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Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a)

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**BANK LIABILITY UNDER THE
ANTITERRORISM ACT: THE MENTAL STATE
REQUIREMENT UNDER § 2333(a)**

*Olivia G. Chalos**

Terrorism is at the forefront of international concern. The United States devotes tremendous resources to disrupt terrorist networks, but the fight against terrorism continues to involve countless fronts. Since September 11, 2001, financial institutions have emerged as an increasingly popular target in efforts to cut off the flow of material support to terrorist organizations abroad. Civil claims continue to be filed against banks, in part because of their “deep pockets.” These claims generally allege that the banks provided material support to terrorist groups through the provision of financial services.

The potential for large civil judgments against banks under the Antiterrorism Act (ATA), however, remains problematic in practice. Inconsistency in the interpretation and application of ATA civil liability limits the statute’s effectiveness. It encourages forum shopping and creates the potential for disparate judgments depending on the court where an action is filed.

This Note specifically addresses the jurisdictional split on the mental state requirement necessary to hold a defendant liable under the ATA. This Note explores the current judicial interpretations of the statute and concludes that, as the statute stands, the Second Circuit best interprets the mental state requirement for § 2333(a) claims predicated on a violation of material support laws. This Note proposes, however, that Congress should amend the ATA to clarify the state-of-mind requirement and should only allow for a cause of action where a bank manifests heightened culpability through intentional wrongdoing in the provision of financial services to foreign terrorist organizations.

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INTRODUCTION

On Tuesday, August 2, 2005, on a central street in downtown Basra, a group of men, dressed in police uniforms and driving a police sedan, kidnapped Steven C. Vincent, a freelance writer and blogger, and his interpreter and close friend, Nooriya Tuaiz.¹ Later that day, Vincent's body was found three miles north of the city center.² He had been shot three times in the chest and his hands were tied together with plastic wire.³ There were bruises on his face and right shoulder.⁴ Tuaiz, also shot, narrowly survived the attack.⁵ Just three days earlier, the *New York Times* had

1. Edward Wong, *U.S. Journalist Who Wrote About Police Corruption Is Abducted and Killed in Basra*, N.Y. TIMES (Aug. 4, 2005), <http://www.nytimes.com/2005/08/04/world/middleeast/us-journalist-who-wrote-about-police-corruption-is.html> [https://perma.cc/QJJ8-J7WP].

2. *Id.*

3. *Id.*

4. *Id.*

5. Anthony Ramirez, *Slain Reporter Is Recalled as Intrepid on Art or War*, N.Y. TIMES (Aug. 4, 2005), <http://www.nytimes.com/2005/08/04/nyregion/slain-reporter-is-recalled-as-intrepid-on-art-or-war.html> [https://perma.cc/2E5Z-7JZ4].

published Vincent's op-ed article, "Switched Off in Basra," exposing Iranian infiltration of the police force in Southern Iraq.⁶

Vincent was the first journalist killed in the Iraq War.⁷ He is, however, one of the thousands of people killed by acts of terrorism in the last decade, and now his wife is one of hundreds of people seeking civil redress in U.S. courts.⁸ In November 2014, Vincent's widow, along with other relatives of American soldiers and civilians injured or killed by Iranian-backed terrorist groups, filed suit in the Eastern District of New York.⁹ The case, *Freeman v. HSBC Holdings PLC*,¹⁰ is named for the lead plaintiff, Charlotte Freeman, whose husband Brian, an Army captain, died in a militant attack in Karbala, Iraq, in 2007.¹¹ The complaint does not target the terrorists responsible for the attacks but instead names five of the largest banks in the world: Barclays, HSBC Holdings, Standard Chartered, Credit Suisse Group AG, and Royal Bank of Scotland NV.¹² The plaintiffs allege, among other claims, that the banks committed acts of international terrorism by supporting terrorist groups through the provision of financial services.¹³

The *Freeman* case represents a growing trend in civil claims brought against banks and other secondary actors under the Antiterrorism Act (ATA).¹⁴ In the wake of terrorist attacks, victims and their families are often left with a troubling reality: they have little chance of hailing those directly responsible into court. Civil liability for those who provide material support to terrorist groups is therefore thought to serve several purposes: (1) it allows victims and their families to hold anyone in the chain of causation directly accountable,¹⁵ (2) it allows for potentially

6. *Id.*; see also Steven Vincent, *Switched Off in Basra*, N.Y. TIMES (July 31, 2005), <http://www.nytimes.com/2005/07/31/opinion/switched-off-in-basra.html> [https://perma.cc/6SVB-3YBK].

7. See Wong, *supra* note 1.

8. See Paul Barrett, *The Big Bet to Hold Banks Liable for Terrorism*, BLOOMBERG BUSINESSWEEK (Feb. 19, 2015), <http://www.bloomberg.com/news/articles/2015-02-19/are-credit-suisse-rbs-standard-chartered-hsbc-and-barclays-terrorist-banks-> [https://perma.cc/4BMR-VRUQ].

9. *Id.*

10. No. 14-CV-06601 (E.D.N.Y. filed Nov. 10, 2014).

11. Barrett, *supra* note 8.

12. See Amended Complaint at 5, *Freeman*, No. 14-CV-06601 (Apr. 2, 2015), ECF No. 77.

13. See *id.*

14. In the last decade, ATA cases also have been brought against oil companies, food distribution companies, and other major corporations. See SULLIVAN & CROMWELL, ANTI-TERRORISM ACT LIABILITY FOR FINANCIAL INSTITUTIONS 1 (2014), https://www.sullerom.com/siteFiles/Publications/SC_Publication_AntiTerrorism_Act_Liability_for_Financial_Institutions_09242014.pdf [https://perma.cc/LMY2-AXTL]; see also, e.g., *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (bringing ATA claims against Chiquita, a banana company, alleging that it paid and provided weapons and ammunition to Colombian paramilitary and guerilla groups to gain competitive advantage over other banana growers).

15. See, e.g., *Linde v. Arab Bank, PLC*, 944 F. Supp. 2d 215, 216 (E.D.N.Y. 2013).

significant financial recourse,¹⁶ and (3) it encourages banks to “think twice” about their role in terrorism’s causal chain.¹⁷

Financial institutions therefore remain a major target in efforts to prevent and combat terrorist financing and support.¹⁸ In general, there are three types of cases brought against banks under the ATA¹⁹: (1) financial services that directly benefit terrorist organizations, including the provision of nonroutine bank services on behalf of the terrorist group;²⁰ (2) routine financial services with terrorist organizations, such as transactions done predominantly by computers;²¹ and (3) violations of laws regarding financial transactions with states sponsoring terrorism.²²

The majority of claims against banks are brought in federal court in New York. A number of courts, however, remain divided over the scope of the ATA and how to apply it in banking cases.²³ There are two primary issues with the statute’s application²⁴: (1) The ATA does not explicitly provide for aiding and abetting liability and (2) § 2333(a) does not include a state-of-mind requirement.²⁵ As to the first issue, which is beyond the scope of

16. See, e.g., *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1011 (7th Cir. 2002) (discussing how banks provide a good alternative for civil recourse because few terrorist organizations are likely to have cash assets or property located in the United States that could be used to fulfill a civil judgment). This Note refers to the Seventh Circuit’s decision in 2002, which held that § 2333(a) permits a secondary cause of liability, as *Boim I*. In 2007, the Seventh Circuit took up the issue again in *Boim v. Holy Land Foundation for Relief & Development (Boim II)*, 511 F.3d 707 (7th Cir. 2007). The Seventh Circuit then reviewed and vacated the *Boim II* decision en banc in 2008, holding against secondary liability. See *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 705 (7th Cir. 2008) (en banc).

17. See generally *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014).

18. Terrorist financing refers to the act of knowingly providing something of value to persons and groups engaged in terrorist activity. See Jeffrey Breinholt, *The Revolution of Substantive Criminal Counterterrorism Law: “Material Support” and Its Philosophical Underpinnings*, in *THE LAW OF COUNTERTERRORISM* 91, 98 (Lynne K. Zusman ed., 2011).

19. VED P. NANDA & DAVID K. PANSIUS, *ATA Banking Cases*, in 2 *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 9:43 (2005).

20. *Id.*; see also *Linde*, 944 F. Supp. 2d at 216.

21. NANDA & PANSIUS, *supra* note 19.

22. *Id.*; see also *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

23. See *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 206 (2d Cir. 2014); *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 705 (7th Cir. 2008) (en banc).

24. The ATA has been criticized on these two bases as being an ineffective remedy for victims of terrorism and “little more than a pyrrhic or moral victory against the perpetrators of acts of international terrorism.” Jimmy Gurulé, *Holding Banks Liable Under the Anti-Terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform*, 41 *J. LEGIS.* 184, 185, 219 (2015).

25. See *id.* at 206. The Second and Seventh Circuits do not recognize secondary liability. The courts rely on the analysis of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 181–82 (1994), where the U.S. Supreme Court held that section 10(b) of the Securities and Exchange Act of 1934 does not permit a private cause of action on an aiding and abetting theory unless explicitly written into the statute. See *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609, 621 (E.D.N.Y. 2006); see also *Boim III*, 549 F.3d at 691. To find liability in jurisdictions that recognize aiding and abetting liability, the provision of financial services by the bank must have “substantially assist[ed]” the principal violation. Plaintiffs do not have to prove that the bank’s provision of financial services was the proximate cause of the attack. Gurulé, *supra* note 24, at 185–86; see Wultz

this Note, banks are not the direct actors carrying out the attack—the terrorists are. The question is: How far removed from a violent act can an action be to still be an activity “involved” in that act?²⁶ Courts are deeply divided over whether the ATA allows for secondary liability on the theory that a bank aided or abetted the acts of terrorism.²⁷

This Note specifically addresses the second issue: The disagreement over the mental state requirement for claims brought under the ATA. This Note analyzes *primary liability* in private suits against banks for alleged violations of the material support and terrorist financing statutes,²⁸ specifically focusing on the different standards applied by the Second and Seventh Circuits. Neither circuit recognizes aiding and abetting liability under the ATA.²⁹ The courts, however, disagree on the requisite level of fault to establish civil liability under § 2333(a) and whether a claim under § 2333(a) requires *deliberate wrongdoing* on the part of the bank.³⁰ The ATA is silent on this issue.

