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**ENDING TERRORISM WITH CIVIL REMEDIES:
BOIM V. HOLY LAND FOUNDATION AND THE
PROPER FRAMEWORK OF LIABILITY**

LAURA B. ROWE*

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INTRODUCTION

Although September 11, 2001, was the starting point of the so-called war on terror,¹ the United States Congress had been attempting to combat international terrorism long before that unforgettable day.² The war on terror has many facets, such as military efforts to capture, or even kill, known terrorist leaders, as well as foreign policy aimed at persuading terrorist organizations to seek peace instead of violence.³

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¹ See *Transcript of President Bush's Address*, CNN.com, Sept. 21, 2001, <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript> (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).

² See Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L. REV. 726, 727–28 (1992).

³ See NATIONAL STRATEGY FOR COMBATING TERRORISM 10–11, 23 (2006), available at <http://www.cbsnews.com/htdocs/pdf/NSCT0906.pdf>.

But perhaps one of the most important and effective means of stopping terrorism is to cut off or significantly impair vital sources of funding.⁴ Throughout the 1990s, Congress passed a series of laws aimed at doing just that. One of the most surprising components of the counter-terrorism legislation is 18 U.S.C. § 2333, which enables private citizens injured by an act of international terrorism to sue for treble damages in federal court.⁵ Because Congress intended to enable private parties to attack terrorist funding through these civil suits, Congress created yet another tool for eliminating terrorism in general.⁶

While countless definitions of terrorism exist,⁷ the concept is exceedingly difficult to define—in part because what is considered as terrorism⁸ has evolved over 2000 years.⁹ By some accounts, the only

⁴ See *id.* at 12.

⁵ 18 U.S.C. § 2333(a) (2006).

⁶ See Rosenfeld, *supra* note 2, at 728.

⁷ The concept of terrorism has been defined in many ways, even among various United States agencies. See, e.g., ALEX P. SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES, AND LITERATURE 5–6 (1988) (identifying 109 definitions of terrorism encompassing twenty-two definitional elements); Louis René Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VANDERBILT J. TRANSNAT’L L. 239 (1995) (discussing several definitions of terrorism and their associated infirmities).

⁸ The term terrorism was first used around the time of the French Revolution, the *regime de la terreur*, in the late eighteenth century. MARK BURGESS, CENTER FOR DEFENSE INFORMATION, A BRIEF HISTORY OF TERRORISM (July 3, 2003), <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502>; see also RICHARD FALK, THE GREAT TERROR WAR xviii–xiv (2003).

⁹ Burgess, *supra* note 8. Interestingly, two of the earliest historical occurrences of terrorism were perpetrated by Muslims and Jews, though not against each other. See *id.* The Sicari and the Zealots were active Jewish terrorist groups during the Roman occupation of the first century Middle East. *Id.* The Sicari mainly targeted other Jews who they believed had renounced their religious faith, while the Zealots murdered Romans and Greeks to “send a message” to Roman authorities and their collaborators. *Id.* The Assassins—“an 11th century offshoot of a Shia Muslim sect known as the Ismailis”—stabbed in broad daylight “politicians or clerics who refused to adopt the purified version of Islam they were forcibly spreading.” *Id.* As with the Sicari and the Zealots, the Assassins used their violence as a means of sending a message—often carrying out their attacks on religious holy days in an

generally agreed-upon characteristic of terrorism is that it involves violence or the threat of violence.¹⁰ Yet, this cannot be the sole defining feature of terrorism, because “war, coercive diplomacy, and barroom brawls” also involve violence and the threat of violence.¹¹ Thus, as one expert has explained, terrorism may be best defined by looking at instances that have been, or could be, commonly accepted as constituting terrorism.¹² As another expert puts it, “[w]e know a terrorist act when we see one.”¹³

While terrorism has existed for millennia in many forms throughout the world, including in the United States, a background on Islamic terrorist groups¹⁴ in the Middle East region is of particular relevance to this Note.¹⁵ One prominent Islamic terrorist group is

effort to “publicize their cause and incite others to it.” *Id.* In addition to these Jewish and Muslim groups, another early example of terrorism was the Thugees, an Indian religious cult that ritually strangled random travelers as an offering to the Hindu goddess of terror and destruction, who were active during the seventeenth through the mid-nineteenth centuries. *Id.* The Thugees may have been the last religiously inspired terrorist group until that phenomenon reemerged in the past two or three decades. *Id.*

¹⁰ WALTER LAQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 6 (1999).

¹¹ JEFFREY RECORD, *STRATEGIC STUDIES INST., BOUNDING THE GLOBAL WAR ON TERRORISM* 6 (2003), available at <http://www.strategicstudiesinstitute.army.mil/Pubs/Display.Cfm?pubID=207>.

¹² Burgess, *supra* note 8.

¹³ RECORD, *supra* note 11, at 9.

¹⁴ Although radical religious-based terrorist groups operating in the Middle East may be classified using any number of terms, this Note will refer to them as Islamic terrorist groups or organizations. See Eli Berman & David D. Laitin, *Religion, Terrorism, and Public Goods: Testing the Club Model* 7–10 (Nat’l Bureau of Econ. Research, Working Paper No. 13725, 2008), available at <http://econ.ucsd.edu/~elib/tc.pdf>.

¹⁵ Despite this Note’s focus on Islamic terrorist groups, it should be stressed that terrorism is by no means a phenomenon confined to those of the Islamic faith or even the Middle East region. To the contrary, terrorist groups have existed in every region of the world, and religiously affiliated terrorist groups have been based on a variety of different religions. See Burgess, *supra* note 8 (discussing terrorist or terrorist-like regimes in France, Russia, Ireland, various African nations, and the United States, among others); see also *supra* note 9. Further, simply because some

Hamas,¹⁶ which emerged from the Egypt-based Muslim Brotherhood in 1987 at the start of the First Intifada, a mass Palestinian uprising against Israeli control in Gaza, the West Bank, and East Jerusalem.¹⁷ Hamas has political, humanitarian, and “military” (terrorist) branches.¹⁸ The organization refuses to recognize the State of Israel, and the terrorist branch carries out suicide bombings, rocket launchings, and ground attacks in Israeli territories to achieve its goal of eliminating the Israeli state.¹⁹ Hamas generally recruits its terrorists by targeting deeply religious young men who have an intense hatred of Israel. After a suicide bomber dies, Hamas offers his family between

Islamic terrorist groups engage in abhorrent violence by *no* means implies that all Muslims do so, or even that they support terrorism. The reality is quite the contrary. For a vast collection of American Muslims’ condemnations of terrorism post-September 11th, see COUNCIL ON AMERICAN ISLAMIC RELATIONS, RESPONSE TO SEPTEMBER 11, 2001 ATTACKS (Mar. 28, 2007), http://www.cair.com/Portals/0/pdf/September_11_statements.pdf.

¹⁶ Hamas was designated as a terrorist organization by President Clinton in 1995, pursuant to Executive Order 12,947. Exec. Order 12,947, 60 Fed. Reg. 5079, 5081 (Jan. 25, 1995) (listing a dozen “terrorist organizations which threaten to disrupt the Middle East peace process”). Hamas was later designated as a “foreign terrorist organization” (FTO) in 1997 pursuant to 8 U.S.C. § 1189, which created a procedure by which the Secretary of State, the Secretary of the Treasury, and the Attorney General, may designate an organization as an FTO. Hamas is now also on the list of Specially Designated Terrorists and Specially Designated Global Terrorists. See Alphabetical List of Blocked Persons, Specially Designated Nationals, SDTs, SDGTs, Foreign Terrorist Organizations & Specially Designated Narcotics Traffickers, 31 C.F.R. Ch. V, App. A (2008). This list was created after the September 11th terrorist attacks when President George W. Bush signed Executive Order 13,224. See Exec. Order No. 13,224, 66 Fed. Reg. 49,089 (Sept. 23, 2001).

¹⁷ See Council on Foreign Relations, Hamas (Jan. 7, 2009), <http://www.cfr.org/publication/8968>. But see Berman & Laitin, *supra* note 14, at 7 (citing 1988 as the founding date of Hamas).

¹⁸ See Council on Foreign Relations, *supra* note 17. Hamas’s military branch is known as the Izz al-Din al-Qassam Brigade. *Id.*

¹⁹ See *id.* Hamas’s “founding charter commits the group to the destruction of Israel, the replacement of the [Palestinian Authority] with an Islamist state on the West Bank and Gaza, and to raising ‘the banner of Allah over every inch of Palestine.’” *Id.*

three and five thousand dollars and “assures them their son died a martyr in holy jihad.”²⁰

Hamas won the Palestinian Authority’s general election in 2006, becoming “the largest and most influential Palestinian militant movement.”²¹ The group’s humanitarian wing funds schools, orphanages, hospitals and other medical facilities, and even sports leagues; Hamas’s social services work has led to its increased popularity and, in part, likely explains its rise to political power.²² Much of Hamas’s funding comes from private donors in oil-rich Persian Gulf states such as Saudi Arabia, as well as from Muslim charities in the United States, Canada, and Western Europe that “funnel money into Hamas-backed social service groups.”²³

In 2002, the United States Court of Appeals for the Seventh Circuit confronted the harsh realities of terrorism in a case of first impression in *Boim v. Quranic Literacy Institute (Boim I)*. There the parents of David Boim, a teenage U.S. citizen who was killed in Israel during an alleged Hamas attack, sued several organizations under 18 U.S.C. § 2333 for purportedly providing financial contributions to Hamas.²⁴ The *Boim I* panel revisited the case in 2007 (*Boim II*);²⁵ in 2008, the Seventh Circuit reheard the case en banc, and issued what is likely to be its final opinion in this case (*Boim III*).²⁶ However, given the increasing effects of international terrorism on American citizens, courts throughout the country are, unfortunately, quite likely to see a growing number of § 2333 cases in the near future. In fact, the Supreme Court of the United States may even speak to this scarcely

²⁰ *Id.*

²¹ *See id.*

²² *See id.*

²³ *Id.*

²⁴ *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001, 1003 (7th Cir. 2002) [hereinafter *Boim I*].

²⁵ *See Boim v. Holy Land Found. for Relief & Dev.*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 4 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>. [hereinafter *Boim II*].

²⁶ *See* 549 F.3d 685, 687 (7th Cir. 2008) (en banc) [hereinafter *Boim III*].

addressed civil statute,²⁷ as some of the parties to the *Boim* litigation have filed petitions for a writ of certiorari.²⁸

Given the relevance of § 2333, it is important to understand its overall context and to determine the most legally sound framework of liability under this civil statute—particularly as it relates to holding financiers of terrorism liable, as in the *Boim* litigation.²⁹ Accordingly, Part I of this Note provides an overview, including the history and purpose, of the anti-terrorism statutory scheme. Part II discusses the facts, legal theories, and procedural history of the *Boim* litigation, which is seen by other courts as the “critical authority” on § 2333.³⁰ Part III addresses two distinct frameworks of liability under § 2333 by reviewing the *Boim III* majority opinion, written by Judge Posner, and one of the dissenting opinions, written by Judge Rovner. Finally, by analyzing the infirmities of both judges’ opinions, Part IV develops a legally sound framework for other courts—including the Supreme Court, if applicable—to adopt when addressing § 2333 donor liability cases.

I. THE ANTI-TERRORISM STATUTORY SCHEME

Throughout the late 1980s and 1990s, Congress enacted a patchwork of legislation aimed at combating terrorism by creating both criminal and civil liability. First, the Antiterrorism Act of 1990³¹

²⁷ See Peter M. Mansfield, *Terrorism and a Civil Cause of Action: Boim, Ungar, and Joint Torts*, 3 CHI.-KENT J. INT’L & COMP. L., at *33 (2003), <http://www.kentlaw.edu/jicl/articles/spring2003/Peter%20M.%20Mansfield.doc>.

²⁸ See *Boim III*, 549 F.3d 685, *petition for cert. filed*, 77 U.S.L.W. 3657 (U.S. May 1, 2009) (No. 08-1441).

²⁹ See, e.g., *Boim I*, 291 F.3d at 1003–04.

³⁰ Brief of Appellee at 17, *Boim v. Holy Land Found. for Relief & Dev.*, Nos. 05-1815, 05-1816, 05-1821, 05-1822 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>. [hereinafter Brief of Appellee] (asserting that, as of 2005, *Boim I* had been followed by at least forty-four other courts in interpreting § 2333).

³¹ Pub. L. No. 101-519, § 132, 104 Stat. 2250 (1990). This entire Act was repealed in 1991 because of a “technical deficiency.” See *Boim I*, 291 F.3d 1000, 1008 n.6 (7th Cir. 2002); 137 CONG. REC. S4511-04 (daily ed. Apr. 16, 1991)

(the Act), codified in part at 18 U.S.C. § 2333, provides a civil cause of action to American victims of international terrorism:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.³²

The Act defines the term “international terrorism” in § 2331(1) as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State. . . ;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished. . .³³

The legislative history of §§ 2331 and 2333 “evidences an intent by Congress to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full

(statement of Sen. Grassley) (noting that the Act had been inadvertently enacted “[d]ue to an enrolling error”). In 1992, however, the provisions of the Act were reenacted as part of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992). See *Boim I*, 291 F.3d at 1008 n.6.

³² 18 U.S.C. § 2333(a) (2006).

