NOTES

READING MINDS: THE MENS REA REQUIREMENT FOR ATA AIDING AND ABETTING LIABILITY IN LIGHT OF *TWITTER, INC. V. TAAMNEH*

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The Antiterrorism Act (ATA) enables injured parties to sue "any person who aids and abets, by knowingly providing substantial assistance, . . . an act of international terrorism [committed by a designated foreign terrorist organization]." In the Supreme Court's 2023 Twitter, Inc. v. Taamneh *decision, the Justices considered the elements of a secondary liability claim under the ATA. While ultimately resolving the case based on the foundational tort principle that liability does not usually extend to inaction or nonfeasance, the unanimous Court also discussed the mens rea requirement for ATA aiders and abettors, noting that courts should view this requirement in light of the common law development of secondary liability.*

But common law aiding and abetting cases have rarely been lucid, and courts—including the Supreme Court in Taamneh*—have referenced a similar collection of precedents to support meaningfully different mens rea tests. Much ink has been spilled over this confusion in the criminal law context, and in the wake of* Taamneh*, a similar puzzle now applies to the ATA.*

This Note provides a path forward, proposing a sliding scale for lower courts to apply when interpreting Taamneh *and adjudicating ATA claims. By organizing the ATA's mens rea and level of assistance prongs on a sliding scale, with a weaker showing of one demanding a stronger showing of the other, courts can ensure that the ATA fulfills its critical mandate: deterring terrorism, compensating injured victims, and crippling terrorist organizations, all without impeding ordinary business activities.*

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INTRODUCTION

On April 8, 2019, President Donald Trump designated the Islamic Revolutionary Guard Corps (IRGC) as a "Foreign Terrorist Organization" (FTO) under Section 219 of the Immigration and Nationality Act.[1] Initially established to defend the Iranian government from external and internal threats in the aftermath of the 1979 Revolution,[2] the IRGC has developed into "the most powerful controller of all important economic sectors across Iran."[3] IRGC subsidiaries built the Tehran–Tabriz railway, the

1. See Press Release, Donald Trump, U.S. President, Statement From the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization (Apr. 8, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/ [https://perma.cc/XCT3-8SZV].

2. CFR.org Eds., Iran's Revolutionary Guards, Council on Foreign Rels., https://www.cfr.org/backgrounder/irans-revolutionary-guards [https://perma.cc/NFD2-DFS3] (last updated Nov. 12, 2024).

3. Munqith Dagher, The Iranian Islamic Revolutionary Guard Corps (IRGC) From an Iraqi View—A Lost Role or a Bright Future?, Ctr. for Strategic & Int'l Stud. (July 30, 2020), https://www.csis.org/analysis/iranian-islamic-revolutionary-guard-corps-irgc-iraqi-view-lost-role-or-bright-future [https://perma.cc/K4E5-U6VF]. The IRGC's economic

Karkheh Dam, and a gas pipeline from Asaluye to Iranshahr.[4] Beyond infrastructure construction, the IRGC owns or controls companies in land, air, and marine transportation; tractor and aircraft manufacturing; and the natural gas and telecommunications sectors.[5]

But there is a darker side to the IRGC. The Iranian government uses the organization to "provide support to terrorist organizations, provide cover for associated covert operations, and create instability in the [Middle East]."[6] In addition to offering training and funds to Hezbollah[7] and Hamas,[8] the IRGC has been accused of masterminding several international crimes, such as a 2007 kidnapping of five British nationals,[9] a 2007 attack on American soldiers,[10] and a 2019 explosion that damaged commercial ships in the Gulf of Oman.[11] As for the previously mentioned

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muscle grew to such an extent that "some western sources estimated the extent of the economy controlled by the IRGC to be around one to two thirds of Iran's GDP." Id.

4. See Frederic Wehrey, Jerrold D. Green, Brian Nichiporuk, Alireza Nader, Lydia Hansell, Rasool Nafisi & S.R. Bohandy, The Rise of the Pasdaran: Assessing the Domestic Roles of Iran's Islamic Revolutionary Guards Corps 60–61 (2009), https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG821.pdf (on file with the *Columbia Law Review*).

5. See Dagher, supra note 3; Babak Dehghanpisheh & Yeganeh Torbati, Firms Linked to Revolutionary Guards to Win Sanctions Relief Under Iran Deal, Reuters (Aug. 10, 2015), https://www.reuters.com/article/iran-nuclear-sanctions/firms-linked-to-revolutionary-guards-to-win-sanctions-relief-under-iran-deal-idINL5N10I3N320150810 (on file with the *Columbia Law Review*); Saeed Ghasseminejad, Iranian Companies' Shares Plummeted After Treasury Designations, Found. for Def. Democracies (Nov. 2, 2018), https://www.fdd.org/analysis/2018/11/02/iranian-companies-shares-plummeted-after-treasury-designations/ (on file with the *Columbia Law Review*); Press Release, U.S. Dep't of Treasury, Treasury Sanctions Multinational Network Supporting Iran's UAV and Military Aircraft Production (Sept. 19, 2023), https://home.treasury.gov/news/press-releases/jy1745 [https://perma.cc/SYJ5-PN6Z].

6. Bureau of Counterterrorism, Country Reports on Terrorism 2021: Iran, U.S. Dep't St., https://www.state.gov/reports/country-reports-on-terrorism-2021/iran/ [https://perma.cc/82YM-3E3M] (last visited Sept. 13, 2024).

7. Kali Robinson, What Is Hezbollah?, Council on Foreign Rels., https://www.cfr.org/backgrounder/what-hezbollah [https://perma.cc/XE4G-5CS9] (last updated Sept. 28, 2024).

8. Mark Mazzetti, Striking Deep Into Israel, Hamas Employs an Upgraded Arsenal, N.Y. Times (Dec. 31, 2008), https://www.nytimes.com/2009/01/01/world/middleeast/01rockets.html (on file with the *Columbia Law Review*).

9. Mona Mahmood, Maggie O'Kane & Guy Grandjean, Revealed: Hand of Iran Behind Britons' Baghdad Kidnapping, The Guardian (Dec. 30, 2009), https://www.theguardian.com/world/2009/dec/30/iran-britons-baghdad-kidnapping (on file with the *Columbia Law Review*).

10. Shawn Snow, US Offering $15 Million for Info on Iranian Planner of 2007 Karbala Attack that Killed 5 US Troops, Military Times (Dec. 5, 2019), https://www.militarytimes.com/flashpoints/2019/12/05/us-offering-15-million-bounty-for-info-on-iranian-who-planned-2007-karbala-attack-that-killed-5-us-troops/ [https://perma.cc/Z8QN-5RR2].

11. Iran Directly Behind Tanker Attacks off UAE Coast, US Says, Gulf News (May 25, 2019), https://gulfnews.com/world/mena/iran-directly-behind-tanker-attacks-off-uae-coast-us-says-1.64179304 [https://perma.cc/A9B2-R8ZE] (last updated May 26, 2019).

IRGC-controlled subsidiaries that are central to the Iranian economy, they help comprise a "web of front companies" that the IRGC exploits to "fund terrorist groups across the region, siphoning resources away from the Iranian people and prioritizing terrorist proxies over the basic needs of its people."[12] Ultimately, according to President Trump, "If you are doing business with the IRGC, you will be bankrolling terrorism."[13]

Of course, the "bifarious" nature of the IRGC and its subsidiary entities is not unique.[14] And the United States government employs a variety of tactics to counter the terrorist activities of these organizations, including economic sanctions[15] and criminal liability.[16] While these measures may be effective preventative and punitive tools, neither directly help compensate those injured in terrorist attacks.[17]

The Antiterrorism Act (ATA) serves this compensatory function, enabling injured parties to sue "any person who aids and abets, by

12. Press Release, U.S. Dep't of Treasury, Treasury Designates Vast Network of IRGC-QF Officials and Front Companies in Iraq, Iran (Mar. 26, 2020), https://home.treasury.gov/news/press-releases/sm957 [https://perma.cc/4SYW-5EJU] (internal quotation marks omitted) (quoting Treasury Secretary Steven T. Mnuchin); see also Dagher, supra note 3 ("[Iranian] protests that began in autumn 2019 . . . directed their criticism at the IRGC, denounced the role of Iran in regional feuds, and chanted slogans such as: 'No to Gaza and Lebanon, I will give my life for Iran,' and 'Leave Syria, think about us!'").

13. Trump, supra note 1; see also Kenneth Katzman, Cong. Rsch. Serv., IN11093, Iran's Revolutionary Guard Named a Terrorist Organization 2 (2019), https://crsreports.congress.gov/product/pdf/IN/IN11093 (on file with the *Columbia Law Review*) ("State Department officials asserted that the IRGC . . . has used [its power and money] to support attacks on the United States and its allies.").

14. This Note uses "bifarious" to characterize entities that pursue both legal and illegal objectives, such as generic infrastructure projects and international terrorism. See, e.g., United States v. Marzook, 383 F. Supp. 2d 1056, 1067 (N.D. Ill. 2005) (describing Hamas as a "bifarious" organization). For two additional examples of bifarious organizations discussed in a relatively recent Supreme Court decision, see Holder v. Humanitarian Law Project, 561 U.S. 1, 9 (2010) ("[T]he [Kurdistan Workers' Party] and [the Liberation Tigers of Tamil Eelam] engage in political and humanitarian activities. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens." (citation omitted)).

15. Press Release, U.S. Dep't of Treasury, Treasury Targets Iran's Islamic Revolutionary Guard Corps (Feb. 10, 2010), https://home.treasury.gov/news/press-releases/tg539 [https://perma.cc/B424-QX6T].

16. A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary, 109th Cong. 2–4 (2005) (statement of Barry Sabin, Chief, Counterterrorism Section, Criminal Division, DOJ).

17. See Charles Doyle, Cong. Rsch. Serv., R41333, Terrorist Material Support: An Overview of 18 U.S.C. § 2339A and § 2339B 1–2 (2023), https://crsreports.congress.gov/product/pdf/R/R41333 (on file with the *Columbia Law Review*) (outlining federal statutes that "sit at the heart of the Justice Department's terrorist prosecution efforts"); see also How Much Are the Penalties for Violating OFAC Sanctions Regulations?, Off. Foreign Assets Control (Mar. 8, 2017), https://ofac.treasury.gov/faqs/12 [https://perma.cc/5AY7-SV8M] (last updated Aug. 21, 2024) (discussing civil penalties for violations of OFAC-administered sanctions programs).

knowingly providing substantial assistance, . . . an act of international terrorism [committed by an FTO]" and "recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."[18] So under the ATA, private parties can sue both the organizations committing terrorist attacks *and* any actor who aids and abets the illegal conduct. That said, considering the difficulties of bringing FTOs into American courts, much of the litigation is directed at those who aid and abet terrorist attacks.[19] Put differently, instead of suing the IRGC itself, terrorism victims can sue the deep-pocketed companies who "knowingly provid[ed] substantial assistance" to the IRGC and its subsidiaries.[20] And as the statutory language indicates, a potential aider and abettor's mental state is a critical component of establishing liability under the ATA.

But in the Supreme Court's 2023 *Twitter, Inc. v. Taamneh* decision, the Justices provided a scrambled account of the ATA's mens rea inquiry and reshaped the scope of secondary liability in the process.[21] Although the unanimous Court clarified that culpable aiders and abettors are those who both operate with "general[] aware[ness]" of the role they are playing in the FTO's terrorist activity and "knowingly" provide substantial assistance to an act of international terrorism[22]—two distinct inquiries that are not "carbon cop[ies]" of one another[23]—the majority left unclear how much knowledge (or purpose) is needed to satisfy the latter mens rea element. Consequently, how lower courts interpret the ATA's mens rea analysis in light of *Taamneh* will determine an injured victim's ability to obtain compensation, a defendant's potential exposure to treble damages, and the American court system's capacity to "interrupt, or at least imperil, the flow of" support to terrorist organizations.[24]

This Note proceeds in three parts. Part I provides a background of civil liability under the ATA and the Justice Against Sponsors of Terrorism Act (JASTA), which expanded ATA liability to aiders and abettors. It then analyzes *Halberstam v. Welch*—the framework that JASTA adopted for aiding and abetting claims—and summarizes circuit court cases applying JASTA and *Halberstam* prior to *Twitter, Inc. v. Taamneh*. Part II examines *Taamneh* and identifies the problem that the Supreme Court's opinion

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18. 18 U.S.C. § 2333 (2018).

19. Jimmy Gurulé, Holding Banks Liable Under the Anti-Terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform, 41 J. Legis. 184, 184 (2015) ("[T]he threat of a large civil monetary judgment is unlikely to have a deterrent effect on foreign terrorists or terrorist organizations that 'are unlikely to have assets, much less assets in the United States.'" (quoting Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev. (*Boim I*), 291 F.3d 1000, 1021 (7th Cir. 2002))).

20. 18 U.S.C. § 2333.

21. 143 S. Ct. 1206 (2023).

22. Id. at 1219 (internal quotation marks omitted) (quoting Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)).

23. Id. at 1229.

24. S. Rep. No. 102-342, at 22 (1992).

created vis-à-vis what it means to "knowingly" assist acts of international terrorism. To highlight this problem and its practical significance, Part II considers the three mens rea tests that the Supreme Court discussed and compares these distinct standards to their criminal law analogs. Part III proposes a solution for lower courts applying the *Taamneh* framework to ATA lawsuits, focusing chiefly on extending liability only to culpable actors.

I. BACKGROUND: THE ATA'S FLUCTUATING SCOPE

To fully contextualize the Supreme Court's discussion of the ATA's mens rea requirement in *Taamneh*, it is necessary to provide an overview of the ATA's historical development. Of particular importance is that secondary liability is a relatively recent feature of the ATA. Accordingly, this Part begins by charting the expansion of the ATA and comparing the Act to its criminal law counterpart: the federal material support statutes. Then, this Part describes the codification of aiding and abetting liability in the ATA and finishes with a discussion of circuit court cases applying JASTA before *Twitter, Inc. v. Taamneh*, illustrating the complex landscape of secondary liability under the ATA prior to the Supreme Court's intervention.

A. *The ATA's Legislative History and Statutory Language*

Introduced on the heels of the Palestine Liberation Organization's hijacking of a cruise ship and murder of an American passenger,[25] the ATA was designed to accomplish two related—but distinct—goals. First, the ATA sought to "empower[] victims of terrorism with the right to their day in court to prove who is responsible for all the world to see."[26] To do this, the statute would "fill a gap in the law by establishing a civil counterpart to the existing criminal statutes,"[27] thereby ensuring that "United States victims of international terrorism were not left without an adequate legal remedy."[28]

But beyond American victims, Congress also viewed the ATA as a means of crippling terrorist organizations. Revealing this motivation, Senator Charles Grassley, the bill's chief cosponsor, argued during a floor debate that the ATA would be critical to holding terrorists "accountable

25. Gurulé, supra note 19, at 188 ("On October 7, 1985, terrorists hijacked the Italian cruise liner Achille Lauro, and murdered Leon Klinghoffer, a passenger bound to a wheelchair, who was shot and his body dumped into the Mediterranean Sea.").

26. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley); see also S. Rep. No. 102-342, at 45 ("This bill opens the courthouse door to victims of international terrorism.").

