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# How Far Is Too Far?: The Proper Framework for Civil Remedies Against Facilitators of Terrorism

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# How Far Is Too Far?

## THE PROPER FRAMEWORK FOR CIVIL REMEDIES AGAINST FACILITATORS OF TERRORISM

### INTRODUCTION

Perhaps no single issue in recent history has galvanized a greater governmental response than the fight against terrorism. Prior to 1992, that fight from a judicial standpoint was limited to criminal claims brought by the U.S. government against individuals and groups directly responsible for carrying out terrorist acts against Americans.[1] Since then, new events and new understandings of the nature of terrorism have triggered several expansions in the anti-terrorism statutes, most notably the addition of a civil remedy and the extension of criminal liability to include those who provide material support to terrorists.[2]

Since the introduction of these two provisions, courts have struggled to determine the elements of the civil cause of action under 18 U.S.C. § 2333 and how far such civil liability extends.[3] These issues have arisen primarily in cases in which terrorist victims have sued financial institutions or other organizations that allegedly provided money to the terrorists who caused their injuries.[4] While initially hesitant to extend civil liability beyond those directly involved in the attack,[5] courts have recently allowed claims against indirect financiers through a variety of theories and with little consistency in terms of the elements required for a successful claim.[6] In response, other courts and scholars have pushed back against this expansion, arguing that it violates general tort requirements and the intent

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[1] *See* 18 U.S.C. § 2332 (2012).

[2] *See* 18 U.S.C. §§ 2333, 2339A, 2339B, 2339C; *see also* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 493 (E.D.N.Y. 2012) (discussing history of statute).

[3] *See Gill*, 893 F. Supp. 2d at 483 ("Much of the relevant law is unsettled.")

[4] *See*, *e.g.*, *id.*; Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000 (7th Cir. 2002).

[5] *See, e.g.*, *Boim I*, 291 F.3d at 1011.

[6] *See Gill*, 893 F. Supp. 2d at 483 (describing different approaches courts have taken).

of Congress that the statute reach only those directly involved in the commission of a terrorist attack.[7]

This note will argue for a middle ground between the two extreme ends of this argument, expanding civil liability beyond those directly involved in the attack, but limiting it to only those facilitators whose material support proximately caused a plaintiff's injuries. Expanding liability beyond the principle actors is the best, and perhaps the only, way to effectively go after terrorist organizations. In virtually all cases, the primary actors are exceedingly difficult to find and have little if any attachable assets, meaning that limiting the civil remedy to these individuals would rarely, if ever, provide an actual remedy to a victim. On the other end, allowing suits against individuals and groups who fund terrorist activity will not only provide the victim with a chance to recover actual damages, it will go a long way toward disrupting the activities of terrorist groups.

Part I will examine the creation of the civil remedy, trace the remedy's expansion through a series of Seventh Circuit decisions, and then consider corresponding push-back and criticism to the expansion. Part II will look at approaches other courts have taken. Part III will argue that legislative history, the plain language of the statute, and policy considerations all support expanding liability beyond the principal actors. Part IV will first argue that the requirement of proximate cause will sufficiently limit the scope of liability and, second, will propose a framework by which to determine when material support has proximately caused plaintiff's injuries.

## I. CREATION OF REMEDY AND EXPANSION IN THE *BOIM* CASES

The provisions of § 2333 were initially enacted to provide victims of international terrorism a way to bring suit against the foreign individuals or groups who carried out the attack, who previously were beyond the jurisdictional reach of American courts. Eventually, courts expanded the statute to reach not only those who directly carried out the attack, but those who provided assistance to these groups.

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[7] *See, e.g.*, Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 580-81 (2013).

### *A. Creation of Civil Remedy*

Congress adopted the current version of 18 U.S.C. § 2333 on October 29, 1992, as part of the Federal Courts Administrative Act of 1992.[8] Section 2333 reads in part:

> 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 therefor 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.[9]

The provision was largely a response to two terrorist attacks that occurred in the 1980s that highlighted gaps in the jurisdictional authority of U.S. courts. The first incident occurred in 1985, when terrorists hijacked a cruise ship travelling through the Mediterranean Sea and killed Leon Klinghoffer, an American citizen.[10] Klinghoffer's widow and other victims of the cruise ship hijacking brought suit against, among others, the Palestinian Liberation Organization (PLO), which was allegedly responsible for the attack.[11] Following a lengthy battle over jurisdiction, the court eventually allowed the claim against the PLO to proceed, because it determined that it fell within certain admiralty-related provisions of federal jurisdiction.[12] When Congress introduced Section 2333, it recognized that had the attack not occurred at sea, Ms. Klinghoffer would likely be without a remedy, noting that "a similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."[13] Further, as reflected in the testimony of Klinghoffer's daughter to Congress during hearings on Section 2333, following the initial favorable ruling on subject-matter jurisdiction, the

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[8] *See* Federal Courts Administration Act, Pub. L. No. 102-572, 106 Stat 4506 (Oct. 29, 1992). The statute actually has a somewhat complicated legislative history. It was first introduced as the Civil Remedies for Victims of Terrorism Act by Senator Charles Grassley in 1990, and incorporated into the Military Construction Appropriations Act of 1991. *See* Military Construction Appropriations Act, Pub. L. No. 101-519, 104 Stat 2240 (Nov. 5, 1991). The bill was repealed in 1991, then reintroduced and re-adopted in 1992. *See id.*

[9] 18 U.S.C. § 2333 (2012).

[10] *See* H.R. REP. No. 102-1040, at 5 (1992) ("The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a comprehensive legal response to international terrorism.").

[11] *See* Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated on other grounds*, 937 F.2d 44 (2d Cir. 1991).

[12] *See id.*, at 858-59.

[13] H.R. REP. 102-1040, at 5.

family became embroiled in a long and costly fight to secure personal jurisdiction over the PLO, eventually settling more than a decade after the original incident.[14]

The second attack that spurred the creation of the civil remedy occurred in 1988, when two Libyan terrorists smuggled a bomb onto a Pan Am flight that exploded over Scotland, killing 270 people.[15] The victims' families were eventually able to secure a judgment against Pan Am for willful misconduct in allowing the bomb onto the plane.[16] Still, the families faced numerous hurdles in trying to bring a suit against the terrorists responsible for the attack. Notably, even after the two smugglers were identified and indicted by a federal grand jury, Libya refused to turn the men over to U.S. authorities to stand trial.[17]

Together, these two incidents provided the impetus for reform. Congress eventually passed Section 2333's civil remedy to ensure that terrorist attack victims and their families could file suit in U.S. courts and have a remedy available to them for injuries stemming from those acts of terrorism.[18]

### *B.* Boim I

It was not until 2002, ten years after Section 2333 first became law, that it was first addressed by the courts in a series of cases in the Seventh Circuit arising from the killing of David Boim, a dual American and Israeli citizen, by members of Hamas in Israel in 1996.[19] Boim's parents brought suit under Section 2333 against Hamas and the two identified Hamas members who carried out the attack.[20] They also named as defendants two American nonprofit organizations, Quiranic Literary Institute (QLI) and Holy Land Foundation (HLF). QLI was an Illinois organization engaged in translating sacred Islamic texts.[21] HLF was a Texas group that raised money for

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[14] *Anti-Terrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. On Courts & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 56-57 (1991) [hereinafter *Anti-Terrorism Hearing*] (statement of Lisa Klinghoffer).