³³ 18 U.S.C. § 2331(1) (2000). Section 2331(1) was amended by the USA PATRIOT Act of 2001. See Pub. L. No. 107-56, § 802, 115 Stat. 272, 376 (2001) (amending § 2331(1)(B)(iii) to read “to affect the conduct of a government by *mass destruction*, assassination, or kidnapping”) (emphasis added).

reaches of traditional tort law.”³⁴ In addition, as the Seventh Circuit noted in *Boim I*, “[t]he statute clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury.”³⁵ Furthermore, the Senate’s Report states that these provisions “and the imposition of liability at any point along the causal chain of terrorism. . . interrupt, or at least imperil, the flow of money.”³⁶ Thus, the Act’s legislative history also indicates quite clearly that the purpose of § 2333 was to cut off, or significantly impair, vital sources of terrorist funding by allowing terrorism victims and their families to pursue private actions to recover for their injuries. To illustrate, at a Senate hearing on the legislation, Joseph Morris, General Counsel to the United States Information Agency, stated: “[A]nything 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.”³⁷

The “criminal counterparts”³⁸ to the civil provisions of the Act were added in 1994 and 1996, when Congress enacted 18 U.S.C. §§ 2339A and 2339B, respectively.³⁹ In relevant part, § 2339A

³⁴ *Boim I*, 291 F.3d at 1010 (citing 137 CONG. REC. S4511-04 (statement of Sen. Grassley)); *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Administrative Practice of Comm. on the Judiciary*, 101st Cong. 136 (1990) [hereinafter *Senate Hearing*] (statement of Joseph Morris, General Counsel, United States Information Agency).

³⁵ *Boim I*, 291 F.3d at 1011.

³⁶ S. REP. NO. 102-342, at 22 (1992) [hereinafter SENATE REPORT].

³⁷ *Senate Hearing*, *supra* note 34, at 79; *see also id.* at 17 (statement of Alan Kreczko, Deputy Legal Advisor, Department of State) (“The existence of such a cause of action. . . may deter terrorist groups from maintaining assets in the United States, from benefitting from investments in the U.S., and from soliciting funds within the U.S.”).

³⁸ *Boim I*, 291 F.3d at 1012.

³⁹ *See* Pub. L. No. 103-322, Title XII, § 120005(a), 108 Stat. 2022 (1994) (§ 2339A); Pub. L. No. 104-132, Title III, § 303(a), 110 Stat. 1250 (1996) (§ 2339B). Section 2339C is an additional criminal component in this statutory scheme that criminalizes the financing of terrorism “by any means, directly or indirectly,” if the financing is provided with the intent or knowledge that the funds

criminalizes “provid[ing] material support or resources [to terrorists]. . . , knowing or intending that they are to be used in preparation for, or in carrying out, a violation of” a number of violent crimes,⁴⁰ including 18 U.S.C. § 2332, which criminalizes the killing of, or the attempting or conspiring to kill, a United States national outside the United States.⁴¹ Section 2339B extends criminal liability to anyone who “knowingly provides material support or resources to a foreign terrorist organization, or attempts to do so.”⁴² Furthermore, § 2339A defines “material support or resources” to include the provision of currency or financial securities, as well as training,

are to be used for carrying out an “act intended to cause death or serious bodily injury to a civilian. . . .” See 18 U.S.C. § 2339C(a)(1) (2006). However, § 2339C is beyond the scope of this Note, as it was enacted years after David Boim’s death and, thus, was not relevant to the *Boim* litigation. See Pub. L. No. 107-197, Title II, § 202(a), 116 Stat. 724 (2002); *Boim III*, 549 F.3d 685, 687 (7th Cir. 2008) (noting that David Boim was killed in 1996). Nevertheless, when §§ 2339A and 2339B are referenced throughout the remainder of this Note, § 2339C is implicitly included, as well.

⁴⁰ 18 U.S.C. § 2339A(a) (2006). Despite the disjunctive “or” in § 2339A(a) (“knowing *or* intending”), courts have interpreted this language as requiring intent. See *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005), *aff’d*, *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009); see also *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 586 (E.D.N.Y. 2005).

⁴¹ 18 U.S.C. § 2332(a)–(b) (2006). In addition to criminalizing the knowing or intentional provision of material support or resources with respect to killing a United States national outside the United States, § 2339A also criminalizes this conduct with respect to thirty other violent crimes associated with terrorism. See *id.* § 2339A; *Boim I*, 291 F.3d at 1013 n.11 (listing the “diverse and extensive list” of crimes covered by § 2339A).

⁴² 18 U.S.C. § 2339B(a)(1) (2006). The term “foreign terrorist organization” is defined according to the lengthy provisions set forth in 8 U.S.C. § 1189 (2006). In 2004, § 2339B(a)(1) was amended by adding the following: “To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization. . . , that the organization has engaged or engages in terrorist activity. . . , or that the organization has engaged or engages in terrorism. . . .” By adding this amendment, Congress clarified that criminal liability attaches as long as the defendant had knowledge of any one of the three possible characteristics of the donee organization. See *Humanitarian Law Project*, 380 F. Supp. 2d at 1147.

facilities, weapons, and “other physical assets, except medicine or religious materials.”⁴³

II. THE *BOIM* LITIGATION: A CASE OF FIRST IMPRESSION

A. *Facts*

In 1996, David Boim, a Jewish teenager who was both a United States and an Israeli citizen, was attending high school in Israel.⁴⁴ In May of that year, as David and some of his classmates were waiting at a bus stop near Jerusalem, a car pulled off the road, stopping a short distance away from the group of students.⁴⁵ One or more of the car’s occupants opened fire; David was shot in the head, and died within hours.⁴⁶ David’s murder was later attributed to two alleged members of the terrorist wing of Hamas.⁴⁷

In an effort to keep “even one nickel” from Hamas that might be used for terrorist acts like the one that took David’s life,⁴⁸ David’s parents, Joyce and Stanley Boim, filed suit in 2000 pursuant to

⁴³ 18 U.S.C. § 2339A(b). Section 2339B also adopts this definition of “material support or resources.” For a discussion of whether some of the activities included in this definition are void for vagueness, see generally *Humanitarian Law Project*, 552 F.3d 916.

⁴⁴ *Boim III*, 549 F.3d 685, 687 (7th Cir. 2008); *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 4 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

⁴⁵ *Boim II*, at 5.

⁴⁶ *Id.*

⁴⁷ *Id.* at 5–6. Whether the Boims had proven that Hamas was, in fact, responsible for David’s death was contested throughout the *Boim* litigation, except as to two defendants who conceded that Hamas was responsible. See *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 899 (N.D. Ill. 2004) (finding a sufficient factual basis for determining that Hamas was responsible for the attack); see also *Boim II*, at 77–78 (vacating the district court’s judgment with respect to one defendant on the basis that the court, *sua sponte*, determined that Hamas was responsible for David’s murder).

⁴⁸ *Boim II*, at 7.

§ 2333.⁴⁹ In that civil action in the United States District Court for the Northern District of Illinois, the Boims named as defendants not only Amjad Hinawi and Khalil Tawfiq Al-Sharif—the two men allegedly responsible for David’s death⁵⁰—but also several individuals and non-profit organizations with alleged ties to Hamas.⁵¹

Two of the named organizational defendants were the Holy Land Foundation (HLF) and the Quranic Literacy Institute (QLI), which the Boims claimed are the main fronts for Hamas in the United States, and whose “allegedly humanitarian functions mask their core mission of raising and funneling money and other resources to Hamas operatives in support of terrorist activities.”⁵² Specifically, the Boims alleged that because it is illegal to provide financial support to foreign terrorist organizations, the money they provide “flows through a series of complicated transactions, changing hands a number of times, and being commingled with funds from the front organizations’ legitimate charitable and business dealings.”⁵³

Defendant HLF adamantly maintains that it is one of the most prominent relief organizations serving the humanitarian needs of the Palestinian people in the West Bank and Gaza Strip.⁵⁴ In fact, a significant portion of the funds that HLF allegedly provided to Hamas was actually given to various charitable entities that are controlled by Hamas, such as a hospital in Gaza.⁵⁵ Nevertheless, its executive director admitted to being a Hamas activist and that some of HLF’s money was channeled to Hamas.⁵⁶ In December 2001, HLF was added to the U.S. government’s “Specially Designated Terrorist” list,⁵⁷ resulting in the issuance of a blocking order freezing HLF’s assets and

⁴⁹ *Boim III*, 549 F.3d at 687; *Boim II*, at 7.

⁵⁰ *Boim I*, 291 F.3d 1000, 1002 (7th Cir. 2002).

⁵¹ *Boim II*, at 7.

⁵² *Boim I*, 291 F.3d at 1003.

⁵³ *Id.* at 1004.

⁵⁴ *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 896 (N.D. Ill. 2004).

⁵⁵ *Boim III*, 549 F.3d 685, 706 (7th Cir. 2008).

⁵⁶ *Boim I*, 291 F.3d at 1003; *Boim*, 340 F. Supp. 2d at 896.

⁵⁷ See discussion *supra* note 16.

accounts.⁵⁸ HLF challenged this administrative designation and blocking order on various statutory and constitutional grounds in the District Court for the District of Columbia, but the district court found substantial support for the designation.⁵⁹ On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed, noting that the record evidence established that “HLF’s role in the funding of Hamas and of its terrorist activities is incontrovertible.”⁶⁰

Defendant QLI is an Illinois not-for-profit corporation that translates and publishes sacred Islamic texts.⁶¹ Two of QLI’s principals claim that “QLI’s major undertaking and central purpose is the ‘Quran Project,’ ‘an entirely new translation of the Quran, based on a careful and scholarly review and analysis of every single word of [its] more than 6200 verses.’”⁶² The Boims alleged that, regardless of any claimed legitimate purpose, QLI also knowingly provided, and aided and abetted others in providing, material support to Hamas.⁶³

The American Muslim Society (AMS) and the Islamic Association for Palestine (IAP), two other named defendants, were also alleged fronts for Hamas.⁶⁴ AMS and IAP are, apparently, alter

⁵⁸ See *Boim*, 340 F. Supp. 2d at 893.

⁵⁹ See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 74 (D.D.C. 2002).

⁶⁰ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003). It should also be noted that in 2004, the United States government indicted HLF and several of its principals for, among several other crimes, providing and conspiring to provide material support to Hamas, in violation of 18 U.S.C. § 2339B(a)(1). See *Boim II*, at 9. In November of 2008, HLF and its principals were found guilty of these charges. *United States v. Holy Land Found. For Relief & Dev.*, No. 3:04-CR-240-P (N.D. Tex. Nov. 24, 2008), 2008 WL 5240652 (jury verdict).

⁶¹ *Boim I*, 291 F.3d at 1003.

⁶² *Boim*, 340 F. Supp. 2d at 927.

⁶³ *Id.* An in-depth FBI investigation of QLI led to the initiation of a civil forfeiture action, whereby the United States successfully seized funds that QLI had “transferred to financial institutions within the United States from abroad with the intent to support the international terrorist activities of the HAMAS organization in violation of the Money Laundering Control Act of 1986.” See *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789, 792 (N.D. Ill. 1999) (citation omitted).

⁶⁴ *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1007 (N.D. Ill. 2001).

egos⁶⁵ and were considered to be essentially one entity throughout the majority of the litigation.⁶⁶ The ostensible purpose of AMS is “advancing a just, comprehensive, and eternal solution to the cause of the Palestine [sic] people through political, social, and educational efforts.”⁶⁷ Nevertheless, the Boims alleged that AMS provided various types of support and resources to Hamas; for example, AMS participated in a 1993 meeting, during which FBI surveillance revealed that the attendees discussed with Hamas officials various ways of continuing their support for Hamas.⁶⁸ Likewise, AMS invited pro-Hamas speakers to participate in their annual conferences, one which “featured a veiled Hamas terrorist as a guest speaker.”⁶⁹ The Boims also alleged that AMS provided financial support to Hamas by funneling money to HLF which, in turn, provided funds to Hamas.⁷⁰

Finally, the Boims named as a defendant Mohammed Abdul Hamid Khalil Salah, who is allegedly the admitted U.S.-based leader of Hamas’s terrorist wing.⁷¹ Salah was nominally employed by QLI as a computer analyst from the late 1980s through 1993.⁷² In January

⁶⁵ *Boim III*, 549 F.3d 685, 687–88 (7th Cir. 2008).

⁶⁶ *See Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 9 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>; *Boim*, 340 F. Supp. 2d at 906 (noting that IAP and AMS “joined forces” in both their Answer to the Complaint and their joint motion for summary judgment). Accordingly, AMS and IAP will be referred to jointly as “AMS” throughout this Note.

⁶⁷ *Boim II*, at 9.

⁶⁸ *See id.* at 50.

⁶⁹ *Id.* at 51.

⁷⁰ *Id.* at 9.

⁷¹ *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001). There were also several other defendants who, for various reasons, were no longer part of the *Boim III* appeal and decision. *See Boim*, 340 F. Supp. 2d at 891–92.

⁷² *Boim*, 340 F. Supp. 2d at 927. QLI alleged that Salah was not actually an employee, but rather only a volunteer. *Id.* However, QLI admitted that it had arranged for Salah to receive a \$3,000 monthly payment from Yassin Kadi, “who QLI characterizes as a ‘Saudi Arabian philanthropist.’” *Id.* As the district court noted, “[a]t least since October 12, 2001, the United States government has

1993, the Israeli government arrested and charged Salah with being an active member of and performing services for Hamas, among other things; Salah pleaded guilty to these charges, and was incarcerated in Israel until November 1997.⁷³ During Salah's incarceration, he admitted in a handwritten statement to other prisoners that he had channeled money for Hamas operations.⁷⁴ Additionally, the United States government added Salah to its Specially Designated Terrorist list⁷⁵ in 1995.⁷⁶ Salah returned to the United States in 1997, after he was released from Israeli custody.⁷⁷

B. *Theories of Liability and Procedural History*

The four organizational defendants and Salah moved to dismiss the Boims' complaint, arguing that the Boims' claim sought to impose aiding and abetting liability, which was not a basis for liability under § 2333.⁷⁸ In other words, the defendants claimed that, even if they had provided financial or other support to Hamas, they could not be held

characterized Mr. Kadi quite differently: as of that date, he is a 'Specially Designated Terrorist.'" *Id.* at 927 n.9.

⁷³ *Boim II*, at 7–8; *Boim*, 340 F. Supp. 2d at 917–18.