27. Ests. of Ungar ex rel. Strachman v. Palestinian Auth., 304 F. Supp. 2d 232, 238 (D.R.I. 2004).

28. Gurulé, supra note 19, at 188.

where it hurts them most: at their lifeline, their funds."[29] Similarly, in a hearing on the ATA, an expert witness reminded the subcommittee that "anything that could be done to deter money-raising in the United States, money laundering in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism."[30] Thus, according to Senator Grassley, the ATA would send an unmistakable message to terrorists to "keep their hands off Americans and their eyes on their assets."[31]

For these reasons, Congress passed the ATA's civil liability provision in 1990.[32] Under the relevant statutory language that remained largely untouched until 2016,[33] "[a]ny national of the United States injured . . . by reason of an act of international terrorism . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including attorney's fees."[34] The statute further defines "international terrorism" as activities that (1) "involve . . . acts dangerous to human life that are a violation of [U.S.] criminal laws"; (2) "appear to be intended" to "intimidate . . . a civilian population," "influence the policy of a government by intimidation," or "affect the conduct of a government by mass destruction, assassination, or kidnapping"; and (3) "occur primarily outside the territorial jurisdiction of the United States."[35] Rephrased, the term requires a dangerous crime, a terrorist intention, and an

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29. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley); see also S. Rep. No. 102-342, at 22 (noting that the ATA imposes "liability at any point along the causal chain of terrorism . . . [to] interrupt, or at least imperil, the flow of money").

30. Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary, 101st Cong. 79 (1990) (statement of Joseph A. Morris, President and General Counsel, Lincoln Legal Foundation).

31. 136 Cong. Rec. 26,717 (1990) (statement of Sen. Grassley). Even Senator Grassley confessed that the ATA was, "in part, symbolic," Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary, 101st Cong. 2 (1990) (statement of Sen. Grassley), given terrorist organizations likely would not have many assets within U.S. jurisdiction to satisfy court judgments, see Jack V. Hoover, Note, The Case for Reforming JASTA, 63 Va. J. Int'l L. 251, 257 (2023). Still, as the Senator noted, the ATA would ensure that "[i]f terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them." 136 Cong. Rec. 7592 (1990) (statement of Sen. Grassley).

32. Technically, due to an error from the enrolling clerk, the 1990 version of the ATA was repealed in 1991. S. Rep. No. 102-342, at 22. But Congress repassed the same bill and language in 1992, which remain in force today. Brief of Anti-Terrorism Act Scholars as Amici Curiae in Support of Respondents at 5 n.2, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496), 2023 WL 361671 [hereinafter Brief of Anti-Terrorism Act Scholars].

33. See infra notes 61–66 and accompanying text.

34. Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 2333, 104 Stat. 2240, 2251 (1990) (codified as amended at 18 U.S.C. § 2333 (2018)).

35. 18 U.S.C. § 2331(1); see also Gill v. Arab Bank, PLC, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012) (comparing a cause of action under § 2333(a) to "a Russian matryoshka doll, with statutes nested inside of statutes" (internal quotation marks omitted) (quoting Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1032 (E.D.N.Y. 2006), rev'd sub nom. McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008))).

international element,[36] although the latter two requirements have received "scant attention" from courts.[37]

B. *Liability Under the ATA Before JASTA: A Circuit Split*

The pre-JASTA Antiterrorism Act raised a critical question at the heart of potential civil liability: *Who* could be held liable? Presumably, victims could sue the individual terrorists who "pull[ed] the trigger or plant[ed] the bomb" in the relevant attack,[38] but what about the parties that aided the terrorists and FTOs in their criminal activities? This question was especially important because direct perpetrators of terrorism were typically shielded from ATA lawsuits, as they often died in the terrorist attacks, lived beyond the personal jurisdiction of the United States, or lacked assets to satisfy court judgments.[39] But the text of the ATA—which simply allowed those "injured . . . by reason of an act of international terrorism . . . [to] sue"[40]—was ambiguous as to which parties could be held civilly liable and which theories of liability would apply.[41] In fact, Congress deliberately left these details unspecified, predicting that "the fact patterns giving rise to [ATA] suits will be as varied and numerous as those found in the law of torts."[42]

Consequently, district and circuit courts were forced to determine the ATA's scope, and they provided at least three different answers to the outstanding liability question. One solution was premised on the Supreme Court's rule from *Central Bank of Denver v. First Interstate Bank of Denver* that courts should not presume Congress's intent to impose secondary liability based on "statutory silence."[43] Thus, according to courts that adopted this approach, the ATA's sparse statutory text permitted only primary liability

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36. Doyle, supra note 17, at 13. There are other requirements for bringing an action under the ATA—such as jurisdiction, venue, and statute of limitations provisions—that are outside the scope of this Note. Id. at 16 n.108.

37. Gurulé, supra note 19, at 193–94.

38. *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002).

39. Brief of Anti-Terrorism Act Scholars, supra note 32, at 8; see also *Boim I*, 291 F.3d at 1021 (observing that direct perpetrators of terrorist attacks "are unlikely to have assets, much less assets in the United States," whereas the entities "support[ing] and encourag[ing] terrorist acts are likely to have reachable assets").

40. Military Construction Appropriations Act, 1991, Pub. L. No. 101-519, § 2333, 104 Stat. 2240, 2251 (1990) (codified as amended at 18 U.S.C. § 2333).

41. Brief of Anti-Terrorism Act Scholars, supra note 32, at 8. Courts also struggled to ascertain the ATA's mens rea requirement. See Olivia G. Chalos, Note, Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a), 85 Fordham L. Rev. 303, 307 (2016) (noting that the Second Circuit required "knowledge" while the Seventh Circuit demanded "deliberate wrongdoing"); see also Gurulé, supra note 19, at 186 ("While the courts uniformly agree that § 2333(a) is not a strict liability statute, they disagree on the requisite mens rea to support civil liability.").

42. S. Rep. No. 102-342, at 45 (1992).

43. See 511 U.S. 164, 185 (1994).

for principals, such as the individual perpetrators of terrorist attacks.[44] Conversely, several courts across the country held the exact opposite: that the ATA overcame the *Central Bank* presumption and established secondary liability for aiders and abettors.[45]

An en banc panel of the Seventh Circuit provided a third interpretation of the ATA's scope based on a broad reading of the term "international terrorism."[46] Specifically, instead of defining the phrase to mean simply "pull[ing a] trigger or plant[ing a] bomb,"[47] the majority determined that providing material support under 18 U.S.C. § 2339A and § 2339B could also qualify as "international terrorism."[48] A brief description of these statutes is helpful not just to explain the Seventh Circuit's reasoning but also to illustrate the confusion that lower courts created when applying the ATA before its 2016 modifications. Under § 2339A, parties are prohibited from providing material support to another while "knowing or intending that they are to be used" to violate—or prepare to violate—a statutorily enumerated violent crime.[49] As for § 2339B, actors can be criminally liable for "knowingly" providing material support to an FTO if they "have knowledge" that the organization is a designated FTO or has engaged in terrorism.[50]

Returning to the Seventh Circuit's analysis, the court first applied the *Central Bank* presumption and reasoned that "statutory silence on the subject of secondary liability means there is none."[51] But almost contradictorily, the en banc panel also concluded that "Congress has expressly imposed liability on a class of aiders and abettors."[52] Justifying this apparent paradox, the court explained that the ATA allows recovery

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44. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 97–98 (2d Cir. 2013) ("We doubt that Congress . . . can have intended § 2333 to authorize civil liability for aiding and abetting through its silence.").

45. See, e.g., *Boim I*, 291 F.3d 1000, 1020–21 (7th Cir. 2002) ("[W]e do not think *Central Bank* controls the result here, but that aiding and abetting liability is both appropriate and called for by the language, structure and legislative history of section 2333."); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 57 (D.D.C. 2010) (holding that the "plaintiffs have convinced the Court to rebut the [*Central Bank*] presumption"); see also Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) ("It is of no consequence that [the defendant] did not himself throw the incendiary device. . . . [ATA liability] includes aiders and abettors . . . who provide money to terrorists.").

46. For a discussion of the term "international terrorism" under the ATA, see supra notes 35–37 and accompanying text.

47. *Boim I*, 291 F.3d at 1021.

48. See Boim v. Holy Land Found. for Relief & Dev. (*Boim II*), 549 F.3d 685, 690 (7th Cir. 2008) (en banc).

49. 18 U.S.C. § 2339A (2018). For a breakdown of the elements needed to prove a § 2339A violation, see Doyle, supra note 17, at 2–11.

50. 18 U.S.C. § 2339B. For an analysis of the components of a § 2339B violation, see Doyle, supra note 17, at 16–26.

51. *Boim II*, 549 F.3d at 689.

52. Id. at 692.

for those injured "by reason of an act of *international terrorism*,"[53] a term that, as explained above, requires a dangerous crime, a terrorist intention, and an international element.[54] And because providing material support to terrorists under § 2339A and § 2339B—"like giving a loaded gun to a child"—is a dangerous crime, the panel established that "a donation to a terrorist group that targets Americans outside the United States" could qualify as the "act of international terrorism" giving rise to the plaintiff's injuries.[55] Through this broad definition of "international terrorism" that included both terrorist attacks and monetary contributions to FTOs, the Seventh Circuit effectively neutralized the impact of its earlier *Central Bank* discussion, as "[p]rimary liability in the form of material support to terrorism has the character of secondary liability."[56]

Aside from the complexity of the Seventh Circuit's reasoning—which puzzled even some judges on the panel[57]—adopting an expansive interpretation of "international terrorism" also produced an additional layer of complication in ATA cases, namely whether plaintiffs needed to prove that the defendant's provision of material support proximately caused their injuries. The Seventh Circuit majority seemed to embrace a relaxed causation requirement when "primary liability is that of someone who aids someone else," refusing to rule out the possibility that the ATA would cover a party who "contributed to a terrorist organization in 1995 that killed an American abroad in 2045."[58] Other circuits rejected this

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53. Id. at 688, 690 (emphasis added) (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(a)).

54. See supra notes 35–37 and accompanying text.

55. *Boim II*, 549 F.3d at 690, 698 (holding that "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities," and "the fact that you earmark [the resources] for the organization's nonterrorist activities does not get you off the liability hook"). But see Linde v. Arab Bank, PLC, 882 F.3d 314, 326 (2d Cir. 2018) ("[T]he provision of material support to a terrorist organization does not invariably equate to an act of international terrorism [because] . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services do not involve violence or endanger life . . . .").

56. *Boim II*, 549 F.3d at 691; see also Brief of Anti-Terrorism Act Scholars, supra note 32, at 9 ("[A]s Judge Posner explained, the *primary* liability imposed by the ATA includes circumstances in which the predicate federal criminal violation is nothing more than the provision of material support to terrorists—which is, itself, a form of secondary liability.").

57. See *Boim II*, 549 F.3d at 707 n.5 (Rovner, J., concurring in part and dissenting in part) ("I must confess to some uncertainty as to the majority's meaning. . . . [T]he majority sees some continued relevance—I am not sure what—in aiding and abetting . . . concepts to liability under section 2333.").

58. Id. at 692, 695–700 (majority opinion) (providing several examples of tort cases that did not require strict but-for and proximate causation, which, to the majority, demonstrated that while "[i]t is 'black letter' law that tort liability requires proof of causation[,] . . . the black letter is inaccurate if treated as exceptionless"). According to Judge Diane Wood, the majority's opinion had "no requirement of showing classic 'but-for' causation, nor, apparently, . . . even a requirement of showing that the defendant's action would have been sufficient to support the primary actor's unlawful activities or any

approach and concluded that the ATA's "by reason of" language required proof of proximate cause.[59] Needless to say, given these divergent and tangled interpretations of the ATA's scope, legal scholars began calling for congressional intervention.[60]

C. *Expanding Liability to Aiders and Abettors: JASTA and the* Halberstam *Framework*

In 2016, Congress passed JASTA over the veto of President Barack Obama.[61] The bill was primarily designed to narrow the scope of foreign sovereign immunity regarding acts of international terrorism committed within the United States.[62] But intending to "provide civil litigants with the broadest possible basis . . . to seek relief against [those] . . . that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities,"[63] Congress also extended ATA liability to anyone who "aids and abets, by knowingly providing substantial assistance," an FTO in committing an act of international terrorism.[64] Further, in JASTA's statutory notes,[65] Congress indicated that

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limitation on remoteness of liability." Id. at 721 (Wood, J., concurring in part and dissenting in part).

59. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 95–98 (2d Cir. 2013).

60. See, e.g., Gurulé, supra note 19, at 222 ("In order to alleviate the problem confronting plaintiffs, Congress should amend § 2333(a) to explicitly authorize liability for aiding and abetting acts of international terrorism.").

61. See Seung Min Kim, Congress Hands Obama First Veto Override, Politico (Sept. 28, 2016), https://www.politico.com/story/2016/09/senate-jasta-228841 (on file with the *Columbia Law Review*).

62. See Hoover, supra note 31, at 260 ("[N]early all of the debate surrounding JASTA centered on liability for foreign states, not private actors, and most discussion in hearings and on the floors of Congress understood the bill to single out governments."); see also David Smith, Congress Overrides Obama's Veto of 9/11 Bill Letting Families Sue Saudi Arabia, The Guardian (Sept. 29, 2016), https://www.theguardian.com/us-news/2016/sep/28/senate-obama-veto-september-11-bill-saudi-arabia [https://perma.cc/G2Z5-EVHT] ("Barack Obama suffered a unique political blow on Wednesday, when the US Congress overturned his veto of a bill that would allow families of the victims of the September 11 terrorist attacks to sue Saudi Arabia.").

63. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, sec. 2(b), § 2333, 130 Stat. 852, 853 (2016) (codified as amended at 18 U.S.C. § 2333 (2018)). But see Hoover, supra note 31, at 261–62 ("A search of the legislative history and leading thought pieces at the time reveals that the issue of secondary liability for U.S. companies engaging in business abroad—as well as for non-governmental organizations and development corporations contracted by the U.S. government—*was not considered* during debates about the law.").

64. 18 U.S.C. § 2333(d)(2); see also supra notes 46–59 and accompanying text (examining the scope of the term "international terrorism" under the ATA). For a discussion of who or what a party must aid and abet to be liable under § 2333, see Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1223–25 (2023) ("[A] defendant must have aided and abetted (by knowingly providing substantial assistance) another person in the commission of the actionable wrong—here, an act of international terrorism.").

65. The Supreme Court and lower courts alike have applied these statutory notes to JASTA cases. See infra sections I.D, II.A; cf. infra note 124 and accompanying text.

the D.C. Circuit's opinion in *Halberstam v. Welch* "provides the proper legal framework" for aiding and abetting claims under the ATA.[66]

In *Halberstam*, the D.C. Circuit upheld a finding of liability in a wrongful death suit against Linda Hamilton, the live-in partner of a serial burglar, for aiding and abetting the murder of a burglary victim even though Hamilton had not been present at the time of the murder, aware of the murder, or told of her partner's plan to burglarize the victim's home.[67] Nevertheless, the court determined that Hamilton was a "willing partner" in the burglar's activities because she had served as his "banker, bookkeeper, recordkeeper, and secretary" during their five years of living together and had witnessed their fortunes turn from "rags to riches," all while her partner lacked any outside employment.[68]

To support this conclusion, Judge Patricia Wald, writing for a panel that also included Judge Robert Bork and then-Judge Antonin Scalia, applied a tripartite framework derived from common law aiding and abetting cases.[69] First, "the party whom the defendant aids must perform a wrongful act that causes an injury."[70] Second, "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance."[71] Third, "the defendant must knowingly and substantially assist the principal violation."[72] Regarding this third prong, the court articulated six factors for assessing whether one's assistance was "substantial": (1) "the nature of the act assisted," (2) "the amount of assistance" given, (3) the defendant's presence or absence at the time of the act, (4) the defendant's "relation to the tortious actor," (5) "the defendant's state of mind," and (6) "the duration of the assistance."[73]

Thus, there are two relevant mental state requirements in this aiding and abetting analysis: "general[] aware[ness]" of one's role in the illegal

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66. Justice Against Sponsors of Terrorism Act § 2333, 130 Stat. at 852. Also in the statutory notes, Congress indicated that its purpose was to permit U.S. nationals to "pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries." Id., 130 Stat. at 853. Insofar as the addition of "recklessly"—which is a lesser mens rea than "knowingly"—in the purpose section has any legal force, it likely references JASTA's extension of secondary liability to foreseeable consequences of principal violations. See infra note 77 and accompanying text.

