

Terrorism and a Civil Cause of Action: *Boim, Ungar*, and Joint Torts

By: Peter M. Mansfield¹

INTRODUCTION

A senseless act of terrorism violently and unexpectedly ended David Boim and Yaron Ungar's lives. While thousands of American families have faced the loss of loved ones through the terror of September 11, 2001, both Boim and Ungar were dead long before that mournful day. Now, as American families continue to recover from the tragedy of 9/11, David Boim's parents and Yaron Ungar's family have blazed a trail of civil anti-terrorism litigation that all terrorism victims' parents, families, and spouses should adopt as their own.

The fight against terrorism at home and abroad has not been without controversy. The military conflict in Afghanistan has received a large amount of media attention – some questioning American tactics and offensives.² The rights and trials of detained suspects have also presented controversy regarding the proper rights of the accused.³ Similarly, the Patriot Act has raised several constitutional and civil-rights issues.⁴ The controversy surrounding anti-terrorism offensives is not limited to criminal and military actions. As Richard Milin observes, some victims of terrorism have filed controversial lawsuits against deep pockets – “airlines whose planes were hijacked, insurers, owners of bombed buildings, and even manufacturers of fertilizer that terrorists have used to make bombs.”⁵ These types of civil suits have “in effect, turn[ed] victims against other victims.”⁶ The Boims and Ungars, however, have set out upon a different course.

While the fight against Al-Quida and similar terrorist groups has been left to the executive branch of the government and the military, private citizens such as David Boim's parents have directly implicated in civil lawsuits in federal court certain United States organizations allegedly responsible for funding terrorist organizations. In response to violent and senseless acts of terror that have reached into the lives of peaceful civilians, the Boims and Ungars have taken up the fight against terrorism in civil court armed with two federal statutes that impose civil liability on countries and persons who provide material aid to acts of international terrorism.

This fight against terrorism in civil courts, though not as publicized as the previous controversies, has also presented several difficult and previously untested questions of constitutional law and statutory construction. We see many of these novel issues encompassed in the recent Seventh Circuit Court of Appeals decision *Boim v. Quranic Literacy Institute, et al.*⁷

¹ Juris Doctor, Ave Maria School of Law, expected May 2003; Bachelor of Arts, Franciscan University of Steubenville. The author would like to thank his family for its support, Lisa Castorino for her patience, and Professors Mollie Murphy and Leo Clarke for their expertise.

² See Rae Vogler, *Nothing Justifies Killing Innocents in War Against Terrorism*, The Capital Times, November 17, 2001, at 11A; Peter R. Gathje, *Mistakes and the Bombing of Afghanistan*, The Commercial Appeal, October 28, 2001, at B4; and Jon Swain, *B-52s Rain Hellfire on the Villagers of Kama Ado*, Sunday Times – London, December 9, 2001, at 16.

³ See *Detroit Free Press, et al. v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) and *North Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002).

⁴ See generally David Cole, *Enemy Aliens and American Freedoms: Experience Teaches us That Whatever the Threat, Certain Principles are Sacrosanct*, Nation, September 23, 2002 at 20.

⁵ Richard K. Milin, *Suing Terrorists and Their Private and State Supporters*, New York Law Journal, October 29, 2001, at s1.

⁶ *Id.*

⁷ 291 F.3d 1000 (7th Cir. 2002) (hereinafter “*Boim II*”).

and *Ungar v. Islamic Republic of Iran, et al.*⁸ from the District Court for the District of Columbia. *Boim II* addressed the previously untested 18 U.S.C. § 2333, which grants a civil cause of action to United States nationals injured “by reason of an act of international terrorism.” The Boims sued not only the gunmen responsible for their son’s assassination, but also included in their complaint American organizations accused of raising and laundering money to terrorist groups. The Seventh Circuit, in a decision certain to have repercussions in the wake of 9/11, determined that: first, funding a terrorist group without knowledge and intent to further its illicit goals does not constitute an act of international terrorism; second, a violation of criminal anti-terrorism provisions does constitute an act of international terrorism in respect to the civil anti-terrorism statute; third, aiding and abetting an act of terrorism is an act of international terrorism in respect to section 2333 and a viable cause of action; and, lastly, neither section 2333 nor its criminal anti-terrorism counterpart violate the First Amendment freedom of association.⁹

In *Ungar*, the court interpreted 28 U.S.C. § 1605(a)(7), which allows a United States national to sue a foreign state that provides material resources for an act of terrorism. *Ungar* determined that a section 1605(a)(7) plaintiff must show that a foreign state had knowledge of the illicit activity, intended to further the activity, and that the foreign state’s material aid was the “but-for” cause of the illicit activity.¹⁰

Much like the tide of an actual war, portions of the *Boim II* and *Ungar* holdings represent individual battles won by victims or defendants. Because the various theories of joint torts and their elements of knowledge, agreement, aid, and causation are less than well-settled in traditional tort law, the battlefield in this war is mysterious and unknown to both parties as well as the detached judge. While it is too early in the conflict to declare a winner, the availability of joint torts in the context of section 2333 and 1605 actions is, in the hands of plaintiffs, a valuable weapon against terrorism. *Boim* and *Ungar*, however, have handicapped the effectiveness of these theories in their explanations and overbroad requirements to prove liability in the joint-tort context.

This article will demonstrate that the *Boim II* decision, while a fundamentally sound first explanation of section 2333, has not properly reconciled the elements of a joint-tort cause of action with the statutory language of section 2333. In a similar fashion, this article will also discuss how *Ungar* incorrectly requires plaintiffs to show that a foreign country’s material aid was the but-for cause of illicit activity. After explaining the legal fallacy in both decisions, this article will explain how courts should examine section 2333 and 1605 claims in the future and also analyze the joint-tort theories likely to recover damages in a civil anti-terrorism action and the elements most difficult to prove.¹¹ In doing so, this article will explicate the *Boim* and *Ungar* decisions in detail. In addition, attention is given to the legislative history of the statutory authority for the two civil causes of action for terrorist activities, relevant Supreme Court authority, and the common law of joint torts, all of which play vital roles in the war against terrorism in the civil courts.

⁸ 211 F. Supp. 2d 91 (D.D.C. 2002).

⁹ *Boim II*, 291 F.3d at 1028.

¹⁰ *Ungar*, 211 F. Supp. 2d at 97-101.

¹¹ Sources have cited a similar ideal as an end goal of the *Boim* litigation. “The plaintiffs have two goals. The more modest of them is simply to establish a precedent that any support for a designated terrorist organization makes a person legally liable for that group’s actions.” Daniel Pipes, *A New Way to Fight Terrorism*, The Jerusalem Post Newspaper: Online News From Israel (May 24, 2000), at <http://www.jpost.com/Editions/2000/05/24/Opinion/Opinion.7178.html>.

Part I of this article examines the background of the *Boim* decision. Section I.A. addresses the factual background leading up to the Boims' lawsuit and section I.B. examines the procedural history and holdings leading up to the Seventh Circuit's decision. Part II explains the various *Boim* holdings in detail, with subsections II.A., II.B., and II.C. individually examining the three questions certified for interlocutory appeal. Part III focuses on the *Ungar* case. Part III.A. provides the factual background to the lawsuit while section III.B. examines *Ungar's* holding. Part IV provides a critical analysis of both decisions in light of the relevant statutory language and joint-tort law. Part IV.A. focuses on the presence of a causation element in joint torts. Part IV.B. examines the remaining elements of a particular variety of joint tort, civil conspiracy. Part IV.C. considers another variety of joint tort, aiding-and-abetting liability and its respective elements. Lastly, part IV.D. focuses on the presence of an intent requirement in joint-tort theory and the relevant First Amendment implications.