⁷⁴ *Boim*, 340 F. Supp. 2d at 918, 920.

⁷⁵ See discussion *supra* note 16.

⁷⁶ *Boim II*, at 8.

⁷⁷ *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002, 1006 (N.D. Ill. 2001). The United States also seized funds and assets belonging to Salah in the same civil forfeiture proceeding brought against QLI. See discussion *supra* note 63. Furthermore, in 2004, a federal grand jury indicted Salah for: (1) violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d); (2) knowingly providing and attempting to provide material support and resources to Hamas, in violation of 18 U.S.C. § 2339B; and (3) attempting to obstructing justice by giving false and misleading answers to interrogatories posted by the Boims in the *Boim* litigation, in violation of 18 U.S.C. § 1503. See *Boim II*, 511 F.3d at 8. The United States government dropped the § 2339B charge before trial, and in February 2007, a jury acquitted Salah of the RICO charge; however, the jury did convict him of the obstruction of justice charge. See *id.* In July 2007, Salah was sentenced to twenty-one months in prison. See *id.*

⁷⁸ *Boim*, 127 F. Supp. 2d at 1010.

civily liable for David's murder.⁷⁹ In January 2001, the district court denied the motions, holding that § 2333 permitted a cause of action based on an aiding and abetting theory of liability.⁸⁰ The district court's rationale for its ruling was based almost exclusively on statutory interpretation, as there was literally no precedent involving § 2333 claims—let alone those against alleged financiers of terrorism.⁸¹ The following month, at the request of QLI and HLF, the district court certified three questions for interlocutory appeal to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1292(b):

- (1) does funding, *simpliciter*, of an international terrorist organization constitute an act of terrorism under 18 U.S.C. § 2331?;
- (2) does 18 U.S.C. § 2333 incorporate the definitions of international terrorism found in 18 U.S.C. § 2339A and 2339B?; and

⁷⁹ See *Boim II*, at 11 (“[W]hat has been vigorously disputed from the inception of this litigation is whether and under what circumstances persons and groups who allegedly have provided money and other support to Hamas (directly and indirectly) may also be liable for David’s murder.”).

⁸⁰ *Boim*, 127 F. Supp. 2d at 1018.

⁸¹ See *id.* at 1011–29. After *Boim* was initially filed, and throughout its lengthy stay in the district court and the Seventh Circuit, other cases were brought under § 2333; however, the plaintiffs in the majority of these cases sued the terrorist organizations themselves, as well as the foreign governments who had allegedly allowed or supported terrorist activities occurring in their jurisdiction. See, e.g., *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004), *aff’d sub nom.* *Ungar v. Palestine Liberation Org.*, 402 F.3d 274 (1st Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *Biton v. Palestinian Interim Self-Gov’t. Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004). In 2005, a group of United States citizens and family members of individuals who were victims of Hamas terrorist attacks in Israel brought a § 2333 action against a Jordanian bank; the plaintiffs claimed that the bank had provided material support to Hamas, as well as charities that it knew were merely fronts for Hamas, by acting as the exclusive administrator responsible for paying the families of suicide bombers. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 575–78 (E.D.N.Y. 2005). This case is currently in the pre-trial stages.

(3) does a civil cause of action lie under 18 U.S.C. § 2331 and 18 U.S.C. § 2333 for aiding and abetting international terrorism?⁸²

Judges Rovner, Wood, and Evans heard the appeal, and in a case of first impression,⁸³ the Seventh Circuit affirmed the district court's denial of the defendants' motion to dismiss, answering in the negative to the first certified question, but in the affirmative to the second and third certified questions.⁸⁴

The case then proceeded through discovery in the district court, after which each defendant moved for summary judgment, and the Boims cross-moved for partial summary judgment, though only on the issue of liability and not with respect to QLI.⁸⁵ The district court granted summary judgment in favor of the Boims as to the liability of HLF, AMS, and Salah.⁸⁶ Because the district court held that there were genuine issues of material fact existing in the claim against QLI, the court denied summary judgment as to that defendant,⁸⁷ and the case went before a jury on the issues of QLI's liability and the amount of damages to be awarded from all the liable defendants.⁸⁸ After a one-week trial, a jury found QLI liable under § 2333, and assed \$52 million in damages against all the defendants, jointly and severally.⁸⁹ Pursuant to § 2333, the judge then trebled the damages—totaling \$156 million—and awarded attorneys' fees.⁹⁰

⁸² *Boim v. Quranic Literacy Inst.*, No. 00 C 2905 (N.D. Ill. Feb. 22, 2001).

⁸³ *See Boim I*, 291 F.3d 1000, 1001 (7th Cir. 2002) (“In this interlocutory appeal, we are asked to consider the viability of a claim brought under the never-tested 18 U.S.C. § 2333.”); *id.* at 1009 (“No court has yet considered the meaning and scope of sections 2331 and 2333, and so we write upon a tabula rasa.”).

⁸⁴ *See id.* at 1001, 1011, 1015, 1021.

⁸⁵ *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 892, 894 (N.D. Ill. 2004).

⁸⁶ *Id.* at 931.

⁸⁷ *See id.* at 929–31.

⁸⁸ *Boim v. Quranic Literacy Inst.*, No. 00 C 2905, 2005 WL 433463, at *1 (N.D. Ill. Feb. 18, 2005); *see Boim*, 340 F. Supp. 2d at 931.

⁸⁹ *Boim*, 2005 WL 433463 at *2.

⁹⁰ *Id.*

It is worth noting—even if only for its novelty—the rather odd actions (or lack thereof) on the part of the defendants and their attorneys at trial. First, HLF’s attorney informed the court that it had “elected not to participate in—or even attend—the liability phase of the trial” because of the court’s prior ruling on summary judgment, and because its assets were already seized and frozen by the United States government.⁹¹ Counsel for AMS and Salah subsequently followed suit.⁹² Although counsel for all three of these defendants notified the court that they might attend and participate in the damages phase of the trial, “none of them did.”⁹³ Second, after the court denied QLI’s motion for summary judgment, QLI’s counsel moved for a continuance of the trial date, claiming that, “because his client was a relatively minor player,” he had intended to “ride the coattails of the other defendants’ defenses.”⁹⁴ However, when the other defendants’ liabilities were decided on summary judgment, and because they had elected not to participate in the trial, QLI’s attorney argued that “he could not reasonably be expected to carry the ball on his own without being given several more months to prepare.”⁹⁵ After the court denied the motion,⁹⁶ QLI’s attorney moved to withdraw from the case; this motion was also denied, “as it was quite clearly a backdoor attempt to push back the trial date.”⁹⁷ Finally, on the morning of trial, QLI filed a “Notice of Non-Participation,” informing the court that QLI and its counsel would attend the trial, but would not actively participate.⁹⁸

⁹¹ *Id.* at *1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The court’s reason for denying the motion was: “given that the trial date had been set for at least six months, and given that the Boims had moved for summary judgment against all of the defendants except QLI, [its counsel] had ample notice that he might be the sole defendant to survive to trial.” *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at *2. The magistrate judge presiding in front of the trial advised QLI’s counsel and its principal that it believed this plan was “both risky and foolish,” and that it was QLI’s counsel’s responsibility to defend QLI—not the court’s. *Id.* They

Accordingly, at trial, QLI’s counsel declined to participate in jury selection; make an opening statement; cross-examine witnesses; object to the admission of exhibits; make a closing argument; and participate in the jury instruction conference.⁹⁹ Perhaps even more shockingly, after the jury found QLI liable and awarded damages to the Boims, QLI filed a motion seeking judgment as a matter of law—or, in the alternative, a new trial.¹⁰⁰ The court aptly denied these motions, explaining that “it is hard to believe that these defendants would actually expect the Court to conduct another trial when they did not even bother to show up for the first trial.”¹⁰¹

After this series of events, the defendants again appealed to the Seventh Circuit, where the case was heard by the same panel of judges that heard the interlocutory appeal—Judges Rovner, Wood, and Evans.¹⁰² In an opinion written by Judge Rovner, the panel vacated the judgment and remanded the case to the district court to reassess liability.¹⁰³ Judge Evans concurred with the court’s reversal as to HLF, but otherwise dissented.¹⁰⁴ The Seventh Circuit then granted the Boims’ petition for rehearing en banc, vacating the panel’s decision.¹⁰⁵

III. *BOIM*: THE EN BANC OPINION

On rehearing en banc, the court affirmed the district court’s judgment in part, and reversed and remanded in part.¹⁰⁶ The en banc majority opinion was written by Judge Posner.¹⁰⁷ Judge Rovner filed

carried on as planned, however, because they were “determined not to participate in the trial.” *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *6.

¹⁰² *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 1 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

¹⁰³ *Id.* at 91–93.

¹⁰⁴ *Id.* at 94.

¹⁰⁵ *Boim III*, 549 F.3d 685, 688 (7th Cir. 2008).

¹⁰⁶ *Id.* at 705.

¹⁰⁷ *Id.* at 687.

an opinion concurring in part and dissenting in part, in which she was joined by Judge Williams and joined in part by Judge Wood.¹⁰⁸ Likewise, Judge Wood filed an opinion concurring in part and dissenting in part, in which she was joined in part by Judges Rovner and Williams.¹⁰⁹ Judges Rovner, Wood, and Williams were all generally in agreement as to the legal standards of liability under § 2333 of the Act—which were, in some respects, quite different than those outlined by the majority.¹¹⁰ In the end, the only issue the full court agreed upon was that the judgment as to HLF should be reversed and remanded, because the court disagreed with the district court’s application of the doctrine of collateral estoppel.¹¹¹

This Part separately addresses the *Boim III* en banc majority opinion written by Judge Posner and the dissenting opinion¹¹² written by Judge Rovner.¹¹³ Although there were various other issues dividing the court that were important to the Boims’ case, this Part focuses on the issues which will most profoundly affect future courts’ analyses of similar cases: (1) whether § 2333 provides for primary or secondary liability; and (2) the elements required to prove liability against a donor or supporter of terrorism under § 2333.

¹⁰⁸ *See id.* at 705, 705 n.1.

¹⁰⁹ *See id.* at 719, 719 n.1.

¹¹⁰ *Compare, e.g., id.* at 689, 693, *with id.* at 708, 712.

¹¹¹ *See id.* at 706, 719–20. For a thorough discussion of why HLF could not be held liable based on collateral estoppel, see *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 22–48 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

¹¹² Although Judge Rovner’s and Judge Wood’s opinions were opinions “concurring in part and dissenting in part,” the only holding with which Judges Rovner, Wood, and Williams concurred was that the district court improperly applied the doctrine of collateral estoppel to HLF. *See id.* at 706; *id.* at 719–20. Therefore, these opinions will be referred to simply as dissenting opinions.

¹¹³ Because the two opinions written by Judge Rovner and Judge Wood basically espouse the same analysis and reasoning, but because Judge Rovner authored the two previous panel opinions, this Part focuses on their analysis as illustrated in Judge Rovner’s opinion.

A. Judge Posner's Majority Opinion

1. Primary vs. Secondary Liability

Breaking with the theory of liability that had formed the basis of the parties' complaints and theories in the *Boim* litigation for approximately eight years, Judge Posner, writing for the en banc majority, first determined that § 2333 does not impose secondary liability on donors or supporters of terrorism.¹¹⁴ Thus, such individuals or organizations could not be held liable for aiding and abetting an act of international terrorism, as the district court and Seventh Circuit had each twice held.¹¹⁵ In reaching this conclusion, Judge Posner relied heavily on the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*.¹¹⁶ Judge Posner stated that the Court in *Central Bank* held that section 10(b) of the Securities and Exchange Act of 1934 did not provide for aiding and abetting liability "because

¹¹⁴ *Boim III*, 549 F.3d at 689. When the Boims initially filed their lawsuit, they argued that § 2333 created primary liability, and that these particular defendants themselves committed "an act of international terrorism." *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1011 (N.D. Ill. 2001) ("According to plaintiffs' theory, sponsoring violence by providing money or other material support that facilitates the recruiting and training of terrorists, enables the purchase of weapons or provides 'compensation' to the families of terrorists who die in the attacks—knowing that the support will enable the terrorists to plan and carry out the bombing or shooting of others—is an 'activity' that 'involves violent acts' that are a violation of federal law and therefore meets the definition of 'international terrorism' in § 2331(1)(A)."). Alternatively, they argued that § 2333 extends liability to aiders and abettors of international terrorism, thereby creating secondary liability. *Id.*

¹¹⁵ See *Boim*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (denying defendants' motions to dismiss on the grounds that secondary—or aiding and abetting—liability was viable basis for establishing liability under § 2333); *Boim I*, 291 F.3d 1000 (answering in the affirmative to the certified question on this issue); *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885 (N.D. Ill. 2004) (granting summary judgment to the Boims on the issue of aiding and abetting liability); *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 4 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>. (reaffirming its holding in *Boim I* on this issue).

¹¹⁶ 511 U.S. 164 (1994).

it makes no reference to secondary liability.”¹¹⁷ According to Judge Posner’s reading of *Central Bank*, “statutory silence on the subject of secondary liability means there is none.”¹¹⁸ Therefore, as with section 10(b), because § 2333 “does not mention aiders and abettors or other secondary actors,” § 2333 does not—in fact, cannot—impose secondary liability.¹¹⁹

Despite this reading of *Central Bank*, Judge Posner concluded that § 2333 imposes *primary* liability on donors and supporters of terrorism—ensuring that such donors would not escape liability.¹²⁰ Judge Posner described this “alternative and more promising ground” for holding donors liable under § 2333 as one involving “a chain of explicit statutory incorporations by reference.”¹²¹ The first link in this chain is the statutory definition of international terrorism found in § 2331(1).¹²² Applying that definition, the central question becomes: does providing financial support to a terrorist organization constitute “activities that . . . involve violent acts or acts dangerous to human life”?¹²³ Although Judge Posner seemingly determined that this conduct by no means involved a “violent act,” he concluded that “[g]iving money to Hamas, like giving a loaded gun to a child. . . , is an

¹¹⁷ *Boim III*, 549 F.3d at 689 (citing *Central Bank*, 511 U.S. 164).

