply because a person uses his associations… to carry out an illegal activity."[154]

The Fifth Circuit rejected the argument that the district court improperly instructed the jury.[155] The judge read the following jury

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[152] Id. at 486.

[153] Id. at 535–36 ("The Government's evidence against Abdulqader included approximately one dozen video recordings of his participation in musical and dramatic performances that referenced Hamas and contained Islamic or anti-Israel themes. The performances occurred at various fund-raising events that HLF sponsored. The Government's theory at trial was that one of Abdulqader's roles in the conspiracy was to motivate audiences to contribute funds to HLF by performing pro-Hamas songs and skits. Most of the performances occurred before Hamas was designated as a terrorist organization, but three were recorded after the designation. The recordings before the designation tended to be obvious in their support of Hamas, expressly referring to both Hamas and killing Israelis. The recordings made after the designation were less overt in their support, and the Government argued to the jury that the defendants made this change intentionally in order to avoid directly showing support for a terrorist organization. Abdulqader contends on appeal that his speech in the video recordings was protected under the First Amendment, and that the district court's jury charge misstated the law and allowed the jury to convict him based solely on protected speech or association.").

[154] *El-Mezain*, 664 F.3d at 536 ("Stated another way, if a defendant's speech, expression, or associations were made with the intent to willfully provide funds, goods, or services to or for the benefit of Hamas, or to knowingly provide material support or resources to Hamas… then the First Amendment would not provide a defense of that conduct.").

[155] See id. at 537 ("Assuming arguendo that the language of the jury charge emphasized above could in isolation be read to allow the jury to consider that speech to be criminal, we conclude that the charge as a whole did not permit the jury to convict Abdulqader based on protected speech.").

instruction with respect to the Material Support Statute and the First Amendment:

> This amendment guarantees to all persons in the United States the right to freedom of speech, freedom of religion, and freedom of association. Because of these constitutional guarantees, no one can be convicted of a crime simply on the basis of his beliefs, his expression of those beliefs, or his associations. The First Amendment however, does not provide a defense to a criminal charge simply because a person uses his associations, beliefs, or words to carry out an illegal activity. *Stated another way, if a defendant's speech, expression, or associations were made with the intent to willfully provide funds, goods, or services to or for the benefit of Hamas, or to knowingly provide material support or resources to Hamas, as described in the indictment, then the First Amendment would not provide a defense to that conduct*.[156]

In the case of the defendant Mufid Abdulqader, the court found that his speech-related activities prior to Hamas's designation as a foreign terrorist organization could not have violated the Material Support Statute under *HLP*.[157] Furthermore, the Fifth Circuit held that the district court clearly stated that the defendants could not be convicted on the basis of their pro-Hamas beliefs and stated that the jury "followed its instructions."[158] The Fifth Circuit emphasized that

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[156] Id. at 536 (emphasis in original).
[157] Id. at 537 ("We recognize that the pre-1995 video recordings of Abdulqader's speech could not themselves be criminal under *Humanitarian Law Project* because it was not illegal at that time to support Hamas.").
[158] *El-Mezain*, 664 F.3d at 537 ("Second, the First Amendment portion of the charge specifically instructed the jury that the defendants could not be convicted "simply on the basis of his beliefs, [or] his expression of those beliefs." If we assume the jury followed

the district court correctly instructed the jury that the First Amendment protections on speech did not apply if the defendants' speech were made with the intent to willfully provide material support to Hamas.[159] The Court recognized that Abdulqader spoke and performed at gatherings "with the intent to raise money for the [Holy Land Foundation]" and that the performances changed "tactically after Hamas was designated as a terrorist organization."[160] Thus, the Fifth Circuit deferred to the record of the trial court that the facts presented against the defendant were indicative of coordinated activity with Hamas, declaring their First Amendment claim meritless, and affirming Abdulqader's conviction under the Material Support Statute.[161]

Finally, the First Circuit applied *HLP*'s distinction between coordinated activity and independent advocacy in upholding the conviction of Tarek Mehanna.[162] In *United States v. Mehanna*, Mehanna appealed his conviction under the Material Support Statute for providing material support to al-Qaeda.[163] The indictment against Mehanna focused on two sets of activities between 2004 and 2005: 1) Mehanna traveled to Yemen in hopes of attending a terrorist training camp; and 2) he translated Arab-language materials into

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its instructions, as we must, the jury would not have convicted Abdulqader of conspiracy for his pre-1995 conduct because it knew that Hamas had not been designated as a terrorist organization.").