I. *Boim*: Background

I.A. Facts

*[A]nother broken heart, another barrel of a gun...*¹²

Much like the victims of 9/11, terror struck David Boim in the midst of his normal routine. A dual citizen of the United States and Israel, seventeen-year-old David was studying at a yeshiva in Israel in 1996.¹³ On May 13, 1996, while standing at a bus stop near Beit El in the West Bank, David Boim was hit by bullets fired from a passing car.¹⁴ He was pronounced dead within an hour of the shooting.¹⁵

His two attackers were eventually identified as Amjad Hinawi and Khalil Tawfiq Al-Sharif, members of the Palestinian militant organization known as Hamas.¹⁶ Hinawi and Al-Sharif were eventually apprehended by Palestinian authorities.¹⁷ While on release awaiting trial, Al-Sharif killed himself and five civilians and injured 192 other people in a suicide bombing in Jerusalem on September 4, 1997.¹⁸ Hinawi was sentenced to ten years' imprisonment for the Boim shooting.¹⁹

¹² Bob Dylan, *Night After Night* at <http://bobdylan.com/songs/nightafternight.html>.

¹³ *Boim II*, 291 F.3d at 1002.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* The Northern District of Illinois's initial opinion in the *Boim* litigation, *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1005 (N.D. Ill. 2001) (hereinafter *Boim I*) notes that Hinawi was granted leave from prison in the same month he was imprisoned. Hinawi did not return to prison and was missing for several months. The court also noted that the United States Ambassador to Israel reported that Hinawi was returned to prison in Palestine at the time of the district court's opinion in 2001. The Israeli government's request to transfer Hinawi to its control has not been met. *Id.* For an account of the Justice Department's actions in the Boim murder, see Nathan Lewin, *A Promise the U.S. Makes, But Does Not Keep*, Washington Post, August 25, 2002, at B01. Lewin served as the Boims' counsel in both the civil case and criminal investigation. *Id.*

The Harakat Al-Muqawama Al-Islamiyya, or Hamas, was founded in 1987 to pursue the creation of an Islamic state.²⁰ Hamas consists of a political branch and a military branch.²¹ Hamas seeks to attain its goal by acts of terrorism and violence on civilians.²² Like Al-Quida and other Middle East-based terrorist organizations, Hamas allegedly has a global presence, with control centers, or cells, in the United States, Britain, and several other European countries.²³ Of key importance to the Boim's' lawsuit, they also claimed that Hamas control centers raise funds from sympathetic parties in different countries, then launder the money to operatives in the Middle East.²⁴ Operatives in the Middle East, in turn, use the money to train terrorists, provide support for terrorists' families, and pay for weapons used in terrorist attacks.²⁵

I.B. Procedural History

*But the enemy I see wears a cloak of decency...*²⁶

I.B.1. District Court Proceedings

David Boim's parents, pitted against the faceless enemy of Hamas that took the life of their son, assigned names and faces to those who would provide money to Hamas and included ten defendants in their civil suit in the Northern District of Illinois.²⁷ Defendant Quaranic Literacy Institute ("QLI") is a non-profit organization that translates and publishes sacred Islamic texts.²⁸ The Boims accused QLI of raising and laundering money for Hamas.²⁹ Also named in the lawsuit was the Holy Land Relief Fund ("HLF").³⁰ HLF is a California corporation with offices in Illinois and Jerusalem.³¹ Similar to QLI, HLF is organized as a non-profit charitable organization to fund

²⁰ *Ungar*, 211 F. Supp. 2d at 94.

²¹ *Boim II*, 291 F.3d at 1002.

²² *Id.*

²³ *Id.*; see also Don Van Natta Jr., *Arrests in U.S. Break Terrorist Network Units*, Pittsburgh Post-Gazette, October 15, 2001, at A5.

²⁴ *Boim II*, 291 F.3d at 1002. The defendant's appeal in *Boim II* comes from an interlocutory appeal after the denial of a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *Id.* For the purposes of ruling on this motion, the court "accept[s] all factual allegations in the complaint and draw[s] all reasonable inferences from those facts in favor of the Boims, the plaintiffs here." *Id.* at 1008 (internal citation omitted). For this reason, any allegations regarding the liability of the defendants in the *Boim* litigation remain unproven allegations, taken as true only for the purpose of ruling on the motion to dismiss.

²⁵ *Boim I*, 127 F. Supp. 2d at 1005, 1010; *Boim II*, 291 F.3d at 1003-04.

²⁶ Bob Dylan, *Slow Train in Slow Train Coming* (Columbia Records, 1979) (33 rpm L.P. recording).

²⁷ *Boim I*, 127 F. Supp. 2d at 1006-08.

²⁸ *Id.* at 1006.

²⁹ *Id.* QLI's formal links to Hamas are also discussed in *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999).

³⁰ *Boim I*, 127 F. Supp. 2d at 1007. HLF's formal links to Hamas are discussed in *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002) (challenging the government's freeze of HLF funds after September 11, 2001).

³¹ *Boim I*, 127 F. Supp. 2d at 1007.

and conduct humanitarian relief and development efforts.³² The Boims accused HLF of raising and channeling funds to finance Hamas terrorist agents in the Middle East.³³

Also named as defendants in the Boims' lawsuit were individuals Mohammed Abdul Hamid Khalil Salah and Mousa Mohammed Abu Marzook.³⁴ Additionally, American corporations Islamic Association for Palestine, American Middle Eastern League For Palestine, and United Association For Studies and Research were named defendants.³⁵ The Boims accused these corporations of channeling money to Hamas for illicit terrorist activities.³⁶

The Boims brought their lawsuit pursuant to 18 U.S.C. § 2333, which provides civil remedies for those injured "by reason of an act of international terrorism."³⁷ The Boims sought treble damages for their injuries and an injunction against all defendants to cease collecting and channeling money for Hamas.³⁸ The essential theory of the Boims' case was that, although Hinawi and Al-Sharif actually committed David Boim's murder, these two were "aided, abetted, and financed by the other defendants named in th[e] complaint."³⁹

All served defendants, with the exception of the United Association for Studies and Research, filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.⁴⁰ The moving defendants argued that "the federal statute that was invoked by the plaintiffs...does not render them [defendants] liable for the murder of an American citizen...unless they have participated directly in that murder."⁴¹ The defendants first argued that funding alone did not constitute an act of terrorism under section 2331.⁴² Secondly, the defendants noted that since the Boims' complaint only accused the defendants of "aid[ing] and abett[ing] acts of international terrorism," and that since the plain language of section 2333 does not specifically mention civil liability for that specific cause of action, the Boims' suit fails.⁴³

For reasons more thoroughly explained in section II of this article,⁴⁴ *Boim I* found that: first, funding a terrorist group, simpliciter, without knowledge or participation in the eventual

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1006-07. Marzook and Salah's formal links to Hamas had been established in *Matter of Extradition of Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996).

³⁵ *Boim I*, 127 F. Supp. 2d at 1007.

³⁶ *Id.* *Boim I* also intricately illustrated how many named defendants were linked to each other in some manner or other. *Id.* at 1008-09.

³⁷ 18 U.S.C. § 2333 (1992). What is currently codified at 18 U.S.C. §§ 2331 – 2339B was previously known as the "Antiterrorism Act of 1990." Congress, however, repealed the Antiterrorism Act of 1990 in its entirety in March 1991. The *Boim I* court noted that the repealed sections were "essentially reenacted under a different title." *Boim I*, 127 F. Supp. 2d at 1004 n.1; see also *Boim II*, 291 F.3d at 1009 n.6 (noting that repealed provisions were re-enacted as part of the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, 106 Stat. 4506 (1992)).

³⁸ *Boim I*, 127 F. Supp. 2d at 1010.

³⁹ *Id.*

⁴⁰ *Id.* Federal Rule of Civil Procedure 12(b)(6) provides: "The following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted." The moving defendants were so confident that the plaintiffs' claim was frivolous that they accompanied their motion to dismiss with a Rule 11 motion for sanctions. *Boim I*, 127 F. Supp. 2d at 1011 n.6.

⁴¹ *Id.* at 1010.

⁴² *Id.* at 1011.