[15] David Treadwell, *Pan Am Guilty of 'Willful Misconduct': Verdict: Jury Finds Airline, now Defunct, to be Negligent in the Lockerbie Bombing that Claimed 270 Lives. Victims' Families can now Seek Further Damages*, L.A. TIMES (July 11, 1992), http://articles.latimes.com/1992-07-11/news/mn-1480_1_willful-misconduct.

[16] *Id.*

[17] Treadwell, *supra* note 15.

[18] *See infra* Part III.A

[19] Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1002, 1009 (7th Cir. 2002) ("No court has yet considered the meaning or scope of section[ ] . . . 2333, and so we write upon a tabula rasa.").

[20] *Id.* at 1004.

[21] *Id.* at 1003.

humanitarian relief efforts.[22] According to the Boims, the groups were also fronts for Hamas, raising and funneling money for the terrorist group in support of its terrorist activities.[23] In *Boim I*, QLI and HLF moved to dismiss the case for failure to state a claim, arguing that Section 2333 did not provide a cause of action beyond those directly involved in the attack.[24] In response, the Boims put forth three theories for establishing their claim against QLI and HLF: (1) Donating money to Hamas satisfies § 2331's definition of international terrorism; (2) Section 2333 incorporates into the civil remedy the criminal material support provisions of §§ 2339A, 2339B and 2339C, which criminalizes the provision of material support, including monetary support, to terrorist groups; and (3) Section 2333 provides for civil aiding and abetting liability.[25] The district court denied the motion to dismiss, rejecting Boim's first theory but accepting their second and third theories.[26]

The Seventh Circuit agreed with the district court on the first theory, that solely providing money to Hamas, without more, did not constitute "international terrorism" under § 2333.[27] Section 2333 defines international terrorism, by reference to § 2331, as activities that "involve violent acts or acts dangerous to human life," appear intended to intimidate or coerce, and occur primarily outside of the United States.[28] The Seventh Circuit in *Boim I* decided that merely providing money to a terrorist group did not constitute a violent act or act dangerous to human life, concluding that to label such activity as terrorism would give § 2333 "an almost unlimited reach."[29]

The Seventh Circuit also accepted Boim's second theory, that § 2333 incorporated §§ 2339A and 2339B, which criminalize the provision of material support to terrorist groups and terrorist activity.[30] Section 2339A makes it a crime to provide material support, including furnishing money or financial services, with the intention that the support be used to facilitate terrorist activity.[31] Section 2339B criminalizes the provision of support to known terrorist groups, regardless of

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[22] *Id.*
[23] *Id.* at 1004.
[24] *Id.*
[25] *Id.* at 1005.
[26] *Id.* at 1005-06.
[27] *Id.*
[28] 18 U.S.C. § 2331(1)(A) (2012).
[29] *Boim I*, 291 F.3d at 1009.
[30] *Id.* at 1012, 1015; 18 U.S.C. §§ 2339A, 2339B.
[31] 18 U.S.C. § 2339A.

whether the donor intends that the support be used to facilitate terrorist activity.[32] The Seventh Circuit concluded that because Congress chose to impose criminal liability for such behavior, they must have intended to impose civil liability as well.[33]

Finally, the Seventh Circuit agreed with the district court that § 2333 provided for civil aiding and abetting liability. In opposing this theory, QLI and HLF noted that the Supreme Court in *Central Bank of Denver N.A. v. First Interstate Bank of Denver* held that civil aiding and abetting liability is only available where the specific statute expressly provided for it.[34] The Seventh Circuit held that *Central Bank* did not apply to § 2333 for four reasons. First, *Central Bank* involved an implied civil cause of action (the SEC's provision against securities fraud does not contain an express civil cause of action, but one has been implied by the courts), while § 2333 involved an express civil cause of action.[35] Second, based on the legislative history, the court concluded that Congress intended § 2333 to include general tort principles, including aiding and abetting liability.[36] Third, the court concluded, based on the legislative history and the language of the statute, that Congress intended that civil liability in § 2333 to be at least as extensive as the criminal liability provided for under §§ 2339A and 2339B.[37] Specifically, the court pointed to the phrase "involve . . . acts dangerous to human life" in the definition of international terrorism in concluding that such broad language necessarily showed Congress's intent to impute all avenues of traditional criminal and civil liability into the anti-terrorism provisions.[38] Aiding and abetting, the court concluded, was both well-ingrained in traditional notions of tort law and, in the context of facilitating terrorist activity, was clearly an activity that "involve[d] acts dangerous to human life."[39] Finally, again pointing to language from the legislative history, the court concluded that in passing § 2333, Congress intended to go after the funding of terrorist group and that disallowing aiding and

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[32] 18 U.S.C. § 2339B; *see also* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 504 (E.D.N.Y. 2012).

[33] *Boim I*, 291 F.3d at 1019.

[34] *See id.* at 1005*; see also* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 165 (1994) (holding that Section 10(b) of the Securities Exchange Act of 1934 does not provide a private right of action for aiding and abetting).

[35] *Boim I*, 291 F.3d at 1019.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1015.

[39] *Id.* at 1020.

abetting liability would thwart that effort.[40] The court then went on to explain the elements of an aiding and abetting cause of action, pointing to *Halberstam v. Welch*, in which the Supreme Court set out the elements of civil aiding and abetting liability.[41] Under this framework, one is liable where they provide "substantial assistance" to another in accomplishing a tortious act.[42]

Thus, in the first instance of a court encountering the § 2333 civil cause of action, the *Boim I* court allowed a Hamas victim's survivors to bring a civil claim against two alleged Hamas donors on two separate theories: (1) primary liability, by concluding that the civil claim incorporated the material support activities included in the criminal provisions; and (2) secondary liability, by concluding that the civil claim includes aiding and abetting liability.

### *C.* Boim II*,* Boim III*, and Criticism*

Following the ruling in *Boim I*, affirming the denial of the defendant's motion to dismiss, the case returned to the district court. In 2004, the district court granted summary judgment to the plaintiff against all defendants except QLI.[43] The court concluded that plaintiffs satisfied the elements for aiding and abetting liability against HLF: (1) David Boim was killed by an attack carried out by Hamas, and (2) HLF provided material support to Hamas knowing that Hamas was engaged in terrorist activities.[44] The Seventh Circuit reversed and remanded in 2007 (*Boim II*).[45] In *Boim II*, the Seventh Circuit reiterated its holding that aiding and abetting was available under § 2333.[46] However, it concluded that even in such secondary liability cases, there must be a showing of causation, requiring the plaintiff's injuries to be a foreseeable consequence of the defendant's contributions to Hamas.[47] In this case, the court concluded it was not sufficiently foreseeable

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[40] *Id.* at 1019.

[41] *See id.* at 1012 (citing Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983)).

[42] *Id.*

[43] Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 931 (N.D. Ill. 2004).

[44] *Id.* The second element was satisfied by collateral estoppel, as the D.C. Circuit had previously affirmed a criminal conviction against HLF for materially supporting Hamas. *Id.*

[45] Boim v. Holy Land Found. for Relief & Dev. (*Boim II*), 511 F.3d 707 (7th Cir. 2007) (order vacating judgment); *see also* Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 688 (7th Cir. 2008) (discussing findings of the *Boim II* court).