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See id.* at 690.

¹²¹ *Id.*

¹²² *Id.* For § 2331(1)’s full definition of “international terrorism,” *see supra* text accompanying note 33.

¹²³ 18 U.S.C. § 2331(1) (2006); *see Boim III*, 549 F.3d at 690. Although there are three sub-parts to § 2331(1)’s definition of “international terrorism,” the defendants never disputed that their alleged conduct satisfied sub-sections (B) and (C). *See Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1012 n.7 (N.D. Ill. 2001). One might question this decision, however. Surely, sub-section (C) is satisfied (activities that “transcend national boundaries in terms of the means by which they are accomplished”), but the defendants would have had at least a decent argument as to (B) (activities that “appear to be intended. . . to intimidate or coerce a civilian population” or “affect the conduct of a government. . .”). That is, it is at least debatable whether, to the objective observer, giving money even directly to Hamas “appears to be intended” to do any of the listed actions.

‘act dangerous to human life.’”¹²⁴ Consequently, the first link to liability was in place.

The second link in the chain is § 2339A,¹²⁵ because the conduct at issue must not only involve a violent act or an act dangerous to human life, but must also be a “violation of the criminal laws of the United States.”¹²⁶ Section 2339A provides that an individual or organization that “provides material support or resources [to terrorists]. . . , knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332],” is guilty of a federal crime.¹²⁷ The third link in the chain is thus § 2332, which “criminalizes the killing . . . , conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.”¹²⁸ Accordingly, the entire “chain of incorporations by reference” was connected, and Judge Posner had established that individuals or organizations who provide financial support to terrorists can be held primarily liable under § 2333 through the § 2331(1)–§ 2339A–§ 2332 chain of liability.¹²⁹

It was at this point where Judge Posner discussed defendant Salah’s liability. Judge Posner determined that Salah could not have rendered material support to Hamas between the 1994 effective date of § 2339A (the second link in the chain) and David Boim’s killing in 1996, because he was in an Israeli prison from 1993 until 1997.¹³⁰ Therefore, the Seventh Circuit reversed the district court’s judgment against Salah.¹³¹ However, Judge Posner noted that most future cases will not likely be affected by this timing issue, because they will rarely involve donations or other material support that ceased before 1994, as was the case with Salah.¹³²

¹²⁴ *Boim III*, 549 F.3d at 690 (quoting 18 U.S.C. § 2331(1)(A)).

¹²⁵ *Id.*

¹²⁶ 18 U.S.C. § 2331(1)(A).

¹²⁷ 18 U.S.C. § 2339A(a) (2006).

¹²⁸ *Boim III*, 549 F.3d at 690 (citing 18 U.S.C. § 2332 (2006)).

¹²⁹ *See id.*

¹³⁰ *See id.* at 691.

¹³¹ *Id.*

¹³² *Id.*

2. Elements of Donor Liability Under § 2333

Judge Posner first explained that because § 2333 is a federal tort statute, the traditional tort requirements of “fault, state of mind, causation, and foreseeability” must be established; however, where, as here, “the primary liability is that of someone who aids someone else, so that functionally the primary violator is an aider and abettor or other secondary actor, a different set of principles comes into play.”¹³³ Furthermore, Judge Posner concluded that § 2333 implicitly creates an intentional tort, if for no other reason than because it provides for an automatic trebling of damages—and treble damages are punitive damages, which are imposed only if the defendant engaged in deliberate wrongdoing.¹³⁴ Therefore, proof of the so-called “state of mind” requirement under § 2333 requires showing that the defendant either “*knows* that the organization engages in [terrorist] acts *or is deliberately indifferent* to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.”¹³⁵

Furthermore, because § 2333 creates an intentional tort, a plaintiff must prove that the *actual defendant* knew that the organization he was supporting was, in fact, a terrorist organization; that is, it is insufficient to prove that the average or reasonable person would have realized this—because “[t]hat would just be negligence.”¹³⁶ Judge

¹³³ *Id.* at 692.

¹³⁴ *Id.*

¹³⁵ *Id.* at 693 (emphasis added). According to Judge Posner, “deliberate indifference” meets the required “deliberate wrongdoing” standard of an intentional tort because deliberate indifference is “recklessness, and equivalent to recklessness is wantonness,” which is equivalent to intentional misconduct. *See id.* Additionally, Judge Posner referred to the *Restatement (Second) of Torts*, which states: “If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965) [hereinafter RESTATEMENT (SECOND)].

¹³⁶ *Boim III*, 549 F.3d at 693.

Posner further elaborated on the state of mind requirement by discussing risk, in terms of probability and magnitude.¹³⁷ For instance, “the greater the risk, the more obvious it will be to the risk taker, enabling the trier of fact to infer the risk taker’s knowledge of the risk with greater confidence. . . .”¹³⁸ Moreover, even if the probability of harm is not great, it will be deemed “reckless” if it is excessive—meaning substantial, relative to its gratuitousness.¹³⁹ And, as the Seventh Circuit had previously recognized, “an activity is reckless when the potential harm that it creates. . . is wildly disproportionate to any benefits that the activity might be expected to confer.”¹⁴⁰

Judge Posner’s conclusion from all of this was that “[t]he mental element required to fix liability on a donor to Hamas is therefore present if the donor knows the character of that organization.”¹⁴¹ In other words, § 2333 does not require proof that the donor *intended* for his contribution to a terrorist organization to be used for terrorism per se.¹⁴² Therefore, “[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.”¹⁴³ From this rule, it follows that there is no “charity defense”; that is, an individual or organization cannot defend itself from liability simply on the ground that it earmarked its donation for humanitarian, charitable, or other non-terrorist activities.¹⁴⁴ From Judge Posner’s point of view, allowing “benign intent” to be a defense

¹³⁷ See *id.* at 694–95.

¹³⁸ *Id.* at 694.

¹³⁹ *Id.* at 695.

¹⁴⁰ *Id.* (quoting *United States v. Boyd*, 475 F.3d 875, 877 (7th Cir. 2007)).

¹⁴¹ *Id.* Of course, one would assume from Judge Posner’s lengthy explanation that by “knows,” Judge Posner actually means “knows or is deliberately indifferent to.” See *id.* at 693; *supra* text accompanying note 135.

¹⁴² See *Boim III*, 549 F.3d at 698–99.

¹⁴³ *Id.* at 698.

¹⁴⁴ See *id.*

would practically “eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.”¹⁴⁵

Additionally, Judge Posner cited two other reasons for not requiring proof that the donor intended for his contribution to be used for terrorism per se. First, because money is fungible, there is no way to prevent organizations like Hamas from using money donated for non-terrorism purposes in carrying out its terrorist missions.¹⁴⁶ Second, “Hamas’ social welfare activities reinforce its terrorist activities,” both directly (for example, by providing financial assistance to the families of killed Hamas terrorists) and indirectly (for example, by boosting its image and popularity among Palestinians and, consequently, recruiting new generations of terrorists).¹⁴⁷

In discussing the next required element, causation, Judge Posner illustrated multiple cases, examples, and hypotheticals to show that traditional but-for causation is not necessary, although some proof of causation is nonetheless required.¹⁴⁸ Judge Posner began by discussing the familiar multiple-fire example to explain that the defendant’s tortious conduct need not have been a “necessary condition” (a but-for cause)¹⁴⁹ of the resulting injury: “when two fires join and destroy the plaintiff’s property and each one would have destroyed it by itself *and so was not a necessary condition*. . . each of the firemakers (if negligent) is [nevertheless] liable to the plaintiff for having ‘caused’ the injury.”¹⁵⁰ In this situation, neither defendant can escape liability

¹⁴⁵ *Id.* at 698–99. Furthermore, such a defense “would also create a First Amendment Catch-22, as the only basis for inferring intent would in the usual case be a defendant’s public declarations of support for the use of violence to achieve political ends.” *Id.* at 699.

¹⁴⁶ *Id.* at 698.

¹⁴⁷ *Id.* (citing Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Service Provision, and Terrorism*, 20 *TERRORISM & POL. VIOLENCE* 356 (2008); Berman & Laitin, *supra* note 14, at 7–10).

¹⁴⁸ *See id.* at 695–97.

¹⁴⁹ *See Maxwell v. KPMG, LLP*, 520 F.3d 713, 716 (7th Cir. 2008).

¹⁵⁰ *Boim III*, 549 F.3d at 695 (citing *Kingston v. Chi. & N.W. Ry. Co.*, 211 N.W. 913 (Wis. 1927)) (internal quotations omitted).

by proving that he was not a but-for cause of the injury,¹⁵¹ because each is nevertheless a *sufficient* condition of the resulting injury.¹⁵²

Furthermore, even where the plaintiff cannot adequately prove which one of multiple defendants' tortious conduct actually caused an injury, causation can still be established to hold those multiple defendants jointly and severally liable for the injury.¹⁵³ Judge Posner also noted that an even more relaxed standard of causation can be acceptable where the tortious acts of several defendants, in conjunction, contributed to the plaintiff's injury.¹⁵⁴ For instance, multiple defendants are all liable if their tortious spilling of toxic waste damages the plaintiff's property, even if it is impossible to determine which defendant actually caused the damage¹⁵⁵—or even if the amount of pollution spilled by each defendant would have been too slight to have independently caused the damage.¹⁵⁶ In these situations,

¹⁵¹ See *id.* at 695–96 (citing *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 74 N.W. 561, 564 (1898)); see also *id.* at 696 (citing PROSSER & KEETON ON THE LAW OF TORTS § 41, 266–67 (5th ed. 1984) [hereinafter PROSSER & KEETON]). As Judge Posner noted, “[t]ort law rejects this conclusion for the practical reason that tortious activity that produces harm would go unsanctioned otherwise.” *Id.* at 696.

¹⁵² See *id.* at 696 (“[T]he acts of each defendant are sufficient conditions of the resulting injury, though they are not necessary conditions (that is, they are not but-for causes).”).

¹⁵³ See *id.* As Judge Posner explained, this was the rule established in the famous *Summers v. Tice* case,

where two hunters negligently shot their rifles at the same time and a third hunter was hit by one of the bullets, [but] it could not be determined which hunter's gun the bullet had come from and so it could not be proved by a preponderance of the evidence that either of the shooters was the injurer in either a sufficient-condition or a necessary-condition sense. . . Nevertheless both defendants were held jointly and severally liable to the injured person. *Id.* (citing *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)).

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 696–97 (“Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance. . . [t]he single act itself becomes wrongful because it is done in the context

a plaintiff must prove “only that there was a *substantial probability*” that any of the defendants’ tortious conduct was a cause.¹⁵⁷ According to Judge Posner, proof that a defendant “helped to create a danger” is sufficient to hold him liable, and one who provides material support to a wrongful act is held responsible as having committed the act.¹⁵⁸

Finally, as to proximate causation or “foreseeability,” Judge Posner acknowledged that the majority’s framework may allow for the imposition of liability on an organization that, for example, made a contribution in 1995 to a terrorist group that killed an American abroad fifty years later in 2045—as long as the donor had the required state of mind.¹⁵⁹ Yet, to Judge Posner, imposing liability in this situation “would not be as outlandish, given the character of terrorism, as one might think.”¹⁶⁰

When applying all the possible theories of causation to the Boims’ case, Judge Posner noted that it is irrelevant that David’s death cannot not be traced even indirectly to any particular defendant, because “[t]he knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that [David] would be a victim. . . .”¹⁶¹ It follows that this is true even if no single defendant’s contribution was large enough to fund the particular attack that led to his death.¹⁶² Aside from this explanation, as well as a discussion of evidentiary issues surrounding the plaintiffs’ proof that Hamas was responsible for David Boim’s murder,¹⁶³ Judge Posner did not address the application of the causation standard to the Boims’ case. Rather, in applying his established framework, Judge Posner focused on the knowledge requirement, albeit only slightly more.

of what others are doing.”) (quoting PROSSER & KEETON, *supra* note 151, at § 41, 268).

¹⁵⁷ *Id.* at 697.

¹⁵⁸ *Id.* (citing Keel v. Hainline, 331 P.2d 397 (Okla. 1958)).

¹⁵⁹ *Id.* at 699–700.

¹⁶⁰ *Id.* at 700.

¹⁶¹ *Id.* at 698.

¹⁶² *Id.*

¹⁶³ *Id.* at 702–05. The evidentiary issues are beyond the scope of this Note.

First, with respect to QLI, Judge Posner did not discuss how the Boims proved QLI's requisite knowledge, but merely said that the jury was able to decide whether QLI had "knowingly provided material support to Hamas," and that the jury found QLI liable.¹⁶⁴ Second, although AMS may have provided other types of material support to Hamas, AMS's only financial contributions were to HLF—not Hamas.¹⁶⁵ Nevertheless, "the fact that [HLF] may not have known that Hamas was a terrorist organization (implausible is that is) would not exonerate [AMS]," because AMS apparently *did* know that Hamas was a terrorist organization;¹⁶⁶ therefore, Judge Posner found that, by giving money to HLF, AMS "was deliberately funneling money to Hamas."¹⁶⁷ Moreover, it was no defense that AMS did not *directly* give material support to Hamas, but rather "launder[ed] donations through a chain of intermediate organizations."¹⁶⁸ To illustrate this point, Judge Posner gave the following example: "Donor A gives to innocent-appearing organization B which gives to innocent-appearing organization C which gives to Hamas. As long as A either knows or is reckless in failing to discover that donations to B end up with Hamas, A is liable."¹⁶⁹

Finally, Judge Posner explained that setting "the knowledge and causal requirement" any higher than the majority had "would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter."¹⁷⁰

¹⁶⁴ *Id.* at 702.