⁴³ *Id.*

⁴⁴ Though section II discusses the reasoning of the Seventh Circuit in *Boim II*, that decision affirms the district court in most regards. Any divergences from the district-court opinion are also noted in section II.

violent act, does not rise to the level of an act of “international terrorism” or an “activity involving violent acts dangerous to human life” under section 2331.⁴⁵ This would prove only a pyrrhic victory for the defendants, however, as *Boim I* went on to hold that sections 2339A and 2339B prohibiting “material support to terrorists” would allow a civil cause of action under section 2333 for funding, provided the elements of knowledge and intent are also met.⁴⁶ Likewise, for any funding that took place before the effective date of sections 2339A and 2339B,⁴⁷ the Boims could proceed on the theory that the defendants aided and abetted an act of international terrorism consistent with the language of section 2331, which defines acts of international terrorism.⁴⁸ Lastly, *Boim I* held that imposing liability for providing material support or aiding and abetting an act of international terrorism does not run afoul of the freedom of association guaranteed by the First Amendment.⁴⁹ In the end, the Boims had pleaded facts sufficient to state a cause of action for providing material aid or aiding and abetting an act of international terrorism. To that end, the defendants’ 12(b)(6) motion to dismiss and Rule 11 motion for sanctions were denied.⁵⁰

I.B.2. Seventh Circuit Court of Appeals

Because the Northern District of Illinois’s denial of the 12(b)(6) motion to dismiss was neither a final decision immediately appealable under 28 U.S.C. § 1291 nor subject to the *Cohen* collateral-order doctrine,⁵¹ the district court certified three issues for interlocutory appeal to the Seventh Circuit pursuant to 28 U.S.C. § 1292(b).⁵²

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

⁴⁵ *Boim I*, 127 F. Supp. 2d at 1012-15. Elsewhere, *Boim I* used an alternative wording for this holding: “[A]llegations of contributions to foreign terrorists groups, without more *direct dealing* with the group, does not constitute an activity involving violent acts or acts dangerous to human life.” *Boim I*, 127 F. Supp. 2d at 1015 (emphasis added).

⁴⁶ *Id.* at 1012-16.

⁴⁷ 18 U.S.C. § 2339A (Providing material support to terrorists) was added in 1994, while 18 U.S.C. § 2339B (Providing material support or resources to designated foreign terrorist organizations) was added in 1996.

⁴⁸ *Boim I*, 127 F. Supp. 2d at 1017-18. Similar to proving civil liability for the criminal offense of providing material support to terrorists under sections 2339A and 2339B, the Boims must also prove the “knowledge and intent” elements of aiding and abetting an act of international terrorism in order to prove civil liability. *Id.* at 1018. In addition, because section 2339 and the criminal action of aiding and abetting require “material” support, the element of a causal link to the terrorist act is also satisfied. *Id.* at 1019.

⁴⁹ *Id.* at 1020-21.

⁵⁰ *Id.* at 1021.

⁵¹ For an explanation of the *Cohen* doctrine see *Cherry v. Univ. of Wisconsin Sys. Bd. of Regents*, 265 F.3d 541, 546-47 (7th Cir. 2001).

⁵² *Boim v. Quaranic Literacy Institute, et al.*, Case No. 00-C-2905, Order (N.D. Ill. February 22, 2001). Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is appropriate in the Seventh Circuit when: the appeal presents a question of law; it is controlling; it is contestable; its resolution will expedite the resolution of the litigation; and the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed. *Ahrenholtz v. Bd. of Trs. of the Univ. of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000).

(3) Does a civil cause of action lie under 18 U.S.C. §§ 2331 and 2333 for aiding and abetting international terrorism?⁵³

For reasons fully set forth in Section II of this article, the Seventh Circuit Court of Appeals, speaking through Judge Rovner, held: first, funding alone is not sufficient to constitute an act of terrorism under 18 U.S.C. § 2331; second, funding that meets the definitions of criminal liability under section 2339B does create liability under section 2333; and, third, funding that meets the definition of aiding and abetting an act of terrorism also creates liability under sections 2331 and 2333.⁵⁴ In addition to answering these three certified questions, *Boim II* also agreed with the district court that civil liability for funding a foreign terrorist organization does not offend the First Amendment, provided plaintiffs have knowledge and intent to provide material support.⁵⁵ In the end, the Seventh Circuit affirmed the district court's denial of the 12(b)(6) motion to dismiss.⁵⁶

II. *Boim II*: Holding

*But if you want money for people with minds that hate...*⁵⁷

The *Boim II* panel⁵⁸ was presented with an opportunity seldom met in our litigious culture – writing on a “tabula rasa” about the meaning and scope of federal statutes that will certainly grow in importance in a post-9/11 America.⁵⁹ As previously noted, the Seventh Circuit answered three certified questions. Each question relates to its companion questions and each answer builds in part on arguments and logic from other questions. For the sake of clarity, this article will address each certified question in separate sections.

⁵³ *Boim II*, 291 F.3d at 1007 (quoting *Boim v. Quaranic Literacy Inst., et al.*, Case No. 00-C-2905, Order (N.D. Ill. February 22, 2001)).

⁵⁴ *Boim II*, 291 F.3d at 1028.

⁵⁵ *Id.* at 1021-27.

⁵⁶ *Id.* at 1028. The opinion of the Seventh Circuit Court of Appeals was released on June 5, 2002. *Id.* at 1000. The HLF's petition for rehearing en banc was denied on July 3, 2002. *Id.* On July 10, 2002, the HLF, represented by Akin, Gump of Washington D.C., filed a motion to stay the mandate order under Federal Rule of Appellate Procedure 41(d)(2)(A). *Boim v. Quaranic Literacy Inst., et al.*, 297 F.3d 542 (7th Cir. 2002) (hereinafter “*Boim III*”). Under Rule 41(d)(2)(A), the court may stay a mandate order pending the filing of a petition for a writ of certiorari in the Supreme Court. The moving party, however, “must show that the certiorari petition would present a substantial question and that there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). HLF's attempt to show good cause was its failure to consult with its attorneys regarding whether or not to file a certiorari petition. *Id.* at 543. Judge Rovner flatly rejected the motion. *Id.* at 544.

⁵⁷ John Lennon and Paul McCartney, *Revolution* on The Beatles (White Album) (Parlophone 1968).

⁵⁸ The *Boim II* panel consisted of Seventh Circuit Judges Ilana Diamond Rovner, Diane Wood, and Terrance Evans. *Boim II*, 291 F.3d at 1001. Judge Rovner authored the decision for the panel. *Id.* Judge Rovner is a Jewish immigrant from Latvia who fled the Nazis in 1939. *Almanac of the Federal Judiciary*, Volume 2, 28, 30 – Seventh Circuit (Aspen Law & Business 2002). She is a member of the International Association of Jewish Lawyers and Jurists and the Chicago Attorney's Council of Hadassah. *Id.* Judge Rovner was also the Hebrew Immigrant Aid Society Honoree in 1996. *Id.*

⁵⁹ *Boim II*, 291 F.3d at 1009; see also Michael Higgins, *Family Can Continue Suit in Hamas Case; Islamic Groups lose court ruling*, Chicago Tribune, June 6, 2002, at 21 and Stephen Franklin & Laurie Cohen, *9/11 Families Sue Chicago Foundation, Sudanese Royals*, Chicago Tribune, August 16, 2002, at 1.

II.A. Question One

The first question addressed was whether funding, simpliciter, of an international terrorist organization constitutes an act of terrorism under 18 U.S.C. § 2331.⁶⁰ Though section 2333 provided the actual basis for the Boims' cause of action in federal court, its reference to and incorporation of the statutory definition of international terrorism found in section 2331 necessitated the interpretation of both statutes. Section 2333 provides, in relevant part:

Any national of the United States injured in his or her person...*by reason of an action of international terrorism*...may sue therefore in any appropriate district court of the United States and shall recover threefold damages he or she sustains and the cost of the suit, including attorney's fees.⁶¹

The term "international terrorism" used in section 2333 is defined in section 2331:

[A]ctivities 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.⁶²

Therefore, in order to implicate QLC and HLF in the act of terrorism, the Boims argued that a payment to a known terrorist group "involves violent acts or acts dangerous to human life" within the meaning of section 2331.⁶³ As a starting premise, *Boim II* did not dispute that David Boim's murder was a "violent act."⁶⁴ *Boim II* next found an inherent ambiguity in the language of the statute concerning whether a simple provision of funds to terrorist groups "involves" a violent act.⁶⁵ Turning to the legislative history for guidance, *Boim II* determined that Congress intended sections 2331 and 2333 to: "codify general common law tort principles"⁶⁶ while "reach[ing] beyond those persons who themselves commit the violent act that directly causes the injury."⁶⁷

While the statutory intent to reach persons beyond those who commit the violent act would favor the Boims' theory of liability (that funding alone constitutes an act of terrorism), the statutory language and imported tort principles mandated a different reading. Most problematic for the Boims' theory of liability was the statutory language "by reason of."⁶⁸ *Boim II* noted that

⁶⁰ *Boim II*, 291 F.3d at 1009.