[159] See id.

[160] Id. at 538.

[161] Id. at 539 ("In sum, the court's charge on the First Amendment may not be read in a vacuum. The district court's charge on the elements of the offense, in conjunction with its express directive that speech alone cannot support a conviction and its limitation that the speech must be considered in relation to the indictment, rendered the charge a correct statement of the law to be applied to the issues confronting the jury. The First Amendment challenge to the jury charge is therefore denied.").

[162] 735 F.3d 32, 44, 49 (1st Cir. 2013).

[163] Id. at 41.

English for a website expressing sympathies for al-Qaeda, both of which constituted violations of the Material Support Statute.[164] On appeal, Mehanna claimed that his actions were protected speech under the First Amendment.[165] Mehanna argued that the district court erred by failing to let the jury consider his First Amendment rights.[166] The district court instructed the jury that it need not worry about the "scope or effect of the guarantee of free speech contained in the First Amendment," stating that the Supreme Court held that the statute "already accommodates that guarantee by punishing only conduct that is done in coordination with or at the direction of a foreign terrorist organization."[167]

The First Circuit rejected Mehanna's argument on the grounds that *HLP* already determined that the First Amendment does not protect actions that provide material support to terrorist organizations.[168] As a result, the First Circuit held that the district

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[164] See id. at 41.

[165] See id. at 47 ("The defendant's second rejoinder represents an attempt to change the trajectory of the debate. He points out that the indictment identifies his translations as culpable activity; that the government introduced copious evidence in support of a theory of guilt based on the translations; that it argued this theory to the jury; and that the jury returned a general verdict. Building on this platform, he argues that even if the evidence of the Yemen trip is sufficient to ground his terrorism-related convictions, those convictions cannot stand because they may have been predicated on protected First Amendment speech.").

[166] See *Mehanna*, 735 F.3d at 48.

[167] Id. ("Put another way, activity that is proven to be the furnishing of material support or resources to a designated foreign terrorist organization under the [Material Support Statute] is not activity that is protected by the First Amendment; on the other hand, as I've said, independent advocacy on behalf of the organization, not done at its direction or in coordination with it, is not a violation of the statute.").

[168] Id. at 49 ("In sum, the district court's instructions captured the essence of the controlling decision in *HLP*, where the Court determined that otherwise-protected speech rises to the level of criminal material support only if it is 'in coordination with foreign

court's jury instruction "captured the essence of the controlling decision in *HLP*," showing that once the defendant's coordinated activity is established, his First Amendment interests are relinquished due to his facially criminal conduct.[169] Thus, the First Circuit upheld Mehanna's conviction on grounds that he engaged in coordinated activity rather than engaging in mere "independent advocacy," which otherwise would have been protected.[170]

These cases offer a number of important lessons. First, it cannot be determined whether the lower courts are using the imprecision in the *HLP* test identified by Justice Breyer and Volokh to erode First Amendment protections. Despite their concern that the doctrinal inexactitude of *HLP* could pave the way for the courts to uphold unconstitutional content-based speech regulations,[171] the approaches of the lower courts have made it difficult to determine if this is in fact occurring. The courts of appeals have not explicitly defined the line distinguishing coordinated activity from independent advocacy; rather, they have found coordinated activity sufficiently plain to classify it as such without laying down a test to address the marginal case. Just like the Supreme Court, the lower appellate courts have resisted implementing a precise test. For this reason, these cases do not provide conclusive evidence to substantiate Volokh's concern that the absence of a clear test delineating coordinated activity from independent advocacy could result in violations of the First Amendment. Equally possible, however, is that the *HLP* decision could open the door to a more restrictive interpretation of protected expressive conduct in the future.

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groups that the speaker knows to be terrorist organizations'… If speech fits within this taxonomy, it is not protected…"), quoting *Humanitarian Law Project*, 561 U.S. at 25–32.

[169] Id. at 49–50.

[170] *Mehanna*, 735 F.3d at 49.

[171] Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5).