For example, in the Seventh Circuit, a victim must demonstrate that a bank violated an underlying criminal offense *and* engaged in deliberate wrongdoing.³¹ Deliberate wrongdoing may be satisfied by criminal recklessness.³² This places a heavy burden on plaintiffs to prove that the bank knew, or was “substantially certain,” that the provision of financial services would be used to commit an act of terrorism.³³

In the Second Circuit, however, a bank may be liable under the ATA if it provides financial services with the knowledge that the customer or beneficiary engages in acts of terrorism.³⁴ A plaintiff must only show that a bank violated a criminal offense, for example, by knowing or being deliberately indifferent to the fact that its customer was collecting money

v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 57 (D.D.C. 2010) (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

26. *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1012 (7th Cir. 2002).

27. The Justice Against Sponsors of Terrorism Act (JASTA) is currently before Congress. If enacted, the bill would explicitly allow secondary liability under the ATA. It would amend § 2333 by adding: “In an action arising under subsection (a), liability may be asserted as to the person or persons who committed such act of international terrorism or any person or entity that aided, abetted, or conspired with the person or persons who committed such an act of international terrorism.” See H.R. REP. NO. 113-3143, at 7 (2013).

28. Liability is found, through statutory incorporation, for secondary actors who are primarily liable for providing material support in violation of a criminal law. See *Boim III*, 549 F.3d at 691.

29. See *Rothstein v. UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013) (dismissing aiding and abetting claims under the ATA); *Linde v. Arab Bank, PLC*, 944 F. Supp. 2d 215, 216 (E.D.N.Y. 2013) (applying *Rothstein* to dismiss conspiracy-based claims under the ATA on the basis that the ATA does not provide for secondary liability). The Second Circuit recognized secondary liability prior to 2012. See Alison Bitterly, Note, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 *FORDHAM L. REV.* 3389, 3398 (2015).

30. See Gurulé, *supra* note 24, at 186, 219.

31. *Id.* at 219.

32. See *Boim III*, 549 F.3d at 693.

33. See *id.*

34. See *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 206 (2d Cir. 2014).

for a foreign terrorist organization (FTO).³⁵ The bank does not need to engage in additional “deliberate wrongdoing,” and plaintiffs do not need to demonstrate that the defendant knew, intended, or recklessly disregarded that the funds likely would be used to finance a terrorist attack.³⁶

Despite the potential benefits of ATA claims, the current framework creates inconsistent and disparate civil judgments. It incentivizes filing in particular courts based on varying theories of liability and culpability requirements. The disagreement among courts is problematic. Although a jury held a bank liable under the ATA for the first time in September 2014,³⁷ the current application of the statute casts doubts on whether it will be an effective, or merely symbolic, means of future recourse for victims of terrorism. Moreover, the current use of the statute also threatens to create expansive and potentially destructive liability for banks and other secondary actors.

Part I of this Note presents background on the ATA’s legislative history and statutory language. Part I also summarizes the material support and terrorist financing laws and their statutory incorporation into § 2333(a) claims against banks. Next, Part II explores the conflict over whether the ATA requires a mental state beyond that of the underlying predicate offense of international terrorism. It also addresses the implications of current judicial interpretations of the statute. Then, Part III argues that the law, in its current form, supports the Second Circuit’s analysis of the ATA’s state-of-mind requirement. It also explores the interpretive infirmities of primary liability under the ATA and proposes that Congress should amend the statute. Congress should clarify the state-of-mind requirement for § 2333(a) primary liability and should allow for a cause of action only where a bank manifests heightened culpability through intentional wrongdoing in the provision of financial services to FTOs.

I. BACKGROUND

This part discusses the ATA’s development and the relevant statutory provisions. It also discusses the material support and terrorist financing statutes, which generally serve as the predicate offenses for ATA claims against banks.

A. ATA Legislative History

The Antiterrorism Act, 18 U.S.C. § 2333(a), provides a private right of action to any U.S. national “injured in his or her person, property, or

35. *See id.* at 206–09.

36. *See id.*

37. *See* Verdict Form, *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287 (E.D.N.Y. 2015) (No. 04-cv-2799), 2014 WL 4913320. The case was settled for an undisclosed amount three days before the damages trial was set to begin. *See* Stephanie Clifford, *Arab Bank Reaches Settlement in Suit Accusing It of Financing Terrorism*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/15/nyregion/arab-bank-reaches-settlement-in-suit-accusing-it-of-financing-terrorism.html> [<https://perma.cc/NB7H-AX99>].

business by reason of³⁸ an act of international terrorism.”³⁹ The statute was enacted, among other reasons, to complement existing criminal sanctions by creating a private cause of action for victims of terrorism.⁴⁰ In passing the ATA, Congress envisioned a statute whose scope would extend beyond terrorists and allow for liability at numerous points in the causal chain.⁴¹

The first Antiterrorism Act was enacted in 1987 in direct response to the 1985 murder of Leon Klinghoffer, a U.S. citizen.⁴² On October 7, 1985, members of the Palestinian Liberation Organization (PLO) hijacked the Achille Lauro, an Italian cruise ship, shot Klinghoffer, and dumped his body into the Mediterranean Sea.⁴³ Klinghoffer’s family brought suit against the PLO claiming that the murder was an act of international terrorism perpetrated by a terrorist organization.⁴⁴ The District Court for the Southern District of New York exercised jurisdiction over the PLO because the crime took place in international waters and therefore fell under federal admiralty jurisdiction and the Death on the High Seas Act.⁴⁵ Had Klinghoffer’s murder occurred within a foreign state instead of navigable waters, a court likely would not have upheld jurisdiction.⁴⁶ The Klinghoffer case illustrated a jurisdictional gap in efforts to develop a comprehensive legal response to international terrorism.⁴⁷ To fill the gap, Congress drafted the ATA and established a civil cause of action for victims of terrorism.

Congress enacted the second Antiterrorism Act in 1990.⁴⁸ It created several terrorism-related provisions, including the ATA’s civil provision and the definition of international terrorism currently in effect.⁴⁹ Sections 2333–2338 (excluding §§ 2332a–2332h) provide U.S. nationals with civil

38. Many courts interpret the “by reason of” requirement to be the same as the requirement in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2012). *See* *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1011 (7th Cir. 2002) (“The Supreme Court has interpreted identical language [in the RICO statute] to require a showing of proximate cause.”); *see also* *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 265–68 (1992) (holding that in civil RICO cases, “by reason of” requires a showing that the defendant’s conduct proximately caused the plaintiff’s injury).

39. 18 U.S.C. § 2333(a).

40. The Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States. *See* U.S. CONST. art. I, § 8, cl. 10; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

41. Stephen I. Landman, *Bank Liability Under the Anti-Terrorism Act: Dispelling the “Routine Banking Services” Defense in Material Support Cases* 19 (Dec. 9, 2008) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314104 [<https://perma.cc/JX76-PWB2>].

42. Pub. L. No. 100-204, §§ 1001–1005, 101 Stat. 1406, 1406–07 (1987).

43. *See* *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 856 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991).

44. *See id.*

45. *See id.* at 859.

46. *See, e.g.,* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984).

47. *See* *Bitterly*, *supra* note 29, at 3398.

48. Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250.

49. *See id.* § 132, 104 Stat. at 2250–51; *Bitterly*, *supra* note 29, at 3397.

remedies for acts of international terrorism, the district courts with jurisdiction, and a statute of limitations period for civil claims.⁵⁰

In 1991, the Antiterrorism Act of 1990 was repealed for technical reasons.⁵¹ In 1992, the substantive provisions of the ATA of 1990 were enacted again.⁵² By imposing “liability at any point along the causal chain of terrorism,” Congress sought to “interrupt, or at least imperil, the flow of money” to terrorist organizations.⁵³ It designed the ATA to “allow victims to pursue renegade terrorist organizations, their leaders, and . . . resources”⁵⁴ and hold them “accountable where it hurts them most: at their lifeline, their funds.”⁵⁵

B. ATA Claims Against Banks

Under § 2333(a), any U.S. national (or an estate, survivor, or heir) may sue for an injury sustained by an act of international terrorism for treble damages⁵⁶ and attorney’s fees.⁵⁷ The ATA, however, contains several limitations: (1) it provides a cause of action only for U.S. nationals; (2) it bars civil actions against state sponsors of terrorism and codifies the act of state doctrine by barring claims arising from official acts of foreign governments;⁵⁸ (3) it prohibits civil actions for injury or loss suffered by reason of “an act of war”;⁵⁹ and (4) the Attorney General may stay any civil

50. See *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 266 (E.D.N.Y. 2007). Effective January 2, 2013, Congress passed an amendment to the ATA extending the statute of limitations from four to ten years. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (codified as amended at 18 U.S.C. § 2335 (2012)).

51. See Pub. L. No. 102-27, § 402, 105 Stat. 130, 155 (1991), amended by Military Construction Appropriations Act, Pub. L. No. 102-136, § 126, 105 Stat. 637, 643 (1991).

52. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521–24; *Almog*, 471 F. Supp. at 266. The terrorism-related provisions are codified at §§ 2331–2338 of Title 18 of the U.S. Code. Sections 2332a–2332h and §§ 2339–2339D were enacted by other laws, including the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

53. *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1011 (7th Cir. 2002).

54. 138 CONG. REC. S17,254 (daily ed. Oct. 7, 1992) (statement of Sen. Grassley).

55. 136 CONG. REC. S14,284 (daily ed. Oct. 1, 1990) (statement of Sen. Grassley).

56. “Damages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed.” *Treble Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014).

57. See 18 U.S.C. § 2333(a) (2012). The first successful terrorism case under the ATA was *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005). It resulted in a \$116 million judgment against the PLO and Palestinian Authority on behalf of the family of an American citizen murdered by terrorists in Israel. See *id.* at 276, 279.

58. Section 2337(2) does not allow suits against a “foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.” 18 U.S.C. § 2337(2). For a critique of sovereign immunity in civil claims against state sponsors of terror, see John Norton Moore, *Civil Litigation Against Terrorism: Neglected Promise*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR (John Norton Moore & Robert F. Turner eds., 2010).