⁶¹ 18 U.S.C. § 2333 (emphasis added).

⁶² 18 U.S.C. § 2331 (1992).

⁶³ *Id.*; *Boim II*, 291 F.3d at 1009.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1009-10. *Boim II* cites the multiple definitions of the word "involve" in the *Webster's Dictionary* for proof of this alleged ambiguity. *Id.* at 1010.

⁶⁶ *Id.* (quoting 137th Cong. Rec. S4511-04 (April 16, 1991) and Antiterrorism Act of 1990, Hearing Before the Subcommittee on Courts and Administrative Practice of Committee on the Judiciary, United States Senate, 101st Cong., Second Session, July 25, 1990).

⁶⁷ *Boim II*, 291 F.3d at 1011.

⁶⁸ 18 U.S.C. § 2333 (1992).

such statutory language indicates a proximate-cause requirement.⁶⁹ Proximate cause would rest upon whether David Boim’s murder was a reasonably foreseeable consequence of the donation.⁷⁰ The plaintiffs’ theory, conversely, would “hold the defendants liable for donating money without knowledge of the donee’s intended criminal use of the funds [and] would impose strict liability.”⁷¹ Therefore, because the statute contemplates a showing of proximate cause, the Boims’ first theory of liability, that funding simpliciter constitutes an act of terrorism, was erroneous.⁷²

Given the inherent tension between the intent to stop terrorism at all points along the causal chain and the imported common-law tort elements, *Boim II* was careful to remark that this portion of the holding refers only to funding simpliciter, or funding a terrorist group without any knowledge or intent to further criminal acts.⁷³ Liability for funding a terrorist organization with knowledge and intent to further its criminal actions is covered under question three, which discusses civil liability for aiding and abetting an act of international terrorism.⁷⁴

This portion of *Boim II*’s holding is relatively non-controversial,⁷⁵ though the district court and appellate court arrived at the same conclusion via a slightly different route. In its analysis of whether ignorant funding, or funding simpliciter, constitutes an “act of terrorism” under section 2331, *Boim I* focused its attention on whether the party giving money to the terrorists had knowledge of the illicit activity and acted in furtherance of the illicit goal.⁷⁶ *Boim I* appears to collapse these two elements into a standard of “direct dealing with the [terrorist] group.”⁷⁷ While *Boim II* agreed that the statute requires some showing of “knowledge” and “intent to further...the criminal acts,” it indicates that the language “by reason of” in section 2333 also requires a showing of proximate cause.⁷⁸ For *Boim II*, the elements of “knowledge” and “intent to further the criminal act” collapse into a proximate-cause standard that rests on whether “murder was a reasonably foreseeable result of making a donation.”⁷⁹ While this rationale clearly supports *Boim II*’s resolution of this issue, the elements of knowledge, intent, material aid, and proximate cause take on a greater importance in the examination of certified questions two and three, concerning secondary liability and aiding and abetting.

⁶⁹ *Boim II*, 291 F.3d at 1011-12 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 26568 (1992) (interpreting “by reason of” language in RICO provision to require proximate causation)).

⁷⁰ *Boim II*, 291 F.3d at 1012.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* *Boim II* hints that if funding alone constitutes an act of international terrorism, then sections 2333 and 2331 would be subject to First Amendment constitutional infirmities. *Id.* at 1011; *see also DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 484 U.S. 568, 575 (1988) (courts should construe statutes to avoid First Amendment problems).

⁷⁴ *Boim II*, 291 F.3d at 1012, 1016-21.

⁷⁵ Based on the relationship between the civil and criminal anti-terrorism statutes, the Seventh Circuit requested a brief from the United States government on appeal. *Boim II*, 291 F.3d at 1009 n.7. The government agreed with the defendants that section 2331 and 2333 did not impose liability for funding simpliciter of a terrorist organization. *Id.* at 1011.

⁷⁶ *See Boim I*, 127 F. Supp. 2d at 1014-15.

⁷⁷ *Id.* at 1015.

⁷⁸ *Boim II*, 291 F.3d at 1011.

⁷⁹ *Id.* at 1012.

II.B. Question Two

Certified question two concerned whether the criminal violation of knowingly providing material support to terrorists, codified at 18 U.S.C. §§ 2339A and 2339B, also constitutes a civil cause of action under section 2333.⁸⁰ Section 2339A prohibits the provision of material support to terrorists.⁸¹ Material support, in turn, is defined as:

[C]urrency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.⁸²

Section 2339B, passed in 1996, extends criminal liability to those providing material support to foreign terrorists specifically.

Whoever...knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.⁸³

Boim II observed that in enacting section 2339B, Congress “intended that the persons providing financial support to terrorists should also be held criminally liable for those violent acts.”⁸⁴ In a similar way, the Congressional record for section 2333 indicates that Congress intended “to cut off the flow of money in support of terrorism generally.”⁸⁵ Noting that there is no “textual, structural, or logical justification for construing civil liability imposed by section 2333 more narrowly than the criminal provisions,” *Boim II* determined that a violation of criminal section 2339 would be sufficient to satisfy an act of international terrorism under sections 2331 and 2333.⁸⁶ “[I]t would be counterintuitive to conclude that Congress imposed criminal liability in sections 2339A and 2339B on those who financed terrorism, but did not intend to impose civil liability on those same persons through section 2333.”⁸⁷ Bolstering this determination was the passage of 28 U.S.C. § 1605(a)(7) that strips sovereign immunity and attaches civil liability to countries that provide material support to terrorists.⁸⁸

In construing what constitutes “material support” in sections 2339A and 2339B, *Boim II* corrected the district court’s reference to “substantial or considerable” support.⁸⁹ The statute defines material support as “currency or other financial securities, financial services...” but makes

⁸⁰ *Id.* at 1012-13.

⁸¹ *Id.*

⁸² 18 U.S.C. § 2339A(b) (1994).

⁸³ 18 U.S.C. § 2339B (1996).

⁸⁴ *Boim II*, 291 F.3d at 1014.

⁸⁵ *Id.* (quoting Sen. Rpt. 102-342 at 22 (July 27, 1992)).

⁸⁶ *Id.* at 1015.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1015 (quoting 28 U.S.C. § 1605(a)(7)). Section 1605 is discussed in section III of this article.