Second, Volokh's speculation that courts could use the presence of "independent advocacy" as a per se trigger for First Amendment protection independent of the strict scrutiny framework does not find support in these cases. In fact, in each of the above described cases, the court *affirmed* the presence of coordinated activity, not independent advocacy, which runs directly counter to Volokh's suggestion. That being said, these cases do not foreclose the possibility that future courts will follow Volokh's suggestion that *HLP* could be used to *extend* First Amendment protections. Thus, it seems Volokh's post-*HLP* questions remain largely unanswered.

Interestingly, the lower courts' rulings *could* suggest that Professor Tsesis's view that *HLP* only barred conduct that would harm the public *seems* to hold true since the lower courts have not clearly demarcated the line between coordinated activity and independent advocacy.[172] This suggests that the lower courts have reaffirmed a Blackstonian notion that those who promulgate speech that endangers the public welfare ought to be held liable.[173] In each of the cases described above, the lower courts have concluded that the respective defendants' conduct fell under "coordinated activity." By so doing, these lower courts' holdings lend some support to the proposition that the Material Support Statute's bar on such conduct revitalized an originalist exception to First Amendment protections, which barred seditious speech with the sole purpose of causing public outrage.

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[172] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1194–95 (cited in note 5).
[173] Blackstone, 4 *Commentaries* at *150–52 (cited in note 17).

CONCLUSION

Holder v. Humanitarian Law Project pushed at the boundaries of the debate about when an individual's desire to support foreign terrorist organizations can result in a constitutionally permissible criminal conviction.[174] The decision represented a flashpoint in the ongoing struggle between two often-competing mandates: the protection of individual free speech rights and the government's pressing need to protect public welfare and nation security.

Contrary to the understanding of Justice Black,[175] the Framers of the First Amendment originally meant to maintain common law seditious libel. [176] Blackstone made it clear that speech that intentionally disturbed the public peace warranted libel charges at the civil and criminal level.[177] While the modern jurisprudence is far more Madisonian than it is originalist, particularly since *New York Times v. Sullivan*, the modern doctrine post-*HLP* could open the door to the renewal of an originalist notion that speech intended to cause public unrest and disorder not only falls outside the protection of the First Amendment, but also should be subject to civil or criminal penalty.[178]

Although *HLP* sought to distinguish between coordinated activity and independent advocacy in order to strike the balance between national security and individual liberty, it is inevitable that future First Amendment challenges will arise. This is likely to occur

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[174] See Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1194–95 (cited in note 5); Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5).
[175] See *Sullivan*, 376 U.S. at 296–97.
[176] Levy, *Emergence of a Free Press* at 274–75 (cited in note 13).
[177] Blackstone, 4 Commentaries at *150–52 (cited in note 17).
[178] Id.

because the Supreme Court failed to clearly apply its prior analytical frameworks and to define its new test in upholding the Material Support Statute, leaving some degree of uncertainty about the relationship between the *HLP* framework and strict scrutiny analysis for content-based regulations.[179]

Furthermore, following the Court's apparent deviation from the modern Madisonian conception of free speech in *HLP*, the lower courts have applied *HLP*'s holding in cases where the conduct of various defendants constitutes "coordinated activity."[180] The explication of *HLP* by the lower courts does, however, lend support to Professor Tsesis' suggestion that *HLP* was another example of the Court's refusal to protect expressive conduct that harms the public welfare.[181] It seems that the Court has opened the door for a departure from the *Madisonian* conception of free speech in favor of a more *originalist* formation that mirrors the original public meaning of what constitutes protected speech.

While the precise legacy of *Holder v. Humanitarian Law Project* remains undefined, the evidence suggests that the decision opened the door to allow the government to be restrictive with regard to speech that is seditious and societally damaging to public welfare. The post-*HLP* case law suggests that this in fact happened since conduct that provided material support for foreign terrorist groups was held unprotected under the Constitution. Thus, if the courts allow the government to regulate speech that endangers the public welfare, then it would represent a return to the original understanding of the First Amendment that one does not possess the

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[179] See Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny* (cited in note 5).
[180] See *Humanitarian Law Project*, 561 U.S. at 40; *Mehanna*, 735 F.3d at 49; *El-Mezain*, 664 F3d at 539; *Farhane*, 634 F.3d at 138.
[181] Tsesis, *Inflammatory Speech: Offense Versus Incitement* at 1189–90 (cited in note 5).

natural liberty to engage in such seditious speech at the expense of national security.