59. “[C]ourts have consistently construed . . . ‘act of war’ to exclude deliberate attacks against innocent civilians.” Gurulé, *supra* note 24, at 189; see also *Sokolow v. Palestine Liberation Org.*, 583 F. Supp. 2d 451, 459 (S.D.N.Y. 2008) (finding that targeting civilians

action brought under § 2333, or limit or stop discovery if the action would interfere with criminal prosecution or a national security operation.⁶⁰

ATA liability occurs through an intricate series of statutory incorporations.⁶¹ Courts describe claims brought under the ATA as “akin to a Russian matryoshka doll, with statutes nested inside of statutes.”⁶² To sustain a § 2333(a) claim, plaintiffs must prove three formal elements: (1) the defendant must commit an “act of international terrorism,” (2) the defendant must act with the mens rea required to prove a *predicate act* qualifying as international terrorism, and (3) the injury of a U.S. national must be “by reason of”⁶³ a crime that constitutes an act of international terrorism.⁶⁴

“International terrorism”⁶⁵ is defined by § 2331(1) to mean 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, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended^[66]—

(i) to intimidate or coerce a civilian population;

outside of a combat or military zone did “not constitute acts of war for purposes of the ATA”); *Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 166 (D.D.C. 2006) (finding that an attack on a public bus in Israel was not committed “in the course of” armed conflict and thus did not come within “act of war” exception to liability under the ATA).

60. See Gurulé, *supra* note 24, at 189.

61. See *Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 206 (2d Cir. 2014).

62. *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012) (citing *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1032 (E.D.N.Y. 2006), *rev’d on other grounds sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)).

63. Courts have interpreted the proximate cause requirement differently. Compare *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013) (requiring plaintiffs asserting ATA civil claims to plausibly allege proximate cause and affirming dismissal of ATA claims against a European bank), and *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 265–68 (1992) (requiring proximate cause for plaintiff to recover under treble damages provision of RICO, that is, a direct relation between conduct alleged and injury asserted), with *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 57 (D.D.C. 2010) (requiring “a causal connection” between the injury and the conduct complained of which occurs where the injury is fairly traceable to the challenged action of the defendant).

64. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 580 (E.D.N.Y. 2005); Gurulé, *supra* note 24, at 189. Some courts have phrased the requisite elements as (1) unlawful action, (2) the requisite mental state, and (3) causation. See, e.g., *Gill*, 893 F. Supp. 2d at 502.

65. This definition is the same as the definition of “international terrorism” provided in the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 (2012)).

66. The Seventh Circuit has issued several decisions in the *Boim* line of cases that establish a different standard from the Second Circuit, including “foreseeability” as the dispositive factor in proving whether acts “appear to be intended” for a terrorist purpose. Gurulé, *supra* note 24, at 193–94. If it were foreseeable that the provision of material support would facilitate a terrorist attack, then such contribution would “appear to be intended” for a terrorist-related purpose. *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 694 (7th Cir. 2008) (en banc) (stating that the “appear to be intended” requirement “is not a state-of-mind requirement; it is a matter of external appearance rather than subjective intent”).

- (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, 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, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.⁶⁷

C. Material Support Statutes

To satisfy the “act of international terrorism” requirement, a defendant first must violate a predicate criminal offense.⁶⁸ The material support⁶⁹ and terrorist financing statutes, §§ 2339A, 2339B, and 2339C, generally serve as the predicate criminal offenses for ATA claims against banks.⁷⁰ The statutes prohibit the provision of material support or financing to terrorist organizations and provide for punishments including the imposition of large fines and imprisonment.⁷¹ Courts have construed violations of the material support statutes as “acts dangerous to human life”⁷² that satisfy the “appear to be intended” and transnational components of “international terrorism” for § 2333(a) purposes.⁷³

The material support statutes are doctrinally innovative.⁷⁴ Unlike traditional criminal complicity, which involves phrases such as aid or abet,

67. 18 U.S.C. § 2331(1) (emphasis added). Courts hold that the ATA applies to transnational acts of terrorism. *See, e.g., Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003) (citing 18 U.S.C. § 2331(1)(C)).

68. *See* 18 U.S.C. § 2331(1)(A); *Gill*, 893 F. Supp. 2d at 553 (“Pleading and proving the violation of a predicate criminal provision is required to satisfy the first requirement of an ATA claim, [a] violation of a federal or state criminal law.”). There is criticism over congressional intent to incorporate crimes—for example, the material support statutes—into the civil provision of the ATA. The material support laws were passed half a decade after the ATA. *See* 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, 559 (2013).

69. Robert M. Chesney notes that the “material support law is one part of a matrix of terrorism-support laws” that have accrued from government efforts to put a stop to persons providing support, well-intentioned or otherwise, to FTOs. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 4 (2005).

70. To fully satisfy the international terrorism requirement, a defendant’s acts must also meet the “appear to be intended” requirements and contain a transnational component. *See supra* note 67 and accompanying text; *see also* Gurulé, *supra* note 24, at 190.

71. *See* 18 U.S.C. § 2339A(a).

72. The “appear to be intended” requirement has generated some controversy. *See Bitterly, supra* note 29, at 3428 (explaining that the “appear to be intended” requirement is often overlooked and is inconsistent with the general understanding of primary liability under the ATA).

73. *See* *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS), 2006 WL 2862704, at *1 (E.D.N.Y. Oct. 5, 2006) (“Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. [§] 2333(a).”); *accord* *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 581 (E.D.N.Y. 2005).

74. *See* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 113 (2d ed. 2005). The material support laws are different from traditional forms of complicity liability;

material support is defined by listing categories of prohibited conduct.⁷⁵ The material support laws fit squarely within the U.S. counterterrorism tradition for this reason.⁷⁶ They are strategically overinclusive;⁷⁷ crimes are based on how terrorists behave, even if they reach conduct, such as the donation of funds, that is not overtly dangerous.⁷⁸

“Material support” is defined broadly by the statutes and typically includes the provision of financial services.⁷⁹ Some courts hold that the materiality requirement is fulfilled by “routine” banking services including opening and maintaining bank accounts, collecting funds, transmitting funds, and providing credit card services.⁸⁰ Banks often challenge liability on the basis that they provided only “routine banking services.”⁸¹ A number of courts reject this argument, however, explaining that even the provision of “routine banking services,” when knowingly provided to a terrorist, subjects a bank to liability.⁸²

The first material support law was codified in 18 U.S.C. § 2339A following the 1993 World Trade Center Bombings.⁸³ The new enforcement paradigm specifically focused on terrorist financing.⁸⁴ Section 2339A prohibits the provision of “material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation” of one or more of enumerated predicate offenses.⁸⁵ The proscribed offenses include crimes typically associated with terrorism, including those involving aircrafts and airports; arson; chemical, biological, and nuclear weapons; murder; explosives; hostage taking; and damage to

the provision of material support is itself an independent substantive offense, with its own penalty, rather than a form of secondary liability to a substantive offense. *Id.*

75. *Id.*

76. Breinholt, *supra* note 18, at 99.

77. The overinclusiveness has been challenged as unconstitutionally vague. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010).

78. Breinholt, *supra* note 18, at 99. The Constitution recognizes certain financial transactions as protected by the First Amendment and guaranteed freedoms of speech and association. *See generally* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

79. 18 U.S.C. §§ 2339A(b), 2339B(g)(4) (2012).

80. *See* *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609, 624 (E.D.N.Y. 2006). Some courts have declined to hold banks liable for injuries following routine banking services, holding that the link between the bank and the injury was too tenuous to afford relief. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 833 (S.D.N.Y. 2005).

81. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d at 832; *see also* *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005) (rejecting the bank’s attempt to escape liability on the theory that it provided only routine services, and finding that the bank’s provision of services exceeded what could reasonably be considered “routine”).

82. *See* *Weiss v. Nat’l Westminster Bank PLC*, 936 F. Supp. 2d 100, 118 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202 (2d Cir. 2014); *see also infra* Part I.J.2.

83. Bitterly, *supra* note 29, at 400; *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. § 2339A).

84. Breinholt, *supra* note 18, at 98. Before, enforcement for similar conduct could be accomplished only through money-laundering prosecutions. *Id.* at 99.

85. 18 U.S.C. § 2339A(a).

U.S. property, communication systems, and energy facilities.⁸⁶ Section 2339A only criminalizes acts in which there is intent for the material support to be used in acts of terrorism or operations.⁸⁷

In early practice, § 2339A proved difficult to enforce.⁸⁸ In the years immediately following September 11, 2001, cases involving charities dominated terrorist financing prosecutions.⁸⁹ Under § 2339A, a person easily could avoid liability by showing that he or she thought the money would be spent on benign activities.⁹⁰ The law largely was ineffective for two reasons: (1) terrorist organizations often engage in legitimate philanthropic and humanitarian efforts⁹¹ and (2) successful prosecution required tracing donor funds to a particular act of terrorism, a “practical impossibility.”⁹² Nevertheless, there has been an increase in recent cases charging this offense.⁹³

In 1996, Congress enacted § 2339B, the most frequently charged terrorist financing crime, to expand the effective scope of the material support law.⁹⁴ Section 2339B was signed into law as part of the Antiterrorism and Effective Death Penalty Act of 1996 in response to the Oklahoma City bombing.⁹⁵ It did not become fully operational until the Secretary of State issued the first list of Designated FTOs on October 7, 1997.⁹⁶

Section 2339B prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization.”⁹⁷ To violate the provision, a person must act with “knowledge that the organization is a designated foreign terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.”⁹⁸ “Engages in terrorist activity” is defined to include “solicit[ing] funds or other things of value for . . . a terrorist organization described in clause (vi)(I)” of the Immigration and Nationality Act.⁹⁹

86. Michael Taxay, Larry Schneider & Katherine Didow, *What to Charge in a Terrorist Financing or Facilitation Case*, U.S. ATTORNEYS’ BULL., Sept. 2014, at 9, 10.

87. See Bitterly, *supra* note 29, at 3400; see also Chesney, *supra* note 69, at 13 n.73.

88. See *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1011 (7th Cir. 2002) (an early ATA case brought alleging § 2339A claims).