¹⁶⁵ *See id.* at 701.

¹⁶⁶ Judge Posner did not specifically explain how AMS satisfied the "knowledge or deliberate indifference" state of mind requirement but merely stated that "[t]he activities of [AMS] are discussed at length in the district court's second opinion." *Id.* at 701 (citing *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 906–13 (N.D. Ill. 2004)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 701–02.

¹⁶⁹ *Id.* at 702.

¹⁷⁰ *Id.*

B. Judge Rovner's Dissenting Opinion

1. Primary vs. Secondary Liability

Judge Rovner concluded that what the defendants allegedly did in this case is not clearly conduct that falls within § 2331(1)'s definition of international terrorism and, thus, may not be a basis for primary liability.¹⁷¹ Although Judge Rovner agreed that the definition “certainly is broad enough to reach beyond bomb-throwers and shooters to include those who provide direct and intentional support to terrorists,” she argues that “it is far from clear that sending money to a Hamas-controlled charitable organization, for example, is on par with that type of direct support for terrorism.”¹⁷² Furthermore, Judge Rovner agreed that donating to Hamas's humanitarian wing *may* indirectly aid terrorism by freeing up other Hamas funds to use for terrorism or by boosting Hamas's image among prospective terrorists or other supporters.¹⁷³ For example, if Hamas's humanitarian wing receives more monetary donations than necessary to carry out its social services programs, Hamas leaders can then spill over the extra funds to augment its terrorist activities.¹⁷⁴ However, Judge Rovner disagreed with Judge Posner's conclusion that donations to Hamas-affiliated entities—including donations that are earmarked and used for humanitarian purposes—can be characterized as “acts dangerous to human life.”¹⁷⁵ Moreover, Judge Rovner believed that it is not “evident (to say the least)” that providing money to “a Hamas-affiliated charity is an act that ‘appear[s] to be intended’ to have the sorts of coercive or intimidating effects on government policy or upon a civilian population as described in section 2331(1)(B).”¹⁷⁶

¹⁷¹ *Id.* at 708.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See id.* at 690, 708.

¹⁷⁶ *Id.* at 708–09. For the full text of § 2331(1), see *supra* text accompanying note 33.

Nevertheless, Judge Rovner concluded that the Boims could attempt to hold these defendants liable under a secondary liability theory.¹⁷⁷ To begin, Judge Rovner disagreed with the defendants and Judge Posner that *Central Bank* precluded the Boims from proceeding on an aiding and abetting theory simply because § 2333 does not expressly provide for it.¹⁷⁸ As noted above, the Court in *Central Bank* held that a private plaintiff may not maintain an aiding and abetting action under section 10(b) of the Securities Exchange Act of 1934, because that statute did not proscribe giving aid to someone who violated the Act.¹⁷⁹ In particular, the Court stated that “there is no general presumption” that a plaintiff may always sue both primary actors *and* aiders and abettors under federal civil statutes.¹⁸⁰ Therefore, where Congress does not express any intent to extend liability under a particular statute, a plaintiff may not sue those who aid and abet violations of that statute.¹⁸¹ Yet, at the same time, Judge Rovner did not read *Central Bank* as eliminating aiding and abetting liability in all federal civil cases except when the relevant statute contain the words “aid and abet.”¹⁸²

In Judge Rovner’s view, there are four reasons why *Central Bank* is not determinative in deciding whether § 2333 provides for secondary liability. First, the issue in *Central Bank* was whether liability under an implied right of action could be extended to aiders

¹⁷⁷ *Id.* at 709 (“The secondary liability framework is a much more natural fit for what the defendants here are alleged to have done. . .”). This was also the conclusion of Judges Wood and Evans, the two other members of the panel in *Boim I* and *Boim II*, 291 F.3d 1000 (7th Cir. 2002); Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 4 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>, as well as Judge Williams, who joined Judge Rovner’s dissent in *Boim III*, 549 F.3d at 705. Although Judge Evans dissented in *Boim II*, he did not do so on the issue of primary versus secondary liability. *See Boim II*, at 94.

¹⁷⁸ *See Boim I*, 291 F.3d at 1019 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

¹⁷⁹ *Cent. Bank*, 511 U.S. at 177–78; *see supra* note 117 and accompanying text.

¹⁸⁰ *Id.* at 182.

¹⁸¹ *See id.* at 183.

¹⁸² *Boim I*, 291 F.3d at 1019.

and abettors, whereas § 2333 provides an express right of action.¹⁸³ Second, Congress *did* express an intent in the language and legislative history of § 2333 “to import general tort law principles, and those principles include aiding and abetting liability.”¹⁸⁴ Third, Congress expressed its intention in § 2333 “to render civil liability at least as extensive as criminal liability,¹⁸⁵ and criminal liability attaches to aiders and abettors of terrorism.”¹⁸⁶ Fourth, failing to extend liability under § 2333 to aiders and abettors “is contrary to Congress’ stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation.”¹⁸⁷ Therefore, even though § 2333 does not contain the words “aid and abet,” it nevertheless extends liability to aiders and abettors, because the language, context, and legislative history of § 2333 indicate that Congress intended the statute to “extend

¹⁸³ *Id.* Judge Rovner noted that, because the courts already had to infer an intent by Congress to create a private right of action under § 10(b), they were reluctant to “pile inference upon inference” to extend liability to aiders and abettors. *Id.* However, “no such stacking is required in section 2333.” *Id.*

¹⁸⁴ *Id.*; *see, e.g.*, 137 CONG. REC. S4511-04 (daily ed. Apr. 16, 1991).

¹⁸⁵ Judge Rovner points out that § 2331(1)’s definition of “international terrorism” includes activities that “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States. . .” *Boim I*, 291 F.3d at 1020 (quoting 18 U.S.C. § 2331(1) (2006)). Thus, “by incorporating violations of any criminal laws that involve violent acts or acts dangerous to human life, Congress was expressly including aiding and abetting to the extent that aiding and abetting ‘involves’ violence.” *Id.*

¹⁸⁶ *Id.* (citing 18 U.S.C. § 2 (2006) (imposing criminal liability on “whoever. . . aids, abets, counsels, commands, induces or procures. . .” the commission of a federal crime)). Since 18 U.S.C. § 2332 makes it a federal crime to commit an act of terrorism, 18 U.S.C. § 2 therefore makes it illegal to aid and abet an act of terrorism.

¹⁸⁷ *Boim I*, 291 F.3d at 1019; *see id.* at 1020 (citing SENATE REPORT, *supra* note 36, at 22); *id.* at 1021 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994)) (“[P]olicy considerations may be used to interpret the text and structure of a statute when a literal reading would lead to a result so bizarre that Congress could not have intended it.”); *id.* (“Also, and perhaps more importantly, there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence.”).

liability to all points along the causal chain of terrorism.”¹⁸⁸ Consequently, the class of possible defendants under § 2333 includes both primary and secondary actors, and aiders and abettors of terrorism can be held liable to the same extent as the terrorists themselves.¹⁸⁹

2. Elements of Donor Liability Under § 2333

To successfully hold donors to terrorism liable under a § 2333 secondary liability theory, a plaintiff must adequately prove the elements of aiding and abetting liability, as well as the traditional tort requirements of actual causation and proximate causation.¹⁹⁰ According to Judge Rovner, there are three aiding and abetting elements applicable to § 2333 cases: the defendant (1) knew about the terrorist organization’s illegal activities, (2) intended to help those illegal activities succeed, and (3) engaged in some act of helping those activities succeed.¹⁹¹ According to Judge Rovner, requiring proof that the defendant specifically intended to further the terrorists’ illegal activities would allow the court to distinguish between the truly culpable and the innocent.¹⁹² Yet, Judge Rovner seemingly recognized the difficulty that plaintiffs would likely encounter when trying to prove such intent with direct evidence; thus, under Judge Rovner’s framework, a plaintiff can prove the requisite intent with circumstantial evidence, allowing the fact finder to *infer* a defendant’s intent to further terrorist activities.¹⁹³

¹⁸⁸ *Id.* at 1019–20.

¹⁸⁹ *See Boim III*, 549 F.3d 685, 712 (7th Cir. 2007) (citing *Boim I*, 291 F.3d at 1016–21).

¹⁹⁰ *See id.*; *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 48, 59, 60–61 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>; *Boim I*, 291 F.3d at 1010.

¹⁹¹ *Boim II*, at 48; *Boim I*, 291 F.3d at 1023 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991)).

¹⁹² *See id.*

¹⁹³ *See id.*

For instance, a donation to Hamas, which has been a crime ever since Hamas was designated as a foreign terrorist organization in 1997, would constitute “prima facie proof of one’s intent to further terrorism.”¹⁹⁴ The same would be true if a defendant donated to a charitable organization that serves as a front for Hamas or any other terrorist group, or that has known ties to such a group.¹⁹⁵ Alternatively, if a defendant merely donated money to a hospital controlled by Hamas but which otherwise lacks ties to terrorist activities, and if the defendant did so with the intention of funding that hospital’s medical services, the fact finder “would be free to conclude that the donor had a benign intent and did not aid or abet Hamas’s terrorism even if, in the abstract, one might believe that furthering Hamas’s humanitarian activity enhances its image and thereby supports its violent activities.”¹⁹⁶

In addition to evidence of financial contributions, Judge Rovner seems to believe that plaintiffs could also circumstantially prove purposeful intent with other types of evidence. For instance, the district court on summary judgment found the following as sufficient evidence of AMS’s intent to help—and its acts of helping—Hamas’s illegal activities succeed: (1) AMS representatives participated in a meeting, attended by Hamas officials, during which the attendees discussed ways to continue to support Hamas; (2) AMS contributed money to HLF and routinely encouraged others to do the same; (3) AMS published and distributed pro-Hamas documents, one of which included an editorial advocating “martyrdom” operations; (4) AMS tried to rally public support for individuals with ties to Hamas, such as Salah, when they were arrested for or charged with supporting terrorism; and (5) AMS invited pro-Hamas speakers to participate in its annual conferences, one of which featured a veiled Hamas terrorist as a guest speaker.¹⁹⁷

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 50–51 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

Although Judge Rovner disagreed with Judge Posner and the en banc majority as to whether § 2333 creates primary or secondary liability, and as to what level of knowledge or intent the defendant must be shown to have had, Judge Rovner most passionately dissented because of Judge Posner's application of the causation standards.¹⁹⁸ Specifically, Judge Rovner believed that Judge Posner's framework not only relaxed "the basic tort requirement that causation be proven," but actually eliminated it altogether.¹⁹⁹ In Judge Rovner's view, it was not "that the plaintiffs were unable to show causation," but "rather that they did not even make an attempt;" and, it was for that reason that the *Boim II* panel decided to remand the case.²⁰⁰

To hold a defendant liable under Judge Rovner's § 2333 framework, a plaintiff must prove causation by a preponderance of the evidence.²⁰¹ Of course, plaintiffs in typical tort cases must show "a causal link between the defendant's actions and the plaintiff's injury."²⁰² However, because these types of defendants are only secondary actors, Judge Rovner explained at length in the *Boim II* opinion exactly what causation means in this context,²⁰³ including a review of extensive precedent where a sufficient causal link was found between the secondary actor's conduct and the resulting injury.²⁰⁴ Perhaps most importantly, requiring proof of causation does *not* mean that, in the Boims' case, they must "link specific donations or other acts of support to David Boim's murder in particular";²⁰⁵ rather, the plaintiffs must provide sufficient evidence "that the defendants' conduct caused terrorist activity that included the shooting of

¹⁹⁸ See *Boim III*, 549 F.3d at 705.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*; *Boim II*, at 59, 63.

²⁰² See *Boim II*, at 59.

²⁰³ See *id.* at 62–72.

²⁰⁴ See *id.* at 66–72.

²⁰⁵ *Boim III*, 549 F.3d at 709–10 (citing *Boim II*, at 63) ("Nothing in *Boim I* demands that the plaintiffs establish a direct link between the defendants' donations (or other conduct) and David Boim's murder—that they funded in particular the terrorists who killed David Boim, for example. . .").

David.”²⁰⁶ Furthermore, a defendant’s conduct need not have been the *sole cause* of the plaintiff’s injury; instead, “it is enough that it be a cause of the [terrorist] act and the resulting harm.”²⁰⁷ Because these rules are somewhat vague, however, Judge Rovner illustrated five ways in which plaintiffs could successfully prove causation.²⁰⁸

First, the plaintiff could certainly prove causation by establishing a direct causal link between the defendants’ acts and the plaintiff’s actual injury—here, David Boim’s death.²⁰⁹ Judge Rovner noted that the Boims proposed such a theory in *Boim I*, “theorizing that the defendants had channeled funds into a central pool of money that was used to train terrorists, buy their weapons, and so forth—and that the terrorists who killed David Boim had been trained and armed using those funds.”²¹⁰ But, again, such direct evidence is not *required* to prove actual causation, because the fact finder could reasonably conclude that a defendant’s material support to a terrorist organization is “as essential in bringing about the organization’s terrorist acts as those who plan and carry out those acts.”²¹¹ Therefore, a second method of proving causation could include the defendant’s statements that he had provided funds to a terrorist organization to purchase weapons and had otherwise supported the organization by training terrorists.²¹² In fact, the Boims pointed to one of Salah’s

²⁰⁶ *Boim II*, at 63; *see Boim III*, 549 F.3d at 710 (insisting that the plaintiffs establish “proof that the types of support the defendants were alleged to have given Hamas were, in fact, a cause of Hamas’s terrorism”).