67. See Halberstam v. Welch, 705 F.2d 472, 474–76 (D.C. Cir. 1983); see also *Taamneh*, 143 S. Ct. at 1218–20; Hoover, supra note 31, at 273.

68. *Halberstam*, 705 F.2d at 474–76, 487.

69. The D.C. Circuit's framing of secondary liability is noticeably different from that in federal criminal law cases, even though courts in both contexts purport to be drawing on the common law. See infra section II.B.

70. *Halberstam*, 705 F.2d at 477.

71. Id.

72. Id.

73. Id. at 488 (emphasis omitted).

activity and "knowing[]" assistance of the principal violation.[74] Applying these two relevant mental state requirements to the facts, the court concluded that Hamilton's actions demonstrated she was both generally aware of her role in a "continuing criminal enterprise"[75] and assisting the burglar "with knowledge that he had engaged in illegal acquisition of goods."[76] As to the murder, "it was enough that [Hamilton] knew [her partner] was involved in some type of personal property crime at night . . . because violence and killing is a foreseeable risk in any of these enterprises."[77]

D. *Lower Court Application of* Halberstam*'s Mens Rea Prongs Before* Taamneh

In the years between JASTA's enactment and *Taamneh*, several circuit courts struggled to differentiate between *Halberstam*'s two mens rea requirements and adapt the framework from its burglary origins to the international terrorism context.[78] To begin, most courts agreed that the first mens rea element demands that the alleged aiders and abettors be

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74. See Weiss v. Nat'l Westminster Bank, PLC, 993 F.3d 144, 164 (2d Cir. 2021) ("[T]he second and third *Halberstam* elements require proof that at the time the defendant . . . aided the principal, the defendant was 'generally aware' of the overall wrongful activity and was 'knowingly' assisting the principal violation." (quoting *Halberstam*, 705 F.2d at 477)). This Note refers to the general awareness prong as the first mens rea requirement and the knowing assistance inquiry as the second mens rea requirement. Admittedly, there is also a third mens rea analysis as part of the substantiality factors. *Halberstam*, 705 F.2d at 488 (fifth factor). But since the *Halberstam* court regarded the substantiality factors as "variables" rather than "elements" of aiding and abetting liability, compare id. at 483, with id. at 477, and courts have recently determined that "the absence of some need not be dispositive," Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 856 (2d Cir. 2021), this Note does not group the third mental state *analysis* with the other two mens rea *requirements*.

75. *Halberstam*, 705 F.2d at 488. According to the court, Hamilton knew that "something illegal was afoot." Id. at 486.

76. Id. at 488; see also Katie Berry, Note, JASTA in an Era of Fake News, Publicity Infused Terror, and a Directive From Congress, 70 Ala. L. Rev. 841, 860 (2019) ("[*Halberstam*] suggests that a common purpose, or specific intent, is not necessary to establish secondary liability . . . ."). Granted, in its analysis of Hamilton's mens rea vis-à-vis the fifth substantiality factor, the court found that because "Hamilton's assistance was knowing, . . . it evidences a deliberate long-term intention to participate in an ongoing illicit enterprise. Hamilton's continuous participation reflected her intent and desire to make the venture succeed . . . ." *Halberstam*, 705 F.2d at 488. While some analysts have interpreted this language to imply that *Halberstam* may demand more than pure knowledge, see Hoover, supra note 31, at 279, assuming purpose from a showing of knowledge is the functional equivalent of simply requiring knowledge.

77. *Halberstam*, 705 F.2d at 488. In other words, as long as aiders and abettors have knowledge of the principal tort, a lesser mens rea vis-à-vis any foreseeable consequences does not excuse liability. See Berry, supra note 76, at 860–61 ("[A] person who assists, even recklessly, could be deemed liable if the facts offer a justifiable conclusion that the secondary actor likely had knowledge that he or she was assisting the primary wrongful act.").

78. See Gonzalez v. Google LLC, 2 F.4th 871, 902 (9th Cir. 2021), rev'd, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) ("The scenario presented in *Halberstam* is, to put it mildly, dissimilar to the one at issue here.").

generally aware of their roles in the FTO's terrorist activities, even if not in the specific terrorist attack at issue.[79] Moreover, although the general awareness prong requires more than the mental state requirement in § 2339B[80]—a statute that imposes liability on those who "knowingly" provide material support to an FTO with "knowledge about the organization's connection to terrorism"[81]—the circuits agreed that "*Halberstam*'s general awareness standard[] does not require proof that the defendant had a specific intent [to further terrorist activity]."[82] As the Second Circuit reasoned in *Kaplan v. Lebanese Canadian Bank*, "*Halberstam*'s attachment of the 'generally' modifier imparts to the concept 'generally aware' a connotation of something less than full, or fully focused, recognition."[83]

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79. See, e.g., Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) ("Nor does awareness require proof that [the defendant] knew of the specific attacks at issue . . . . What the jury did have to find was that, in providing [financial] services, the [defendant] was 'generally aware' that it was thereby playing a 'role' in Hamas's violent or life-endangering activities." (quoting *Halberstam*, 705 F.2d at 477)); see also Honickman v. BLOM Bank SAL, 6 F.4th 487, 496 (2d Cir. 2021) ("The defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury . . . ."); *Gonzalez*, 2 F.4th at 908 (finding that the first mens rea requirement is satisfied when "defendants [are] generally aware that ISIS use[s] defendants' platforms to recruit, raise funds, and spread propaganda in support of their terrorist activities"); *Kaplan*, 999 F.3d at 865 (holding that to be liable under the ATA, the defendant must have been "at least generally aware that through its money-laundering banking services . . . [the defendant] was playing a role in Hizbollah's terrorist activities").

80. See *Linde*, 882 F.3d at 329–30 (holding that 18 U.S.C. § 2339B "requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities"); see also *Kaplan*, 999 F.3d at 860 ("[K]nowingly providing material support to an FTO, without more, does not as a matter of law satisfy the general awareness element.").

81. Holder v. Humanitarian L. Project, 561 U.S. 1, 16–17 (2010); 18 U.S.C. § 2339B (2018); see also Doyle, supra note 17, at 16–26 (analyzing the components of a § 2339B violation). Thus, while the Supreme Court concluded in *Holder* that § 2339B extends to parties who wish to provide monetary donations, legal training, and political advocacy to FTOs, *Holder*, 561 U.S. at 10, 16–17, the Second Circuit determined that "the facts in *Holder*—adequate for criminal material support—fall short for the general awareness element of JASTA aiding and abetting," *Honickman*, 6 F.4th at 499; see also Transcript of Oral Argument at 38, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2023 WL 9375469 (statement of Justice Kagan) ("[T]he material support statute is, if I help Hamas build hospitals, I'm still liable under the material support statute . . . and I'm not liable under [the ATA].").

82. *Kaplan*, 999 F.3d at 863; see also Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 220 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.) (holding that *Halberstam*'s first mens rea requirement does not demand a showing of "specific intent"); *Gonzalez*, 2 F.4th at 903 (noting the same); *Linde*, 882 F.3d at 329 ("Such awareness may not require proof of the specific intent demanded for criminal aiding and abetting culpability, i.e., defendant's intent to participate in a criminal scheme as 'something that he wishes to bring about and seek by his action to make it succeed.'" (emphasis omitted) (quoting Rosemond v. United States, 572 U.S. 65, 76 (2014))).

83. 999 F.3d at 863. Granted, other circuit courts appeared to treat this mental state element as more demanding. See Bernhardt v. Islamic Republic of Iran, 47 F.4th 856, 869 (D.C. Cir. 2022) ("Even if we could infer that [the defendant] was aware of [a customer's] connections to al-Qaeda, [the plaintiff] fails to allege that those connections were so close

But the circuit courts diverged when analyzing *Halberstam*'s second mens rea requirement (*knowingly* providing assistance), especially as it relates to the first (*general awareness* of one's role in the overall illegal scheme).[84] Some courts appeared to merge the two prongs, seeking to determine whether a defendant "knowingly played a role in the terrorist activities."[85] Similarly, when attempting to parse "the *Halberstam* factors relat[ing] to whether the defendant 'knowingly' and 'substantial[ly]' assisted" a terrorist attack—which is the third prong in the *Halberstam* framework—a Fifth Circuit panel invoked language from a Second Circuit opinion, asserting that "'aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization'; it requires 'awareness.'"[86] But the Second Circuit's reasoning in this quoted passage was directed at *Halberstam*'s general awareness inquiry,[87] not the knowing assistance element that the Fifth Circuit was examining.

Other courts seemed to drop the second mens rea analysis altogether.[88] For instance, in characterizing the *Halberstam* framework, a panel of the D.C. Circuit explained that the precedent "spells out three elements that establish the referenced aiding or abetting—wrongful acts, general awareness, and substantial assistance."[89] A Second Circuit panel engaged in a similar exercise, offering a lengthy exploration of the general awareness and substantial assistance prongs without analyzing the meaning of "*knowingly* and substantially assist[ing] the principal

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that [the defendant] had to be aware it was assuming a role in al-Qaeda's terrorist activities by working with [the customer].").

84. See *Halberstam*, 705 F.2d at 477.

85. Siegel v. HSBC N. Am. Holdings, Inc., 933 F.3d 217, 224 (2d Cir. 2019); see also *Bernhardt*, 47 F.4th at 870 ("There is significant overlap between the requirement that the assistance be 'knowing' and the general awareness required by *Halberstam*."); Hoover, supra note 31, at 279 ("Some courts have fully merged prongs of this test.").

86. Retana v. Twitter, Inc., 1 F.4th 378, 383 (5th Cir. 2021) (second alteration in original) (emphasis omitted) (quoting *Linde*, 882 F.3d at 329).

87. See *Linde*, 882 F.3d at 329 ("[A]iding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization. Aiding and abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." (quoting *Halberstam*, 705 F.2d at 477)).

88. This is particularly striking given that *Halberstam*'s third prong (and thus second mens rea requirement) most closely resembles JASTA's statutory text. Compare *Halberstam*, 705 F.2d at 488 (stating that the third prong of its aiding and abetting inquiry is "the defendant must knowingly and substantially assist the principal violation"), with 18 U.S.C. § 2333(d)(2) (2018) (extending liability "to any person who aids and abets[] by knowingly providing substantial assistance").

89. Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 216 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.); see also Honickman v. BLOM Bank SAL, 6 F.4th 487, 496 (2d Cir. 2021) (describing *Halberstam*'s second prong as the "general awareness" element and the third as the "substantial assistance" factor).

violation."[90] But *Honickman v. BLOM Bank* provides the most direct illustration of a court finding the second mens rea requirement to be a superfluity, as the panel held that "[*Halberstam*] did not require Hamilton to 'know' anything more about [the burglar's] unlawful activities than what she knew for the general awareness element."[91]

To the extent that courts did discuss the bounds of the knowing assistance prong, they appeared to view the requirement as easy to satisfy. In the Second Circuit, "knowingly" giving assistance meant that the defendant did not act "innocently or inadvertently."[92] Likewise, in the D.C. Circuit, if defendants could not prove that their actions were "in any way accidental," then their "assistance was given knowingly."[93] Finally, the Ninth Circuit placed significant emphasis on *Halberstam*'s discussion of foreseeability.[94] So if a social media company was "generally aware" that terrorist organizations used its platform to recruit and fundraise but "refused to take meaningful steps to prevent that use," then the company "knowingly assisted" the terrorist organization's "broader campaign of terrorism" from which specific terrorist attacks were "foreseeable."[95] But under a standard in which a company's general awareness of its role in terrorism fundraising and recruitment equates to knowing assistance of the FTO's "broader campaign of terrorism,"[96] the second mens rea requirement independently factors into the analysis only insofar as the

90. *Linde*, 882 F.3d at 329–31 (emphasis added) (internal quotation marks omitted) (quoting *Halberstam*, 705 F.2d at 488). In a footnote, *Linde* did mention the relevance of a secondary actor's "state of mind" in the *Halberstam* framework. *Linde*, 882 F.3d at 329 n.10 ("[E]vidence of the secondary actor's intent can bear on his state of mind, one of the factors properly considered in deciding whether the defendant's assistance was sufficiently knowing and substantial to qualify as aiding and abetting."). That note, however, likely referred to *Halberstam*'s fifth substantiality factor. See supra text accompanying note 73. To the extent this statement *was* directed at the second mens rea requirement, see infra notes 100–102 and accompanying text.

91. 6 F.4th at 500.

92. Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 864 (2d Cir. 2021).

93. *Atchley*, 22 F.4th at 222.

94. See *Halberstam*, 705 F.2d at 488.

95. Gonzalez v. Google LLC, 2 F.4th 871, 905, 908–09 (9th Cir. 2021), rev'd, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); see also *Taamneh*, 143 S. Ct. at 1229 ("[The Ninth Circuit] analyzed the 'knowing' subelement as a carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role in ISIS' overall scheme.").

96. *Gonzalez*, 2 F.4th at 903–05. For an additional example besides *Gonzalez v. Google LLC*, see *Kaplan*, 999 F.3d at 860 ("[A] defendant may be liable for aiding and abetting an act of terrorism if it was generally aware of its role in an 'overall illegal activity' from which an 'act of international terrorism' was a foreseeable risk." (quoting *Halberstam*, 705 F.2d at 488)).

specific act of terrorism is *not* a "foreseeable result" of the FTO's "broader campaign of terrorism,"[97] which is likely a fairly infrequent occurrence.[98]

Even the courts that did engage in two mens rea inquiries, however, made clear that *Halberstam*'s third prong does not require proving a secondary actor's purpose (or "conscious[] desire[]"[99]) to participate in the terrorist attack.[100] That said, providing evidence of the alleged aider and abettor's purpose could certainly help establish that "the defendant's assistance was sufficiently knowing and substantial to qualify as aiding and abetting."[101] Nevertheless, as the D.C. Circuit held, "Knowledge of one's own actions and general awareness of their foreseeable results, not specific intent, are all that is required" under JASTA.[102]

To summarize the JASTA landscape before *Twitter, Inc. v. Taamneh*, courts agreed that the *Halberstam* framework required a greater mens rea than that in § 2339B but a lesser one than any purpose to partake in the terrorist attack. Between these two guideposts, the circuits trained the bulk of their mens rea analysis on whether the secondary actors were generally aware of their roles in the FTO's terrorist activities, viewing *Halberstam*'s third prong as predominantly focused on substantial assistance with, at most, a nominal mens rea requirement. But as the following Part illustrates, *Taamneh* redistributed the weight between these two mens rea requirements and even revised the role that the *Halberstam* framework plays in a JASTA analysis, potentially changing the scope of ATA secondary liability in the process.

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97. *Gonzalez*, 2 F.4th at 904–05 (holding that "when assessing whether the [plaintiff] satisfies the third element of aiding-and-abetting liability, we consider ISIS's broader campaign of terrorism to be the relevant 'principal violation'" because the specific terrorist attack at issue was "a foreseeable result of ISIS's broader campaign of terrorism").

98. This reading of the ATA's mens rea requirements also starts to bleed into § 2339B, effectively extending liability to social media companies for "knowingly" providing material support (here, a platform) to ISIS when the parties "have knowledge" that ISIS is a designated FTO. See supra notes 50, 80–81 and accompanying text; cf. Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) ("[A]iding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*.").

99. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

100. See, e.g., *Kaplan*, 999 F.3d at 860 ("[A]n absence of proof of intent is not fatal to the aiding-and-abetting claim because intent is not itself a *Halberstam* element."); see also Atchley v. AstraZeneca UK Ltd., 22 F.4th 204, 224 (D.C. Cir. 2022), vacated, 144 S. Ct. 2675 (2024) (mem.) ("A specific intent, or 'one in spirit,' requirement is contrary to *Halberstam* as incorporated into the JASTA."). For a discussion of purpose vis-à-vis *Halberstam*'s general awareness prong, see supra notes 79–83 and accompanying text.

101. *Linde*, 882 F.3d at 329 n.10.

102. *Atchley*, 22 F.4th at 223.

II. AN ONGOING PUZZLE: PURE KNOWLEDGE, TRUE PURPOSE, AND INTENT TO FACILITATE

In 2023, the Supreme Court waded into this confusion over *Halberstam* and ATA secondary liability, providing both clarity and uncertainty regarding JASTA's mens rea requirements.[103] This Part begins with a description of *Taamneh*'s factual history and procedural posture. Then, it highlights the Supreme Court's concerns with JASTA and *Halberstam*'s mens rea requirements, exemplified both at oral argument and in the Court's opinion. Finally, this Part draws from the common law development of secondary liability—which the Court emphasized is critical to understanding the scope of JASTA—to provide three potential ways to read and apply *Taamneh*'s mens rea analysis.

A. Twitter, Inc. v. Taamneh*: Clarification and Confusion*

Twitter, Inc. v. Taamneh arose from a shooting massacre that took place in Istanbul, Turkey, where an ISIS-trained terrorist attacked the Reina nightclub and killed thirty-nine people.[104] The following day, ISIS claimed responsibility for the killings.[105] Relatives of one of the victims sued Twitter, Google, and Facebook under the ATA for aiding and abetting the Reina attack.[106] According to the plaintiffs, the social media companies failed to identify and remove numerous ISIS-related posts despite "extensive media coverage, complaints, legal warnings, petitions, congressional hearings, and other attention" alerting the companies that ISIS was exploiting their platforms to recruit members, raise funds, and spread propaganda.[107] The plaintiffs alleged that through these actions, Twitter, Google, and Facebook "knowingly provid[ed] substantial assistance" to ISIS and its terrorist activities, including the Reina attack.[108]

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103. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023).

104. See Gonzalez v. Google LLC, 2 F.4th 871, 883 (9th Cir. 2021), rev'd, *Taamneh*, 143 S. Ct. 1206.

105. Id.

106. Id.

107. Id. (internal quotation marks omitted) (quoting Third Amended Complaint ¶ 20, Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156 (N.D. Cal. 2018) (No. 4:16-cv-03282-DMR), 2017 WL 6040930); see also *Taamneh*, 143 S. Ct. at 1215–17. After the companies successfully appealed to the Supreme Court, the plaintiffs also argued that the defendants employed a "recommendation" algorithm that connected ISIS posts with other users, further aiding in ISIS's terrorist activities. See Transcript of Oral Argument, supra note 81, at 118 (statement of Eric Schnapper) ("[I]nsofar as the recommendations were affirmatively calling the attention of . . . users to ISIS materials, that would . . . be extremely valuable to ISIS in recruiting more fighters . . . ."); see also *Taamneh*, 143 S. Ct. at 1217 ("[P]laintiffs assert that defendants aided and abetted ISIS by knowingly allowing ISIS and its supporters to use their platforms and benefit from their 'recommendation' algorithms, enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits.").

108. *Taamneh*, 143 S. Ct. at 1218.

The district court dismissed the plaintiffs' complaint, and the Ninth Circuit reversed.[109] Finding that the plaintiffs' complaint satisfied the first two prongs of the *Halberstam* framework,[110] the court focused its attention on whether the companies "knowingly and substantially assist[ed] the principal violation."[111] And having already determined that the "principal violation" referred to "ISIS's broader campaign of terrorism," the court concluded that the companies' "assistance to ISIS was knowing" because they had "been aware of ISIS's use of their respective social media platforms for many years . . . but ha[d] refused to take meaningful steps to prevent that use."[112] Then, after applying *Halberstam*'s six substantiality factors and deciding that the social media companies' assistance was substantial, the court held that the plaintiffs stated a claim for aiding and abetting liability under the ATA.[113]

The social media companies successfully petitioned for certiorari,[114] raising the question of whether their failure to remove ISIS accounts and posts despite their awareness of ISIS's activities qualified as "knowingly providing substantial assistance" to the terrorist group.[115] According to the companies, the Ninth Circuit erred when finding that the defendants "knowingly" assisted ISIS simply because they were aware that ISIS

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109. See *Gonzalez*, 2 F.4th at 880. The Ninth Circuit consolidated the *Taamneh* plaintiffs' case with two similar lawsuits against the social media companies based on separate ISIS terrorist attacks. See id. at 879.

110. None of the parties contested the first prong, and the court quickly determined that the complaint demonstrated the companies were generally aware of their role in ISIS's terrorist activities. See id. at 908 ("These allegations suggest the defendants, after years of media coverage and legal and government pressure concerning ISIS's use of their platforms, were generally aware they were playing an important role in ISIS's terrorism enterprise by providing access to their platforms and not taking aggressive measures to restrict ISIS-affiliated content.").

111. Id. at 903–05 (alteration in original) (quoting Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983)).

112. Id. at 905, 909.

113. See id. at 910.

114. The plaintiffs from one of the other consolidated cases that the Ninth Circuit decided also petitioned for certiorari to challenge the scope of Section 230 immunity. See Petition for a Writ of Certiorari at i, Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023) (per curiam) (No. 21-1333), 2022 WL 1050223. The Supreme Court similarly granted this certiorari petition but ultimately declined to answer the question presented, choosing instead to resolve the case based on its holding in *Twitter, Inc. v. Taamneh*. See *Gonzalez*, 143 S. Ct. at 1192 ("We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief. Instead, we vacate the judgment below and remand the case for the Ninth Circuit to consider plaintiffs' complaint in light of our decision in *Twitter*.").

115. Conditional Petition for a Writ of Certiorari at i, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496), 2022 WL 1785719 (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(d)(2) (2018)). The Court also granted certiorari on the companies' second question: whether aiders and abettors needed to assist a particular "act of international terrorism"—rather than a campaign of terrorism—to be liable under the ATA. Id. (internal quotation marks omitted).

members used the social media platforms, thereby "effectively transform[ing] the statute's knowledge requirement into something akin to recklessness or negligence."[116] Instead, the petitioners contended that JASTA's text extends liability only to secondary actors who both "knowingly undertook the specific conduct that comprised substantial assistance to the act of international terrorism" and "understood that its conduct would substantially assist such an act."[117] Supporting the petitioners, the U.S. government concurred, emphasizing the importance of establishing that the defendants had knowledge they were assisting in a terrorist attack.[118]

But the petitioners and government's otherwise comprehensible knowledge standard began to blur during oral argument as the Court bombarded both lawyers with hypotheticals and the Justices expressed their skepticism of the *Halberstam* framework. For example, Justice Elena Kagan asked Edwin Kneedler, representing the government, whether a bank could be liable under the ATA if, among hundreds of customers, the bank knew that Osama bin Laden opened an account and was using it to conduct terrorist activities.[119] When the Deputy Solicitor General responded in the affirmative, Justice Kagan appeared to agree, admitting that she "would be shocked if the government gave that one away."[120] But when Justice Samuel Alito posed a similar hypothetical—whether a telephone company would be liable as an aider and abettor if it were told that a gangster was using his phone to conduct mob activities—Kneedler was unsure, saying, "Perhaps not. Probably not. I mean, it depends."[121] Expressing his surprise, Justice Alito remarked, "Wow. That's a perhaps?"[122]

The Justices then directed their ire at *Halberstam* itself, both for its broad scope and confusing framework. According to Justice Alito, "[T]he problem is *Halberstam*, and we're stuck with *Halberstam*[,] because

116. Brief for Petitioner at 37, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2022 WL 17384573; see also Transcript of Oral Argument, supra note 81, at 18–19 (statement of Seth Waxman) ("[T]he Second Circuit [in *Kaplan*] and the D.C. Circuit [in *Atchley*] erred . . . because they collapsed the mental state required under Step 2 and Step 3 of *Halberstam*." (emphasis added)).

117. Brief for Petitioner, supra note 116, at 38.

118. Brief for the United States as Amicus Curiae in Support of Reversal at 18, *Taamneh*, 143 S. Ct. 1206 (No. 21-1496), 2022 WL 17548394 ("JASTA incorporates a knowledge requirement twice over: It requires that the defendant 'knowingly provid[e] substantial assistance,' 28 U.S.C. 2333(d)(2), and it invokes the *Halberstam* framework and thus adopts its similar mens rea requirements." (alteration in original)).

119. See Transcript of Oral Argument, supra note 81, at 72–73 (statement of Justice Kagan).

120. Id. at 73 (statement of Justice Kagan).

121. Id. at 79 (statement of Edwin Kneedler).

122. Id. (statement of Justice Alito).

[*Halberstam*'s] three factors are met in . . . my telephone example."[123] Similarly, Justice Neil Gorsuch pleaded with Kneedler to agree that the Court could decide the case based on JASTA's statutory text alone and avoid having to "wade through [*Halberstam*'s] three elements where the third element has two prongs and the second prong is made up of six factors, some of which you tell us don't apparently count for very much."[124]

Consequently, the Justices proposed ways to simplify the case and limit the scope of secondary liability under the ATA. Of particular note is Justice Alito's suggestion that the Court engage in a more rigorous mens rea analysis, asking if "it [would] be consistent with *Halberstam* to read 'knowingly' to mean, oh, just a *shade* short of 'purposefully,'" as that would give "some substance" to the *Halberstam* framework.[125] Relatedly, Justice Sonia Sotomayor wondered if, "[i]nstead of knowledge," *Halberstam*'s third factor can "have some purpose to it."[126] Not responding directly to these questions, Kneedler expressed his belief that courts should "make a judgment, basically, a societal . . . judgment, are we prepared to hold that person liable?"[127]

With Justice Clarence Thomas writing the opinion, a unanimous Court accepted the government's recommendation to focus on culpability, concluding that the "point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue."[128] According to the Court, simply creating social media platforms and algorithms is not culpable, meaning that the thrust of the plaintiffs' complaint "rests so heavily on defendants' failure to act" rather than on

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123. Id. at 80 (statement of Justice Alito) (emphasis added); see also id. at 21–22 (statement of Justice Alito) ("If this were a criminal case, I think it's clear that there would not be aiding and abetting liability . . . . [W]e've addressed aiding and abetting in criminal cases directly, and it requires the intention of causing the crime to be committed."). Justice Alito also specifically criticized *Halberstam*'s general awareness prong, arguing that it has "very little meaning." Id. at 22 (statement of Justice Alito).

124. Id. at 89 (statement of Justice Gorsuch) ("Is there some way to cut through [*Halberstam*'s] kudzu and . . . decide this case on the statutory terms? Please say yes."); see also id. at 69 (statement of Chief Justice Roberts) ("[E]ach one of these situations that will come along will have different of [*Halberstam*'s factors] prominent and different ones not there, and . . . is there any way to articulate how to approach these cases without having a 6- or 12- . . . or maybe 36-factor test?").

125. Id. at 80–81 (statement of Justice Alito) (emphasis added).

126. Id. at 85–86 (statement of Justice Sotomayor). Justice Gorsuch proposed a different limiting principle based on a requirement that secondary actors aid a particular person rather than an act. See id. at 90–91 (statement of Justice Gorsuch). Nonetheless, he too expressed a desire to "cabin[] in the [ATA's] scope and prevent[] secondary liability from becoming liability for just doing business." Id. at 91 (statement of Justice Gorsuch).

127. Id. at 77 (statement of Edwin Kneedler); see also id. at 80 (statement of Edwin Kneedler) ("It's a judgment call as to whether the defendant is culpable, has become complicit, in . . . the way a conspirator would."); id. at 83 (statement of Edwin Kneedler) ("I think it's a judgment that a company engaged in this sort of activity which is overall very helpful to society should not be held responsible, culpable, a willing participant . . . .").

128. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1230 (2023).

any "affirmative misconduct."[129] Emphasizing that both tort and criminal law are reluctant to impose secondary liability for "mere passive nonfeasance," the majority ruled that the companies could not be liable as aiders and abettors under JASTA.[130]

But before resolving the case based on the foundational tort principle that liability does not usually extend to "mere omissions, inactions, or nonfeasance,"[131] the Court discussed aiding and abetting under JASTA generally, potentially reshaping the scope of liability in the process.[132] While acknowledging the applicability of the *Halberstam* framework, the Court noted that the precedent should be viewed "in context of the common-law tradition from which it arose" without narrowly focusing on the D.C. Circuit's "exact phrasings and formulations."[133] Thus, the Court canvassed the common law growth of secondary liability in the criminal law setting—which is "rough[ly] simila[r]" to its tort law counterpart even if appreciably different from the framework in *Halberstam*[134]—and determined that the "phrase 'aids and abets' in § 2333(d)(2), as elsewhere, refers to a conscious, voluntary, and culpable participation in another's wrongdoing."[135] When describing the mental state needed to prove "conscious, voluntary, and culpable participation," however, the Court referenced and quoted from cases that adopted different mens rea requirements,[136] clarifying only that the "knowing" element of a JASTA inquiry is "designed to capture the defendants' state of mind with respect to their actions and the tortious conduct . . . , not the same general

129. Id. at 1226–28; see also id. at 1227 ("At bottom, . . . the claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms. But, as noted above, both tort and criminal law have long been leery of imposing aiding-and-abetting liability for mere passive nonfeasance.").

130. Id. at 1227.

131. Id. at 1220–21.

132. See id. at 1218–23. Beyond critiquing the Ninth Circuit's application of *Halberstam* to the present case, however, id. at 1229–30, the Court did not discuss the various lower court understandings of the *Halberstam* framework.

133. Id. at 1218, 1220; see also id. at 1231 (Jackson, J., concurring) ("The Court . . . draws on general principles of tort and criminal law to inform its understanding of § 2333(d)(2).").

134. Id. at 1223 (majority opinion) (alteration in original) (internal quotation marks omitted) (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)).

135. Id.

136. See infra section II.B; see also Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 Fordham L. Rev. 1341, 1376 (2002) ("[C]ourt[s] will often cull legal pronouncements indiscriminately from previous aiding and abetting cases without realizing that those earlier cases are wholly inconsistent with one another."). For a similar critique of a different Supreme Court case, see Rosemond v. United States, 572 U.S. 65, 84–85 (2014) (Alito, J., concurring in part and dissenting in part) (contending that when determining the mens rea requirement for secondary liability in criminal law, the majority "refers interchangeably" between knowledge and purpose, thereby "leav[ing] our case law in the same, somewhat conflicted state that previously existed").

awareness that defines *Halberstam*'s second element."[137] Therefore, the *Taamneh* opinion raised an important question: If *Halberstam* should not be read as an "inflexible code[],"[138] what mens rea must the aider and abettor have to be liable under the ATA?

B. *The Three* Taamneh *Tests*

As this section explains, the *Taamneh* Court invoked criminal law secondary liability to help clarify JASTA's scope, even though aiding and abetting in the criminal setting has rarely been lucid. The overarching question is what, if anything, beyond pure knowledge is required to sustain liability for a secondary actor. Many courts, including the Supreme Court in *Taamneh*,[139] cite to Judge Learned Hand's opinion in *United States v. Peoni* as the conclusive statement on the mens rea requirement for aiders and abettors in criminal law.[140] But the meaning of *Peoni* is in the eye of the beholder,[141] and courts have championed Judge Hand's words to support meaningfully distinct mens rea tests.[142] Much ink has been spilled over this confusion in the criminal law context,[143] and in the wake of

137. *Taamneh*, 143 S. Ct. at 1229.