89. See, e.g., *id.*

90. The statute also did not allow for investigations based on “activities protected by the First Amendment, including expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.” SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* 28 (2011).

91. Chesney, *supra* note 69, at 13.

92. *Id.* (quoting JOHN ROTH, DOUGLAS GREENBURG & SERENA WILLE, *MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 31–32 (2004), http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf [<https://perma.cc/NVA9-F6MU>]).

93. Taxay, Schneider & Didow, *supra* note 86, at 9.

94. Breinholt, *supra* note 18, at 101.

95. HERMAN, *supra* note 90, at 28.

96. Breinholt, *supra* note 18, at 101.

97. 18 U.S.C. § 2339B(a)(1) (2012); see also *infra* Part I.D (discussing the designation of FTOs).

98. 18 U.S.C. § 2339.

99. 8 U.S.C. § 1182(a); see also 18 U.S.C. § 2339B.

Additionally, under § 2339B, “any financial institution that becomes aware that it has possession of, or control over FTO funds must retain possession of, or maintain control over, such funds, and report it to the Secretary.”¹⁰⁰

The § 2339B statute centers on the belief that organizations that engage in terrorist activities are “so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct.”¹⁰¹ The provision is designed to criminalize all financial supporters of terrorists, including those who fund terrorism in the guise of philanthropic and charitable activities.¹⁰² It is the most frequently charged of the terrorist financing statutes.¹⁰³

Section 2339C is the primary and only terrorist financing statute that addresses the collection of funds.¹⁰⁴ It was enacted in 2001 as part of the USA PATRIOT Act and implements the International Convention for the Suppression of the Financing of Terrorism.¹⁰⁵ Section 2339C punishes the provision or collection of funds “with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out” a statutorily enumerated predicate crime.¹⁰⁶ The predicate offenses are those prohibited under international law by a counterterrorism treaty,¹⁰⁷ or any act

intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹⁰⁸

“Provides” includes “giving, donating and transmitting,” and “collects,” means both “raising and receiving funds.”¹⁰⁹

Prosecutors rarely use § 2339C¹¹⁰ because it overlaps with §§ 2339A and 2339B, has limited jurisdictional reach compared to other terrorist financing

100. 18 U.S.C. § 2339B(a)(2). Any financial institution that knowingly fails to comply is subject to a civil penalty in an amount that is the greater of \$50,000 per violation or twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control. *Id.*

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

102. RICHARD M. PIOUS, *THE WAR ON TERRORISM AND THE RULE OF LAW* 78 (2008).

103. Taxay, Schneider & Didow, *supra* note 86, at 9.

104. *Id.* at 11. Section 2339C also covers concealment, applying to a person who “knowingly conceals or disguises the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds” if he or she knows or intends that the support or resources are to be provided in violation of §§ 2339B or 2339C. *See* 18 U.S.C. § 2339C(c).

105. *See* JIMMY GURULÉ, *UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM* 318 n.157 (2009) (“Section 2339C was intended to implement the International Convention for the Suppression of the Financing of Terrorism, which requires signatories to prosecute or extradite individuals who contribute to, or collect money for, terrorist groups.”).

106. 18 U.S.C. § 2339C(a).

107. *Id.*; *see also* Taxay, Schneider & Didow, *supra* note 86, at 11.

108. 18 U.S.C. § 2339C(a)(1)(B).

109. *Id.* § 2339C(e)(3)–(4).

crimes, and requires specific intent that the funds are used to “carry out” an enumerated predicate act.¹¹¹

D. Designating Foreign Terrorist Organizations

The practice of list making is integral to the material support and terrorist financing laws.¹¹² The United States publishes lists of designated persons and groups that are determined to be terrorists.¹¹³ It becomes a crime to engage in any financial transactions with a person or group on that list, regardless of whether the financial transaction itself is designed to promote acts of terrorism.¹¹⁴

The Secretary of State, in consultation with the Attorney General and Secretary of the Treasury, designates FTOs for a two-year period under § 219 of the Immigration and Nationality Act.¹¹⁵ The designation is made if the Secretary finds that the group is foreign, engages in or has the capacity or intent to engage in terrorist activity, and threatens the security of U.S. nationals or the national security of the United States.¹¹⁶

Several other lists also are relevant to terror financing enforcement. The International Emergency Economic Powers Act (IEEPA) allows for prosecution of persons who willfully engage in financial transactions with persons and organizations that the President has determined to be a threat to the United States.¹¹⁷ Under IEEPA authority, the Office of Foreign Assets Controls (OFAC) creates the Specially Designated Global Terrorists (SDGT) and State Sponsors of Terrorism (SST) lists.¹¹⁸ The SDGT list includes all organizations on the State Department’s FTO list, plus more.¹¹⁹ Under the IEEPA, OFAC is authorized to freeze bank accounts and block assets of entities appearing on the SDGT list, but it applies only to U.S. individuals and financial institutions.¹²⁰ OFAC also maintains a list called

110. Taxay, Schneider & Didow, *supra* note 86, at 11.

111. *Id.*

112. *See* Bitterly, *supra* note 29, at 3410.

113. Breinholt, *supra* note 18, at 101.

114. *Id.*

115. *Id.* FTO designations follow an exhaustive review process of information about a group’s activity taken from classified and open sources. The State Department, working with the Justice and Treasury Departments and the intelligence community, prepares a detailed record of the terrorist activity of the proposed individual or group. The State Department provides classified notification to Congress seven days before publishing an FTO designation in the Federal Register. *Id.* at 101–02.

116. *See* 8 U.S.C. § 1182(a)(3)(B) (2012). The D.C. Circuit held that designated FTOs may have a due process right to notice, disclosure of at least unclassified parts of the administrative record underlying their designation, and an opportunity to be heard. *See* Nat’l Council of Resistance v. Dep’t of State, 251 F.3d 192, 201 (D.C. Cir. 2001). A designated organization has thirty days to obtain judicial review of the action from the D.C. Circuit. *Id.* at 196. The court may overturn the action only if the Secretary acted unconstitutionally, illegally, or arbitrarily. *Id.* at 199.

117. *See* 50 U.S.C. § 1701.

118. *See* Breinholt, *supra* note 18, at 102.

119. *See id.*

120. *See* Bitterly, *supra* note 29, at 3411.

the Specially Designated Nationals and Blocked Persons (SDN) list, which combines OFAC and State Department lists, including SSTs.¹²¹

E. IEEPA Violations

Terrorist financing cases occasionally include another criminal offense under 50 U.S.C. § 1705(c). The statute criminalizes the willful violation of an executive order or an implementing regulation issued pursuant to IEEPA.¹²² Although IEEPA has extraterritorial reach, it is limited in comparison to the jurisdictional reach of the material support statutes.¹²³

F. International Money Laundering

In terrorist financing cases, prosecutors also sometimes include an international money laundering charge under 18 U.S.C. § 1956(a)(2).¹²⁴ The statute prohibits the transportation, transmission, or transfer of funds from a place inside the United States to a place outside the United States “with the intent to promote the carrying on of specified unlawful activity.”¹²⁵ The list of unlawful activities is extensive; it includes the material support offenses, IEEPA violations, and many other terrorism-related crimes.¹²⁶ Section 1956(a)(2) effectively criminalizes “reverse” money laundering, or the movement of “clean” money overseas for an illicit purpose.¹²⁷

G. Prosecutorial Guidance for Terrorist Financing Cases

To fully understand the use of the material support and terrorist financing statutes in ATA civil suits, it is useful to look at prosecutorial guidance in this area. The U.S. Attorney’s Bulletin advises:

When considering how to charge a terrorist financing or facilitation case, the first step is to determine the intended recipient of the material support or resources. The basic question is: What terrorist or terrorist group is involved? If the terrorist group is an FTO, prosecutors should consider a § 2339B charge. If the terrorist group is an SDGT (but perhaps not an FTO, for example, the Taliban), consider IEEPA. If no FTO or SDGT is involved, but the support was *intended* to help prepare for or carry out an enumerated predicate offense, then look to § 2339A and/or § 2339C. Finally, where there is evidence that the defendant sent, or attempted to

121. *Id.*

122. 50 U.S.C. § 1705(c).

123. Taxay, Schneider & Didow, *supra* note 86, at 12. The Supreme Court has held that to prove willful criminal conduct, the government must show that the defendant acted with knowledge that his conduct was unlawful; the government need not show that the defendant knew precisely which law was being violated. *Id.*; see *Bryan v. United States*, 524 U.S. 184, 191–97 (1998). This is considered a higher mens rea standard than the “knowing” standard of § 2339B. Taxay, Schneider & Didow, *supra* note 86, at 12.

124. Taxay, Schneider & Didow, *supra* note 86, at 13.

125. 18 U.S.C. § 1956(a)(2).

126. Taxay, Schneider & Didow, *supra* note 86, at 13.

127. *Id.*

send, funds overseas, a charge of international money laundering may also be appropriate.¹²⁸

This prosecutorial guidance demonstrates the interplay between the material support statutes and the IEEPA statutes, and it also highlights the importance of the different designations discussed in Part I.D.

H. Hypothetical: A Look at the Statutory Link to Liability

Victim A, a U.S. citizen, is killed during an overseas terrorist attack perpetrated by FTO Z. Bank 1 provided financial services for FTO Z in the days prior to the attack. Victim A's estate decides to bring a civil claim against Bank 1 under the ATA premised on the following statutory incorporations¹²⁹:

(1) Victim A's estate brings the claim under § 2333(a) which provides a civil cause of action for injuries suffered by reason of an act of "international terrorism." "International terrorism," is defined by § 2331 as "acts dangerous to human life" that are a violation of U.S. criminal laws and "appear intended" "to intimidate or coerce a civilian population."

(2) Victim A argues that Bank 1's provision of financial services to FTO Z was an "act of international terrorism" as required by § 2333(a). Victim A first alleges that FTO Z violated a U.S. criminal law (as required by § 2331): Victim A claims that, by providing financial services to an FTO, Bank 1 violated § 2333A, § 2339B, or the terrorist financing statute, § 2339C. Then, Victim A argues that by committing these crimes, Bank 1 engaged in "acts dangerous to human life" that appeared intended to intimidate or coerce a civilian population, meeting § 2331's definition of "international terrorism" for § 2333(a) purposes.