[46] *See Boim III*, 549 F.3d at 688.

[47] *Id.* at 692.

that HLF's procurement of funds and other support to Hamas would result in plaintiff's injuries.[48]

Plaintiffs petitioned for and received rehearing by the Seventh Circuit en banc (*Boim III*).[49] In *Boim III*, the Seventh Circuit reversed course in several key respects, eliminating aiding and abetting liability, but arguably expanding the reach of § 2333. First, the court reversed its *Boim I* holding as to aiding and abetting liability, concluding that *Central Bank* controlled, and thus Congress's silence meant there was no aiding and abetting liability.[50] Further, the court reasoned that to allow aiding and abetting liability would expand "the federal courts' extraterritorial jurisdiction," a power that is reserved to Congress.[51] After rejecting aiding and abetting liability, the court turned to the elements required for a primary liability through incorporation claim. While the court concluded that causation is required, it rejected the *Boim II* holding that causation—both cause in fact and proximate cause—was lacking as to HLF.[52]

On the issue of cause in fact, the court equated the case with the multiple fires example from torts. The multiple fires example involves two fires simultaneously converging to burn down a building.[53] Because the fires converged, it is impossible to determine which fire caused the building to burn down. In such cases, the analysis shifts from whether each individual event caused the result to whether each event was a substantial factor in bringing about the result.[54] The court reasoned that although it was impossible to determine whether an individual monetary donation to a terrorist group caused the attack, the requirement of but-for causation would be relaxed to avoid a situation in which an injured party was without a remedy.[55]

On the issue of proximate cause, the court rejected the *Boim II* conclusion that the plaintiff's injury was not a foreseeable result of HLF's support.[56] "Giving money to Hamas," knowing the nature of its activities, the court reasoned, was

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[48] *Id.* at 698-700.
[49] *Id.* at 688.
[50] *Id.* at 689.
[51] *Id.* at 689-90.
[52] *Id.* at 690-92.
[53] *Id.* at 695-97.
[54] *Id.* at 697.
[55] *Id.*
[56] *Id.* at 698.

analogous to "giving a loaded gun to a child."[57] That is, just as it would be reasonably foreseeable that giving a gun to a child would result in the child or someone else being shot, it is reasonably foreseeable that giving money to Hamas would lead to a terrorist act resulting in injury. The court remanded the case as to HLF to determine whether there was causation in this case, as the lower court had not even addressed the subject in its original summary judgment decision.[58]

The dissent in *Boim III* criticized the holding in several respects. First, it argued that the majority's new conception of causation in these cases—essentially that any financial contribution to a terrorist group was a cause of a subsequent attack by that group—effectively eliminated a causation requirement.[59] Second, the court noted that by treating the case as one of primary rather than secondary liability, it eliminated the need to show that the defendants intended that their support would be used to facilitate terrorist activity.[60] As in this case, recklessness would now be sufficient; a donor who knew or should have known the nature of the organization could be held liable. Taken together, the dissent concluded, "[t]his sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity."[61] In the case of HLF, the dissent concluded, there was a genuine issue whether it knew or intended that its donations to various alleged Hamas front charities would in fact be used to facilitate Hamas's terrorist activity.[62] The dissent envisioned liability for a potentially endless array of groups and individuals, including groups who host Hamas speakers at their conventions or publish sympathetic editorials.[63] At some point, the dissent argued, "the harm is simply too remote from the original tortious act to justify holding the actor responsible for it."[64] Finally, and relatedly, the dissent argues that the majority's holding would expose a donor to potentially endless liability, as one who gives

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[57] *Id.* at 690.
[58] *Id.* at 701.
[59] *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).
[60] *Id.* at 707.
[61] *Id.* at 705.
[62] *Id.* at 706.
[63] *Id.*
[64] *Id.* at 724.

money to Hamas in 2000 could theoretically be held perpetually liable for any subsequent Hamas attacks.[65]

### *D. Sant's Criticism*

Geoffrey Sant, a professor at Fordham Law School, advances two primary criticisms of *Boim III* and other court decisions that allowed claims to proceed against banks under § 2333, namely that (1) providing financial support does not fall within the meaning of "international terrorism," as defined by § 2331; and (2) that the legislative history supports a more narrow reading of § 2333.

First, Sant argues that the term "international terrorism" in § 2333 and its definition in § 2331 as an activity that "involves acts dangerous to human life" does not include the furnishing of money or financial services.[66] He points to *Stutts v. De Dietrich Group*, one of the earliest known § 2333 decision involving a bank.[67] In *Stutts*, a group of former military members exposed to toxic gas while deployed in Iraq brought suit against De Dietrich Group, a bank that issued letters of credit to alleged producers and suppliers of the sarin gas used against the injured plaintiffs.[68] The court referenced the decision in *Boim I*—which held that funding by itself did not constitute international terrorism—in concluding that merely issuing letters of credit similarly did not constitute "an act dangerous to human life" as required by the international terrorism definition.[69] Sant reasons that it is hard to envision corporate bankers acting in their normal business duties as fitting into the conception of international terrorists.[70]

Sant's second argument is that Congress intended § 2333 to be a jurisdictional and largely symbolic provision with limited reach, specifically targeting the terrorist actors themselves and providing actual relief in only the very small number of cases where these terrorist groups have attachable assets in the United States.[71] Sant first points to several examples from the legislative history that he says demonstrates that Congress adopted the civil remedy as a

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[65] *Id.*

[66] *See* Sant, *supra* note 7, at 579.

[67] *Id.* at 579; Stutts v. De Dietrich Grp., No. 03-CV-4058, 2006 WL 1867060, at *1 (E.D.N.Y. June 30, 2006).

[68] *Stutts*, 2006 WL 1867060, at *1.

[69] *Id.* at *2-*3.

[70] Sant, *supra* note 7, at 539.

[71] *Id.* at 549.

purely jurisdictional provision. Sant focuses on the *Klinghoffer* and *Pan Am* cases, which were the impetus behind the adoption of § 2333.[72] First, he notes that the main issue in the *Klinghoffer* case, was the court's inability, but for certain admiralty provisions, to secure personal jurisdiction over a terrorist group with no contacts with the United States[73] The civil remedy, Sant argues, was created as a way to close this jurisdictional loophole, which would allow terrorist victims to sue their attacker if the attack occurred at sea but not on land or in an airplane.[74] Sant focuses on testimony given by Joseph Morris, the president of the Lincoln Legal Foundation, during a subcommittee hearing on the civil remedy, where he emphasized that § 2333's purpose was to redress jurisdictional issues.[75] Morris testified that

> Victims who have attempted to sue terrorists have encountered numerous jurisdictional hurdles and have found the courts reluctant to intrude in the absence of clear statutory mandates showing them what their jurisdictional boundaries are[76] . . . . Whereas that [*Klinghoffer*] opinion rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our federal courts and a cause of action for cases where an American has been injured by an act of terrorism overseas.[77]

Sant also cites to testimony by Lisa Klinghoffer, the victim's daughter, who testified that "it's taken our family [four and a half] years to give us the right to sue the PLO. We are hoping that other families in the future won't have to go through the years that we have gone through. They will have that . . . right."[78]

Sant then points to examples from the legislative history that he contends shows Congress's intent to limit the § 2333 civil remedy to the terrorist actors directly involved in carrying out the attacks. For example, he points to testimony by the chairmen of a group representing the victims of the Pan Am attack, who did not mention third-party actors, instead stating that the civil remedy "would permit victims of terrorism to file civil actions against *terrorists and terrorist*

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[72] *See id.*; *see also supra* Part I.A.