⁸⁹ *Boim II*, 291 F.3d at 1015.

no mention as to the amount of support necessary.⁹⁰ Indeed, *Boim II* observed that the statute contemplates the “type of aid provided rather than whether it is substantial or considerable.”⁹¹ *Boim II* also rectified the district court’s mistake regarding the time frame in which sections 2339A and 2339B analyses are applicable. *Boim I* originally held that the prohibitions of sections 2339A and 2339B could not be used in a civil matter alleging material aid before the sections’ respective dates of effective passage.⁹² *Boim II*, however, noted that the effective dates of sections 2339A and 2339B’s passages are irrelevant because “we are using sections 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by ‘international terrorism.’”⁹³ “No timing problem arises because sections 2339A and 2339B merely elucidate conduct that was already prohibited by sections 2333.”⁹⁴

Boim II’s interpretation of the relationship between sections 2331, 2333, 2339A, and 2339B draws upon its holding in certified question one, though it also begins to reveal inconsistencies that will continue into question three. In certified question one, *Boim II* held that plaintiffs were required to show that the contributing defendants had “knowledge” and “intent to further...criminal acts” before assessing liability under section 2333. Section 2339B requires an element of “knowing[]” and “material support,”⁹⁵ but does not require an “intent to further ... criminal acts.”⁹⁶ Despite this inconsistency, *Boim II* clearly held that “conduct that would give rise to criminal liability under section 2339B...meet[s] the definition of international terrorism as that term is used section 2333.”⁹⁷

II.C. Question Three

The third and most difficult certified question concerned whether QLC and HLF could be held civilly liable under section 2333 for “aiding and abetting an act of international terrorism.”⁹⁸ The civil cause of action for aiding and abetting and the statutory prohibitions governing the provision of material support found in sections 2339A and 2339B both impose liability on those who do not commit the violent act itself, but fund and lend material support to such acts.⁹⁹ Because much of the Boims’ complaint concerned support provided before the passage of sections 2339A and 2339B, the Boims were forced to rely on section 2333 alone and an aiding-and-abetting cause of action. By the time *Boim II* reached this third certified question, it had already explained that “sections 2339A and 2339B merely elucidate conduct that was already prohibited by section 2333.”¹⁰⁰ Therefore, it was certain that *Boim II* would find that section 2333 encompassed a cause

⁹⁰ 18 U.S.C. § 2339A(b) (1994).

⁹¹ *Boim II*, 291 F.3d at 1015.

⁹² *Boim I*, 127 F. Supp. 2d at 1016-17.

⁹³ *Boim II*, 291 F.3d at 1016.

⁹⁴ *Id.*

⁹⁵ 18 U.S.C. § 2339B(a)(1) (1996).

⁹⁶ *Boim II*, 291 F.3d at 1016.

⁹⁷ *Id.* at 1028.

⁹⁸ *Id.* at 1016.

⁹⁹ *See id.* at 1015-21.

¹⁰⁰ *Id.* at 1016.

of action for “aiding and abetting an act of terrorism,” which, essentially, was the common-law counterpoint for the statutory prohibitions against providing material support to terrorists.¹⁰¹

Though *Boim II* had already provided a strong foundation to support its answer that section 2333 allows liability for aiding and abetting an act of terrorism, *Boim II* had yet to examine the 1994 Supreme Court case *Central Bank of Denver N.A. v. First Interstate Bank of Denver*.¹⁰² In *Central Bank*, the Supreme Court determined that section 10(b) of the Securities Exchange Act of 1934 did not provide a civil cause of action for aiding and abetting securities violations.¹⁰³ Using the language of the Securities Exchange Act as a starting point, *Central Bank* first recognized that a civil cause of action under section 10(b) is implied, not expressly granted.¹⁰⁴ Second, *Central Bank* determined that the language “directly or indirectly” in the statute does not provide a cause of action for aiding and abetting a deceptive act: “[A]iding and abetting liability extends beyond persons who engage, even indirectly, in proscribed activity.”¹⁰⁵

QLI and HLF utilized strong language from *Central Bank* regarding statutory interpretation of aiding-and-abetting liability:

Congress knew how to impose aiding and abetting liability when it chose to do so. If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words “aid” and “abet” in the statutory text. But it did not.¹⁰⁶ ... Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.¹⁰⁷

Based on this language from *Central Bank*, *Boim II* was presented with two options: first, distinguish and limit the holding of *Central Bank* to the narrow factual scenario of the case; or, second, presume that sections 2331 and 2333 do not allow a cause of action for civil aiding and abetting because the exact words are not found in the statute. *Boim II* chose the former, distinguishing *Central Bank* on four grounds.¹⁰⁸

First, *Boim II* argued that *Central Bank* addressed aiding-and-abetting liability for a 10(b) implied right of action, as opposed to the express cause of action granted in section 2333.¹⁰⁹ This distinction was important for *Boim II* because, in order to find a cause of action for aiding and abetting an act of securities fraud, *Central Bank* would have been required to “pile inference upon inference in determining Congressional intent.”¹¹⁰ However, in section 2333, with its express cause of action for those injured by an act of terrorism, “Congress’ intent is clear from the language

¹⁰¹ See *id.* at 1015-21.

¹⁰² 511 U.S. 164 (1994).

¹⁰³ *Id.* at 177-78.

¹⁰⁴ *Id.* at 172.

¹⁰⁵ *Id.* at 176.

¹⁰⁶ *Id.* at 176-77 (internal citations omitted).

¹⁰⁷ *Id.* at 182 (internal citation omitted).

¹⁰⁸ *Boim II*, 291 F.3d at 1019-21.

¹⁰⁹ *Id.* at 1019.

¹¹⁰ *Id.*

and structure of the statute itself as well as from the legislative history”¹¹¹ – no inference piling was necessary.

The second distinguishing factor is “that the language and legislative history of section 2333 evidence an intent to import general tort law principles into the statute, a factor glaringly absent from section 10(b).”¹¹² This distinguishing factor relied heavily on *Boim II*’s previous answer to certified question one, discussing the presence of traditional tort-law elements in section 2333.¹¹³ In section 10(b), however, Congress had “manifest[ed] a deliberate choice to exclude aiding and abetting liability.”¹¹⁴

Boim II’s strongest argument distinguishing *Central Bank* was that “Congress also expressed an intent in section 2333 to make civil liability at least as extensive as criminal liability.”¹¹⁵ This argument derives its strength from the plain language of the statute. The language of section 2333 allows suit from any national “injured...by reason of an act of international terrorism.”¹¹⁶ Section 2331, in turn, defines “international terrorism” as “activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.”¹¹⁷ *Boim II* noted that “activities that ‘involve’ violent acts, taken at face value would certainly cover aiding and abetting violent acts.”¹¹⁸ Second, aiding and abetting a criminal act is also a violation of the criminal laws of the United States.¹¹⁹ In sum, “[b]y incorporating violations of any criminal laws that involve violent acts or acts dangerous to human life, Congress was expressly including aiding and abetting to the extent that aiding and abetting ‘involves’ violence.”¹²⁰

Lastly, *Boim II* distinguished *Central Bank* on the ground that aiding-and-abetting liability is necessary in order to effectuate “Congress’ clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence.”¹²¹ Though policy considerations were unnecessary to consider in light of the plain language of section 2331, *Boim II* maintained that “the statute would have little effect if liability were limited to the persons who pull the trigger or plant the bomb.”¹²² Therefore, the only way for the statute to have any teeth at all “is to impose

¹¹¹ *Id.*

¹¹² *Id.* at 1020.

¹¹³ *See supra* notes 60-79.

¹¹⁴ *Boim II*, 291 F.3d at 1020.

¹¹⁵ *Id.*

¹¹⁶ 18 U.S.C. § 2333 (1992).

¹¹⁷ 18 U.S.C. § 2331(1)(A) (1992).

¹¹⁸ *Boim II*, 291 F.3d at 1020.

¹¹⁹ *Id.* (citing 18 U.S.C. § 2 (1948)).

¹²⁰ *Boim II*, 291 F.3d at 1020. This justification for allowing aiding and abetting as a cause of action under section 2333 follows the form of the classical logical syllogism, with a major and minor premise followed by a conclusion. *See* Donald Kalish, Richard Montague, and Gary R. Mar, *Logic: The Techniques of Formal Reasoning* (HBJ College and School Division Publishing, 2nd edition, 1980).

Major Premise: Activities that involve violent acts under section 2331 are acts of terrorism under section 2333.

Minor Premise: Aiding and abetting a violent act is an activity that involves violent acts under section 2331.

Conclusion: Aiding and abetting a violent act is an act of terrorism under section 2333.

¹²¹ *Boim II*, 291 F.3d at 1021.