(3) The last statutory link is § 2332(a), which punishes whoever kills a U.S. national outside of the United States. Victim A argues that Bank 1 materially supported FTO Z, the terrorist group that killed a U.S. national, Victim A, overseas, which thus satisfies the § 2332(a) requirement.

This "chain of incorporations" was specifically delineated by the Seventh Circuit in *Boim v. Holy Land Foundation for Relief & Development*¹³⁰ (*Boim III*) for ATA claims against secondary actors:

By this chain of incorporations by reference ([§] 2333(a) to [§] 2331(1) to [§] 2339A [or §§ 2339B or 2339C] to [§] 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate [§] 2333. Which makes good sense as a counterterrorism measure. Damages are a less effective remedy against terrorists and their organizations than against their financial angels.¹³¹

128. *Id.* (emphasis added).

129. *See supra* Part I.B–C.

130. 549 F.3d 685 (7th Cir. 2008) (en banc).

131. *Id.* at 705.

*I. Proximate Cause Requirement
in Primary Liability Jurisdictions*

To satisfy the proximate cause requirement in primary liability jurisdictions, plaintiffs also must prove that the provision of financial services was a “substantial factor” in the sequence of causation.¹³² “[T]here must be a causal connection between the injury and the conduct complained of” and “the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”¹³³ Second, the injury must have been “reasonably foreseeable” as a natural consequence of the bank’s provision of financial services.¹³⁴ This is a tough and exacting standard.¹³⁵

J. Mental State Requirement Under the ATA

This section specifically addresses the second element of an ATA claim and the inconsistent interpretation of the § 2333(a) state-of-mind requirement. As discussed, the second element of an ATA claim requires that, at a minimum, the defendant satisfy the mens rea requirement of the *predicate act* qualifying as international terrorism.¹³⁶

1. Terrorist Financing
and Material Support Mens Rea

To understand the conflict over the § 2333(a) mental state requirement, it is important first to address the underlying criminal offenses. The material support or terrorist financing statutes presumably will act as the predicate offenses for banks. Each statute has its own mens rea requirement.

Sections 2339A and 2339C require proof of a heightened mens rea.¹³⁷ To violate § 2339A, the defendant must provide material support or resources “*knowing or intending*” that they are used to carry out acts of terrorism.¹³⁸ To violate § 2339C, the defendant must have provided or collected funds with the *specific intent or knowledge* that the funds were to be used to “carry out” enumerated predicate offenses related to terrorism.¹³⁹ Currently, no case law interprets the § 2339C “carry out” language; it remains an open question whether courts will find that it covers funds

132. Gurulé, *supra* note 24, at 185.

133. Rothstein v. UBS AG, 708 F.3d 82, 91 (2d Cir. 2014) (alterations in original) (emphasis omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1975)).

134. Gurulé, *supra* note 24, at 203 n.125 (“Assuming plaintiff could demonstrate that [Arab] Bank acted recklessly, it has not shown that his—an American’s—injuries were reasonably foreseeable by [Arab] Bank as a result of the size and timing of funds transfers put in issue by plaintiff.” (quoting Gill v. Arab Bank, PLC, 893 F. Supp. 2d 542, 572 (E.D.N.Y. 2012))).

135. *Id.* at 203.

136. *See supra* Part I.B. The defendant must satisfy the first element of an ATA claim, an act of international terrorism, by meeting the (A) predicate criminal offense, (B) “appear to be intended,” and (C) international nexus requirements. *See Gurulé, supra* note 24, at 203.

137. Gurulé, *supra* note 24, at 196.

138. *See* 18 U.S.C. § 2339A (2012) (emphasis added).

139. *See id.* § 2339C (emphasis added).

intended to support a terrorist group's general operational infrastructure.¹⁴⁰ Both statutes do not require specific intent to support the particular attacks that injured the plaintiffs, but the defendants must know or intend that the funds support terrorist acts.¹⁴¹

By contrast, to violate § 2339B, the defendant must only have *knowledge that the organization* is a designated FTO or engages or has engaged in acts of terrorism.¹⁴² The defendant is not required to know or intend that the material support or resources would be used to carry out a violent crime.¹⁴³ Instead of tracing money from the United States to its use in terrorist acts, prosecutors must only establish that persons are engaged in financial transactions with persons they know are acting on behalf of *designated* terrorist groups and individuals.¹⁴⁴ The accused need only agree to provide funds to a terrorist organization and send a payment in furtherance of that goal.¹⁴⁵

Courts hold that the knowledge requirement of § 2339B may be satisfied by evidence that a defendant acted with willful blindness regarding the organization.¹⁴⁶ In *In re Terrorist Attacks on September 11, 2001*,¹⁴⁷ the court found that a defendant must know that “the recipient of the material support . . . is an organization that engages in terrorist acts, or the defendant must be deliberately indifferent to whether or not the organization does so.”¹⁴⁸ That is, the “defendant knows there is a substantial probability that the organization engage[s] in terrorism, but does not care.”¹⁴⁹ Several courts agree with this analysis.¹⁵⁰

Although far-reaching, the § 2339B mens rea requirement has been upheld against challenges alleging vagueness and violations of the First Amendment rights to freedom of association and speech.¹⁵¹ In *Holder v. Humanitarian Law Project*,¹⁵² the U.S. Supreme Court resolved whether § 2339B requires proof that the defendant acted with the specific intent to further the terrorist group's illegal activities.¹⁵³ It held that § 2339B only requires knowledge of the terrorist group's *status* as a foreign terrorist

140. Taxay, Schneider & Didow, *supra* note 86, at 11.

141. *See* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 45, 47 (D.D.C. 2010).

142. *See* 18 U.S.C. § 2339B (emphasis added). “Engaged or engages in terrorist activity” is defined in § 212(a)(3)(13) of the Immigration and Nationality Act. For further discussion on the requirements, see *supra* Part I.C.

143. Gurulé, *supra* note 24, at 191.

144. Breinholt, *supra* note 18, at 101.

145. *Id.*

146. Gurulé, *supra* note 24, at 196.

147. 740 F. Supp. 2d 494 (S.D.N.Y. 2010).

148. *Id.* at 517.

149. *Id.*

150. *See, e.g.,* Strauss v. Credit Lyonnais, S.A., 925 F. Supp. 2d 414, 428 (E.D.N.Y. 2013); Goldberg v. UBS AG, 660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009). These courts have rejected arguments that “knowledge” in § 2339B for § 2333(a) claims requires plaintiffs to show that the defendant intended the funds, financial services, or support to be used for terrorist attacks. Gurulé, *supra* note 24, at 196.

151. *See supra* note 78.

152. 561 U.S. 1 (2010).

153. *Id.*

organization or participation in terrorist-related activities—not specific intent for violent acts.¹⁵⁴

2. Culpability Determinations in ATA Cases

To determine culpability under §§ 2339A, 2339B, and 2339C, courts look to the specific banking activities in each case. The type of services that a bank provides may create a strong presumption of its mental state and knowledge about the terrorist organization and its activities.¹⁵⁵ Nonroutine banking services, that is, those that are more unusual and specific, may suggest that the bank knew that its services were aiding terrorists.¹⁵⁶ Courts look to a number of factors when considering a bank's mental state, including client interaction and the "knowing and intentional nature of the [b]ank's activities" in its provision of client services.¹⁵⁷ Additionally, the potential for liability based on routine services may turn on whether the court recognizes aiding and abetting liability under the ATA.¹⁵⁸

The Second Circuit, in *In re Terrorist Attacks on September 11, 2001*, held that the link between the bank's routine services and plaintiffs' injuries was too tenuous to afford relief, but the court left open the possibility of whether some routine banking services might qualify to establish primary liability.¹⁵⁹

The presence of nonroutine services, on the other hand, may demonstrate that the bank knew or intended that its services fund acts of terrorism.¹⁶⁰ The court in *Linde v. Arab Bank, PLC*¹⁶¹ found that the defendant bank far exceeded what is considered routine in its provision of services to terrorist groups.¹⁶² Thirteen civil lawsuits were filed against Arab Bank in the Eastern District of New York, between 2004 and 2011, by victims of suicide bombings and other terrorist attacks linked to Hamas.¹⁶³ The plaintiffs alleged that the bank supported (1) Hamas, (2) charitable organizations that funded Hamas and the Palestinian Islamic Jihad, and (3) the Saudi Committee in Support of the Intifada Al Quds, and provided

154. "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Id.* at 11. In *Weiss v. National Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014), the court primarily relied on the *Holder* Court's analysis in assessing § 2333(a) mens rea requirements. See *infra* Part II.B.

155. Bitterly, *supra* note 29, at 3408–10.

156. *Id.*

157. See, e.g., *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007). Evidence that a bank and a terrorist organization worked closely together to advance a common scheme or plan may also satisfy the "appear to be intended" requirement for proving a violation of the ATA. Gurulé, *supra* note 24, at 210.

158. See Bitterly, *supra* note 29, at 3408.

159. *Id.* This case was decided before secondary liability was uniformly rejected in the Second Circuit. See *Rothstein v. UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013).

160. Bitterly, *supra* note 29, at 3409–10.

161. 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

162. See Bitterly, *supra* note 29, at 3409–10.

163. See SULLIVAN & CROMWELL, *supra* note 14, at 2.

“martyr insurance” to families of suicide bombers, including Hamas members.¹⁶⁴

While *Linde* has been cited to support bank liability for involvement with terrorist activities, it is unique for its facts.¹⁶⁵ Arab Bank actively worked with terrorist entities to process payments for suicide bombers; it was not merely making transfers of funds in the ordinary course of providing services. This behavior created a strong presumption of the bank’s knowledge and intent to directly support terrorist activities.¹⁶⁶ A jury found the bank liable to plaintiffs in September 2014.¹⁶⁷ To date, it is the first and only bank held liable under the ATA.¹⁶⁸

3. Section 2333(a) Mental State Requirement

Section 2333(a) is silent on the mental state required to trigger civil liability.¹⁶⁹ In passing the ATA, Congress intended to incorporate general principles of tort law into the cause of action.¹⁷⁰ It intentionally left it to courts, “according to the common law tradition,” to define the contours of the statute.¹⁷¹ In practice, the courts have been unable to resolve the requisite mental state issue.¹⁷²

Courts generally agree on several facets of civil claims under the ATA. They uniformly hold that the ATA is not a strict liability statute.¹⁷³ A bank cannot be held liable *solely* because the money that funded a terrorist attack passed through the bank during routine banking services.¹⁷⁴ They also agree that acting with mere negligence is insufficient to trigger liability.¹⁷⁵

164. See Bitterly, *supra* note 29, at 3409.

165. See NANDA & PANSIUS, *supra* note 19, § 9:43.

166. See *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005) (“Given plaintiffs’ allegations regarding the knowing and intentional nature of [Arab] Bank’s activities, there is nothing ‘routine’ about the services the Bank is alleged to provide.”).