²⁰⁷ *Boim II*, at 64 (citing RESTATEMENT (THIRD) OF TORTS § 26 cmt. c (Proposed Final Draft No. 1, 2005) [hereinafter RESTATEMENT (THIRD)]; *id.* at cmt. l; RESTATEMENT (SECOND), *supra* note 135, at § 430 cmts. d, e). In other words, Judge Rovner’s view is that the defendant’s act need not be a but-for cause (or a “necessary condition”), but merely a sufficient condition or “substantial factor,” of the plaintiff’s injury. *See id.* at 60 (citing RESTATEMENT (THIRD), § 26 (“Factual Cause”)); *id.* at § 26 cmt. b (but-for causation); RESTATEMENT (SECOND), *supra* note 135, at § 9 cmt. b (“substantial factor”).

²⁰⁸ *See id.* at 62–65.

²⁰⁹ *Id.* at 62.

²¹⁰ *Id.*

²¹¹ *Id.* (citing *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002)).

²¹² *See id.* at 63.

statements in which he made these specific claims.²¹³ This would prove causation because the fact finder could reasonably conclude a subsequent terrorist attack—and the resulting injuries—“were in part caused by Salah’s actions, even if Salah had no role in planning and executing a particular terrorist act.”²¹⁴

A third example would be proof that the defendant established a network in the United States for the purpose of providing ongoing financial support for Hamas’s terrorist activities. In that situation, the fact finder could reasonably infer that establishing this type of network caused subsequent Hamas terrorist acts, “even if no line could be drawn linking a particular dollar raised to a particular terrorist act.”²¹⁵ Fourth, even if a defendant contributed solely to a terrorist organization’s humanitarian or charitable arms, this could suffice to establish an inference of causation if the plaintiff proved that, in doing so, the defendant freed up the terrorist organization’s resources and, thus, enabled more funds to be put toward the organization’s terrorist activities.²¹⁶ Moreover, it is possible that even “relatively minor financial contributions to terrorists or other minor acts of support would be sufficient” to establish causation.²¹⁷

Finally, under Judge Rovner’s approach, a plaintiff must prove that the injury was a proximate cause of the tortious conduct or, in other words, that it was foreseeable to the defendant.²¹⁸ Not only is

²¹³ *Id.* (citing *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 899 (N.D. Ill. 2004)) (noting that the Boims identified an August 1995 statement in which Salah wrote that, “in the early 1990s, he had helped to test and train terrorists, funneled money to Hamas for the purchase of weapons, and had coordinated with other Hamas leaders in rebuilding Hamas’s infrastructure and command”).

²¹⁴ *Id.*

²¹⁵ *Id.* at 63–64.

²¹⁶ *Id.* at 64–65.

²¹⁷ *Id.* at 66. This is true because, according to Judge Rovner, “the conduct need only be one of the causes,” yet need not be “the predominant or primary cause of the injury.” *Id.* (citing RESTATEMENT (THIRD), *supra* note 207 § 26 cmts. c, j, & l; RESTATEMENT (SECOND), *supra* note 135, § 430 cmts. d & e).

²¹⁸ *See id.* at 57. In her dissent, Judge Wood notes that the term “proximate causation” is “imprecise at best,” as pointed out in the *Proposed Final Draft to the Restatement (Third) of Torts. Boim III*, 549 F.3d 685, 724 (7th Cir. 2008) (citing

foreseeability a required element to prove any tort, but, according to Judge Rovner, it is also *explicitly* required under § 2333 because that statute provides a private right of action to a person who is injured “by reason of” an act of international terrorism.²¹⁹ A defendant will generally only be liable for injuries that would have reasonably been seen as a “natural consequence” of his actions.²²⁰ In this context, the plaintiff must at least show that murder was a reasonably foreseeable consequence of providing funds or other material support.²²¹ According to Judge Rovner, if the plaintiff could prove this—along with the three aiding and abetting elements,²²² as well as a causal link between the defendant’s conduct and the plaintiff’s injury²²³—the plaintiff would be able to establish that the defendant was liable for a violation of § 2333.

IV. THE PROPER FRAMEWORK OF LIABILITY UNDER § 2333

A thorough analysis of both Judge Posner’s majority opinion and Judge Rovner’s dissenting opinion reveals that neither judge’s framework provides the most legally sound standard for liability. By addressing the infirmities of both opinions, this Part develops a more grounded framework for other courts to apply when presented with § 2333 donor liability cases.

RESTATEMENT (THIRD), *supra* note 207, at ch. 6, (Special Note on Proximate Cause)). Instead, the *Restatement (Third)* refers to this concept as “scope of liability,” recognizing that, “[a]t some point, the harm is simply too remote from the original tortious act to justify holding the actor responsible for it.” *Id.*

²¹⁹ *Id.*; see *Boim I*, 291 F.3d 1000, 1011 (7th Cir. 2002) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992)) (“[T]he statute itself requires that in order to recover, a plaintiff must be injured ‘by reason of’ an act of international terrorism. The Supreme Court has interpreted identical language to require a showing of proximate cause.”).

²²⁰ *Boim I*, 291 F.3d at 1012.

²²¹ *Boim II*, at 57 (citing *Boim I*, 291 F.3d at 1012) (emphasis omitted).

²²² See *supra* note 196 and accompanying text.

²²³ See *supra* note 208 and accompanying text.

A. *Primary and Secondary Liability*

As it turns out, both primary and secondary liability theories are available to plaintiffs bringing claims against donors under § 2333. First, a primary liability theory is available, though not for the reasons Judge Posner provided when laying out the so-called “chain of explicit statutory incorporations by reference.”²²⁴ Judge Posner determined that the defendants’ conduct satisfies § 2331’s definition of international terrorism by concluding that donating money to Hamas—or even to Hamas’s humanitarian wing or a purported Hamas-affiliated charity—is an act dangerous to human life.²²⁵ This is extremely problematic. What Judge Posner deems a foregone conclusion was in fact rejected by Judge Rovner²²⁶ and the district court,²²⁷ as well as the United States as *amicus curiae* in *Boim III*.²²⁸ The literal act of transferring money to Hamas does not endanger human life whatsoever; rather, the result of giving money to Hamas may be *violent terrorist activities* which, in turn, result in the endangerment of human life.

Despite the fact that primary liability is not available for the reasons set forth by Judge Posner, it is nevertheless a viable theory. Under a primary liability theory, a plaintiff must show that he (or his heir) was injured or killed by reason of a crime that constitutes an act of international terrorism committed by the defendant.²²⁹ As Judge Rovner and other courts have recognized, actions giving rise to

²²⁴ See *Boim III*, 549 F.3d 685, 690 (7th Cir. 2008).

²²⁵ See *id.*

²²⁶ See *id.* at 708.

²²⁷ See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1015 (N.D. Ill. 2001).

²²⁸ Brief for the United States as *Amicus Curiae* at 27–28 & n.6, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (Nos. 05-1815, 05-1816, 05-1821, 05-1822).

²²⁹ See 18 U.S.C. § 2333(a) (2006); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 580 (E.D.N.Y. 2005).

criminal liability under §§ 2339A and 2339B²³⁰ can serve as the basis for civil liability under § 2333, because §§ 2339A and 2339B elucidate conduct prohibited under § 2333 by providing examples of what constitutes an act of international terrorism.²³¹ Put another way, Congress's subsequent enactment of §§ 2339A and 2339B confirmed and clarified that providing material support to terrorists or designated foreign terrorist organizations is itself an act of international terrorism.²³² Therefore, if a plaintiff can establish a violation of either § 2339A or § 2339B, he can satisfy the first element of a § 2333 claim: an act of international terrorism.²³³

In addition, contrary to Judge Posner's conclusion, a plaintiff in this type of case *may* proceed on a theory of secondary liability. As recognized by Judge Rovner,²³⁴ the United States as *amicus curiae* in *Boim I* and *Boim III*,²³⁵ and various other courts,²³⁶ *Central Bank* is distinguishable and thus not a bar to aiding and abetting liability under § 2333. Moreover, the Court in *Central Bank* did not hold that secondary liability is available only if the statute explicitly provides

²³⁰ For the relevant language of these criminal provisions, see *supra* text accompanying notes 40 and 42.

²³¹ See *Boim I*, 291 F.3d 1000, 1014–16 (7th Cir. 2002); *Linde*, 384 F. Supp. 2d at 581 (citing *Boim I*, 291 F.3d at 1014–15); *Boim*, 127 F. Supp. 2d at 1016 (holding that providing material support or resources for terrorism constitutes an act of international terrorism under § 2333).

²³² See *Boim I*, 291 F.3d at 1014–16; *Linde*, 384 F. Supp. 2d at 581.

²³³ The same holds true regarding a violation of § 2339C. See *Linde*, 384 F. Supp. 2d at 582.

²³⁴ See *Boim I*, 291 F.3d at 1019; *supra* text accompanying notes 183–87.

²³⁵ See *Boim I*, 291 F.3d at 1017; Brief for the United States as *Amicus Curiae* Supporting Affirmance at 21, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (Nos. 01-1969, 01-1970); Brief for the United States as *Amicus Curiae* at 5, 11, *Boim*, 549 F.3d 685 (Nos. 05-1815, 05-1816, 05-1821, 05-1822).

²³⁶ See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 261–62 (E.D.N.Y. 2006); *Linde*, 384 F. Supp. 2d at 583; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 at *16 (E.D.N.Y. 2002).

for it.²³⁷ Rather, *Central Bank* stands for the proposition that there is simply no presumption that aiding and abetting is always available in all federal civil statutes.²³⁸ Consequently, the court must determine on a case-by-case basis whether the text and history of a particular statute extends liability to aiders and abettors.²³⁹

When looking at the language, context, and history of § 2333, it becomes quite clear that Congress intended to create secondary liability. First, although Congress exempted certain parties from liability—such as the United States and foreign states²⁴⁰—Congress did not address or restrict the liability of any other type of defendant.²⁴¹ Second, the legislative history of § 2333 illustrates that Congress was specifically looking to enable plaintiffs to sue not only terrorists and terrorist organizations, but also those who aid in terrorist activity.²⁴² Finally, Congress intended to incorporate common law tort principles into § 2333, and such principles include attaching liability to those who “*make it possible for some actor grievously to injure somebody else.*”²⁴³

²³⁷ See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (“To be sure, aiding and abetting a wrongdoer out to be actionable in certain instances.”).

²³⁸ *Cent. Bank*, 511 U.S. at 182; see *Boim I*, 291 F.3d at 1018.

²³⁹ See *Boim I*, 291 F.3d at 1018; Brief for the United States as *Amicus Curiae* at 5, *Boim*, 549 F.3d 685 (Nos. 05-1815, 05-1816, 05-1821, 05-1822).

²⁴⁰ See 18 U.S.C. § 2337 (2006).

²⁴¹ See Brief for the United States as *Amicus Curiae* at 6–7, *Boim*, 549 F.3d 685 (Nos. 05-1815, 05-1816, 05-1821, 05-1822).

²⁴² See *id.* at 10 (quoting SENATE REPORT, *supra* note 36, at 22) (noting, for example, that the Senate Report on § 2333(a) emphasized that the statute sought to impose “liability at *any* point along the causal chain of terrorism” to “interrupt, or at least imperil, the flow of money” to terrorists and terrorist organizations) (emphasis added) (internal quotations omitted); see also *id.* at 9 (quoting *Senate Hearing, supra* note 33, at 126 (statement of Prof. Wendy Perdue)) (discussing questions raised at the congressional hearings regarding whether the remedy would extend to “the organizations, businesses, and nations who support, encourage, and supply terrorists[,] who are likely to have reachable assets”) (internal quotations omitted).

²⁴³ *Senate Hearing, supra* note 33, at 136 (statement of Joseph Morris, General Counsel, United States Information Agency).

Nevertheless, although Judge Rovner was correct that § 2333 provides for secondary liability, she incorrectly enumerated the elements required to prove civil aiding and abetting liability under § 2333. In *Boim I*, Judge Rovner concluded that proving that a defendant aided and abetting an act of international terrorism would require evidence that the defendant (1) knew of Hamas’s illegal activities; (2) desired to help those activities succeed; and (3) engaged in some act of helping the illegal activities.²⁴⁴ However, when setting forth this standard, Judge Rovner cited *United States v. Zafiro*—a criminal aiding and abetting case.²⁴⁵ Yet, less is required in terms of the intent element to establish civil aiding and abetting liability.²⁴⁶ Instead, as explained by other courts, as well as the United States as *amicus curiae* in *Boim III*, the general standards for civil aiding and abetting liability are summarized in *Halberstam v. Welch*,²⁴⁷ which the Supreme Court described as “a comprehensive opinion on the subject.”²⁴⁸

In *Halberstam*, the D.C. Circuit relied on the *Restatement (Second) of Torts* and an array of federal case law to develop a comprehensive standard for civil aiding and abetting liability.²⁴⁹ In

²⁴⁴ See *Boim I*, 291 F.3d 1000, 1023 (7th Cir. 2002); *supra* note 191 and accompanying text.

²⁴⁵ See *Boim I*, 291 F.3d at 1023 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991)).

²⁴⁶ See Brief for the United States as *Amicus Curiae* at 16, *Boim*, 549 F.3d 685 (Nos. 05-1815, 05-1816, 05-1821, 05-1822). Furthermore, the United States noted that “a heightened showing of intent” to further the primary actor’s illegal goals (as would be required under Judge Rovner’s aiding and abetting formulation) “is not always required for aiding/abetting liability even in the criminal context.” *Id.* (citing *United States v. Fountain*, 768 F.2d 790, 797–98 (7th Cir. 1985)).

²⁴⁷ See *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); Brief for the United States as *Amicus Curiae* at 15–16, *Boim*, 549 F.3d 685 (Nos. 05-1815, 05-1816, 05-1821, 05-1822) (citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)).

²⁴⁸ *Cent. Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).