[73] Sant, *supra* note 7, at 541.

[74] *Id.*

[75] *Id.* at 541-42.

[76] *Anti-Terrorism Hearing*, *supra* note 14, at 78 (statement of Joseph Morris, President, Lincoln Legal Foundation).

[77] *Id.* at 17.

[78] *Id.* at 75 (statement of Lisa Klinghoffer).

*organizations*."[79] Sant also points out that the victims of the *Klinghoffer* and *Pan Am* cases, the cases that triggered § 2333, were able to secure monetary relief against third parties such as the airline and cruise operator, and that the families sought the civil remedy as a way to sue the actual perpetrators and either get money (if the terrorist group could be found and had assets in the United States), or, more likely, some sort of moral vindication or sense of justice.[80] As Sant notes, Lisa Klinghoffer seems to suggest as much in her testimony before Congress: "If one such as Abu Abbas [the mastermind of the attack that killed her father] or his agents can be found within our borders, he could be made to answer for his deeds."[81] Sant further points to statements by Senator Grassley, the sponsor of the bill, that "[T]his bill provides victims with the tools necessary to *find terrorists' assets and seize them*," which suggests he was focused on instances where a terrorist group itself may have assets in the United States.[82]

Sant argues there are several factors that have led judges to assume an activist role in these cases, ignoring Congressional intent and contorting the definition of international terrorism in order to include the activities of banking defendants. These include the horrendous nature of terrorist acts, the desire to punish terrorist groups, the overwhelmingly sympathetic nature of the victims, and the desire to provide victims with a financial remedy.[83] These sentiments are reflected in the decision of courts. Sant notes, for instance, that the *Boim II* opinion contains references to David Boim's "trademark hug and smile." He further contends that in most murder cases, judges do not make these kind of sympathy-inducing references to victims, but rather only refer to victims to explain the circumstances of the death or in reference to other more factual information. Sant perceives this as evidence of judges' particular susceptibility to sympathy in these cases.[84]

Sant also focuses at length on a particular sentence in the *Boim III* opinion. After concluding that § 2333 does not provide for aiding and abetting liability, the court goes on to say that "an alternative and more promising ground for bringing donors . . . within the grasp of section 2333" would be

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[79] Sant, *supra* note 7, at 544 (emphasis in original).
[80] *Id.* at 546.
[81] *Anti-Terrorism Hearing*, *supra* note 14, at 59, 62.
[82] Sant, *supra* note 7, at 545 (emphasis in original).
[83] *See id.* at 535.
[84] *See id.* at 536, 557.

the primary liability through incorporation theory.[85] Sant calls this "a remarkable and seemingly revealing passage," suggesting that the "more promising" language shows that "the court may have been searching for a means of reaching a predetermined result."[86] As Sant notes, the dissent in *Boim III* also quotes this language.[87] The dissent begins its opinion by noting that, "[t]he murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents." The dissent goes on to describe terrorism as a "scourge" before qualifying that, "it is [the court's] responsibility to ask whether [terrorism] presents so unique a threat as to justify the abandonment of" the causation requirement and to justify the other deficiencies in the majority opinion.[88]

## II. APPROACHES FOLLOWING THE *BOIM* DECISIONS

Bolstered by the ruling in *Boim I*, § 2333 became the basis for a number of new lawsuits, primarily aimed at financial institutions with alleged ties to terrorist groups. While some courts adopted, and even expanded, the *Boim I* approach, other courts pushed back.

### *A. Courts Embracing the* Boim I *Approach*

In 2004, two years after *Boim I*, the families of several Americans killed in a purported Hamas terrorist attack in Israel in 2000 brought suit in New York against Arab Bank P.L.C.[89] Arab Bank is one of the largest financial institutions in the Middle East.[90] It is headquartered in Jordan and does business all over the world.[91] According to the plaintiffs in *Linde v. Arab Bank P.L.C.*, Arab Bank maintained accounts for several groups and individuals it knew were fronts for Hamas, and that Hamas utilized these accounts to fund its terrorist activities.[92] The plaintiffs further alleged that Arab Bank was the administrator of a "universal death and dismemberment

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[85] Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 690 (7th Cir. 2008).

[86] Sant, *supra* note 7.

[87] *Id.*

[88] *Boim III*, 549 F.3d at 705 (Rovner, J., concurring in part and dissenting in part).

[89] Linde v. Arab Bank, 384 F. Supp. 2d 571, 575-76 (E.D.N.Y. 2005).

[90] Arab Bank, *Our Profile* (2013), http://www.arabbank.com/en/profile.aspx?CSRT=2366691262021416800.

[91] *Id.*

[92] *Linde*, 384 F. Supp. 2d at 578.

plan," through which families of Hamas agents killed or injured received a cash payment.[93] According to the plaintiffs, Hamas provided the bank with a list of eligible individuals, who then provided the bank with the necessary certificates and received payment.[94] The plaintiffs alleged that the maintenance of accounts and the handling of the payment plan facilitated and encouraged Hamas's terrorist activity, and they sought to hold them secondarily liable for the victims' injuries, relying on *Boim I*.[95] The district court, in denying Arab Bank's motion to dismiss, relied on the language and reasoning of *Boim I*, concluding that § 2333 allows for aiding and abetting liability.[96] The court further held that § 2333 allows for civil conspiracy liability, which was never addressed in *Boim I*. The court reasoned that the criminal portions of the act included conspiracy liability, and that there was no reason not to extend this to the civil remedy as well.[97] The court went on to conclude that plaintiffs' allegations established a claim under either an aiding and abetting theory or a conspiracy theory, and that, were they to prove at trial that the victims were killed by terrorists who were enrolled in the benefit plan, such proof would be sufficient to prevail on either theory.[98]

Other courts similarly embraced the *Boim I* secondary liability holding. In *Wutz v. Islamic Republic of Iran*, a victim of an attack by a Palestinian terrorist group sued the Bank of China in the D.C. District Court, alleging that the Bank made several wire transfers to the Palestinian group through its leadership in Iran.[99] Relying on the aiding and abetting liability theory for the reasons set forth in *Boim I*, the court held that the plaintiffs pled sufficient facts to state an aiding and abetting claim against Bank of China. The court pointed to the allegations that the Palestinian terrorist group carried out the attacks that injured plaintiff, and that the Bank knowingly provided them with material assistance.[100]

Similarly, in 2010, the District Court for the Southern District of Florida recognized both the aiding and abetting theory and conspiracy liability theory under § 2333. *In Re Chiquita Brands Intern, Inc., Alien Tort Statute and*

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[93] *Id.* at 577.
[94] *Id.*
[95] *Id.* at 577, 582-83.
[96] *Id.* at 583.
[97] *Id.*
[98] *Id.* at 585.
[99] Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 18 (D.D.C. 2010).
[100] *Id.* at 54-57.