167. See Verdict Form, *supra* note 37.

168. See *supra* note 37 and accompanying text.

169. Gurulé, *supra* note 24, at 195.

170. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1965) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he or she: (a) does a tortious act in concert with the other or pursuant to a common design with him or her, or (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct him- or herself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”).

171. Gurulé, *supra* note 24, at 195 (quoting *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 484 (E.D.N.Y. 2012)).

172. *Id.*

173. *Id.* at 186; see *Gill*, 893 F. Supp. 2d at 481–82, 505–06. The Seventh Circuit emphasized this point: “To hold defendants liable for donating money without knowledge of the donee’s intended criminal use of the funds would impose strict liability.” *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1012 (7th Cir. 2002).

174. See *Boim I*, 291 F.3d at 1012.

175. Gurulé, *supra* note 24, at 199. Negligent conduct does not satisfy the requirement of knowledge or deliberate wrongdoing. *Id.* In *Boim v. Holy Land Foundation for Relief & Development (Boim III)*, 549 F.3d 685 (7th Cir. 2008) (en banc), the Seventh Circuit noted that to impose liability, it would not be enough “that the average person or a reasonable person would realize that the organization he was supporting was a terrorist organization, if

Courts, however, remain divided on the requisite state of mind to sustain a civil judgment.¹⁷⁶ They are split on whether the statute requires proof of a state of mind *beyond* that of the underlying offense qualifying as international terrorism.¹⁷⁷ “Defining practical boundaries [is] problematic,” particularly in claims predicated on § 2339B, which does not contain the heightened mental state requirements of §§ 2339A or 2339C.¹⁷⁸ “Some courts hold that the ATA requires proof of scienter. Under this view, a bank is liable if the provision of financial services was conducted with knowledge that the customer or beneficiary of the services engages in acts of terrorism.”¹⁷⁹ Others require that a bank also engage in “deliberate wrongdoing.”¹⁸⁰

Although plaintiffs may sustain an ATA claim by meeting the predicate offense *mens rea* requirement, to find liability under § 2333(a), they must still prove the third element: the injury of a U.S. national must be “by reason of”¹⁸¹ a crime that constitutes an act of international terrorism.¹⁸²

II. CIRCUIT SPLIT ON THE § 2333(a) MENTAL STATE REQUIREMENT

This part examines the split between the Seventh and Second Circuits in their attempts to clarify the mental state requirement of § 2333(a).

A. *The Seventh Circuit and the Boim Line of Cases*

In 1996, David Boim, a seventeen-year-old American and Israeli citizen, was shot while waiting with his classmates at a bus stop near Jerusalem.¹⁸³ Boim’s murder was later attributed to two alleged members of Hamas.¹⁸⁴ In 2000, Boim’s parents filed suit in the Northern District of Illinois, naming not only Amjad Hinawi and Khalil Tawfiq Al-Sharif, the two men allegedly responsible for Boim’s death, but also nonprofit organizations and

the actual defendant did not realize it.” *Id.* at 693. This would be insufficient to prove knowledge or recklessness.

176. Gurulé, *supra* note 24, at 195. “The substance of such an action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism.” S. REP. No. 102-342, at 45 (1992); *see also Boim I*, 291 F.3d at 1011.

177. Gurulé, *supra* note 24, at 196.

178. NANDA & PANSIUS, *supra* note 19.

179. Gurulé, *supra* note 24, at 186.

180. *Id.* The mental state analysis is separate from the third element of an ATA claim, “by reason of,” which also requires proximate cause to sustain a judgment. *See supra* note 38.

181. *See supra* Part I.I (discussing the proximate cause requirements for primary liability jurisdictions).

182. Courts look to a number of factors in assessing the “by reason of” requirement, including the time elapsed between the provision of services and the attack. *See Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

183. *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 687 (7th Cir. 2008) (en banc).

184. *Id.*

other individuals with alleged ties to Hamas.¹⁸⁵ Two of the named defendants were the Holy Land Foundation (HLF) and the Quranic Literacy Institute (QLI).¹⁸⁶ The Boims alleged that the two organizations were the main fronts for Hamas in the United States.¹⁸⁷ Although the defendants were charities, not banks, courts consistently cite the *Boim* line of cases in banking cases.¹⁸⁸

The district court denied the defendants' motion to dismiss the complaint for failure to state a claim.¹⁸⁹ The defendants argued that providing financial services does not constitute an act of international terrorism.¹⁹⁰ The Seventh Circuit authorized an interlocutory appeal and affirmed the district court.¹⁹¹ The case then resumed in the district court, which granted judgment in favor of the plaintiffs with respect to the liability of the three defendants other than QLI.¹⁹² After damages were trebled and attorneys' fees added, the jury entered a \$52 million verdict against all the defendants.¹⁹³

The defendants appealed again, this time from a final judgment. On appeal, the panel vacated the judgment and directed the district court to redetermine liability.¹⁹⁴ However, the plaintiffs petitioned the Seventh Circuit for rehearing en banc. The court granted the plaintiffs' petition to "consider the elements of a suit under 18 U.S.C. § 2333 against financial supporters of terrorism."¹⁹⁵

1. *Boim v. Holy Land Foundation (Boim III)*

In 2008, the Seventh Circuit reheard the case en banc and issued an opinion authored by Judge Richard Posner.¹⁹⁶ The court's en banc opinion addressed whether (1) § 2333 imposes primary, not secondary, liability on donors and supporters of terrorism through a series of statutory incorporations¹⁹⁷ and (2) plaintiffs must satisfy the scienter requirements of § 2333(a) regardless of whether §§ 2339A, 2339B, or 2339C serve as the predicate offense.¹⁹⁸

The court emphasized that, because the ATA is a federal tort statute, the traditional tort requirements of "fault, state of mind, causation and

185. *Id.* at 687–88.

186. *Id.* at 687.

187. *Id.* at 709.

188. *See, e.g.,* Linde v. Arab Bank, PLC, 944 F. Supp. 2d 215, 216 (E.D.N.Y. 2013).

189. *See* Boim v. Quranic Literary Inst., 127 F. Supp. 2d 1002, 1021 (N.D. Ill. 2001).

190. *Boim III*, 549 F.3d at 688.

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

192. *Boim III*, 549 F.3d at 688.

193. *Id.*

194. *See* Boim v. Holy Land Found. for Relief & Dev. (*Boim II*), 511 F.3d 707, 707 (7th Cir. 2007).

195. *Boim III*, 549 F.3d at 688.

196. *Id.*

197. *See id.* at 689, 691–92 (“[S]tatutory silence on the subject of secondary liability means there is none.”).

198. *Id.* at 692. (“18 U.S.C. §§ 2339A, B, and C . . . do not require proof that the material support resulted in an actual terrorist act, or . . . punish an attempt.”).

foreseeability” must be established for liability. Judge Posner explained that the structure of the ATA provides for “[p]rimary liability in the form of material support to terrorism [with] the character of secondary liability,” through which Congress “expressly imposed liability on a class of aiders and abettors.”¹⁹⁹ Because the primary violator is functionally “an aider and abettor or other secondary actor,” ordinary tort requirements do not apply.²⁰⁰ Instead, tort requirements for secondary actors are appropriate for ATA claims.²⁰¹

Applying this reasoning, Judge Posner specifically focused on the automatic trebling of damages under the ATA—a punitive damages provision.²⁰² Because “something more than the mere commission of a tort is always required for punitive damages,” when they apply “[t]here must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.”²⁰³ On this basis, to satisfy § 2333(a), there must be proof of intentional misconduct or “deliberate wrongdoing” on the part of the defendant in addition to “the state-of-mind requirements” of the predicate criminal statutes upon which plaintiffs base their claims.²⁰⁴

Judge Posner went on to explain that to satisfy the mens rea requirement for the predicate offense in § 2339B cases, a plaintiff must only show that the defendant either “*knows* that the organization engage[d] in acts [of terrorism] 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.”²⁰⁵ It is insufficient to prove that a reasonable person would have realized that the organization was a terrorist group because “[t]hat would just be negligence.”²⁰⁶

In assessing culpability for the second requirement—proof of “deliberate wrongdoing,”—Judge Posner likened giving “money to Hamas” to giving a loaded gun to a child.²⁰⁷ Providing funds to a terrorist organization “creat[es] a substantial risk of injury” and thus, is reckless and may generate personal liability.²⁰⁸ To determine a defendant’s level of knowledge, the court held that the fact finder should look to the risk: “The

199. *Id.*

200. *Id.*

201. *See id.*

202. *See id.* at 692–93 (“The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct.” (quoting *Tex. Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981))).

203. *Id.* at 692 (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 2 (5th ed. 1984)).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 693.

208. *Id.* (“[I]f the child shoots someone you will be liable to the victim.”). As the Seventh Circuit recognizes, “an activity is reckless when the potential harm . . . is wildly disproportionate to any benefits that the activity might be expected to confer.” *United States v. Boyd*, 475 F.3d 875, 877 (7th Cir. 2007).