138. Id. at 1225.

139. See id. at 1221.

140. See, e.g., *Rosemond*, 572 U.S. at 76–77; United States v. Urciuoli, 513 F.3d 290, 299 (1st Cir. 2008); People v. Cooper, 40 N.W.2d 708, 711 (Mich. 1950); see also Weiss, supra note 136, at 1350 ("Since *Peoni*, . . . the prevailing wisdom among courts and commentators has been that the issue is now closed.").

141. See Weiss, supra note 136, at 1373 (arguing that courts "disagree as to what the *Peoni* standard is" even though they "uniformly adopt Judge Hand's standard," leaving accomplice liability "hopelessly muddled and divided, despite the sixty years that have elapsed since Judge Hand's decision in *Peoni*, and despite the seeming clarity of his pronouncements"); see also Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 507 (2d ed. 2019) ("Sometimes the same Circuit—and in fact, the same *judge*—has vacillated between a strict *Peoni* and a knowledge standard.").

142. Compare United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (referencing *Peoni* to hold that secondary actors "must in some sense promote their venture himself, make it his own, have a stake in its outcome" to sustain liability), with *Rosemond*, 572 U.S. at 76–77 (quoting *Peoni* but also applying the "principle" that the "intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense"), Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994) (citing *Peoni* and *Nye & Nissen* to conclude that aiders and abettors must have an "intent to facilitate the crime" to be held liable), and United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995) (citing *Peoni* but holding that despite a literal reading, "in the actual administration of [the *Peoni* rule,] it has always been enough that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would . . . make the principal's success more likely"). For a broader discussion of the convoluted mens rea requirement in criminal law aiding and abetting cases both before and after *Peoni*, see Weiss, supra note 136, at 1350–52.

143. See Charles F. Capps, Accomplice Liability 8 (2020) (Ph.D. dissertation, University of Chicago) (on file with the *Columbia Law Review*) (quoting various commentators who have criticized the state of secondary liability in criminal law). For a thorough discussion of the mens rea requirement in the criminal law aiding and abetting context, see generally Weiss, supra note 136.

Taamneh, a similar puzzle now applies to JASTA. Unlike in criminal law, however, the burden will ordinarily fall on judges, not prosecutors and juries, to draw the lines of ATA secondary liability in motions to dismiss or for summary judgment, subjecting some parties to legal penalties while absolving others.

The various mens rea tests for secondary liability can be broadly organized into three categories: pure knowledge, true purpose, and intent to facilitate.[144] The differences between these standards are subtle, but the Supreme Court has regarded the nuances as "[p]erhaps the most significant, and most esoteric, distinction drawn by [a mens rea] analysis."[145] Although courts sometimes collapse these mental states,[146] as "there is [often] good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results" of their actions,[147] there are certain categories of cases in which the distinctions are emphasized, such as murder and treason.[148] Given the language in *Taamneh* and the similarity of terrorist attacks to murder and treason vis-à-vis seriousness and blameworthiness, the ATA is likely another area where the presence of "heightened culpability . . . merit[s] special attention" for the mens rea analysis.[149] Still, the lines separating the three mens rea tests, and especially delineating true purpose from an intent to facilitate, are hazy, which further supports the discussion in Part III that recasts the mens rea rules as a single continuum rather than three distinct standards.

To illustrate the differences between these three mens rea tests—and thus demonstrate the practical significance of determining which one the *Taamneh* Court adopted for JASTA cases—this section consistently references a hypothetical ATA lawsuit that is similar to several real JASTA

144. *Halberstam* and *Taamneh* also recognized a fourth category for aiding and abetting liability in which secondary actors are liable for the "natural and foreseeable consequence[s]" of their conduct. Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983); see also *Taamneh*, 143 S. Ct. at 1225 ("[P]eople who aid and abet a tort can be held liable for other torts that were 'a foreseeable risk' of the intended tort." (quoting *Halberstam*, 705 F.2d at 488)); supra notes 66, 77. The "natural and probable consequences" test, as Baruch Weiss labels it, also has deep support in the common law. See Weiss, supra note 136, at 1424–31. But since this test alters more than just the mens rea inquiry—simultaneously relaxing the act requirement for secondary actors and adding a nexus requirement between the assisted act and actionable tort, id. at 1425; see also *Taamneh*, 143 S. Ct. at 1225 ("[A] close nexus between the assistance and the tort might help establish that the defendant aided and abetted the tort, but even more remote support can still constitute aiding and abetting in the right case.")—this fourth aiding and abetting category is beyond the scope of this Note.

145. United States v. Bailey, 444 U.S. 394, 404 (1980).

146. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) ("Next down, though not often distinguished from purpose, is knowledge." (citing *Bailey*, 444 U.S. at 404)).

147. *Bailey*, 444 U.S. at 404 (internal quotation marks omitted) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978)).

148. Id. at 405.

149. Id.

cases and complaints.[150] Assume that a telecommunications company sold its products to an IRGC-owned corporation. The IRGC told the company that some of the communication devices would be used for a military mission, others for a so-called "foreign disruption," and the rest resold to regular consumers. As it turned out, the "foreign disruption" was a terrorist attack that injured U.S. nationals abroad. Since the IRGC used the communication devices to orchestrate the incident, the injured Americans sued the telecommunications company under the ATA for aiding and abetting the attack.[151] *Halberstam*'s first two elements are satisfied, as the IRGC "committed a wrong" that caused the injuries and the telecommunications company knew it was "playing some sort of role in [the IRGC's] enterprise."[152] So if the assistance was substantial, the plaintiffs' ability to recover treble damages and the company's exposure to liability would hinge on the company's mens rea.[153]

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150. For instance, this hypothetical is loosely based on the facts giving rise to a recent ATA lawsuit in the Eastern District of New York. See Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 314–20 (E.D.N.Y. 2023). Although the author worked in Judge Carol Bagley Amon's chambers while the case was pending, nothing in this Note references any discussion or material beyond what is published in the court's opinion. For even newer ATA complaints of a similar character, see Ava Benny-Morrison, Binance Sued by Hamas Hostage, Families of Victims in Attack, Bloomberg (Jan. 31, 2024), https://www.bloomberg.com/news/articles/2024-01-31/binance-sued-by-hamas-hostage-families-of-victims-in-attack (on file with the *Columbia Law Review*); Riley Brennan, Greenberg Traurig Files Suit Accusing Groups of Acting as Hamas 'Propaganda Division,' Spreading Falsehoods, Law.com (May 2, 2024), https://www.law.com/2024/05/02/greenberg-traurig-files-suit-accusing-groups-of-acting-as-hamas-propaganda-division-spreading-falsehoods/ (on file with the *Columbia Law Review*); see also Amal Clooney and Jenner & Block File Lawsuit in US Court Seeking Accountability for Genocide Against Yazidis, Jenner & Block (Dec. 14, 2023), https://www.jenner.com/en/news-insights/news/amal-clooney-and-jenner-and-block-file-lawsuit-in-us-court-seeking-accountability-for-genocide-against-yazidis [https://perma.cc/6TMV-7BF3].

151. For the purposes of this hypothetical, assume that the terrorist attack occurred after the IRGC was designated as an FTO and satisfied the "international terrorism" requirements listed in § 2331. See 18 U.S.C. §§ 2331(1), 2333(d)(2) (2018).

152. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1225 (2023); see also Trump, supra note 1 ("If you are doing business with the IRGC, you will be bankrolling terrorism."). For a discussion of corporate mens rea in the criminal law context, see generally Michael A. Foster, Cong. Rsch. Serv., R46836, Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses (2021), https://crsreports.congress.gov/product/pdf/R/R46836 (on file with the *Columbia Law Review*).

153. In *Taamneh*, the Supreme Court advised that *Halberstam*'s "'knowledge and substantial assistance' components 'should be considered relative to one another' as part of a single inquiry designed to capture conscious and culpable conduct," with "a lesser showing of one demanding a greater showing of the other." *Taamneh*, 143 S. Ct. at 1222, 1228–29 (quoting Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991)). The IRGC hypothetical and this Note, however, are focused less on the depth of a complaint's factual allegations and more on the legal standard itself. See infra notes 235, 265 and accompanying text. After all, "the facts from which a mental state may be inferred must not be confused with the mental state that the [plaintiff] is required to prove." See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984).

1. *Test One: Pure Knowledge.* — The first mens rea test that some courts apply for alleged aiders and abettors is pure knowledge, which does not require any intent to either commit a tort or assist in the commission of a tort.[154] As the Supreme Court recently explained, parties act with pure knowledge when they are "aware that [a] result is practically certain to follow" from their conduct.[155] In the aiding and abetting context, the common law epitome of this test is *Backun v. United States* in which the defendant knowingly sold stolen items to a third party who subsequently traveled to another state to resell those goods.[156] Writing for the Fourth Circuit panel, Judge John Parker upheld the defendant's conviction for interstate transportation of stolen merchandise as an aider and abettor because the defendant knew that the third party would leave the state to resell the goods even though he never specifically desired the third party to do so.[157] Canvassing several common law cases,[158] the court adopted a pure knowledge test for secondary liability, holding that a party who sells items "which he knows will make [a felony's] perpetration possible *with knowledge* that they are to be used for that purpose" aids and abets the

154. One reading of *Rosemond v. United States* suggests that the Supreme Court accepted a pure knowledge test for secondary liability in criminal law, see John Kaplan, Robert Weisberg & Guyora Binder, Criminal Law: Cases and Materials 803 (9th ed. 2021), as the Court noted that the mens rea requirement is "satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense," 572 U.S. 65, 77 (2014) (referencing Supreme Court decisions in *Pereira v. United States* and *Bozza v. United States* to support the holding that an "active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun"); see also id. at 79–80 ("What matters for purposes of gauging intent . . . is that the defendant has chosen, with full knowledge, to participate in the illegal scheme . . . . The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding."). But see id. at 77 n.8 ("We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it.").

155. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (alteration in original) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)). Alternatively, proving "willful blindness" satisfies the pure knowledge test, such as when "the facts suggest a conscious course of deliberate ignorance." United States v. Littlefield, 840 F.2d 143, 147 (1st Cir. 1988); see also infra note 172.

156. 112 F.2d 635, 636 (4th Cir. 1940); Kaplan et al., supra note 154, at 786; see also Charles F. Capps, Upfront Complicity, 101 Neb. L. Rev. 641, 644–45 (2023) [hereinafter Capps, Upfront Complicity] (referencing *Backun* and *Peoni* as the two leading twentieth-century cases on the mens rea requirement in accomplice liability); Sherif Girgis, Note, The Mens Rea of Accomplice Liability: Supporting Intentions, 123 Yale L.J. 460, 468 (2013) (citing *Backun* as an example of "some federal and state authorities" holding that "a helper need not intend that the principal commit his crime" as long as "he *kn*[*e*]*w* that the principal will commit it").

157. See *Backun*, 112 F.2d at 636–37; Kaplan et al., supra note 154, at 786.

158. See *Backun*, 112 F.2d at 637–38 (compiling cases that permitted secondary liability based on an actor's knowledge of another's criminal intentions); see also Anstess v. United States, 22 F.2d 594, 595 (7th Cir. 1927) ("One who, with full knowledge of the purpose with which contraband goods are to be used, furnishes those goods to another to so use them, actively participates in the scheme or plan to so use them.").

commission of the crime.[159] Further, as is also relevant in the JASTA context, the panel asserted that the "seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise."[160] In other words, there is no requirement that the defendant "hav[e] a stake" in the crime's commission because "those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise."[161]

The support for a pure knowledge test in the JASTA context is easy to identify: Both the statutory text and *Halberstam* use the word "knowingly."[162] While the *Taamneh* Court warned parties that "any approach that too rigidly focuses on *Halberstam*'s . . . exact phraseology risks missing the mark,"[163] this admonition likely does not apply to JASTA's statutory text itself.[164] Moreover, if common law terms such as "aids and abets" "'brin[g] the old soil' with them,"[165] this "old soil" presumably includes *Backun* and similar common law cases that adopted a pure knowledge test, some of which the *Taamneh* opinion expressly

159. *Backun*, 112 F.2d at 637 (emphasis added).

160. Id.

161. Id. (rejecting Judge Hand's test in United States v. Falcone, 109 F.2d 579 (2d Cir. 1940)). The Fourth Circuit noted that even if it were to reject the pure knowledge test, the defendant's conviction could still be upheld based on the evidence. See id. at 638 ("[E]ven if the view be taken that aiding and abetting is not to be predicated of an ordinary sale made with knowledge that the purchaser intends to use the goods purchased in the commission of felony, . . . the circumstances relied on by the government here are sufficient to establish . . . guilt . . . ."). Nevertheless, the opinion still exemplifies a court willing to hold an aider and abettor liable based on mere knowledge of another's planned wrongdoing.

162. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1214 (2023) (repeating the language of § 2333 that defines aiding and abetting as "knowingly providing substantial assistance" (internal quotation marks omitted) (quoting 18 U.S.C. § 2333(d)(2) (2018))); id. at 1219 (citing *Halberstam*'s third prong for secondary liability, which requires the defendant to "knowingly and substantially assist the principal violation" (internal quotation marks omitted) (quoting Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983))). Insofar as the limited legislative history is instructive, it also lends support to Congress's adoption of a pure knowledge test in JASTA. See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Const. & Civ. Just. of the Comm. on the Judiciary, 114th Cong. 13 (2016) (statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary) ("Aiding and abetting liability should only attach under the ATA to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization, in connection with the organization's commission of an act of international terrorism.").

163. *Taamneh*, 143 S. Ct. at 1223.

164. See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 22 (1997) ("The text is the law, and it is the text that must be observed.").

165. *Taamneh*, 143 S. Ct. at 1218 (alteration in original) (quoting Sekhar v. United States, 570 U.S. 729, 733 (2013)).

referenced.[166] The Court also suggested in dicta that secondary liability is premised on a defendant's "*conscious* participation in the underlying tort," which resembles characterizations of pure knowledge more than descriptions of true purpose.[167] Even the petitioners and government (perhaps erroneously) appeared to concede at oral argument that pure knowledge could result in JASTA liability without any proof of purpose or an intent to facilitate the commission of a terrorist attack.[168]

To apply the pure knowledge test to the hypothetical laid out at the beginning of this section,[169] the telecommunications company actively selling its products to the IRGC for a "foreign disruption" would be liable as an aider and abettor under the ATA as long as the company was "aware" that an act of terrorism was "practically certain to follow" from its actions.[170] Considered in conjunction with the IRGC's reputation,[171] these facts alone are likely sufficient to support liability, as the company knew that the FTO was planning a "foreign disruption" separate and distinct

166. See, e.g., Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991) ("[A]iding and abetting not only requires assistance, but also knowledge of a wrongful purpose."); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 802–03 (3d Cir. 1978) (holding that the "combination of knowledge and action" is sufficient to sustain secondary liability even without "evidence of an intent by the [defendant] to assist a primary violation of [the] law"); see also *Taamneh*, 143 S. Ct. at 1222 (referencing these cases). Granted, the *Taamneh* Court also rejected a rule that would "effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Taamneh*, 143 S. Ct. at 1229. While this language could be interpreted to mean that the majority rejected a pure knowledge test, the sentence is more likely meant to demonstrate that a failure to act is insufficient to sustain JASTA liability. See supra notes 129–131 and accompanying text.