*Shareholder Derivative Litigation* involved five missionaries who were kidnapped in 1993 and 1994 and eventually killed by a Columbian terrorist group, Fuerzas Armadas Revolucionarias de Colombia (FARC).[101] Chiquita, an Ohio-based company engaged in the production and distribution of bananas, made numerous secret payments and smuggled weapons to FARC from 1989 through 1997.[102] Chiquita pled guilty in 2007 to numerous violations of the criminal terrorism provisions.[103] Following this guilty plea, families of the five victims brought suit against Chiquita under both primary and secondary liability theories.[104] The court concluded that the plaintiffs pled sufficient facts to establish a claim under the *Halberstam* test for aiding and abetting liability,[105] holding that Chiquita's alleged monetary donations and weapons smuggling qualified as "substantial assistance."[106] Further, the court recognized civil conspiracy liability under § 2333, and held that the plaintiffs' allegations stated a conspiracy claim as there were sufficient allegations as to a common scheme between the two organizations.[107]

### *B. Pushing Back against Secondary Liability*

In 2012, another Hamas victim brought a claim against Arab Bank in the Eastern District of New York.[108] Mati Gill, a dual American-Israeli citizen, was injured by a bullet fired from the Gaza Strip, in an incident for which Hamas took credit.[109] He brought suit against Arab Bank, asserting claims under a variety of statutes, including primary and secondary liability under § 2333.[110] The court first concluded that § 2333 does not allow for civil aiding and abetting liability, relying on the rule set out by the Supreme Court in *Central Bank*.[111] The court rejected the *Boim I* reasoning that § 2333 was distinguishable from the statute in Central Bank because it involved an express cause of action and because Congress intended to expand liability beyond primary actors in the terrorism context.[112] The

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101 *In re* Chiquita Brands Int'l, 690 F. Supp. 2d 1296, 1301-02 (S.D. Fla. 2010).
102 *Id.* at 1302-03.
103 *Id.* at 1303.
104 *Id.* at 1309.
105 *Id.* at 1310; *see also supra* Part I.B.
106 *Chiquita*, 690 F. Supp. 2d at 1310-11.
107 *Id.* at 1311.
108 Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 479 (E.D.N.Y. 2012).
109 *Id.*
110 *Id.* at 479-80.
111 *Id.* at 481.
112 *Id.* at 499-500.

court concluded that *Central Bank* was not intended to be limited to implied rights of action, and that the issue of whether Congress intended to extend liability to secondary actors is irrelevant in light of the *Central Bank* rule, since Congress did not explicitly make such a distinction in the statute.[113] However, the court recognized the primary liability through incorporation theory described in *Boim I*.[114] Additionally, the court set out the specific elements a plaintiff would need to prove to succeed on such a claim. According to the court, the primary liability through an incorporation claim had three elements: wrongful act, mental state, and causation.[115] That is, first, the plaintiff must show that the defendant violated the acts and satisfied the mental state described in the specific material support criminal provision.[116] Second, the plaintiff must show that the defendant's actions proximately caused his or her injuries.[117]

The Second Circuit eventually weighed in, agreeing with the Eastern District that § 2333 did not allow aiding and abetting liability but did allow for primary liability for material supporters through incorporation. In *Rothstein v. UBS AG*, the plaintiffs, injured in a series of rocket attacks in Israel, allegedly carried out by Hamas and Hezbollah, sued UBS, a Swiss bank with offices throughout the U.S.[118] According to plaintiffs, UBS provided financial services and other forms of support to Iran, which in turn provided various forms of material support, including large amounts of money, to Hamas and Hezbollah.[119] Through this alleged chain of support, the plaintiffs sought to hold UBS primarily and secondarily liable under § 2333 for their injuries.[120] In affirming the district court's decision to grant defendant's motion to dismiss, the Second Circuit first held that § 2333 does not allow for aiding and abetting liability in light of the *Central Bank* holding.[121] The court then went on to recognize the primary liability through incorporation theory but affirmed the dismissal nonetheless because the plaintiffs had failed to plead sufficient facts, specifically as to the

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[113] *Id.*
[114] *Id.* at 502.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] Rothstein v. UBS AG, 708 F.3d 82, 84-85, 87 (2d Cir. 2013).
[119] *Id.* at 84-85.
[120] *Id.* at 88.
[121] *Id.* at 97.

connection between Iran and the terrorist groups, to plausibly show that UBS proximately caused their injuries.[122]

As demonstrated above, courts and scholars have taken § 2333 to two extremes. On the one end is Geoffrey Sant, who contends that civil actions should be limited to those directly involved in carrying out the terrorist attack that caused a particular plaintiff's injuries. On the other end is *Boim III*, which would conceivably attach civil liability to anyone who knowingly or even recklessly provided money, services, encouragement, or other support to the terrorist group responsible for the plaintiff's injuries. The proper approach to these contending positions lies somewhere in between.

## III. LEGISLATIVE HISTORY, PLAIN LANGUAGE, AND POLICY SUPPORT EXTENDING LIABILITY BEYOND THOSE DIRECTLY INVOLVED IN THE ATTACK

### *A. Legislative History*

The legislative history of § 2333 indicates that Congress intended the provision to be read broadly. The language of the statute was left intentionally broad, and it was passed as part of Congress's effort to expand the scope of its fight against terrorism and provide victims with a remedy.

A 1992 report from the House Judiciary Committee regarding the adoption of § 2333 notes that, "The recent case of the Klinghoffer family is an example of this gap in our efforts to develop a *comprehensive* legal response to international terrorism."[123] The *Klinghoffer* case involved a family left without a legal remedy and a group of individuals that were not held accountable for their actions due to jurisdictional limitations. In emphasizing its desire for § 2333 to be a *comprehensive* response to this gap, Congress indicates its intent for § 2333 to be read as broadly as possible as a way to eliminate the previous inequities.

The Senate Judiciary Committee Report also highlights the expansive nature of the legislation. It notes that,

> [Section 2333] would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By

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[122] *Id.*

[123] H.R. REP. 102-1040, at 5 (1992) (emphasis added).

> its provisions for compensatory damages, tremble [sic] damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.[124]

This passage reflects the evolving understanding in the fight against terrorism. Terrorist groups, unlike other bad actors, are virtually impossible to attack directly through the courts. Instead, these groups can be significantly deterred by securing judgments against the entities that provide them money and supplies. In recognizing that § 2333 was a key part of this new fight against terrorism, Congress clearly intended the statute would extend to these financial supporters of terrorism.