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."²⁰⁹ The mental element required to fix liability, on a donor (or any individual providing material support), is present if the donor or supporter knows the character of the organization. From there, "[a]nyone who knowingly contributes to [even] the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."²¹⁰ There is no "charity defense" or defense based on intent to support only the humanitarian efforts of the larger terrorist infrastructure.²¹¹ The court concluded that allowing "benign intent" to be a defense would practically "eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent."²¹² Without an expansive interpretation of the ATA, "[d]onor liability would be eviscerated, and the statute would be a dead letter."²¹³

Thus, in addition to proving the mens rea for the predicate crime of international terrorism, the Seventh Circuit requires plaintiffs to prove that the defendant had knowledge that the provision of material support or funds would assist the terrorist organization in committing a terrorist attack, or knowledge that the consequences were "substantially certain" to result from his risky conduct, and deliberately disregarded that fact.²¹⁴ It is sufficient to show that the defendant "knew the entity had been designated as a terrorist organization and deliberately disregarded that fact while continuing to provide financial services to the organization with knowledge that the services would in all likelihood assist the organization in accomplishing its violent goals."²¹⁵

2. Summary of the Seventh Circuit's Mental State Standard

If an ATA claim is filed in Seventh Circuit, plaintiffs must satisfy two scienter requirements for claims predicated on a violation of § 2339B²¹⁶: First, plaintiffs must prove the mens rea for the underlying statutory violation (alleged act of international terrorism).²¹⁷ This often involves a claim that the bank provided financial services to an FTO in violation of § 2339B.²¹⁸ Plaintiffs must prove that the bank had knowledge of the terrorist group's designation as an FTO or knowledge that the terrorist organization engaged or engages in terrorist activity.²¹⁹ Knowledge can be

209. *Boim III*, 549 F.3d at 694.

210. *Id.* at 698.

211. *Id.* at 698–99.

212. *Id.*

213. *Id.* at 702.

214. Gurulé, *supra* note 24, at 198.

215. *Id.* (citing *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009)).

216. *See id.* at 201.

217. *See id.*

218. *See id.*

219. *See id.*

satisfied by deliberate indifference.²²⁰ Second, plaintiffs must also demonstrate “deliberate wrongdoing” by the defendant. “Deliberate wrongdoing” may be satisfied by proof of criminal recklessness—that “the actor knows that the consequences are certain, or substantially certain, to result from his act.”²²¹ The defendant must know, intend, or recklessly disregard, or it must be substantially certain, that the funds are being used to finance acts of terrorism.²²²

For § 2339A or § 2339C claims, the deliberate wrongdoing requirement is satisfied if the defendant meets the mens rea for the predicate crime; both statutes already require that the defendant acted with the knowledge or intent for funds to be used to support *acts* of terrorism.²²³

3. Two Dissents in *Boim III*

The dissenters in *Boim III*, Judges Ilana Rovner and Diane Wood, mainly disagree with the majority opinion regarding cases in which donations only indirectly benefit Hamas. The majority assumes liability even in cases of indirect support.²²⁴ The dissents are useful in demonstrating the shortcomings of current interpretations of the statute and the problematic nature of the majority’s holding in *Boim III*.²²⁵

B. *The Second Circuit’s State-of-Mind Requirement for § 2333(a)*

In *Weiss v. National Westminster Bank PLC*,²²⁶ the Second Circuit clarified the state-of-mind requirement for § 2333(a) claims predicated on a violation of § 2339B. The Second Circuit does not require a state of mind beyond that required to prove a violation of the predicate criminal offense.²²⁷ This differs from the standard required for plaintiffs filing ATA claims in the Seventh Circuit following the en banc opinion in *Boim III*.

The plaintiffs in *Weiss* were approximately 200 U.S. victims (or their estates, survivors, or heirs) of terrorist attacks launched in Israel by Hamas.²²⁸ The plaintiffs claimed that National Westminster Bank

220. Some courts refer to this as willful blindness. See *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428 (E.D.N.Y. 2013).

221. *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 693 (7th Cir. 2008) (en banc).

222. *Id.*

223. Gurulé, *supra* note 24, at 198; see also *supra* Part I.J.1.

224. *Boim III*, 549 F.3d at 709 (Rovner, J., concurring in part and dissenting in part) (“[T]he majority relieves the plaintiffs of any obligation to demonstrate a causal link between whatever support the defendants provided to Hamas and Hamas’s terrorist activities.”); see also *id.* at 724 (Wood, J., concurring in part and dissenting in part) (“The en banc majority freely concedes that there are no limits at all to its rule, and that a donor who gave funds to an organization affiliated with Hamas in 1995 might still be liable under § 2333 half a century later, in 2045.”).

225. See *infra* Part III.C (discussing the dissents’ criticisms, specifically relating to the “incorporation” method for finding primary liability).

226. 768 F.3d 202 (2d Cir. 2014).

227. See *id.* at 204.

228. *Id.*

(“NatWest”) provided material support and resources to a terrorist organization in violation of the ATA by maintaining bank accounts and transferring funds for the Palestine Relief & Development Fund, also known as Interpal, a purported charity.²²⁹ Interpal allegedly engaged in “terrorist activity” by soliciting funds and otherwise providing support for Hamas, a designated terrorist organization.²³⁰ The district court dismissed plaintiffs’ claims on summary judgment, holding that the evidence demonstrated that NatWest did not have the requisite scienter to sustain a claim under the ATA.²³¹

The Second Circuit, in an opinion authored by Judge Pierre N. Leval, reversed and remanded the case.²³² The court held that the district court applied an incorrect standard for determining whether NatWest acted with the requisite scienter for § 2333(a) liability predicated on a violation of § 2339B(a)(1).²³³ The district court had improperly focused on NatWest’s lack of knowledge regarding the financing of specific terrorist acts, rather than focusing on its knowledge of Interpal’s ties to Hamas, a designated FTO.²³⁴

The court noted that “[w]hile § 2333(a) does not include a mental state requirement on its face, it incorporates the knowledge requirement from § 2339B(a)(1).”²³⁵ Relying on *Holder v. Humanitarian Law Project*,²³⁶ it explained that § 2339B “prohibits the knowing provision of any material support to terrorist organizations without regard to the types of activities supported.”²³⁷ In reinstating the claims, the Second Circuit held that liability may therefore be sustained where the defendant had knowledge that, or exhibited deliberate indifference to whether, it provided material support to a terrorist organization.²³⁸ Because Hamas is designated as an FTO, to be liable, plaintiffs were required to show only “that NatWest had actual knowledge that Interpal provided material support to Hamas, or . . . deliberate indifference to whether Interpal provided material support to Hamas.”²³⁹ Plaintiffs did not need to show that the defendants knew or intended to support terrorist activities.²⁴⁰

229. *Id.*

230. *Id.*

231. *See Weiss v. Nat’l Westminster Bank PLC*, 936 F. Supp. 2d 100, 118 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202.

232. *See Weiss*, 768 F.3d at 212.

233. *See id.* at 207–08.

234. Judge Dora Irizarry relied upon the scienter requirement initially set forth in her *Strauss* decision, that “a plaintiff must show that a defendant: (i) had actual knowledge of links to terrorism, or (ii) exhibited deliberate indifference to links of terrorism.” *Weiss*, 936 F. Supp. 2d at 114 (quoting *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 423–25 (E.D.N.Y. 2013)).

235. *Weiss*, 768 F.3d at 207.

236. 561 U.S. 1 (2010).

237. *Weiss*, 768 F.3d at 207.

238. *Id.* at 208–09.

239. *Id.* at 205.

240. *Id.*

The court additionally emphasized that a bank may not escape liability by demonstrating that a foreign government had a benign view of a terrorist organization.²⁴¹ The fact that it was not illegal for NatWest to provide financial services to Interpal under British law was no defense to noncompliance with U.S. law, including the civil tort provision of the ATA.²⁴² This indicates that banks must be diligent about U.S. designations to avoid liability.²⁴³

In short, the Second Circuit held that to sustain a claim under § 2333(a), plaintiffs only have to prove § 2339B(a)(1)'s scienter requirement, which is directly incorporated into § 2333(a).²⁴⁴ Plaintiffs must show that the bank *knew* or was *deliberately indifferent* to whether it provided material support to a terrorist organization, irrespective of whether the funds were intended to support terrorist activities or facilitate the attack that injured plaintiffs.²⁴⁵

III. CLARIFYING THE § 2333(a) MENTAL STATE REQUIREMENT

This part concludes that, as the statute stands, the Second Circuit best interprets the mental state requirement for § 2333(a). Further, this part suggests that Congress should amend the ATA to clarify the state-of-mind requirement and impose a heightened culpability standard.

A. *The Second Circuit's Analysis Is Correct*

Under the current statutory framework, the Second Circuit's interpretation of the § 2333(a) mens rea requirement should be adopted universally.²⁴⁶ This is because courts continue to hold that the material support statutes serve as predicate offenses that satisfy the international terrorism requirement for § 2333(a) purposes.²⁴⁷

The material support and terrorist financing laws are criminal offenses, carrying punishments that include the possibility of life in prison.²⁴⁸ The ATA civil provision should not impose a higher mens rea standard than the underlying *criminal* offense of "international terrorism."²⁴⁹ Therefore, if liability is predicated on a violation of § 2339B, courts should incorporate the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of material support of any form to an FTO, regardless of

241. *Id.* at 209.

242. *Id.* at 209–10.

243. SULLIVAN & CROMWELL, *supra* note 14, at 5.

244. *See Weiss*, 768 F.3d at 207.

245. *Id.* at 208.

246. Gurulé, *supra* note 24, at 221.

247. *See supra* Part I.C. As precedent dictates, the Second Circuit's reasoning is correct on this basis. *But see infra* Part III.B. (discussing why this interpretation should be overruled by statutory amendment).

248. *See* 18 U.S.C. § 2339B (2012). The statute also proscribes attempts and conspiracies. The maximum sentence of imprisonment for a violation of § 2339B is fifteen years or, if death results, any term of years or life.