167. *Taamneh*, 143 S. Ct. at 1222 (emphasis added); cf. infra section II.B.2. While the Court did not further explain the meaning of "conscious participation," Merriam-Webster defines "conscious" as, inter alia, "perceiving, apprehending, or noticing with a degree of controlled thought or observation." See Conscious, Merriam-Webster, https://www.merriam-webster.com/dictionary/conscious [https://perma.cc/Q33E-W5E9] (last visited Sept. 14, 2024).

168. See Transcript of Oral Argument, supra note 81, at 26 (statement of Seth Waxman) (conceding that "culpable knowledge" could be inferred if Twitter were told about specific accounts planning terrorist attacks but refused to take them down); see also supra text accompanying notes 119–120.

169. See supra notes 150–153 and accompanying text.

170. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

171. See Trump, supra note 1 ("If you are doing business with the IRGC, you will be bankrolling terrorism."); supra notes 6–13 and accompanying text. Of course, the company's general awareness of its role in the IRGC's overall scheme is not sufficient alone to sustain JASTA liability. See *Taamneh*, 143 S. Ct. at 1229 (noting that the "knowing" part of the *Halberstam* inquiry is not a "carbon copy of the antecedent element of whether the defendants were 'generally aware' of their role" in terrorist activity). Nonetheless, along with its direct interactions with the IRGC and its subsidiary, the company's knowledge about how and where the devices would be used distinguishes this hypothetical from *Taamneh*. See id. at 1226 ("Notably, plaintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that [the terrorist] himself ever used Facebook, YouTube, or Twitter.").

from any conventional commercial or military objective.[172] That the telecommunications company did not care how the IRGC used the devices and instead treated the organization as any ordinary paying customer would be irrelevant.[173] Thus, compared to the true purpose and intent to facilitate tests, pure knowledge would create the broadest scope of liability.

2. *Test Two: True Purpose.* — The second mens rea standard that the *Taamneh* Court favorably referenced is the true purpose test, which demands the greatest culpability. Beyond being "practically certain" that a proscribed result would follow from their conduct, parties must "consciously desire[]" the illegal outcome to satisfy the true purpose test—so here, actors must want a terrorist attack to occur.[174] The canonical case adopting this test—a precedent that has since been cited in several Supreme Court cases[175]—is Judge Learned Hand's opinion in *Peoni*, which Judge Hand further developed in *United States v. Falcone*.[176] In *Peoni*, the defendant sold counterfeit bills to a party who resold the same bills to another person.[177] The trial court convicted the defendant for aiding and abetting the possession of counterfeit money, and the government supported this verdict on appeal by arguing that the defendant knew the first party would resell the bills to the second.[178] Rejecting this argument,

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172. These facts may even support a jury instruction based on willful ignorance, colorfully known as "ostrich instructions." See United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) ("The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings."); see also United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) ("[D]eliberate ignorance and positive knowledge are equally culpable. . . . To act 'knowingly' . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required."); supra note 155.

173. See Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) ("One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun . . . .").

174. *Counterman*, 143 S. Ct. at 2117 (internal quotation marks omitted) (quoting *Bailey*, 444 U.S. at 404).

175. Rosemond v. United States, 572 U.S. 65, 76 (2014) ("[T]he canonical formulation of th[e] needed state of mind [for secondary liability]—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's [in *Peoni*] . . . .").

176. 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940); see also Kaplan et al., supra note 154, at 785. For a countervailing argument that *Peoni* adopted the "natural and probable consequences" test that left the mens rea question for secondary actors unresolved, see Weiss, supra note 136, at 1432–35. But see id. at 1466 ("[A]lthough *Peoni* may not be Judge Hand's definitive aiding and abetting case, when it is read together with Judge Hand's other cases, it is clear that Judge Hand was a strong proponent of purposeful intent.").

177. See United States v. Peoni, 100 F.2d 401, 401 (2d Cir. 1938); Kaplan et al., supra note 154, at 785. For another example of the true purpose test, see United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993) ("To be proved guilty of aiding and abetting . . . the defendant [must have] desired the illegal activity to succeed.").

178. *Peoni*, 100 F.2d at 401–02.

the Second Circuit opinion surveyed common law cases and held that aiding and abetting "carr[ies] an implication of purposive attitude towards it."[179] In oft-quoted language, Judge Hand concluded that the defendant must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[180] Reasserting this rule less than two years later, Judge Hand wrote, "It is not enough that [the defendant] does not forego a normally lawful activity, . . . the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome."[181]

There are several portions of the *Twitter, Inc. v. Taamneh* decision that favorably discussed the true purpose test. As with several other Supreme Court opinions,[182] the Court frequently cited *Peoni* to illustrate the common law meaning of the term "aids and abets."[183] For instance, when describing criminal law aiding and abetting cases that the Court considered "rough[ly] simila[r]" to the tort context,[184] the opinion quoted the *Peoni* rule as adopted in a prior Supreme Court decision, *Nye & Nissen v. United States*.[185] Similarly, while canvassing civil aiding and abetting cases at common law, the majority not only referenced several

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179. Id. at 402.

180. Id. Notably, Judge Hand suggested in dicta that the court's decision might have been different if the case were civil rather than criminal. Id. The *Taamneh* Court did not appear to raise this distinction in its opinion, potentially because Judge Hand was likely referencing tort law's negligence standard that is insufficient under JASTA. See *Falcone*, 109 F.2d at 581 ("Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts.").

181. *Falcone*, 109 F.2d at 581. Put differently, a "seller's knowledge [of another's unlawful activity is] not alone enough. . . . [H]is attitude towards the forbidden undertaking must be more positive." Id.; see also United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951) ("[T]he crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose.").

182. See, e.g., Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (quoting *Peoni*, 100 F.2d at 402)); see also Rosemond v. United States, 572 U.S. 65, 76–77 (2014); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994).

183. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218 (2023) ("[T]erms like 'aids and abets' are familiar to the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others.").

184. Id. at 1223 (alteration in original) (internal quotation marks omitted) (quoting *Cent. Bank*, 511 U.S. at 181).

185. Id. at 1221 ("[C]riminal law thus requires 'that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed"' before he could be held liable." (quoting *Nye & Nissen*, 336 U.S. at 619)); see also Kevin Cole, Purpose's Purposes: Culpability, Liberty, Legal Wrongs, and Accomplice Mens Rea, 2 Ga. Crim. L. Rev., no. 1, 2024, at 1, 18 ("[T]he cases *Taamneh* cites in describing the criminal-law approach [to secondary liability] skew towards the purpose standard.").

precedents that adopted a true purpose test[186] but even recited the operative language from one that required the defendant's actions to be "'*calculated and intended to produce* [an injury]' to warrant liability for the resulting tort."[187] In a footnote, the Court also raised the question—initially proposed by the Second Circuit—of "whether any of [the common law tort cases'] 'elaborate discussions of the aiding and abetting standard . . . "have added anything except unnecessary detail"' to the formulation set forth by Judge Learned Hand in *United States v. Peoni* and adopted by this Court in *Nye & Nissen v. United States*."[188]

Beyond its common law case analysis, the *Taamneh* Court also invoked true purpose language when engaging in JASTA-specific reasoning, such as recasting the *Halberstam* framework as principally "designed to hold defendants liable when they consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.'"[189] This language reflects the questions that Justices Alito and Sotomayor asked during oral argument regarding whether the Court could read *Halberstam* as requiring purpose in addition to knowledge.[190] Further, when applying the *Halberstam* framework and rejecting secondary liability for the social media companies, the Court concluded that "[t]he fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants . . . aided and abetted those wrongdoers' acts."[191] While this language does not explicitly reference the true purpose test, the Court's analysis resembles Judge Hand's decision in *Falcone*, which was similarly concerned with criminalizing "normally lawful activity, . . . the fruits of which [the defendant] knows that others will make an unlawful use."[192]

The practical significance of the Court's language becomes clearer once one compares the true purpose test to the pure knowledge standard. With true purpose, only aiders and abettors who "consciously desire[]" a

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186. See Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) ("[T]he ordinary understanding of culpable assistance to a wrongdoer . . . requires a desire to promote the wrongful venture's success."); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975) ("[A]n alleged aider-abettor should be found liable only if scienter of the high 'conscious intent' variety can be proved."); Smith v. Thompson, 655 P.2d 116, 118 (Idaho Ct. App. 1982) (adopting the rule from Bird v. Lynn, 49 Ky. 422 (1850)); see also *Taamneh*, 143 S. Ct. at 1222, 1226 (referencing these cases).

187. *Taamneh*, 143 S. Ct. at 1222 (emphasis added) (quoting *Bird*, 49 Ky. at 423).

188. Id. at 1222 n.10 (second alteration in original) (citations omitted) (quoting Sec. & Exch. Comm'n v. Apuzzo, 689 F.3d 204, 212 n.9 (2d Cir. 2012)).

189. Id. at 1225 (alteration in original) (quoting *Nye & Nissen*, 336 U.S. at 619); see also id. at 1223 (quoting the *Nye & Nissen* true purpose test when characterizing JASTA and *Halberstam*'s "conceptual core").

190. See Transcript of Oral Argument, supra note 81, at 80–81 (statement of Justice Alito); id. at 85–86 (statement of Justice Sotomayor); see also supra notes 125–126 and accompanying text.

191. *Taamneh*, 143 S. Ct. at 1228; see also id. at 1226 (holding that the plaintiffs' allegations do not satisfy the *Nye & Nissen* true purpose test).

192. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940).

terrorist attack can be liable.[193] Using the hypothetical above,[194] the fact that the telecommunications company knew the IRGC's "foreign disruption" was code for a terrorist attack—and the company's knowledge that "[i]f you are doing business with the IRGC, you will be bankrolling terrorism"[195]—is insufficient alone to sustain JASTA liability because the court likely could not infer that the company "participate[d] in [the terrorist attack] as in something that [it] wishe[d] to bring about."[196] As a result, the scope of secondary liability under the true purpose test is appreciably smaller than under the pure knowledge rule, and the burden on the plaintiffs to uncover more incriminating evidence of the company's intentions is even greater.

3. *Test Three: Intent to Facilitate.* — The intent to facilitate test sits in between the pure knowledge and true purpose standards, incorporating aspects of both. As the California Supreme Court explained in *People v. Beeman*, the intent to facilitate rule requires that the aider and abettor "know[] the full extent of the perpetrator's criminal [objectives] and give[] aid . . . with the intent . . . of facilitating the perpetrator's commission of the crime."[197] Granted, since "facilitate" means making something easier to complete,[198] one may initially regard this standard as the functional equivalent of the true purpose test.[199] But according to some courts, the critical distinction between an intent to facilitate and full-blown purpose is that the former does not depend on whether the secondary actor had a stake in the underlying crime or "consciously desire[d]"[200] the proscribed result, which, in this context, is an act of terrorism.[201]

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193. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

194. See supra notes 150–153 and accompanying text.

195. Trump, supra note 1.

196. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). Circumstantial evidence of this true purpose can include, for example, a pecuniary interest in the commission of the crime or a special relationship between the principal and secondary actors. See United States v. Irwin, 149 F.3d 565, 572 (7th Cir. 1998) (discussing United States v. Pearson, 113 F.3d 758 (7th Cir. 1997), United States v. Blankenship, 970 F.2d 283 (7th Cir. 1992), and United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990)).

197. 674 P.2d 1318, 1326 (Cal. 1984) (holding that intent to facilitate "mean[s] neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime"); see also Model Penal Code § 2.06(3)(a) (Am. L. Inst. 1962) (defining an "accomplice" as one who provides assistance "with the purpose of promoting or facilitating the commission of the offense").

198. See Facilitate, Merriam-Webster, https://www.merriam-webster.com/dictionary/facilitate [https://perma.cc/8FSW-8X5L] (last visited Sept. 14, 2024).

199. See supra text accompanying notes 145–149.

200. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

201. Perhaps this distinction most resembles the Model Penal Code's nuanced definition of the "purposely" culpability level itself. If the relevant statute uses "purposely"

United States v. Moses illustrates the intent to facilitate rule and the meaningful—if nuanced—distinctions between the three mens rea tests.[202] In *Moses*, two undercover agents asked the defendant if she knew where to obtain illegal drugs.[203] Although the defendant did not possess any drugs herself, she introduced the officers to a group of men from whom she had previously purchased drugs and confirmed that they were "all right."[204] Then, the officers and the group of drug dealers left the defendant, and she did not witness or participate in any of the subsequent drug transactions.[205] The government charged the defendant with aiding and abetting the sale of illegal drugs even though her actions "were not intended for personal gain, present or future, nor to secure drugs for herself."[206]

The district court convicted the defendant in a bench trial.[207] While conceding that the defendant would not be an aider and abettor if all the government could prove was that she *knew* a drug deal would take place between the undercover agents and the group of men,[208] the court determined that the defendant need not "have any stake in the success of the crime" to be liable as a secondary actor.[209] Consequently, that the defendant had no vested interest in whether a drug deal would actually occur after the men left her house did not defeat secondary liability as long as the defendant harbored "the purpose of assisting" the transaction.[210] Since the defendant actively "vouched" for the group of men, which "was an essential ingredient of the entire transaction," the court deduced that she had an intent to facilitate the drug sale and thus could be convicted as an aider and abettor.[211]

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to modify a result element of the offense, the government must prove that "it [was the defendant's] conscious object . . . to cause such a result." Model Penal Code § 2.02(2)(a)(i). If this mental state applies to a conduct element, however, the prosecution must establish only that "it [was the defendant's] conscious object to engage in conduct of that nature." Id. Regardless, the blurriness between the true purpose and intent to facilitate standards further supports the solution provided in Part III that reframes the mens rea levels as a single continuum.

202. 122 F. Supp. 523 (E.D. Pa. 1954), rev'd, 220 F.2d 166 (3d Cir. 1955).

203. See id. at 525.

204. Id.

205. Id.

206. Id. ("[The defendant's] actions in this case were taken solely for the purpose of helping two persons whom she thought to be addicted to the drug habit . . . .").

207. Id.

208. Id. at 526 ("If all that the defendant had done in this case was merely to direct the agents to an address where, or even to a person from whom narcotics might be obtained, without more, she would not be an aider and [abettor].").

209. Id.; cf. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (holding that an aider and abettor "must in some sense . . . have a stake in [the] outcome" of the "forbidden undertaking").

210. *Moses*, 122 F. Supp. at 526 (internal quotation marks omitted) (quoting Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952)).

211. Id. at 526–27.

Quoting the *Peoni* rule as adopted in *Nye & Nissen*, the Third Circuit reversed because the defendant had no "personal or financial interest in bringing trade to" the drug sellers.[212] Instead, the Court reaffirmed the "general rule" that "one who has acted *without interest* in the selling cannot be convicted as a seller."[213] Put differently, the circuit panel distinguished between an intent to facilitate and true purpose, ultimately rejecting the district court's holding that proof of the former is sufficient alone to sustain secondary liability.

In several Supreme Court opinions—including *Taamneh* and cases that *Taamneh* referenced—the Court invoked language that resembles the intent to facilitate test. For example, the *Central Bank* Court explained that aiding and abetting under federal law requires "knowing aid to persons committing federal crimes, with the intent to facilitate the crime."[214] Likewise, in *Rosemond v. United States*, one of the Supreme Court's most recent cases on criminal secondary liability, the Court held that "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."[215] Aside from naming and quoting these precedents, the *Taamneh* Court also appeared to employ the intent to facilitate test when rejecting the plaintiffs' JASTA claims against the social media companies, highlighting "the lack of any defendant *intending to assist* ISIS."[216] Furthermore, again harkening back to Justices Alito and Sotomayor's questioning during oral argument,[217] the *Taamneh* opinion concluded by holding that the "plaintiffs have failed to allege that defendants *intentionally* provided any substantial aid to the Reina attack,"[218] which is noticeably different wording than JASTA's requirement that aiders and abettors "*knowingly* provid[e] substantial assistance."[219] Finally, in a case decided a few weeks after *Twitter, Inc. v. Taamneh*, the Supreme Court cited *Taamneh* as an illustration of aiding and abetting

212. United States v. Moses, 220 F.2d 166, 168–69 (3d Cir. 1955).

213. Id. at 169 (emphasis added).

214. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994); see also Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218, 1220, 1223 (2023) (citing *Cent. Bank*, 511 U.S. at 181). Oddly, the *Central Bank* Court cited *Nye & Nissen* to support this proposition. See *Cent. Bank*, 511 U.S. at 181; cf. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (adopting the true purpose test from *Peoni*).