Further Congressional testimony provides additional insight into the broad and comprehensive intent of the legislators. In introducing the bill in 1991, Senator Charles Grassley noted that,

> [The Anti-Terrorism Act (ATA) civil remedy] empowers victims with all the weapons available in civil litigation, including: Subpoenas for financial records, banking information, and shipping receipts—this bill provides victims with the tools necessary to find terrorists' assets and seize them. The ATA accords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees.[125]

Later, he stated that, "[o]ur resolve to fight terrorism and equip victims with civil remedies for terrorist acts is as strong as ever."[126] Moreover, in a subsequent hearing on the bill in 1992, Senator Grassley stated, "While this bill will not permit civil actions against sovereign leaders, *it will allow the victims to pursue renegade terrorist organization and their leaders, and go after the resource that keeps them in business—their money*."[127]

Moreover, at a hearing on an earlier version of the ATA civil remedy, Joseph Morris, a former Department of Justice attorney testified that,

> I think that the bill as drafted is powerfully broad, and its intention, as I read it, is to bring focus on the problem of terrorism and, reaching behind the terrorist actors to those who fund and guide and harbor them, bring all of the substantive law of the American tort law system.[128]

Finally, the specific order in which the material support provisions were adopted shows Congress's evolving and

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[124] S. REP. NO.102-342, at 22 (1992).
[125] 137 CONG. REC. S4511-04, 1991 WL 56141, at *1 (daily ed. Apr. 16, 1991).
[126] *Id.* at 2.
[127] Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 496 (E.D.N.Y. 2012).
[128] *Anti-Terrorism Hearing*, *supra* note 14, at 136 (statement of Joseph A. Morris).

expanding sense of how to pursue terrorist groups. In 1994, 18 U.S.C. § 2339A was passed, which criminalizes providing money or other support to a terrorist group with the intention that the support be used to further the terrorist activity.[129] Section 2339B followed in 1996 as a way to close the loophole created by 2339A; it targeted individuals who give money to terrorist groups under the guise of a charitable donation.[130] This section criminalized material support to terrorist groups regardless of whether the person intended that the support would be used to facilitate terrorist activity.[131] Finally, 18 U.S.C. § 2339C, passed in 2006, extends liability beyond donating money to the mere furnishing of financial services.[132] Together, these statutes show an evolving understanding of how best to target and dismantle terrorist groups and a continually expanding commitment to pursue terrorist groups at all possible levels. The civil remedy should be read in the context of Congress's ever-evolving and ever-expanding position regarding terrorist organizations.

Sant argues that the legislative history shows that Congress intended the civil remedy to be a largely symbolic provision that would only come into play on the rare occasion when a terrorist group had attachable assets in the United States.[133] However, as noted above, the statute is broad by design and should be read in the context of current understanding. The individuals Sant quotes may not have thought it practicable or possible to identify the source of money behind terrorist groups and may have believed that a symbolic defeat of a terrorist group would have a significant impact. As recent years have shown, and as Congress's subsequent actions have revealed, the current understanding is that the most effective, and possibly the only, way to go after terrorist groups is by attacking the source of their funding.

### *B. Statutory Language*

The plain language of the statute further supports an expansive view that includes financial institutions.

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[129] 18 U.S.C. § 2339A (2012).
[130] *Id.* § 2339B.
[131] *Id.*
[132] *Id.* § 2339C.
[133] *See* Sant, *supra* note 7, at 540-43.

1. "International Terrorism"

One of Sant's principal arguments is that Congress could not have intended to extend liability to financiers because the term "international terrorism," defined as activities that "involve violent acts or acts dangerous to human life," does not include donating money or providing financial services.[134] As argued in *Boim III*, giving money to a known terrorist group is an act dangerous to human life in the same way as giving a gun to a child.[135] Notably, the definition of international terrorism does not include a requirement that the conduct be intentional or even knowing.[136] *Boim III* and the courts that have followed its course have all concluded that negligent conduct will not satisfy the statute, as treble damages are generally not available for mere negligence.[137] However, if recklessness is sufficient, as *Boim III* and others have advocated, the knowing provision of support to a terrorist group such as Hamas clearly qualifies.

The Restatement of Torts defines recklessness as engaging in an activity "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."[138] Further, in contrasting recklessness from negligence, the Restatement explains:

> "[N]egligence" excludes conduct which the actor does or should realize as involving a risk to others which is not merely in excess of its utility, but which is out of all proportion thereto and is therefore "recklessly disregardful of the interests of others." As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm.[139]

This language generally tracks the language in the international terrorism definition, and indicates a level of culpability that is consistent with a punitive, treble damages

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134 *Id.* at 537.
135 *See supra* Part I.C.
136 *See* 18 U.S.C. § 2331.
137 *See* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 497 (E.D.N.Y. 2012).
138 RESTATEMENT (SECOND) OF TORTS § 500 (1965).
139 *Id.* § 282.

civil remedy. Further, it is clear that knowingly providing support to a terrorist group satisfies this requirement. Though the utility of providing support to a terrorist group, assuming the group also engages in positive, humanitarian efforts, could conceivably be relatively high, the magnitude of risk is still sufficiently exorbitant to qualify as reckless. Magnitude of risk involves both probability and scope of potential harm.[140] For a group such as Hamas, which has engaged in numerous attacks over a long period and has expressly stated a desire to eradicate an entire group of people,[141] the probability that the group will use the support to facilitate an attack that will injure people like David in *Boim I* is very high, at least as great as the probability that a child provided with a loaded gun will cause harm to himself or another. Further, the scope of potential harm is astronomical, as Hamas and other terrorist groups generally target areas with large groups of victims to ensure maximum impact.[142]

That Congress viewed the provision of support to terrorist groups as an "act dangerous to human life" is further supported by the fact that Congress later criminalized this very activity, alongside other activities, such as hijacking an airplane, that are traditionally thought to be acts dangerous to human life.[143] Moreover, the fact that the statute specifically says "involve violent acts" rather than just "violent acts," suggesting that Congress intended to expand liability to acts that, while not inherently violent, contribute to the overall violence of the terrorist attack.[144]

2. Other Language

Further, other language in the statute supports an expansive view. The fact that Congress created a civil cause of action without expressly stating the elements of such a cause of action suggests that they intended for the claim to include the general elements and principles of tort liability.[145]

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[140] *Id.*

[141] *See* Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 694 (7th Cir. 2008) (describing Hamas as "gunning for Israelis").

[142] *See Gill*, 893 F. Supp. 2d at 485.

[143] 18 U.S.C. § 2331(1)(A) (2012).

[144] *Id.*; *Gill*, 893 F. Supp. 2d at 482 (quoting from Section 2331 and emphasizing the statute's use of the word "involve").

[145] *See Gill*, 893 F. Supp. at 522.

Further, the House report contains sections on limitations to the civil cause of action.[146] One such express limitation is that a plaintiff may not bring suit, or may be limited in discovery if the Attorney General determines it will impair a corresponding criminal action.[147] Another is that a plaintiff may not sue for injuries arising out of an act of war.[148] There is no mention on any limitation to the class of people to which a plaintiff may sue.

3. Policy

There are two primary policy justifications for providing a civil remedy to victims of terror. The first is providing the victim with justice and relief.[149] The second is punishing and hopefully hindering or even incapacitating terrorist groups in order to prevent future attacks.[150] Both of these policy goals are furthered by expanding liability beyond the principal terrorist actors to those who provide the actors with support.

The first way in which these policy goals are furthered is that given the lower standard of proof and expanded discovery, civil trials are more likely to lead to findings of liability than criminal trials.[151] Thus, as a general matter, the more people involved with terrorism that a victim may sue, the greater the remedy to the victim and the stronger the penalty to the terrorist. This is particularly true when dealing with banks, where the expanded discovery afforded in civil cases allows plaintiffs to get past bank secrecy laws that may pose a greater barrier in criminal cases.[152]

The second way these policy goals are furthered is that, terrorist groups are exceedingly hard to sue civilly, or even criminally, for a number of reasons: they are intentionally covert; they rarely have any contact in the United States; and they often have few assets, certainly not enough to satisfy a judgment following a large attack.[153] Thus, a potential plaintiff would face numerous obstacles, and likely an eventual dead

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[146] H.R. REP. NO. 102-1040, at 3 (1992).