249. Gurulé, *supra* note 24, at 221.

whether the defendant intended to support the FTO's terrorist or nonterrorist activities.²⁵⁰

If a violation of § 2333(a) is based on a violation of §§ 2339A or 2339C, courts should incorporate the state-of-mind requirements of those statutes.²⁵¹ This, in turn, automatically incorporates the Seventh Circuit's intended result in *Boim III*; violations of §§ 2339A or 2339C satisfy the deliberate wrongdoing standard because they already are conducted with the knowledge or intent for funds to be used to support *acts* of terrorism.²⁵²

This provides dual objectives as the statute is currently understood. The Second Circuit's analysis provides for uniform application and also serves counterterrorism objectives aimed at stopping the flow of material support to terrorist groups. Some courts currently agree that through its structure, the ATA creates primary liability (albeit, for secondary actors).²⁵³ Through the material support laws, Congress has spoken to the seriousness of engaging in even benign activities with terrorist organizations.²⁵⁴ It consistently emphasizes the fungible nature of money and the importance of preventing activities at every point along the causal chain.²⁵⁵ Although the material support laws were enacted after the ATA, and there are doubts about whether Congress envisioned the use of the material statutes this way, § 2333(a) nonetheless serves to deter financial support and give victims significant civil recourse.²⁵⁶ If banks are diligent about the individuals and organizations with whom they are doing business, and have sufficient monitoring policies in place that reflect U.S. terrorism designations, they may be able to avoid triggering liability.²⁵⁷

B. Congress Should Nonetheless Amend the ATA

The current application of the Antiterrorism Act nonetheless creates numerous issues and widespread confusion. Congress should therefore amend the ATA to address the problematic interpretation of the statute.²⁵⁸ There are several available causes of actions—theories including indirect assistance that creates direct liability; aiding and abetting liability; tort theories; international law claims; mixes of §§ 2339A, 2339B, and 2339C; and varying standards regarding necessary knowledge, intent, scienter, nexus, and causation.²⁵⁹ Interpretations are inconsistent and often

250. *Id.*

251. *Id.*

252. *Id.*

253. *See supra* Parts I.C., II.A.

254. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

255. Sant, *supra* note 68, at 534–36.

256. *Id.*

257. *See SULLIVAN & CROMWELL, supra* note 14, at 5.

258. NANDA & PANSIUS, *supra* note 19, § 9:39 (“No customer goes through the line and ends up with her plate containing the exact same mix of items as any other customer. So it is with the judicial decisions addressing civil liability for material support of terrorism. Each one is different.”).

259. *Id.*

significantly different from one another.²⁶⁰ For this reason, Congress should amend the statute to clarify both the state-of-mind requirement and the bases for primary or secondary liability.

By linking the civil suit provision of § 2333(a) with the material support statutes, courts have dramatically expanded the scope of the ATA.²⁶¹ Instead of limiting suits to actions against terrorists, courts are allowing civil suits to be brought against those providing services.²⁶² This has given the ATA extreme, and perhaps unintended, breadth in practice.²⁶³

In reaching a proposed resolution, Congress and the courts should be guided by two principles: “(1) the requirements for liability cannot be so stringent as would leave loopholes for persons to easily evade its proscriptions; and (2) the requirements cannot be so vague or demanding that normal everyday functions such as doing business and giving to charities creates liability for the unwary.”²⁶⁴

C. Too Much Liability?

As the statute and its application stand, the ATA may generate large civil judgments disproportionate to the conduct upon which plaintiffs base their claims.²⁶⁵ There are serious issues with holding that violations of the material support statutes in the financial services context qualify as “international terrorism” for ATA claims in the first place.²⁶⁶ Courts generally have not questioned or engaged in a thorough analysis of this shortcoming. By extending the ATA civil suit provision to cover donations, the “Seventh Circuit’s en banc decision simply writes out of the statute its requirement that the acts at issue be ‘violent acts or acts dangerous to human life.’”²⁶⁷ Courts post-*Boim III* have adopted Posner’s statutory incorporation analysis to find primary liability for nonterrorist actors, holding that the provision of financial services are “acts dangerous to human life” that satisfy the international terrorism requirement for § 2333(a) purposes.²⁶⁸ The courts take this analysis on its face without considering the potentially flawed bases upon which it relies. The expansive reading provided by the *Boim* Court, however, and since adopted by other courts, serves to be more “results-oriented” than consistent with the text of the statute. The requirement of violence, “acts dangerous to human life,” is central to § 2333(a); it is meant to target the actors directly responsible for acts of international terrorism.²⁶⁹

260. *Id.*

261. Sant, *supra* note 68, at 558.

262. *See, e.g.,* Force v. Facebook, Inc., No. 1:16-cv-05490 (LAK) (S.D.N.Y. July 10, 2016).

263. *Id.*

264. NANDA & PANSIUS, *supra* note 19.

265. Sant, *supra* note 68, at 534–36.

266. *Id.*; *see also supra* Part I.B (discussing the “international terrorism” standard).

267. Sant, *supra* note 68, at 572.

268. *See supra* note 73 and accompanying text.

269. *See Sant, supra* note 68, at 534–36.

The Seventh Circuit's analogy, likening giving money to Hamas to giving a child a gun, is strained.²⁷⁰ As noted by Geoffrey Sant, a loaded gun, by its nature, is a dangerous instrumentality that must be handled differently than money; it does not logically follow that providing routine banking services is a similarly dangerous act to human life.²⁷¹ The liability analysis is akin to holding a bank liable for a death, caused by a gun, purchased by a known murderer, with funds withdrawn from one of its accounts at the bank.²⁷² The Restatement (Second) of Torts states that one may be liable for the actions of another if one "knows that the other's conduct constitutes a breach of duty and [nevertheless] gives substantial assistance or encouragement to the other."²⁷³ "By contrast, as courts have long recognized, '[t]he maintenance of a bank account and the receipt or transfer of funds does not constitute substantial assistance' to criminals who happen to keep accounts at a bank."²⁷⁴ The "substantial assistance" reasoning has been discussed by the courts during a proximate cause analysis under the ATA, rather than questioning whether the underlying acts serve to meet the international terrorism requirement needed to trigger the mental state and proximate cause analysis in the first place.²⁷⁵

Had Congress intended to extend the potential for massive liability (including through an attenuated chain of multilayered incorporation, as framed by the *Boim* decision) it would have.²⁷⁶ The *Boim III* interpretation engages in gap filling that does not provide for coherent standards of application. This is especially apparent in light of a number of federal statutes that do provide for secondary liability through explicit aiding and abetting provisions to hold third parties directly and civilly liable to victims.²⁷⁷ One dissenting opinion in *Boim III* points out that this is "judicial activism at its most plain."²⁷⁸ To hold banks primarily liable for acts of international terrorism, utilizing secondary liability tort requirements, does not make practical sense and does not meet the plain reading of the statute.²⁷⁹

Engaging in a state-of-mind analysis for banks for acts of international terrorism is even harder to reconcile. Banks provide financial services for

270. *See id.* at 535 ("This definition has been stretched to reach financial transactions, which, on their face, are neither 'violent' nor 'dangerous.' In fact, the entire basis for describing banking transactions as 'dangerous' acts is nothing more than a single, unsupported analogy in which financial transfers to terrorists are compared to giving a loaded gun to a child.").

271. *Id.* at 568.

272. *Id.*

273. RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1965).

274. Sant, *supra* note 68, at 580 (alteration in original) (quoting *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *9 (E.D.N.Y. Oct. 5, 2006)).

275. *See* Gurulé, *supra* note 24, at 214–15.

276. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 181–82 (1994) (explaining that statutes that intend for secondary liability explicitly allow for liability on the basis that a secondary actor aided and abetted an offense).

277. *Id.*

278. *Boim v. Holy Land Found. for Relief & Dev. (Boim III)*, 549 F.3d 685, 709 (7th Cir. 2008) (Rovner, J., concurring in part and dissenting in part).

279. Sant, *supra* note 68, at 586–87.

profit—not to fund terrorism. Unless the financial institution directly intends to support terrorist activities, as in *Linde* for example, it should not be held primarily liable for attacks that are carried out by terrorist organizations.²⁸⁰ This is attenuated and particularly troublesome when analyzed through a state-of-mind analysis. Liability currently rests on the following premise: the bank knew, intended, or recklessly disregarded, during the provision of basic banking services, carried out in the ordinary course of business, that funds were being provided to terrorist organizations (or through charities or individuals that support terrorist organizations) that engage in acts of terrorism and substantially assisted and caused a terrorist attack for which it should be held directly liable.²⁸¹

Because the holdings of post-*Boim* courts have generally applied this flawed framework, Congress should act to remedy the infirmities of interpreting the statute this way. Congress ultimately has a duty to ensure that § 2333(a) is applied uniformly. However, the current application of § 2333(a) is resulting in disparate treatment under the statute, and defendants face potentially bankrupting civil judgments on an attenuated basis of liability and causation that is inconsistent with the text of the statute.²⁸²

CONCLUSION

The jurisdictional split on the § 2333(a) state-of-mind requirement creates several problems. Because the Seventh Circuit requires proof of a heightened mental state to support a claim under the ATA, plaintiffs have incentive to forum shop. It will be easier to obtain a favorable judgment in jurisdictions where the plaintiffs must only prove the mens rea required to establish a material support violation.²⁸³ The split on the § 2333(a) mental state requirement will lead to inconsistent, and potentially disparate, civil judgments depending on the place of filing. In the Second Circuit, a defendant may be liable for violating § 2333(a) for knowingly providing financial services to a designated FTO.²⁸⁴ The same defendant would not be found liable in a jurisdiction where a plaintiff also had to demonstrate that the defendant acted with knowledge or intention, or with reckless disregard that the funds were to be used to facilitate or finance a terrorist attack.²⁸⁵

While the Second Circuit's standard best interprets the statute as it is currently applied, the current ATA framework exposes secondary actors to disproportionate judgments for acts of international terror. To remedy the issue, Congress should clarify the requisite § 2333(a) mental state, and it should amend the ATA to allow for primary liability only when a bank acts with heightened culpability in its provision of financial services to terrorist

280. *See supra* Part I.J.2.

281. *See supra* Part II.

282. Sant, *supra* note 68, at 563.

283. Gurulé, *supra* note 24, at 200.

284. *Id.*

285. *Id.*

organizations. Unless Congress adopts liability for secondary actors through an explicit aiding and abetting provision, banks should not be subject to primary liability for the provision of financial services unless such provision is done with the *knowledge or intent* that the funds are used to finance acts of terrorism.