215. 572 U.S. 65, 76 (2014); see also *Taamneh*, 143 S. Ct. at 1220, 1221, 1223, 1224 (referencing *Rosemond* and citing the majority's determination that a criminal defendant must act "with the intent of facilitating the offense's commission" to be liable as an aider and abettor (internal quotation marks omitted) (quoting *Rosemond*, 572 U.S. at 71)). For an argument that *Rosemond* is actually unclear as to which mens rea standard the majority embraced, see *Rosemond*, 572 U.S. at 84–85 (Alito, J., concurring in part and dissenting in part) ("The Court refers interchangeably to both [the pure knowledge and true purpose] tests and thus leaves our case law in the same, somewhat conflicted state that previously existed."); see also supra note 154.

216. *Taamneh*, 143 S. Ct. at 1230 (emphasis added).

217. See supra notes 125–126, 190 and accompanying text.

218. *Taamneh*, 143 S. Ct. at 1231 (emphasis added).

219. 18 U.S.C. § 2333(d)(2) (2018) (emphasis added).

liability, which requires "the provision of assistance to a wrongdoer *with the intent to further* an offense's commission."[220]

To end with the IRGC hypothetical,[221] a court applying the intent to facilitate test would demand evidence from which to infer that the telecommunications company was more than indifferent about whether the IRGC would use the devices to orchestrate a terrorist attack. In other words, the company's argument that the IRGC was just another paying customer would carry more exculpatory weight under the intent to facilitate standard than in the pure knowledge context. That said, the injured Americans need not allege that the company "consciously desire[d]" terrorism and certainly not that the company had any "personal or financial interest in" a terrorist attack.[222] Therefore, although the plaintiffs' burden is greater here than under the pure knowledge standard, the intent to facilitate test provides plaintiffs with a better chance of recovering treble damages than in a true purpose regime.

C. *The Foggy State of the ATA Post-*Taamneh

As detailed in the previous sections, *Taamneh* provided support for three distinct mens rea tests for courts to apply in a JASTA inquiry, each of which would delineate a meaningfully different scope of liability. Few JASTA cases have been adjudicated in the months since *Taamneh*,[223] but those that have reveal some confusion regarding the Supreme Court's proclamations in the opinion and its impact on the ATA. One district court concluded that *Taamneh* "does not constitute a change in intervening law"

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220. United States v. Hansen, 143 S. Ct. 1932, 1940 (2023) (emphasis added); see also id. at 1945 ("[A]iding and abetting implicitly carries a mens rea requirement—the defendant generally must intend to facilitate the commission of a crime." (emphasis omitted)).

221. See supra notes 150–153 and accompanying text.

222. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)); United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1955).

223. In one of these cases, a district court found "conscious participation in the underlying tort" in an opinion that was subsequently vacated due to newly discovered information bearing on the plaintiffs' factual allegations. Sotloff v. Qatar Charity, 674 F. Supp. 3d 1279, 1321 (S.D. Fla. 2023), vacated, No. 22-CV-80726-MIDDLEBROOKS, 2023 WL 6471413 (S.D. Fla. Sept. 29, 2023). Additionally, the D.C. Circuit recently discussed *Taamneh* in the context of a civil aiding and abetting claim under common law, which independently involves the *Halberstam* framework, but determined that the plaintiffs failed to allege the defendants were "generally aware" of their role in terrorist activities. Ofisi v. BNP Paribas, S.A., 77 F.4th 667, 675 (D.C. Cir. 2023); see also Newman v. Associated Press, No. 1:24-cv-20684-KMM, 2024 WL 5063288, at *6 (S.D. Fla. Dec. 10, 2024) (dismissing a JASTA claim because the defendant "lack[ed] general awareness" and thus could not "be said to have knowingly assisted [the] FTO"). As for the Supreme Court, the Justices vacated the D.C. Circuit's judgment in *Atchley* and remanded the case "for further consideration in light of" *Taamneh*. AstraZeneca UK Ltd. v. Atchley, 144 S. Ct. 2675, 2675–76 (2024) (mem.).

but rather "largely align[s] with . . . Second Circuit precedent"[224]—even though pre-*Taamneh* "Second Circuit precedent" was not completely harmonious.[225] As for the mens rea inquiry, the court determined that *Taamneh* is fully consistent with prior JASTA opinions that defined "knowing" assistance as anything beyond "innocent [or] inadvertent" aid,[226] a rule that is akin to the pure knowledge test.

Another district court was less certain, expressly "declin[ing]" to "pronounce that Second Circuit precedent is entirely consistent with [*Taamneh*] and no 'tension' exists."[227] And when applying *Halberstam*'s "'knowing and substantial' assistance" prong in light of *Taamneh*, the court focused on the defendant's "specific intent" to facilitate the production of explosive IED ingredients,[228] which resembles the intent to facilitate and true purpose standards.

Finally, instead of using any of the three mens rea tests outlined above, a third district court interpreted *Taamneh* as entailing "a balancing act, considering 'the nature and amount of assistance' on the one hand, and 'the defendant's scienter' on the other."[229] Accordingly, the court inferred "conscious and culpable" participation from the defendant's "'direct and extraordinary' assistance."[230] And notably, the court cited circuit court precedents only when considering *Halberstam*'s general awareness prong and six substantiality factors, not when evaluating whether the defendant had "knowingly" assisted a terrorist attack.[231]

In sum, though the *Taamneh* Court provided some mens rea guideposts to consider when adjudicating JASTA claims, courts are still struggling to synthesize and implement the *Taamneh*–*Halberstam* framework. And the question of what mens rea test courts should apply to potential aiders and abettors in light of *Taamneh* will almost certainly intensify as more JASTA lawsuits are filed,[232] meaning courts and litigants will not be able to avoid confronting the issue altogether.

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224. King v. Habib Bank Ltd., Nos. 20 Civ. 4322 (LGS), 21 Civ. 2351 (LGS), 21 Civ. 6044 (LGS), 2023 WL 8355359, at *3 (S.D.N.Y. Dec. 1, 2023).

225. See supra notes 84–102 and accompanying text.

226. *King*, 2023 WL 8355359, at *3; see also supra notes 92–93 and accompanying text.

227. Bonacasa v. Standard Chartered PLC, No. 22-cv-3320 (ER), 2023 WL 7110774, at *9 (S.D.N.Y. Oct. 27, 2023).

228. Id. at *5, *10 (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221–25 (2023)).

229. Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 346 (E.D.N.Y. 2023) (quoting *Taamneh*, 143 S. Ct. at 1223).

230. Id. at 347 (quoting *Taamneh*, 143 S. Ct. at 1222).

231. See id. at 336–54.

232. See, e.g., Benny-Morrison, supra note 150; Brennan, supra note 150; see also Amal Clooney and Jenner & Block File Lawsuit in US Court Seeking Accountability for Genocide Against Yazidis, supra note 150.

III. A SLIDING SCALE SOLUTION

This Part provides a framework for lower courts to apply when interpreting *Taamneh* and adjudicating JASTA claims, which is especially important in the tort law context because the burden falls on judges, not prosecutors and juries, to screen and decide cases. After first explaining and contextualizing a sliding scale for ATA cases, this Part demonstrates why a sliding scale is faithful to the Supreme Court's opinion in *Taamneh*, consistent with JASTA's statutory text, and aligned with the overarching policy aims of the ATA.

A. *The JASTA Sliding Scale*

While Part II describes three mens rea tests that courts adopt in aiding and abetting cases, the three standards often blur together,[233] comprising more of a mental state continuum than three discrete categories. Rather than fight this dynamic and choose a single mens rea requirement to apply in JASTA cases, lower courts should read *Taamneh* as embracing a sliding scale for aiders and abettors. After all, the mens rea requirement is merely one proxy in a broader normative analysis designed to impose liability on only those who engaged in "truly culpable conduct."[234]

A JASTA sliding scale would balance the two components of *Halberstam*'s third prong (knowing and substantial assistance), with a higher showing of one allowing for a lower showing of the other. This sliding scale is more than just the amount of evidence required to satisfy each element; the mens rea requirement itself changes depending on the level of assistance provided.[235] Thus, if there is significant substantial assistance (almost all six of the substantiality factors are conclusively established[236]), then the mens rea prong will require only pure knowledge. Conversely, if the assistance provided is more modest (only a couple of the substantiality factors are satisfied), the mens rea requirement will heighten to true purpose. Anything in between—for example, a large corporation seeking to help all customers, law-abiding and nefarious, in all their activities, whether lawful or criminal—will result in an intent to facilitate

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233. See United States v. Bailey, 444 U.S. 394, 404 (1980) ("In the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results."'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978))).

234. *Taamneh*, 143 S. Ct. at 1221.

235. See People v. Beeman, 674 P.2d 1318, 1325 (Cal. 1984) ("[T]he facts from which a mental state may be inferred must not be confused with the mental state that the [plaintiff] is required to prove."); see also supra note 153; infra note 265.

236. As a reminder, these six factors are (1) "the nature of the act assisted," (2) "the amount of assistance" given, (3) the defendant's presence or absence at the time of the act, (4) the defendant's "relation to the tortious actor," (5) "the defendant's state of mind," and (6) "the duration of the assistance." Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983) (emphasis omitted).

rule.[237] Finally, if parties provide significant substantial assistance *and* do so with true purpose, then they can be liable for each and every terrorist attack committed by the FTO.[238]

To make this abstract sliding scale more tangible, consider the IRGC hypothetical introduced in Part II.[239] When adjudicating the plaintiffs' JASTA suit, courts should first apply *Halberstam*'s six substantiality factors.[240] Assuming the telecommunications company's assistance to the IRGC was substantial—such as if the company provided hundreds of specially made devices to the IRGC over a long period of time and taught IRGC leaders how to operate the gadgets—the mens rea requirement would slide to pure knowledge, meaning a court need only find that the company was "aware" that an act of terrorism was "practically certain to follow" from its actions to sustain liability.[241] Given its knowledge of the IRGC's "foreign disruption" plans, the telecommunications company would likely be liable under the ATA.[242]

Alternatively, if the company merely engaged in a one-off sale of generally available products at arm's length, the plaintiffs would need to prove the company's "conscious[] desire[]" to participate in a terrorist attack, which is the true purpose test.[243] Nevertheless, even though several of *Halberstam*'s six substantiality factors are not established in the latter scenario, the plaintiffs could still prevail if they, for instance, discovered recordings of the company's executives discussing the economic benefits of driving competitor businesses out of the region through acts of terrorism. That there is still an avenue—albeit a narrow one—to impose liability on the company in this situation would ensure that the ATA covers "truly culpable conduct."[244]

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237. At first glance, the intent to facilitate test may seem most applicable to the social media companies in *Taamneh*, since the platforms were "agnostic" as to the material they promoted and thus "match[ed] any content (including ISIS' content) with any user who [wa]s more likely to view that content." *Taamneh*, 143 S. Ct. at 1227. But considering the lack of any affirmative assistance from the companies, who "at most allegedly stood back and watched" once the "algorithms were up and running," the true purpose rule is probably more appropriate. Id. ("[P]laintiffs would need some other very good reason to think that defendants were consciously trying to help . . . the Reina attack. . . . [But] plaintiffs point to no act of encouraging, soliciting, or advising the commission of the Reina attack . . . ."). Regardless, given the parallels between the true purpose and intent to facilitate tests, the analysis of the companies' mens rea under either would likely be similar. See supra notes 197–213, 221–222 and accompanying text.

238. See infra notes 266–268 and accompanying text.

239. See supra notes 150–153 and accompanying text.

240. See supra notes 65–66 and accompanying text.

241. Counterman v. Colorado, 143 S. Ct. 2106, 2117 (2023) (internal quotation marks omitted) (quoting United States v. Bailey, 444 U.S. 394, 404 (1980)).

242. See supra notes 169–173 and accompanying text.

243. *Counterman*, 143 S. Ct. at 2117 (internal quotation marks omitted) (quoting *Bailey*, 444 U.S. at 404).

244. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221 (2023).

Admittedly, a sliding scale could pose administrability concerns, potentially adding a "vague[] mathematical metaphor" on top of a *Halberstam* framework that has puzzled and frustrated judges for years.[245] But even if a sliding scale does not completely "cut through [*Halberstam*'s] kudzu,"[246] this approach would provide a coherent structure with which to analyze *Halberstam*'s third prong and assess the defendant's mens rea and level of assistance, thereby promoting both accuracy and efficiency.[247] As a result, although there may be some vagueness regarding whether a defendant's assistance is sufficiently substantial to change the mens rea requirement from true purpose to pure knowledge, the sliding scale would guide judicial discretion while also granting courts flexibility to impose civil liability only on culpable parties.[248] Short of amending JASTA to eliminate any reference to *Halberstam*, this approach best addresses the indeterminacies of the *Halberstam* framework without distracting from the core inquiry in aiding and abetting cases: the defendant's overall culpability.[249]

Moreover, though not expressly applying it, several courts have favorably discussed a mens rea standard that resembles a sliding scale in the criminal law aiding and abetting context, which lends further support to this framework in the JASTA setting.[250] For example, the Second Circuit adopted a pure knowledge test for secondary actors unless their assistance merely involved routine, lawful sales or their relationship to the principal was tenuous, in which case the mens rea requirement would heighten to

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245. Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. Chi. L. Rev. 1, 17 (1993) (describing a sliding scale for unconscionability); see also supra notes 84–102, 119–127 and accompanying text.

246. Transcript of Oral Argument, supra note 81, at 89 (statement of Justice Gorsuch).

247. Some scholars have concluded that in certain contexts, sliding scales are more efficient than sharp lines. See, e.g., Edward Fox & Jacob Goldin, Sharp Lines and Sliding Scales in Tax Law, 73 Tax L. Rev. 237, 249 (2020) (analyzing sliding scales in tax law).

248. Vagueness concerns could make some uncomfortable with a sliding scale in criminal law. Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) ("[A penal] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."). But this framework is more attractive and useful in a tort law setting that must balance several competing policy considerations, such as deterrence and corrective justice. See John Makdisi, Proportional Liability: A Comprehensive Rule to Apportion Tort Damages Based on Probability, 67 N.C. L. Rev. 1063, 1067–75 (1989) (arguing for a proportional liability approach to tort law rather than all-or-nothing rules).

249. See *Taamneh*, 143 S. Ct. at 1230 (noting that "[b]y their very nature, the concepts of aiding and abetting and substantial assistance do not lend themselves to crisp, bright-line distinctions").