²⁴⁹ *Halberstam*, 705 F.2d at 477–78 (citing *RESTATEMENT (SECOND)*, *supra* note 135, at § 876).

doing so, the court held that civil aiding and abetting liability typically rests upon proof of the following elements: “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must generally be aware of his role as part of an overall illegal or tortious activity at the time he provides assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.”²⁵⁰ As to the third element, the *Halberstam* court identified six factors to determine whether the defendant’s assistance was sufficiently substantial.²⁵¹ In addition, *Halberstam* required the plaintiff’s injury to have been a “natural and foreseeable consequence” of the activity that the defendant helped the principal undertake.²⁵²

Despite *Halberstam*’s usefulness in understanding civil aiding and abetting jurisprudence, it is nevertheless not the ideal standard to be applied under § 2333 for two reasons. First, *Halberstam* set forth these standards in the context of a negligence action.²⁵³ Section 2333, in contrast, creates an *intentional* tort. Therefore, as discussed in Part IV.B, secondary liability under § 2333 is also dependent on proof of some level of intent. Second, the *Halberstam* standard focuses extensively on whether the defendant provided substantial assistance to the primary actor.²⁵⁴ In the context of § 2333, however, the financial support provided by a defendant need not be “substantial” to qualify as “material support,” because “even small donations made knowingly

²⁵⁰ *Id.* at 477.

²⁵¹ *Id.* at 483–84. The D.C. Circuit took five of the factors from the *Restatement (Second) of Torts* and created a sixth factor. The five *Restatement* factors are: (1) “the nature of the act encouraged;” (2) “the amount [and kind] of assistance given;” (3) “the defendant’s absence or presence at the time of the tort;” (4) the defendant’s “relation to the tortious actor;” and (5) “the defendant’s state of mind.” *Id.* (citing RESTATEMENT (SECOND), *supra* note 135, at § 876, cmt. d). The sixth factor added by the court is the duration of the assistance provided. *Id.* at 484.

²⁵² *Id.* at 488.

²⁵³ The plaintiff in *Halberstam*, a widow, brought a *wrongful death* action against a primary and a secondary actor. 705 F.2d at 474.

²⁵⁴ See *id.* at 478 (“Aiding and abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct. . .”).

and intentionally²⁵⁵ in support of terrorism may meet the standard for civil liability under section 2333.”²⁵⁶

For these reasons, a more appropriate civil aiding and abetting standard under the § 2333 statutory scheme would synthesize the appropriate elements propounded by Judge Rovner and the *Halberstam* court. The first element would combine two related concepts suggested by Judge Rovner and the *Halberstam* court and would require proof that the defendant knew of the organization’s illegal activities when it provided material support.²⁵⁷ Second, the plaintiff would need to prove that the defendant engaged in some act of helping the organization’s illegal activities—an element advocated by Judge Rovner²⁵⁸ and which is based on one of the *Halberstam* elements (but without the need for the assistance to have been substantial).²⁵⁹ Finally, the third element, taken from *Halberstam*, would require proof that the party whom the defendant aided had performed a tortious act that caused the relevant injury.²⁶⁰ This three element standard would be the most appropriate aiding and abetting standard to use in § 2333 cases because it incorporates commonly accepted civil aiding and abetting concepts while also taking into

²⁵⁵ See *infra* Part IV.B.

²⁵⁶ *Boim I*, 291 F.3d 1000, 1015 (7th Cir. 2002); see *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 65 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>. (highlighting the “possibility that relatively modest financial contributions to terrorists or other minor acts of support would be sufficient to render the donor liable for the injuries subsequently inflicted by terrorists.”).

²⁵⁷ See *Boim I*, 291 F.3d at 1023 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991)) (requiring proof that the defendant “knew of Hamas’s illegal activities”); *Halberstam*, 705 F.2d at 477 (“[T]he defendant must generally be aware of his role as part of an overall illegal or tortious activity at the time he provides assistance.”).

²⁵⁸ See *Boim I*, 291 F.3d at 1023 (citing *Zafiro*, 945 F.2d at 887).

²⁵⁹ See *Halberstam*, 705 F.2d at 477 (“[T]he defendant must knowingly and substantially assist the principal violation.”).

²⁶⁰ See *Halberstam*, 705 F.2d at 477 (“[T]he party whom the defendant aids must perform a wrongful act that causes an injury.”).

account what specifically is and is not required for liability under the § 2333 statutory scheme.

B. *The Intent Requirement*

In addition to proving the basic elements of primary liability (which, in donor liability situations, requires proof that the defendant violated §§ 2339A or 2339B)²⁶¹ or secondary liability (which would require proof of the Judge Rovner-*Halberstam* synthesized standard),²⁶² a plaintiff must also establish that the defendant acted with some type of intent. This is so because, as all sitting judges on the Seventh Circuit agree, § 2333 creates an intentional tort.²⁶³ Judge Posner concluded that the intentional tort state of mind element would be satisfied here if the defendant knew that the donee organization engages in terrorism or was deliberately indifferent to whether it does so.²⁶⁴ Judge Rovner incorporated the intent requirement through one of the three elements which she claimed were required to prove aiding and abetting liability—namely, that the defendant intended to further the illegal goals of the donee organization.²⁶⁵ An analysis of intentional tort jurisprudence reveals that neither judge’s conceptualization nor explanation of the intent element is completely satisfactory, but that Judge Posner’s is the most accurate.

²⁶¹ See *supra* notes 231–33 and accompanying text.

²⁶² See *supra* notes 257–60 and accompanying text.

²⁶³ See *Boim III*, 549 F.3d at 692 (majority opinion); *id.* at 720 (dissenting opinion authored by Judge Wood and joined in relevant part by Judges Rovner and Williams).

²⁶⁴ See *id.* at 693. Judge Posner later elaborates on this by quoting the *Restatement (Second)*: “‘If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.’” *Id.* (quoting *RESTATEMENT (SECOND)*, *supra* note 135, § 8A cmt. b).

²⁶⁵ See *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 48 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>; *Boim I*, 291 F.3d at 1023; *supra* text accompanying note 191.

1. Intent Means Purpose *or* Knowledge of a Substantial Certainty

The *Restatement (Third) of Torts* states that a person acts with intent if he either acts (1) with the purpose of producing a particular consequence or (2) “knowing that the consequence is substantially certain to result.”²⁶⁶ Additionally, the intent that must be shown is the intent “to bring about the type of harm that the particular tort seeks to prevent against.”²⁶⁷ The type of harm that § 2333 seeks to prevent against is the injuring or killing of a United States citizen by an act of international terrorism.²⁶⁸ Therefore, in § 2333 donor liability cases, a plaintiff must prove that the donor either (1) acted with the purpose of bringing about the injury or death of a United States citizen via an act of international terrorism, or (2) acted despite knowing that the injury or death of a United States citizen via an act of international terrorism was substantially certain to result.²⁶⁹

Although Judge Posner’s formulation of the state of mind element approaches this widely accepted rule,²⁷⁰ his wording misses the mark somewhat. First, as just described, intent is not defined as knowledge or deliberate indifference (meaning not caring despite a substantial probability)—as Judge Posner claimed.²⁷¹ Rather, intent is more precisely defined as purpose or knowledge of a near certainty.²⁷²

²⁶⁶ RESTATEMENT (THIRD), *supra* note 207, at § 1; *see also* RESTATEMENT (SECOND), *supra* note 135, at § 8A (defining intent as a desire to cause the consequences of the act, or a belief that “the consequences are substantially certain to result from it”).

²⁶⁷ RESTATEMENT (THIRD), *supra* note 207, at § 1, cmt b.

²⁶⁸ *See* 18 U.S.C. § 2333(a) (2006).

²⁶⁹ *See* RESTATEMENT (THIRD), *supra* note 207, at § 1 & cmt b.

²⁷⁰ *See, e.g.,* *Eddy v. V.I. Water & Power Auth.*, 369 F.3d 227, 232 (3d Cir. 2004) (intentional infliction of emotional distress); *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1210 (9th Cir. 2003) (intentional interference of another’s interest in the use and enjoyment of his land); *ANR W. Coal Dev. Co. v. Basin Elec. Power Coop.*, 267 F.3d 957, 972 (8th Cir. 2002) (tortious interference with contract).

²⁷¹ *See Boim III*, 549 F.3d 685, 693 (7th Cir. 2007); *supra* text accompanying note 135.

²⁷² RESTATEMENT (THIRD), *supra* note 207, at § 1.

Second, the consequence of the defendant's intent is not that the organization engages in terrorism—as Judge Posner stated²⁷³—because that is not the type of harm that § 2333 seeks to prevent against. Instead, the relevant consequence is the injuring or killing of a United States citizen by an act of international terrorism.²⁷⁴

Judge Rovner's formulation of the intent element is likewise inaccurate. By adopting a standard used for criminal aiding and abetting liability, Judge Rovner required that the plaintiff prove that the defendant acted with the purpose of furthering the donee organization's illegal goals.²⁷⁵ However, as just described, that also is not the proper formulation of the intent element. Moreover, Judge Rovner's explanations for why she believed a defendant can be held liable only if he acted with specific intent or purpose are unavailing. For instance, Judge Rovner claimed that requiring proof that the defendant provided material support to further the terrorists' illegal activities “would serve to single out the most culpable of Hamas's financiers and other supporters by focusing on those who actually mean to contribute to its terrorist program, as opposed to those who may unwittingly aid Hamas's terrorism by donating to its charitable arm.”²⁷⁶ Yet, courts and commentators across the country have

²⁷³ See *Boim III*, 549 F.3d at 693; *supra* text accompanying note 135.

²⁷⁴ See 18 U.S.C. § 2333(a).

²⁷⁵ See *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 48 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>; *Boim I*, 291 F.3d at 1023 (citing *United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991)); *supra* text accompanying note 191.

²⁷⁶ *Boim III*, 549 F.3d at 712. The second key reason Judge Rovner believed the defendant must have acted with the goal of furthering the organization's illegal activities is because she thought any other level of intent would “pose[] a genuine threat to First Amendment freedoms.” *Id.* at 706. In particular, Judge Rovner was concerned with the idea of holding a defendant civilly liable for an organization's illegal activity based solely on his contributions if the donee organization also engages in lawful activity. *Id.* at 713; *see also id.* at 713–15 (fully discussing her First Amendment concerns). Although the First Amendment implications of the intent requirement advocated in this Note are certainly important and worthy of further development, the issue is beyond the scope of this Note. However, for a general discussion of why Judge Rovner's concerns are likely unwarranted, see

recognized that a defendant who contributes to a terrorist organization's humanitarian wing is just as culpable as a defendant who contributes directly to the organization with the purpose of funding terrorism—because, among other reasons, augmenting humanitarian-directed funds frees up money that can be used for terrorist acts.²⁷⁷ Although this may be seen as a harsh restriction, Congress evidently saw it as necessary to effectively halt the financing that is so critical to perpetuating terrorism.²⁷⁸ And because requiring a plaintiff to prove a defendant's purposeful intent would likely thwart Congress's goal of eradicating terrorism by cutting off its vital

generally *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *aff'd en banc*, 393 F.3d 902 (9th Cir. 2004) (upholding § 2339B against a First Amendment challenge, despite its imposition of criminal liability without requiring an intent to further a terrorist organization's illegal goals); Jeff Breinholt, *Resolved, or Is It? The First Amendment and Giving Money to Terrorists*, 57 AM. U. L. REV. 1273 (2008).

²⁷⁷ See, e.g., *Reno*, 205 F.3d at 1136 (“[A]ll material support given to such organizations aids their unlawful goals. . . . More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.”) (footnote omitted); *id.* at 1134 (“Material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used.”); Angela A. Barkin, Comment, *Corporate America—Making a Killing: An Analysis of Why It Is Important to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism*, 40 CAL. W. L. REV. 169, 185 (2003); see also, e.g., *Boim III*, 549 F.3d at 698 (“But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook.”); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 580 (E.D.N.Y. 2005) (citing *Humanitarian Law Project*, 205 F.3d at 1134).

²⁷⁸ See, e.g., *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005), *aff'd*, *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009) (noting that Congress rejected the extensive objections made during the hearings on § 2339B, a violation of which does not require an intent to further any illegal activity, and that it in fact “made a specific finding [in § 2339B] that ‘foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’”) (citation omitted).

financial lifelines, that standard simply cannot be required under § 2333.²⁷⁹

There are several reasons why Judge Rovner's purposeful intent standard cannot be the correct requirement under § 2333. First, if Judge Rovner's purposeful intent requirement were adopted, there are many situations in which a defendant's act of donating to Hamas or a Hamas-affiliated charity would subject him to criminal liability, but not civil liability.²⁸⁰ For instance, an organization could be found guilty under § 2339B for donating to Hamas's humanitarian wing even if it merely knew that Hamas engages in terrorism;²⁸¹ but, under Judge Rovner's framework, a private plaintiff could not recover damages for the same act unless the plaintiff could prove that the organization donated with the purpose of furthering Hamas's illegal activities. Yet, in almost every other area of law, criminal liability is imposed only for more egregious conduct.²⁸² Second, Judge Rovner herself pointed out that "Congress expressed an intent in section 2333 to render civil liability *at least as extensive* as criminal liability,"²⁸³ and, in fact, that "Congress intended for civil liability for financing terrorism to sweep *more broadly* than the conduct described in sections 2339A and 2339B."²⁸⁴ Therefore, because the idea of requiring a defendant to have acted with purposeful intent as a prerequisite to civil—but not criminal—liability is contradictory to established jurisprudence and Congressional intent, it is clear that § 2333 liability cannot be based upon proof of such a specific intent.²⁸⁵

²⁷⁹ See Barkin, *supra* note 277, at 186.

²⁸⁰ See Recent Case, *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), 116 HARV. L. REV. 713, 718 (2002).

²⁸¹ See *supra* note 42 and accompanying text.

²⁸² See Recent Case, *supra* note 280, at 718.

²⁸³ *Boim I*, 291 F.3d 1000, 1019 (7th Cir. 2002).

²⁸⁴ *Id.* at 1015 (emphasis added).

²⁸⁵ See Barkin, *supra* note 277, at 185.