¹²² *Id.*

liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts.”¹²³

III. *Ungar* and Section 1605(a)(7)

*Persecution, execution, governments out of control...*¹²⁴

III.A. *Ungar*: Facts

Yaron Ungar and his wife were killed in a terrorist machine-gun attack on June 9, 1996 near Beit Shemesh, Israel.¹²⁵ Four of the five Palestinian men responsible for the murders were apprehended and confessed to the Ungars’ murders.¹²⁶ The Ungars’ survivors sued, among others, the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and three Iranian government officials.¹²⁷ The Ungars based jurisdiction over these defendants, as well as the defendants’ ultimate liability, on a 1996 amendment to the Foreign Sovereign Immunities Act.¹²⁸

In 1996, as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Congress added an exception to the Foreign Sovereign Immunities Acts (“FSIA”) to allow liability against a foreign state and individual officeholders for claims arising out of state-sponsored terrorism.¹²⁹ The amendment was also enacted retroactively, encompassing causes of action arising both before and after its passage.¹³⁰ If a state is not entitled to immunity due to sponsorship of terrorism and State Department designation as a sponsor of terrorism, it will be held liable “in the same manner and to the same extent as a private individual under like circumstances.”¹³¹ Eschewing a personal appearance in court, state sponsors of terrorism will often fail to appear, resulting in a request for a default judgment – a scenario that took place in *Ungar*.¹³² A default judgment may be granted, however, only if supported by “evidence satisfactory to the court.”¹³³

¹²³ *Id.*

¹²⁴ Bob Dylan, *Trouble in Shot of Love* (Columbia Records, 1981) (33 rpm L.R. recording).

¹²⁵ *Ungar*, 211 F. Supp. 2d at 92.

¹²⁶ *Id.* at 93.

¹²⁷ *Id.*

¹²⁸ *Id.* The Ungars also brought a section 2333 civil claim. *Ungar v. Palestinian Auth., et al.*, 153 F. Supp. 2d 76 (D.R.I. 2001).

¹²⁹ 28 U.S.C. § 1605(a)(7) (1996 amendment).

¹³⁰ *Ungar*, 211 F. Supp. 2d at 91 n.3.

¹³¹ 28 U.S.C. § 1606 (1976); *see also Ungar*, 211 F. Supp. 2d at 91.

¹³² *Id.*

¹³³ 28 U.S.C. § 1608(e) (1976). *Ungar* also construes what evidentiary standard must be presented to “satisfy the court” pursuant to section 1608(e). *Ungar* eventually settles on the standard for granting judgment as a matter of law under Federal Rule of Civil Procedure 50(a) – a legally sufficient basis for a reasonable jury to find for the plaintiff. *Ungar*, 211 F. Supp. 2d at 98.

III.B. *Ungar*: Holding

In assessing whether the Ungars had produced sufficient evidence for a default judgment against Iran for sponsorship of the Ungars' assassination, the court struggled with the legal standard necessary to implicate a state sponsor of terrorism under section 1605 of the FSIA.¹³⁴

Similar to the issues presented in the discussion of *Boim II* and section 2333, *Ungar* specifically noted the ambiguity in sections 1605 and 2339 regarding what causal nexus between the support of terrorism and the specific terrorist act is necessary to trigger, first, jurisdiction, and, second, liability.¹³⁵ While a simple allegation that the country in question provided material support that caused the plaintiff's injury is sufficient for jurisdiction under section 1605(a), liability depends on the elusive but-for causation.¹³⁶ *Ungar* describes the standard that plaintiffs must satisfy: "Plaintiffs have established that Iran provided extensive support to HAMAS, but their proof does not link that support to the *Ungar* murders specifically."¹³⁷

The language of section 1605 provides that a foreign state is not entitled to immunity from suit for "personal injury or death that was caused by ... the provision of material support or resources" to a terrorist organization.¹³⁸ With the statute's causation requirement in mind, the Ungars proceeded on two causes of action in order to implicate Iran in the death of Yaron Ungar. Like the Boims, the Ungars alleged that Iran aided and abetted the tortious conduct.¹³⁹ Relying on *Halberstam v. Welch*,¹⁴⁰ a case from the District of Columbia Circuit, *Ungar* construed civil aiding and abetting to require: a wrongful act causing an injury aided by the defendant; the defendant's knowledge of the act at the time he or she provided the assistance; and substantial assistance in the wrongful act.¹⁴¹ Though *Ungar* devoted little discussion to the application of the elements, it appears that prong one is surely met by the murder of Yaron Ungar. Prong two, essentially a knowledge element, appears to be met as well. Iran's formal links to the known terrorist group Hamas were well-established: "Here, plaintiffs have established that Iran provided extensive support to HAMAS..."¹⁴² However, *Ungar* found a deficiency in prong three, the link to the wrongful act: "[t]heir proof does not link that support to the *Ungar* murders specifically."¹⁴³

The Ungars also alleged that Iran and Hamas had engaged in a civil conspiracy to murder Yaron Ungar. Again relying on *Halberstam* for the elements of this cause of action, *Ungar* required the following proof:

¹³⁴ See *id.* at 98-101. Hamas is no stranger to federal courts. As *Ungar* recognized, the factual links between Iran and Hamas have been noted in *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002); *Mousa v. Islamic Republic of Iran*, 238 F. Supp. 2d 1 (D.D.C. 2001); and *Eisenfield v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000). *Ungar*, 211 F. Supp. 2d at 91.

¹³⁵ *Id.* at 98-101.

¹³⁶ *Id.* at 98-99.

¹³⁷ *Id.* at 99 (emphasis added).

¹³⁸ 28 U.S.C. § 1605(7) (1976).

¹³⁹ *Ungar*, 211 F. Supp. 2d at 99.

¹⁴⁰ 705 F.3d 472 (D.C. Cir. 1983). *Halberstam*'s explanation of civil aiding and abetting is explored fully in section IV of this article.

¹⁴¹ 211 F. Supp. 2d at 99.

¹⁴² *Id.*; see also *id.* at 94-97.

¹⁴³ *Id.* at 99.

(1) [A]n agreement between two or more persons; (2) to participate in an unlawful or tortious act; (3) an injury caused by an unlawful or tortious overt act performed by one of the parties; (4) which was done pursuant to and in furtherance of the common scheme.¹⁴⁴

Because the civil-conspiracy analysis does not require proof of “knowing and substantial assistance to a particular act,”¹⁴⁵ it appears that it would be easier for the Ungars to produce sufficient evidence to satisfy the standard. *Ungar*, however, held that there was insufficient evidence to establish any sort of “common and unlawful plan” between Iran, Hamas, and the ultimate shooters.¹⁴⁶ In so holding, the district court denied the plaintiffs’ motion for default judgment without prejudice, allowing them to renew their motion with new evidence.¹⁴⁷

IV. *Boim* and *Ungar*: Their Inconsistencies and an Alternative Interpretation

*There’s too much confusion, I can’t get no relief...*¹⁴⁸

Due in part, perhaps, to the phrasing of the questions certified for appeal, *Boim II* provides its analysis of the elements necessary to sustain a section 2333 civil cause of action in a piecemeal fashion. This section will summarize the elements outlined above, identify certain inconsistencies in the reasoning and requirements of both *Boim* and *Ungar*, and also indicate, when applicable, arguments and interpretations to maximize a plaintiff’s likelihood of recovery in section 2333 and 1605(a) actions against those who provide material aid to terrorists.

IV.A. Joint-Tort Causation

The first element that *Boim II* indicates must be satisfied in a section 2333 action is causation.¹⁴⁹ *Ungar* also focused most of its attention on the factual and proximate-cause requirements.¹⁵⁰ In its answer to certified question one, *Boim II* indicates that the presence of the statutory language “by reason of” in section 2333 requires a plaintiff to show proximate causation.¹⁵¹ “[T]he plaintiffs must be able to show that murder was a reasonably foreseeable result of making a donation.”¹⁵² *Boim II* also cites *Holmes v. Securities Investor Protection*

¹⁴⁴ *Id.* at 100 (citing *Halberstam*).

¹⁴⁵ *Id.* (internal quotation marks omitted).