250. See Richman et al., supra note 141, at 508 (characterizing some court opinions as adopting a "sliding scale" for criminal law aiding and abetting cases); see also *Taamneh*, 143 S. Ct. at 1220 (adjudicating an ATA claim in light of "the common law of aiding and abetting upon which *Halberstam* rested and to which JASTA's common-law terminology points").

true purpose.[251] Similarly, some courts have adopted a true purpose test for secondary actors but relaxed this requirement when "the crime is particularly grave."[252] So while shopkeepers marketing dresses to prostitutes are criminally liable as aiders and abettors only if the prosecution can prove true purpose,[253] parties who knowingly provide military goods to rebels[254] or sell guns to someone who expressed a desire to kill[255] can be held secondarily liable for treason and murder respectively even without evidence of purpose. Justifying this flexible approach using language that is strikingly similar to the third *Halberstam* prong, Judge Richard Posner reasoned that courts can infer secondary actors want the principal to succeed when they "knowingly provide[] essential assistance."[256]

There is even some historical support for creating a sliding scale that balances the mens rea requirement with the level of assistance provided, which is most analogous to the JASTA context. Under the Model Penal Code's 1953 draft, although true purpose was always sufficient to sustain secondary liability, pure knowledge was also adequate if accompanied by substantial assistance.[257] The Seventh Circuit also appeared to favor this approach in *United States v. Irwin*.[258] In that case, the court determined that while evidence of true purpose was sufficient to support liability even when "the assistance was quite minor,"[259] a defendant "who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is . . . an aider and abettor even if there is no evidence that he wants the acts to succeed" as long as "the assistance is deliberate and material."[260] Rephrased, though true purpose was required in both instances, the court was more willing to infer this purpose when the government provided evidence of knowledge and substantial assistance.[261]

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251. Weiss, supra note 136, at 1397–400 (discussing United States v. Campisi, 306 F.2d 308 (2d Cir. 1962)).

252. United States v. Fountain, 768 F.2d 790, 798 (7th Cir.), opinion supplemented on denial of reh'g, 777 F.2d 345 (7th Cir. 1985).

253. Id.

254. Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870) (holding that a defendant "cannot be permitted to stand on the nice metaphysical distinction" between true purpose and pure knowledge when the "consequences of his acts are too serious and enormous").

255. *Fountain*, 768 F.2d at 798.

256. United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993).

257. Scales v. United States, 367 U.S. 203, 225 n.17 (1961) (citing a tentative draft of the Model Penal Code that required "purpose" to sustain accomplice liability unless, "acting with knowledge that such other person was committing or had the purpose of committing the crime, [the secondary actor] knowingly, substantially facilitated its commission").

258. 149 F.3d 565 (7th Cir. 1998).

259. Id. at 572.

260. Id. (quoting United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995)).

261. See Weiss, supra note 136, at 1409 (arguing that *Irwin* "attempted to reconcile the [pure] knowledge cases with the [true purpose] cases," concluding "that knowledge

B. *Staying Faithful to* Taamneh *and JASTA's Statutory Text*

While the Supreme Court did not expressly adopt or even mention a sliding scale, the *Taamneh* opinion implicitly endorsed the logic of a sliding scale for the mens rea analysis.[262] Importantly, the Court consistently cautioned against reading *Halberstam* as an "inflexible code[]" and instead refocused the inquiry on the defendant's overall "culpability,"[263] which is largely a normative inquiry that depends on both one's mental state and the amount of assistance provided to the criminal activity. So when considering hypothetical "situations where the provider of routine services does so in an unusual way or provides such dangerous wares" to an FTO, the nine Justices could not "rule out the possibility" of JASTA liability for the provider.[264] Justifying this conclusion, the Court noted that when parties offer "more direct, active, and substantial [assistance] than what we review[ed] here[,] . . . plaintiffs might be able to establish liability with a lesser showing of scienter."[265] Relatedly, when characterizing the facts and analysis from *Halberstam*, the Court determined that "Hamilton's assistance to [the burglar] was so *intentional and systematic* that she assisted each and every burglary committed by [him]."[266] In other words, a secondary actor—providing significant substantial assistance with true

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coupled with substantial assistance was a fair basis from which to infer desire or purposeful intent"). In his proposed jury instructions for criminal law aiding and abetting cases, Baruch Weiss also supported a relaxing of the mens rea requirement when the defendant "*substantially* aided" the principal. See id. at 1489–90.

262. Additionally, the Court also appeared to favorably discuss a sliding scale based on the nexus between the defendant's acts and the terrorist attack, as in *United States v. Campisi*. Compare Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1230 (2023) ("When there is a direct nexus between the defendant's acts and the tort, courts may more easily infer such culpable assistance. But, the more attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort."), with supra note 251 and accompanying text.

263. *Taamneh*, 143 S. Ct. at 1225, 1229; see also id. at 1221 ("[C]ourts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct."); id. at 1223 (defining "aids and abets" in § 2333(d)(2) as "conscious, voluntary, and culpable participation in another's wrongdoing"); id. at 1230 (stating that the "fundamental question of aiding-and-abetting liability" is whether "defendants consciously, voluntarily, and culpably participate in or support the relevant wrongdoing"); id. ("The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue.").

264. Id. at 1228.

265. Id. It is unclear whether the phrase "lesser showing of scienter" refers to a lower mens rea test—such as pure knowledge—or a reduced burden of production, simply allowing courts to infer culpable participation more easily. See id.; see also supra note 153. Either way, the logic of the Court's dicta fits cleanly with a sliding scale. See Zobay v. MTN Grp. Ltd., 695 F. Supp. 3d 301, 346 (E.D.N.Y. 2023) (characterizing *Taamneh*'s discussion of the mens rea and substantiality inquiries as "a balancing act").

266. *Taamneh*, 143 S. Ct. at 1224 (emphasis added).

purpose—can be liable for every tort committed by the principal,[267] which directly supports the extreme iteration of the sliding scale.[268]

Granted, both JASTA's statutory text and *Halberstam*, which JASTA's statutory notes adopt as "the proper legal framework" for secondary liability,[269] use the word "knowingly" without mentioning a sliding scale or any requirement of purpose.[270] As the *Taamneh* Court highlighted, however, the statute also uses the term "aids and abets,"[271] which is "familiar to the common law" and thus "'brin[gs] the old soil' with" it.[272] And a sliding scale mens rea test is an implicit feature of several common law aiding and abetting cases, including those cited in *Taamneh*.[273] For instance, in *Camp v. Dema*, the court held that "[s]ome knowledge [of the primary violation] must be shown, but the exact level necessary for liability remains flexible and must be decided on a case-by-case basis."[274] The *Rosemond* Court similarly appeared to contemplate the possibility of a sliding scale in criminal law aiding and abetting cases. Although the Court held that secondary liability extends to those "who *actively* participate[] in a criminal scheme *knowing* its extent and character," the majority deliberately did not address the mens rea needed for actors who "*incidentally* facilitate a criminal venture rather than actively participate in

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267. Id. at 1225 ("[I]n appropriate circumstances, a secondary defendant's role in an illicit enterprise can be so systemic that the secondary defendant is aiding and abetting every wrongful act committed by that enterprise . . . ."); see also supra text accompanying note 238.

268. Some court watchers have argued that the Supreme Court's aiding and abetting cases during the 2023 term "foreshadow[ed] a sliding scale approach to mens rea depending on the substantiality of aid given and the seriousness of the facilitated offense," specifically identifying *Taamneh* as possibly "foreshadow[ing] a less rule-like approach" to the mens rea inquiry. Cole, supra note 185, at 3, 14.

269. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, sec. 2(a)(5), § 2333, 130 Stat. 852, 852 (2016) (codified as amended at 18 U.S.C. § 2333 (2018)).

270. See 18 U.S.C. § 2333; see also Halberstam v. Welch, 705 F.2d 472, 488 (D.C. Cir. 1983).

271. See 18 U.S.C. § 2333.

272. *Taamneh*, 143 S. Ct. at 1218 (quoting Sekhar v. United States, 570 U.S. 729, 733 (2013)). The *Taamneh* Court also warned against regarding *Halberstam*'s language as "totemic" or "inflexible." Id. at 1225.

273. In *Woodward v. Metro Bank of Dallas*—which both *Taamneh* and *Halberstam* cite—the Fifth Circuit favorably discussed several distinct sliding scale mens rea tests, such as those based on the existence of an affirmative duty, the type of assistance offered, and the nexus between the defendant's acts and the principal violation. See 522 F.2d 84, 95, 97 (5th Cir. 1975); see also *Taamneh*, 143 S. Ct. at 1222. Likewise, the Eleventh Circuit reasoned in *Woods v. Barnett Bank of Fort Lauderdale* that "[f]or an aider and abettor who combines silence [in the face of securities violations] with affirmative assistance, the degree of knowledge required should depend upon how ordinary the assisting activity is in the involved businesses." 765 F.2d 1004, 1010 (11th Cir. 1985) (citing *Woodward*, 522 F.2d at 96–97); see also *Taamneh*, 143 S. Ct. at 1222.

274. 948 F.2d 455, 459 (8th Cir. 1991); see also *Taamneh*, 143 S. Ct. at 1222, 1229 (citing *Camp*, 948 F.2d at 459–60).

it."[275] Accordingly, when analyzing these and other cases, the *Taamneh* Court deduced that courts frequently view the knowing and substantial assistance "requirements as working in tandem, with a lesser showing of one demanding a greater showing of the other."[276]

Another potential critique of adopting a sliding scale for the mens rea inquiry is that this test places significant weight on *Halberstam*'s six substantiality factors, as the presence or absence of these considerations will determine the precise mens rea requirement. Yet *Halberstam* itself recognized that these factors are not "immutable components" of aiding and abetting liability,[277] a warning that the *Taamneh* Court repeatedly echoed.[278]

But unlike the Ninth Circuit's approach that was criticized in *Taamneh*, a sliding scale does not render the *Halberstam* elements "a sequence of disparate, unrelated considerations without a common conceptual core."[279] Instead, the sliding scale, in which the six substantiality factors combine with the mens rea analysis to determine the defendant's liability, ensures that "'the knowledge and substantial assistance' components '[are] considered relative to one another' as part of a single inquiry designed to capture conscious and culpable conduct."[280] This structure would consequently "help courts capture the essence of aiding and abetting: participation in another's wrongdoing that is *both significant and culpable enough* to justify attributing the principal wrongdoing to the aider."[281] Ultimately, by cementing the relationship between the defendant's mens rea and level of assistance on a sliding scale, this framework would prevent ATA liability from straying "far beyond its essential culpability moorings."[282]

C. *Aligning With the Overarching Policy Aims of the ATA*

A sliding scale would also help achieve the ATA's principal policy goals. Specifically, the ATA is designed to simultaneously provide victims of terrorist attacks with their day in court and an avenue to recover compensation for their injuries while also punishing and deterring

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275. Rosemond v. United States, 572 U.S. 65, 77 & n.8 (2014) (emphasis added). The specific scenario the Court pondered was an "owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used." Id. at 77 n.8.

276. *Taamneh*, 143 S. Ct. at 1222. Put differently, "less substantial assistance required more scienter before a court could infer conscious and culpable assistance. And, vice versa, if the assistance were direct and extraordinary, then a court might more readily infer conscious participation in the underlying tort." Id. at 1222 (citation omitted).

277. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983).

278. See *Taamneh*, 143 S. Ct. at 1220, 1223, 1225, 1230.

279. Id. at 1229.

280. Id. (quoting Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991)).

281. Id. (emphasis added).

282. Id. at 1228–29.

organizations that fund terrorism.[283] These policy aims even drove some of the questioning during the *Taamneh* oral argument.[284] Each of the mens rea tests outlined above, however, is inherently inflexible and hence could frustrate the ATA's objectives. For example, the true purpose standard is often underinclusive, failing to extend civil liability to actors who deliberately provide substantial assistance to terrorists but lack any desire for a terrorist attack to occur.[285] Conversely, the pure knowledge rule can be overinclusive, especially when the assistance provided stemmed from routine, lawful conduct.[286]

Rather than pick one of these blunt mens rea instruments, a sliding scale would balance the policy goals of the ATA, smoothing the rough edges of the traditional mens rea tests. In applying the expansive pure knowledge standard to only the narrow subset of actors who provided significant substantial assistance to terrorist attacks, the sliding scale would help the ATA deter and punish organizations that fund terrorism while avoiding the overinclusivity concerns of the conventional mens rea rule. Likewise, demanding a showing of true purpose when the secondary actor offered more modest assistance would prevent courts from haphazardly penalizing routine, lawful conduct without inhibiting plaintiffs' ability to

283. See 136 Cong. Rec. 26,716 (1990) (statement of Sen. Grassley) (quoting Lisa Klinghoffer, who explained that her lawsuit against the Palestine Liberation Organization was "a search for justice" intended to "legally set responsibility for [those] who gave the orders to murder my father; for [those] who gave the orders to hijack the ship"); supra notes 25–31 and accompanying text; see also John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 2–3 (2020) (defining torts as "legally *recognized* wrongs of a particular sort" and explaining that a central principle of tort law is a "person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her").

284. For instance, Justice Amy Coney Barrett asked the government if one reason for its proposed test was to "make sure that whatever we said about social media companies wouldn't get banks off the hook when they have those kinds of special relationships that you're talking about," to which Edwin Kneedler agreed and added that the government was also concerned about charities escaping liability. Transcript of Oral Argument, supra note 81, at 107–08 (statements of Justice Barrett and Edwin Kneedler).

285. See Capps, Upfront Complicity, supra note 156, at 643 ("The common refrain is that the [true purpose] requirement is underinclusive insofar as it fails to hold liable accomplices who, though genuinely complicit, do not care whether the principal's criminal conduct occurs.").

286. See Alexander F. Sarch, Condoning the Crime: The Elusive Mens Rea for Complicity, 47 Loy. U. Chi. L.J. 131, 141 (2015) (arguing that the pure knowledge test "sets the [liability] bar too low"); Gideon Yaffe, Intending to Aid, 33 Law & Phil. 1, 10 (2014) ("Generally speaking, the intent position seems to set the bar of liability too high, and the knowledge position too low."); see also Transcript of Oral Argument, supra note 81, at 134 (statement of Justice Kavanaugh) ("[W]e want to have fair notice for major sanctions, civil or criminal."); Weiss, supra note 136, at 1398 (noting that even though *United States v. Campisi* adopted the pure knowledge test, the court clarified that a "merchant who makes a routine sale of lawful goods should not become an aider and abettor of the customer's subsequent crime absent a purposeful desire . . . to aid and abet that crime").

recover damages from parties—such as banks or charities[287]—who stealthily supported a terrorist attack.

Although striking a proper scope of liability is obviously a critical aspect of any tort regime, this balance is even more important in the JASTA context, considering the ATA "function[s] as [a] prototypical private enforcement statute[]" in which private parties "independently enforce the government's national security laws and policies through litigation."[288] Therefore, to adequately (1) compensate plaintiffs for their terrorism-related injuries, (2) deter organizations from assisting the activities of FTOs, and (3) further the United States' national security objectives, courts should resist the simplicity of the blunt mens rea rules and instead adopt a sliding scale that recasts the mens rea inquiry as a single continuum designed to "cabin aiding-and-abetting liability to cases of truly culpable conduct."[289]

CONCLUSION

The ATA is charged with the difficult task of simultaneously deterring terrorism, compensating injured victims, and crippling FTOs, all without impeding ordinary business activities. And after the Supreme Court's opinion in *Twitter, Inc. v. Taamneh*, courts adjudicating these high-stakes claims must now apply *Halberstam*'s tripartite, dual-pronged, six-factor framework in light of the common law aiding and abetting cases from which it arose, opinions that are often "hopelessly muddled and divided."[290] Adopting a sliding scale would provide coherence to an otherwise unruly scheme and ensure that *Halberstam*'s mens rea inquiry fully captures the defendant's culpability. Above all, in the rapidly evolving context of international terrorism, a sliding scale would guard against rigid applications of *Halberstam* and *Taamneh* that could disturb the ATA's delicate policy balance.

287. See supra note 284.

288. Maryam Jamshidi, The Private Enforcement of National Security, 108 Cornell L. Rev. 739, 742, 746 (2023).

289. Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1221 (2023).

290. Weiss, supra note 136, at 1373; see also *Taamneh*, 143 S. Ct. at 1225.