2. Application of the Intent Requirement

Of course, as with the majority of the Boims' case, difficulty arises when determining exactly how a plaintiff would go about proving the requisite level of intent. To begin, however, the first meaning of intent—that the defendant acted with the *purpose* of bringing about the result—can essentially be eliminated from discussion. As Judge Posner noted, no donor would be “foolish enough to admit his true intent.”²⁸⁶ Therefore, although in some cases it may be possible to produce evidence that a defendant acted with the purpose of bringing about this particular result, its probable rarity renders it a less useful discussion.

With regard to the second meaning of intent, however, Judge Posner stated that a plaintiff would be able to satisfy the intent element by showing that the donor defendant knows the character of the donee organization.²⁸⁷ Despite Judge Posner's somewhat imprecise description of the relevant intent rules,²⁸⁸ his *application* appears to be proper.²⁸⁹ According to Judge Posner, the Boims could have proved—and, in his opinion, did prove—that the QLI and AMS had the requisite level of intent because they knew the nature of the organizations to which they donated.²⁹⁰ In other words, a plaintiff could hold a defendant liable with evidence that the defendant knowingly “contributed to a group engaged in the open and regular pursuit of violence,”²⁹¹ because knowledge of the organization's character certainly would have caused the defendant to know that, by

²⁸⁶ *Boim III*, 549 F.3d at 699.

²⁸⁷ *See id.* at 695; *supra* text accompanying note 141.

²⁸⁸ *See supra* notes 271–74 and accompanying text.

²⁸⁹ *See* Brief for the 9/11 Families United to Bankrupt Terrorism in Support of Plaintiffs-Appellees' Supporting Affirmance of the District Court's Decision Below at 7, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (Nos. 05-1815, 05-1816, 05-1821, 05-1822) [hereinafter Brief for the 9/11 Families United to Bankrupt Terrorism].

²⁹⁰ *See Boim III*, 549 F.3d at 701–02.

²⁹¹ *See* Brief for the 9/11 Families United to Bankrupt Terrorism, *supra* note 289, at 7.

providing material support, it was substantially certain that a United States citizen would be injured or killed by the donee's violent acts.

In terms of proof, the plaintiffs could rely on circumstantial evidence to allow the fact finder to infer that the defendant had the requisite type of knowledge of the donee organization.²⁹² For instance, in *Boim*, the plaintiffs presented evidence that AMS rallied public support for individuals with ties to Hamas, such as Salah, when they were arrested for or charged with supporting terrorism.²⁹³ While such support is certainly not illegal, and although a defendant could not be held liable under § 2333 solely for engaging in such support,²⁹⁴ it does help create a basis for inferring that AMS knew that Hamas engages in terrorism.²⁹⁵ Additionally, in future cases, knowledge of the donee organization's character can be inferred somewhat easily because many or most terrorist organizations (including Hamas) are now officially designated by the U.S. government as a Foreign Terrorist Organizations (FTO).²⁹⁶ Thus, everyone is on constructive notice that these organizations engage in international terrorist activities which may injure or kill a United States citizen.²⁹⁷ In the *Boims*' case, however, Hamas had not been designated as an FTO until 1997²⁹⁸ — after David was killed and, thus, after the relevant donations were

²⁹² See *supra* text accompanying note 197.

²⁹³ *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 51 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

²⁹⁴ See *Boim III*, 549 F.3d at 700; *Boim I*, 291 F.3d 1000, 1023 (7th Cir. 2002) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982)).

²⁹⁵ See *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 911 (N.D. Ill. 2004).

²⁹⁶ As Judge Rovner noted, a donation to Hamas or any other designated FTO after its designation in 1997 could serve as *prima facie* proof of even one's *purposeful* intent to further terrorism, *Boim III*, 549 F.3d at 712, and thus could also create an inference of the lesser level of intent.

²⁹⁷ See Breinholt, *supra* note 276, at 1288.

²⁹⁸ See *Boim I*, 291 F.3d 1000, 1002 n.2 (citing 8 U.S.C. § 1189 (2006)); *supra* note 16.

made. Therefore, in the Boims' case, more traditional circumstantial evidence would be necessary.²⁹⁹

An additional hurdle to overcome in the Boims' case is the fact that the defendants often did not donate directly to Hamas,³⁰⁰ and, thus, inferring the defendants' knowledge of Hamas's character would be insufficient to satisfy the intent element. Rather, some of the recipient organizations were Hamas-controlled charitable organizations or were otherwise connected with the humanitarian wing of Hamas.³⁰¹ Even if this is true, however, Judge Posner stated 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."³⁰² Again, although his use of the term "knowledge" is somewhat off-target, Judge Posner aptly clarified that donating to an intermediary does not automatically relieve the defendant of liability simply because the intermediary does not engage in violent acts itself. Therefore, it can be said that a defendant has the requisite level of intent even if he provides material support to a nonviolent intermediary organization, as long as the defendant knew that the intermediary organization had a substantial connection to a violent organization, such as Hamas. This would allow the fact finder to conclude that the defendant provided material support to the intermediary with knowledge of a near certainty that it would result in the injury or death of a United States citizen by an act of international terrorism.

²⁹⁹ *But see* Exec. Order 12,947, 60 Fed. Reg. 5079, 5081 (Jan 25, 1995) (prohibiting the provision of funds to Hamas as of January 25, 1995); Brief for the 9/11 Families United to Bankrupt Terrorism, *supra* note 289, at 7–8 (noting that Hamas's reputation as a lethal terrorist organization preceded its official designation by several years" and that, based on media coverage, "donors were on notice of Hamas's commitment to suicide bombings" even as of April 1994).

³⁰⁰ *See Boim III*, 549 F.3d at 706.

³⁰¹ *Id.*

³⁰² *Id.* at 698.

C. Causation & Proximate Causation

Finally, under either a primary or secondary liability theory, and in addition to some level of intent, a plaintiff must also prove the other elements of an intentional tort—namely, causation and proximate causation.

Judge Rovner’s heated attack on Judge Posner’s causation analysis³⁰³ made it appear as though she vehemently disagreed with the causation rules that he reviewed. However, the standards laid out by Judge Rovner for proving causation are quite similar to those described by Judge Posner. For instance, both judges agreed that proving traditional but-for causation is not necessary,³⁰⁴ and that the Boims did not need to prove that the defendants’ material support was somehow used to facilitate the specific attack that killed David Boim.³⁰⁵ Similarly, both judges agreed that the Boims would not need to prove that each defendant was the sole or principal cause of Hamas’s terrorist activity in general, but rather that they must at least prove that the defendant was “part of the causal chain that indirectly facilitated Hamas’s terrorist activities.”³⁰⁶ For the reasons set forth by both judges, it appears as though these causation principles are fundamentally sound, and should be applied to § 2333 cases.

As with the intent element, the *application* of the causation standard to the Boims’ case illustrates the complexity of these cases, and it was also seemingly the main reason Judge Rovner felt that Judge Posner had eliminated the requirement of proving causation.³⁰⁷ In Judge Rovner’s opinion, the Boims had not yet proven causation, and therefore, if for no other reason, she believed the case should have

³⁰³ See *Boim III*, 549 F.3d at 705, 709–10; *supra* notes 198–200.

³⁰⁴ See *id.* at 695; *Boim II*, Nos. 05-1815, 05-1816, 05-1821, 05-1822, at 64 (7th Cir. 2007), <http://www.ca7.uscourts.gov/tmp/PU0UUODT.pdf>.

³⁰⁵ See *Boim III*, 549 F.3d at 695; *id.* at 709–10 (Rovner, J., dissenting).

³⁰⁶ Matthew T. Glavin, *Combating Terrorism: Will Civil Penalties Help Win the War on Terror?*, 14 PUB. INT. L. REP. 99, 101 (2008); see *Boim III*, 549 F.3d at 695–97; *Boim II*, at 64–66, 71.

³⁰⁷ See *Boim III*, 549 F.3d at 705.

been remanded.³⁰⁸ In fact, at oral argument and in their briefs for the *Boim II* appeal, the Boims' counsel acknowledged that they did not even attempt to prove causation³⁰⁹—because they (correctly) thought that *but-for* causation did not have to be proven in an aiding and abetting case, and because they (mistakenly) thought *Boim I* had only required them to prove *proximate* causation.³¹⁰ However, as both Judge Posner and Judge Rovner pointed out, although traditional *but-for* causation is not a necessary element in an aiding and abetting case, some sort of legal causation must still be established—in *addition to proximate causation*.³¹¹

Under the proper causation standard, a plaintiff would have to prove that the recipient of the defendant's material support was "sufficiently affiliated with" the terrorist organization, such that the material support "indirectly supported [the organization's] terrorist mission."³¹² As this applies to the Boims' case, it would require proof that "QLI's and AMS's actions amounted to at least a sufficient cause of the terrorist act that killed David Boim, even if, on [the] facts, there were multiple such causes."³¹³ In her opinion in *Boim II*, Judge Rovner detailed numerous similar cases where this type of causation standard was utilized.³¹⁴ The fact that plaintiffs were able to prove causation under the standard set forth in these cases shows that requiring plaintiffs to prove causation is not unduly burdensome;

³⁰⁸ *Boim III*, 549 F.3d at 705.

³⁰⁹ See Brief of Appellee, *supra* note 30, at 23–24 (citing *Boim I*, 291 F.3d 1000, 1011–12) (7th Cir. 2002)) (arguing that *Boim I* held that § 2333's "by reason of" language only required them to prove proximate causation); Audio recording: Oral Argument (Part 2) for *Boim v. Holy Land Found. for Relief & Dev.*, Nos. 05-1815, 05-1816, 05-1821, 05-1822 (7th Cir. 2007) (Nov. 30, 2005), available at <http://www.ca7.uscourts.gov/tmp/MN0S7YW6.mp3> (argument of Nathan Lewin, counsel for Stanley and Joyce Boim).

³¹⁰ See *Boim II*, at 73.

³¹¹ See *Boim III*, 549 F.3d at 695–97; *Boim II*, at 710–11).

³¹² *Boim III*, 549 F.3d at 724 (Wood, J., dissenting).

³¹³ *Id.* at 723; see also *Boim II*, at 65 (requiring "some evidence of a causal link between a defendant's conduct" and the type of attack that killed David Boim).

³¹⁴ See *Boim II*, at 66–72; *supra* note 204 and accompanying text.

rather, Judge Rovner's causation requirement is "sufficiently flexible to account for the reality that a terrorist act may have many causes without abandoning the longstanding tort requirement that an act have some factual nexus with the plaintiff's injury before it may be deemed a basis for liability."³¹⁵

Finally, with regard to proximate causation, the proper standard is merely that the plaintiff's injury or death was a "natural and foreseeable consequence" of providing the material support.³¹⁶ Judge Posner correctly pointed out that, in § 2333 cases, this standard would allow for the imposition of liability even a significant number of years after the actual support was given.³¹⁷ While this rule seems somewhat atypical, it makes sense, given the nature of terrorism.³¹⁸ This is because if a defendant provides material support to an organization, with knowledge of a substantial certainty that it will result in the injuring or killing of a United States citizen by an act of international terrorism, it simply does not matter if the act of terrorism leading to an American's injury or death occurs fifty years after the donation. It is true that, "as the temporal or factual chain between the tortious act and the harm becomes ever longer, the likelihood of intervening or superseding causes becomes greater";³¹⁹ however, even if the donated money is never actually used to carry out an act of terrorism, the donor's money or other material support could be used to keep the terrorist organization afloat, enabling it to continue to exist even fifty years later and, thus, enabling the terrorist act to occur³²⁰. Therefore, because the injury or death of an American citizen by an act of international terrorism is certainly a "natural and foreseeable consequence" of providing material support to an organization

³¹⁵ *Boim II*, at 72.

³¹⁶ *See Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983); *see also Boim II*, at 61–62.

³¹⁷ *See Boim III*, 549 F.3d at 699–700; *supra* text accompanying note 159.

³¹⁸ *See Boim III*, 549 F.3d at 700.

³¹⁹ *Id.* at 724 (Wood, J., dissenting).

³²⁰ *Id.* at 700 (majority opinion) ("Seed money for terrorism can sprout acts of violence long after the investment.").

involved in terrorism³²¹—even fifty years later—the proximate causation requirement likely will not present a significant obstacle to liability in § 2333 cases.

In sum, the most appropriate framework for holding a donor liable under § 2333 would require a plaintiff to prove that:

- (1) the defendant either
 - (a) violated §§ 2339A or 2339B (primary liability); or
 - (b) (i) knew of the organization’s illegal activities when it provided material support; (ii) engaged in some act of helping the organization’s illegal activities; and (iii) aided a principal who performed a tortious act that caused the relevant injury;
- (2) the defendant either
 - (a) acted with the purpose of bringing about the injury or death of a United States citizen via an act of international terrorism; or
 - (b) acted despite knowing that the injury or death of a United States citizen via an act of international terrorism was substantially certain to result;
- (3) the recipient of the defendant’s material support was sufficiently affiliated with a terrorist organization, such that the material support indirectly supported the terrorist organization’s violent goals; and
- (4) the plaintiff’s injury or death was a natural and foreseeable consequence of providing support.

CONCLUSION

As terrorism continues throughout the world, so too will grieving families’ use of § 2333. Following in the Boims’ footsteps, other families will use § 2333 both to seek justice for their loved ones killed by senseless terrorist acts, and to bankrupt the financiers who enable such violence. Because other courts will look to the *Boim* decisions as the “critical authority” on § 2333,³²² it was vital for the Seventh Circuit to employ the most legally sound standards when deciding

³²¹ See *id.* at 694.

³²² Brief of Appellee, *supra* note 30, at 17.

Boim III. Unfortunately, although the court likely reached the correct result in *Boim III*, neither Judge Posner's nor Judge Rovner's framework incorporated the correct standard for each essential element of § 2333. The framework advocated in this Note, however, seeks to strike the delicate balance between following the traditional principles of tort law and fulfilling the purpose of § 2333.