¹⁴⁶ *Id.* In so holding, the court focused its attention on the fact that the actual shooters were only loosely affiliated with Hamas and were not full-fledged members of the group. Therefore, the court reasoned, it is unlikely that a mere henchman at the “end of a long chain conspiracy knew of the existence of the larger conspiracy.” *Id.* If the shooters were full-fledged, known members of Hamas, knowledge of Iranian support would surely have been more likely based upon the known link between the groups. See *Mousa*, 238 F. Supp. 2d at 11-12; *Eisenfield*, 127 F. Supp. 2d at 7-9.

¹⁴⁷ 211 F. Supp. 2d at 100. Because of the novel nature of the questions presented concerning causation in the joint-tort theories of liability, *Ungar* also indicated its willingness to certify a 28 U.S.C. § 1292(b) interlocutory appeal. *Id.* at 100-01.

¹⁴⁸ Bob Dylan, *All Along the Watchtower* in *John Wesley Harding* (Sony Records, 1967) (33 rpm L.P. recording).

¹⁴⁹ 291 F.3d at 1011-12.

¹⁵⁰ 211 F. Supp. 2d at 98-100.

¹⁵¹ 291 F.3d at 1012.

¹⁵² *Id.*

Corp.,¹⁵³ for the proposition that the statutory language “by reason of” necessitates a proximate-cause requirement.¹⁵⁴ *Holmes* clearly interprets such statutory language to require not only proximate cause, but also factual, or but-for causation, as well.¹⁵⁵ This portion of the *Boim* holding creates potentially irresolvable tension with its answer to question three, which holds that aiding and abetting and other forms of secondary liability constitute an “act of terrorism.”¹⁵⁶ In short, because the common forms of secondary liability do not necessarily require a traditional showing of but-for and legal causation related to the aider and abetter, the statutory requirement to prove causation exceeds what a plaintiff can practically accomplish in litigation.

The seminal case regarding secondary liability and joint torts, *Halberstam v. Welch*,¹⁵⁷ explains and distinguishes two of the most common forms: civil conspiracy and aiding and abetting:

Civil conspiracy includes: (1) an agreement between two or more persons; (2) to participate in an unlawful act; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme. . . .

Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.¹⁵⁸

These two theories of joint liability correspond to the first two subsections of section 876 in the Second Restatement of Torts.¹⁵⁹ The Restatement includes a caveat that encapsulates the ambiguity regarding causation in secondary liability: “The Institute takes no position on whether the rules stated in this Section are applicable when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability for the resulting harm.”¹⁶⁰ While secondary liability clearly would require some sort of damage resulting from an intentional

¹⁵³ 503 U.S. 258, 265-68 (1992).

¹⁵⁴ 291 F.3d at 1011-12.

¹⁵⁵ 503 U.S. at 268.

¹⁵⁶ 291 F.3d at 1016-21.

¹⁵⁷ 705 F.2d 472 (D.C. Cir. 1983). The *Halberstam* panel is also noteworthy. Judge Wald wrote the majority opinion for future Supreme Court Justice, then-Judge, Antonin Scalia, and future Supreme Court nominee Judge Robert Bork.

¹⁵⁸ *Id.* at 477. For a recent Supreme Court treatment of civil conspiracy, see *Beck v. Prupis*, 529 U.S. 494 (2000). For a general history of the civil-conspiracy cause of action, see Jerry Whitson, Student Author, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. Rev. 921 (1979).

¹⁵⁹ *Restatement (Second) of Torts* §§ 876(a) & (b) (1977).

¹⁶⁰ *Id.* at caveat.

injury¹⁶¹ or negligence,¹⁶² cases applying these legal theories¹⁶³ and the Restatement examples¹⁶⁴ clearly do not require *both* parties to be the factual and proximate cause of the resultant damage. As one commentator has noted: “There is no requirement that [the joint tortfeasor] be the ‘but for’ cause of the accident.”¹⁶⁵ W. Page Keeton similarly commented regarding proximate cause that: “[I]t makes no difference that the damage inflicted by one tortfeasor exceeds what the other might reasonably have foreseen.”¹⁶⁶

In addition to the discrepancy in reconciling this causation requirement with the elements of traditional joint torts and secondary liability, the causation element *Boim II* and *Ungar* require would be difficult to prove. American organizations that fund Hamas and other terrorist organizations do so in a covert fashion. As *Boim I* explained the funding process:

Hamas’ presence in the United States is significant but covert. It conducts its affairs through a network of front organizations that ostensibly have religious and charitable purposes. ... These organizations’ purportedly humanitarian functions mask their mission of raising and funneling money and other resources to Hamas operatives to support their terrorist campaigns.¹⁶⁷

Boim II further explains the complicated process by which American organizations fund Hamas:

The money flows through a series of complicated transactions, changing hands a number of times, and being commingled with funds from the front organizations’ legitimate charitable and business dealings. The funds are laundered in a variety of ways, including through real estate deals and through Swiss bank accounts.¹⁶⁸

Both courts also noted that Hamas receives up to one-third of its multi-million-dollar budget from overseas fund-raising.¹⁶⁹ Practically speaking, it would be near impossible for a plaintiff to carry

¹⁶¹ See, e.g., *Rael v. Cadena*, 604 P.2d 822, 822-23 (N.M. App. 1979) (verbal encouragement given during battery creates joint liability for the tort).

¹⁶² See, e.g., *Am. Fam. Mut. Ins. Co. v. Grim*, 440 P.2d 621, 625-26 (Kan. 1968) (boy who broke into church was jointly liable when his co-conspirator set fire to the building).

¹⁶³ See *Rael*, 604 P.2d at 822-23, and *Grim*, 440 P.2d at 625-26; see also *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035-37 (D. Mass. 1981) (joint theories of liability in *Restatement (Second) of Torts* § 876 assess liability without traditional tort causation); *Keel v. Hainline*, 331 P.2d 397, 400 (Okla. 1958). In *Keel*, the court held a defendant liable as an aider and abettor for a girl’s injury though the defendant was only handing erasers to other boys to throw across the room. *Keel* explicitly rejected any cause-in-fact requirement, noting that it was immaterial whether the defendant aided the actual boy who threw the offending eraser because of the defendant’s overall participation in the general tortious activity.

¹⁶⁴ *Restatement (Second) of Torts* § 876 cmt. on clause (b), illus. 10: “A and B conspire to burglarize C’s safe. B, who is the active burglar, after entering the house and without A’s knowledge of his intention to do so, burns the house in order to conceal the burglary. A is subject to liability to C, not only for the conversion of the contents of the safe but also for the destruction of the house.”

¹⁶⁵ John L. Diamond, Lawrence C. Levine & M. Stuart Madden, *Understanding Torts* 231 (LEXIS L. Publng 2000).

¹⁶⁶ W. Page Keeton, Prosser & Keeton, *Torts* 323 n.7 (5th ed. 1984) [hereinafter Keeton et al., *Torts*] (citing *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950)).

¹⁶⁷ 127 F. Supp. 2d at 1005.

¹⁶⁸ 291 F.3d at 1004.

¹⁶⁹ *Boim I*, 127 F. Supp. 2d at 1005; *Boim II*, 291 F.3d at 1003.

her burden of proving that a monetary contribution to an American charitable organization, after passing through several laundering channels to an overseas terrorist organization, was used to finance and, ultimately, cause the violent act that forms the basis of the plaintiff's suit. As *Humanitarian Law Project v. Reno*,¹⁷⁰ a case from the Ninth Circuit discussing section 2339, observed: "Once the support [to terrorism] is given, the donor has no control over how it is used."¹⁷¹ In addition, sections 2339A and 2339B, which create criminal penalties for providing material support to terrorists, do not require that the aid be proximately related to a violent act.¹⁷²

It its discussion of criminal section 2339B,¹⁷³ *Humanitarian Law Project* argued that any showing of factual or proximate cause relating to a donation to overseas terrorism is practically impossible to prove.