[147] *Id.*

[148] *Id.*

[149] *See id.* at 4.

[150] *See generally Anti-Terrorism Act Hearing.*

[151] John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 315-16 (2008).

[152] *See* Sant, *supra* note 7, at 562.

[153] *Id.* at 546; *see also* Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 691(7th Cir. 2008).

end, in trying to sue a foreign terrorist group in an American court. Though § 2333 gives the courts subject matter jurisdiction, it is unlikely a plaintiff would be able to establish that a group such as a Hamas would have sufficient contacts with the United States for personal jurisdiction.[154] ?Even in the exceedingly rare case where a terrorist group had contacts in the U.S. and was brought to the U.S. to stand trial, it is likely the group would have only minimal attachable assets in the U.S., certainly not enough to satisfy a wrongful death action.[155] These issues are all illustrated in cases such as Klinghoffer and many others. The financial supporters of terrorist groups, on the other hand, are often large businesses with substantial assets and sufficient contacts in the United States to establish personal jurisdiction.[156]

Indeed, Sant concedes that were the civil remedy limited to the terrorist actors, suits would be rare and monetary awards almost non-existent. Though Sant contends that this was Congress's intent, it seems counterintuitive that Congress would create a remedy that actually did not provide any real remedy. Rather, it is more likely, especially in the context of the vigorous fight against terrorism, that Congress would intend that the remedy reach as far as the courts were willing to allow it, so as to most effectively achieve its twin goals of fighting terrorists and compensating victims.

## IV. PROXIMATE CAUSE IS PROPER LIMITATION ON CIVIL LIABILITY

Given the strong considerations supporting the expansion of civil liability to include supporters of terrorism, it is not surprising that most courts dealing with § 2333 have recognized the potential for claims against at least some class of material supporters.[157] However, even among these courts there is still wide disagreement about where to draw the line. As seen in Part I, some courts still allow claims premised on aiding and abetting liability, which has no proximate cause requirement and instead focuses on intent as the cutoff in liability.[158] Other

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[154] *See* Murphy, *supra* note 151, at 323-24.

[155] *Id.* at 327; Sant, *supra* note 7, at 546.

[156] *See* Adam N. Schupack, *The Arab Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 238 (2010).

[157] *See* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 497-502 (E.D.N.Y. 2012) (discussing different courts' approaches).

[158] *See supra* Part I.

courts have focused on the claims as ones of primary liability, and thus have used proximate cause, rather than intent, as the cutoff. As will be discussed below, proximate cause provides the most useful cutoff for these claims, as it not only incorporates intent but addresses the primary concerns voiced by those who worry about extending liability too far.

### *A. Secondary Liability is Too Expansive*

Aside from the issue that secondary liability might not even be available under § 2333 due to *Central Bank*, its reliance on intent as a cutoff on liability is inadequate. The initial summary judgment ruling against HLF in *Boim I* is illustrative of the problem. After ruling that aiding and abetting liability was available and dismissing HLF's motion to dismiss, the district judge noted that under such a theory, the Boims could prevail if they proved that HLF knowingly provided material support to Hamas.[159] In 2001, the Treasury Department pursuant to an executive order seized HLF's assets following an investigation that revealed it had ties to Hamas.[160] HLF challenged its designation as a terrorist group in federal court, and the decision was upheld by a district court and affirmed by the D.C. Circuit in 2003.[161] The D.C. Circuit recounted the district courts summary of the administrative record, which described HLF's ties to Hamas in general terms, such as "HLF has had financial connections to Hamas since its creation in 1989," and "FBI informants reliably reported that HLF funds Hamas."[162] The Boims then moved for summary judgment against HLF, arguing that through collateral estoppel, there was no issue of material fact as to one required element, namely that HLF knowingly provided material support to Hamas.[163] The district court agreed and granted summary judgment.[164]

The district court never even addressed the connection between HLF's alleged monetary donations and the attack that killed David Boim. David Boim was killed in 1996. The Treasury Departments report explains only that HLF had economic ties to Hamas as far back as 1989. It does not detail any specific

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159 Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1015 (7th Cir. 2002).

160 Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 701 (7th Cir. 2008).

161 *Id.*

162 Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 902 (N.D. Ill. 2004).

163 *Id.*

164 *Boim III*, 549 F.3d at 705.

donations or whether the donations were made to particular segment of Hamas. Such general allegations of long-term financial ties may be sufficient for a seizure of assets or a criminal conviction, but there must be some further information that it some way ties to HLF's donation to the attack that killed David Boim. This evidence may consist of specific donations close in time to the 1996 donation, a substantially large donation made to the terrorist arm of Hamas, or even some evidence indicating that at the time HLF made its donations in the early 90s, the first years of Hamas' existence, they knew or had reason to know Hamas was engaged in carrying out attacks against civilians. Under the aiding and abetting framework used by the *Boim* district court, if HLF today severed all ties with Hamas and never made another donation to them, they could nonetheless conceivably be perpetually liable to any victim of a future Hamas attack. Thus, without making some effort to tie the defendant's support to the plaintiff's particular injuries, the potential scope of § 2333 liability is too expansive.

### *B. Cause in Fact is Too Limiting*

On the other hand, requiring the plaintiffs to show that their injury would not have occurred but for the defendant's support is equally problematic as this would effectively preclude claims against any supporters. One basic problem with requiring but for cause in these cases is the issue of proof. With so many streams of money and supplies being funneled to terrorist groups, it would be virtually impossible for plaintiffs to isolate a particular donation as being involved in the commission of the attack that caused their injuries. Another fundamental issue with applying cause in fact to these cases is the problem of the fungibility of money.[165] A group like Hamas conceivably has numerous sources of support and substantial money in its reserve. Thus, were a particular group, such as HLF, to decide to withhold its donation, Hamas could move money that was allotted for another project in order to make up this shortfall and fund its next attack. In this sense, HLF's monetary support cannot be said to be a but for cause of any particular Hamas attack.

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[165] *Id.* at 698.

> Some courts have recognized this issue and decided to apply a "substantial factor" test instead.[166] This is the proper approach. To do otherwise would leave most victims without a remedy and effectively insulate terrorist groups and their financiers from liability. While it is impossible to prove that a particular donation caused a particular attack, it is undeniable that any significant provision of support to a terrorist group will substantially facilitate future attacks. The substantial factor test will encompass these significant donations that, though they cannot be tied directly to a particular attack, clearly played a role in bringing about the attack. Proximate cause presents the best cutoff for liability.

Proximate cause provides the best cutoff for liability in these cases. Two characteristics of proximate cause make it particular useful as a cutoff for liability. First, because proximate cause is an abstract, legal concept, rather than a logical one, it is able to incorporate many considerations, including mental state and timing. While, as discussed above, mental state by itself does not provide a suitable measure of liability in these cases, it weighs heavily in the ultimate determination, and proximate cause allows mental state to be considered in context along with other important factors. Relatedly, as will be discussed further below, factors such as mental state and timing are codependent. A donation made to Hamas intending to support its terrorist activities may lead to liability further into the future than a donation made recklessly. Proximate cause takes all of these considerations into account.

Second, proximate cause's focus on foreseeability and intervening cause both usefully track culpability in this context and protect against the two main concerns associated with § 2333 liability. Under traditional proximate cause formulations, an actor only faces liability for actions that are reasonably foreseeable results of the action.[167] Similarly, an intervening act cuts off liability where it is not foreseeable.[168] The first concern with § 2333 is that civil liability could be extended to a potentially endless class of groups and individuals that provide even the most remote support to a terrorist group. An example discussed in the *Boim III* dissent is the political group that has a member of Hamas speak at its convention. In the abstract, it does not seem reasonably foreseeable that inviting a Hamas member to speak will result in a Hamas attack. Thus, the

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[166] *See e.g. id.*; *see also* Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012).

[167] Jim Gash, *At The Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the Proposed Restatement of Torts*, 91 KY. L.J. 523, 586 (2003).

[168] *Id.*

subsequent attack would be a superseding intervening cause cutting off liability for the political group. On the other hand, it is reasonably foreseeable in the abstract that a knowing donation of money or weapons to Hamas will lead to an attack, and thus a subsequent attack would rightfully not cut off liability for these donors, who have provided Hamas with material assistance and thus would and should be culpable.

The second main concern with extending § 2333 liability to supporters is that it will lead to perpetual liability for all future attacks conducted by the terrorist group. Again, this concern is addressed by proximate cause. As discussed further below, the greater the time period is between donation and attack, the less foreseeable it is that the donation would lead to such an attack. That is, it is foreseeable that a large donation made to Hamas in 2013 will result in an attack in 2013 but not in 2050. Where the line is ultimately drawn will be a case by case decision, but the threat of perpetual liability is eliminated.

### *C. Proximate Cause Model*

Having determined that proximate cause provides the most useful cutoff in these cases, the final question is what the test for proximate cause will be in these cases. Courts have taken many different approaches. As seen above, *Boim III* essentially concludes that any provision of support to a terrorist group, if made at least recklessly, would satisfy proximate cause.[169] The dissent in *Boim III* criticized this approach as too expansive, as have other courts.[170] The Second Circuit has not provided much guidance, concluding only that a showing of proximate cause requires more than the "fairly traceable" standard used to determine standing.[171]

The Eastern District of New York in *Gill* has come the closest to providing a workable framework for determining proximate cause in these cases. Unlike *Boim III*, which turns proximate cause into a yes-no question, the court in *Gill* treats proximate cause essentially as a sliding scale with multiple factors, including mental state, timing, and nature of donation. Thus, the court concludes, "[A] major recent contribution with a malign state of mind would—and should—be enough . . . . But a small contribution made long before the event—even if

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[169] *See generally Boim III*, 549 F.3d at 695-700.

[170] *Id.* at 711-12 (Rovner, J., concurring in part and dissenting in part); Abecassis v. Wyatt, 785 F. Supp. 2d 614, 645 (S.D. Tex. 2011).

[171] Rothstein v. UBS AG, 708 F.3d 82, 92 (E.D.N.Y. 2013).

recklessly made—would not be. The concept of proximate cause is central in imposing a balance."[172]

1. Mental State

Mental state is perhaps the most important, and also most complex, factor in this formulation. Not only must the court determine what level of mental state to require, but it must also determine which facts to apply the mental state to. For example, in *Gill*, the court concluded that the defendant must be at least reckless not only to the fact that the group to which it made donations was engaged in terrorist activities but also that it targeted Americans.[173] On the other hand, a Texas district court recently concluded that recklessness was not sufficient, holding that defendant must know or intend both of these elements.[174]

Requiring recklessness in these cases makes more sense, as proving knowledge or intent would be exceedingly difficult and place an undue burden on plaintiffs. Many terrorist groups are large organizations with many branches and fronts that carry out non-violent humanitarian activities in addition to its terrorist activities. As such, it would be very difficult, if not impossible, to prove that a defendant who provided support to a front or earmarked its support for humanitarian efforts actually knew or intended that this support would be used to facilitate terrorist activity. This concern was voiced by the dissent in *Boim III*.[175] However, as the majority in *Boim III* reasoned, the violent nature of Hamas and other terrorist groups are so notorious that any donation, even if made with innocent intent, is a dangerous activity.[176] It was exactly this thinking that led Congress to pass § 2339B in order to supplement § 2339A in the material support criminal provisions. Section 2339A criminalizes material support made with the intent to further terrorist activities, thus allowing a donor to escape liability by earmarking its donation for humanitarian purposes.[177] Section 2339B closed this loophole

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[172] Gill v. Arab Bank PLC., 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012).

[173] *Id.* at 506.

[174] *Abecassis*, 785 F. Supp. 2d at 635-36.

[175] Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 706 (7th Cir. 2008) (Rovner, J., concurring in part and dissenting in part).

[176] *See id.* at 698.

[177] 18 U.S.C. § 2339A (2012).

by holding a donor liable so long for any donation made to a designated terrorist group, regardless of the donor's intent.[178]

2. Time

The second important factor is time. As discussed above, a principal concern of the detractors is potentially perpetual, ruinous liability. It is generally not reasonably foreseeable that a donation will result in an attack 20 years down the line. Rather than setting a fixed cutoff, the question of temporal proximity will be a fact-specific and case-by-case question. It will also be dependent on the other two factors in the analysis. Thus, where an individual makes a large donation to a known terrorist group, it is reasonably foreseeable that the donation will facilitate attacks further into the future than a small donation made to a relatively unknown group.

3. Nature of Support

The final factor in the analysis is the nature, particularly the size, of the support. It is foreseeable that a large monetary donation will facilitate terrorist activity, whereas with a small donation or verbal support, it is not reasonably foreseeable. For example, it is not necessarily reasonably foreseeable that a five dollar donation to Hamas will result in an imminent attack. Conversely, it is highly foreseeable that continuously funneling large amounts of money will facilitate an attack.

The result of these factors is a sliding scale and balancing test. Thus, on one end of the spectrum are large monetary donations made to a well-known terrorist group within a short time of the attack in question. On the other end are small donations to unknown groups far removed from the attack that injured plaintiff. In between, the court will engage in fact-specific analysis using the three factors discussed above. This measured approach will best ensure that victims are compensated and terrorist are punished, while avoiding potentially ruinous liability for marginally involved third parties.

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[178] *Id.* § 2339B.

## CONCLUSION

Since September 11, 2001, the United States has engaged in many, largely reactive measures designed to prevent the next terrorist attack. The civil remedy of § 2333 provides one of the more promising proactive avenues in the fight against terrorism. By allowing citizens to secure judgments against those who fund and supply terrorists, the civil remedy could potentially have a real impact in interrupting the terrorist groups' activities, while also providing victims with actual relief. In pursuit of these goals, the courts should interpret § 2333 broadly, allowing claims against those who materially support terrorist activity, so long as there is sufficient proximate cause between the support and the particular attack that injured the plaintiff. Through this approach, the civil cause of action will provide an adequate remedy to victims and bring those responsible to justice.

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