Congress explicitly incorporated a finding into the statute that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." It follows that all material support given to such organizations aids their unlawful goals... Therefore, when someone makes a donation to them, *there is no way to tell how the donation is used*... Even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive.¹⁷⁴

The legislative history of section 2333 also recognizes that the statute does not address a typical cause of action. "Title X [section 2333] would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed."¹⁷⁵ Additionally, the legislative history indicates that this non-traditional cause of action should not necessarily require the traditional elements of factual and proximate causation. "The imposition of liability *at any point along the causal chain* of terrorism... would interrupt, or at least imperil, the flow of money."¹⁷⁶ An imposition of liability "at any point along the causal chain" stands in stark contrast to the imposition of liability at only those points proximately related to, or the but-for cause of, the act of terrorism as *Boim II* and *Ungar* require. Likewise, the legislative history envisions that section 2333 would allow varied causes of action. "The substance of such an action is not defined by statute because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts."¹⁷⁷ Therefore, section 2333

¹⁷⁰ 205 F.3d 1130 (9th Cir. 2000), *cert denied sub nom. Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001) and *Ashcroft v. Humanitarian Law Project*, 532 U.S. 904 (2001).

¹⁷¹ *Id.* at 1134.

¹⁷² 18 U.S.C. §§ 2339A (1994) & 2339B (1996).

¹⁷³ According to *Boim II*, a violation of section 2339B also leads to civil liability under section 2333. 291 F.3d at 1016. Though *Humanitarian Law Project* discusses only section 2339B, its observations are relevant to a section 2333 analysis as both sections prohibit the provision of material support to terrorism with corresponding criminal and civil penalties.

¹⁷⁴ 205 F.3d at 1136 (citations and footnotes omitted) (emphasis added).

¹⁷⁵ Sen. Rpt. 102-342 at *22 (July 27, 1992).

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ *Id.* at *45.

could encompass causes of action such as a civil conspiracy and aiding and abetting, which, arguably, do not require such a showing of causation.¹⁷⁸

In order to rectify the inconsistency between *Boim II* and *Ungar*'s causation requirements and the lack thereof in joint-tort theory, the "by reason of" language in section 2333, based on Supreme Court discussion of similar language in other federal statutes, may not require a rigid but-for factual causation and proximate causation in order to assess liability. This solution would fully effectuate the purposes of the act as evidenced in the legislative history while remaining within the plain language of the statute.¹⁷⁹

In *Price Waterhouse v. Hopkins*,¹⁸⁰ the Supreme Court addressed the standard of causation required by the words "because of" in Title VII of the Civil Rights Act.¹⁸¹ The Court noted that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation'... is to misunderstand them."¹⁸² In the typical but-for inquiry, "ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way."¹⁸³ *Price-Waterhouse* alters this inquiry slightly: "the words 'because of' do not mean 'solely because of.'"¹⁸⁴ Therefore, in the context of Title VII, "[w]hen...an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations..."¹⁸⁵ This approach is adaptable for analyzing the causation required by section 2333. As a preliminary consideration, there is no difference in the meaning of "because of" as opposed to "by reason of" – both contemplate the same level of causation.¹⁸⁶ Based on the *Price Waterhouse* analysis, "by reason of" does not mean "solely by reason of," nor does it require a plaintiff to show traditional but-for causation. Using the standard outlined in *Price Waterhouse*, if a plaintiff shows that a terrorist organization that injured her was funded at least in some part by the defendant, then she succeeds in showing that she was injured "by reason of" the funding, though others may have also funded the act.

Price Waterhouse illustrates this interpretation of the causation requirement with an example of a joint tort:

¹⁷⁸ See, e.g., cases cited *supra* nn. 161-63, 166.

¹⁷⁹ See Sen. Rpt. 102-342, at *22, *45.

¹⁸⁰ 490 U.S. 228 (1988).

¹⁸¹ *Id.* at 279-82. As noted in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 626 (1999) (Thomas, J., dissenting), the statutory language "because of" means "by reason of."

¹⁸² 490 U.S. at 240. For a full explanation of the alternatives to but-for causation in the cause-in-fact inquiry, see David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765 (1997).

¹⁸³ 490 U.S. at 240.

¹⁸⁴ *Id.* at 241.

¹⁸⁵ *Id.*

¹⁸⁶ *Olmstead*, 527 U.S. at 626 (Thomas, J., dissenting).

Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a ‘cause’ of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply ‘in the air’ unless we can identify at least one of them as a but-for cause of the object’s movement. Events that are causally overdetermined, in other words, may not have any ‘cause’ at all. This cannot be so.¹⁸⁷

This example not only comports with the well-settled law of joint torts,¹⁸⁸ but is also particularly applicable to the complex funding of terrorist organizations. As *Boim II* observed, foreign terrorist organizations receive up to one-third of their funding from overseas organizations.¹⁸⁹ While this is a substantial amount, a full two-thirds is then obtained through other channels. As Judge Kozinski wrote in *Humanitarian Law Project*, “terrorist organizations do not maintain open books”¹⁹⁰ – there is no practical way to determine what exact source of funding was used on specific attacks.

As the cited language indicates, it would be practically impossible to determine that any portion of the funding was the but-for cause of a terrorist attack. Without adopting a *Price Waterhouse*-fashioned causation analysis, no portion of aid could possibly be considered the but-for cause. This incongruous result is clearly outside of Congress’ intent in enacting section 2333. Indeed, in Congressional findings accompanying the passage of the criminal counterpart to section 2333, Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution* to such an organization *facilitates that conduct*.”¹⁹¹ A logical conclusion to such a finding eschews any proximate or factual-cause requirement: “All material support given to such organizations aids their unlawful goals.”¹⁹²

The requirement of proximate causation in joint torts is, at best, unsettled.¹⁹³ While the Restatement allows itself a caveat to account for this inconsistency,¹⁹⁴ its examples and language allow credible arguments to be made in favor and against a proximate-cause element. The Restatement offers that “a person who encourages another to commit a tortious act may be responsible for other acts by the other”¹⁹⁵ and provides an example in which a joint tortfeasor is

¹⁸⁷ 490 U.S. at 241.

¹⁸⁸ See text accompanying *supra* notes 161-66.

¹⁸⁹ 291 F.3d at 1003.

¹⁹⁰ 205 F.3d at 1136. Nathan Lewin, lawyer for the Boims, similarly remarked: “One argument we made was that after Sept. 11, you can’t tell what is a benign use of funds.” Stephanie Francis Cahill, *Hitting Terrorists In the Pocketbook*, 24 ABA J. E-Report 5 (2002) (quoting Lewin).

¹⁹¹ Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214 (1996) (emphasis added).

¹⁹² *Humanitarian Law Project*, 205 F.3d at 1136. This argument roughly mirrors the substantial-factor alternative to the traditional but-for, cause-in-fact requirement. See Robertson, *supra* note 182, at 1775-81.

¹⁹³ While there is no doubt that the alleged injury must be proximately caused by some action or negligence, the inconsistency regarding proximate causation in joint torts refers to whether the particular joint-tortfeasor’s action is the proximate cause of the injury as well. See, e.g., *Restatement (Second) of Torts* § 876 caveat and accompanying text.

¹⁹⁴ *Restatement (Second) of Torts* § 876 caveat: “The Institute takes no position on whether the rules stated in this Section are applicable when the conduct of either the actor or the other is free from ... negligence but involves strict liability for the resulting harm.”

¹⁹⁵ *Id.* at cmt. on clause (b).

liable for an act of which he is neither the factual nor proximate cause.¹⁹⁶ Immediately following this sentence and example, however, the Restatement states that “ordinarily [a joint tortfeasor] is not responsible for other acts...that were not foreseeable by him”¹⁹⁷ and provides a corresponding example.¹⁹⁸ Other authorities also disagree. For example, while Keeton writes that “it makes no difference that the damage inflicted by one tortfeasor exceeds what the other might reasonably have foreseen,”¹⁹⁹ the seminal case regarding joint liability, *Halberstam v. Welch*, explains that “a person who assists a tortious act may be liable for ... reasonably foreseeable acts...”²⁰⁰

Boim II, in an attempt to resolve this inconsistency, appears to stand for the proposition that if a terrorism funder has general knowledge of the illicit activity and provides assistance, then the illicit act is reasonably foreseeable and the causation element (related to the specific aid as opposed to the tort itself) is satisfied. The terrorist act itself (e.g. bombing, assassination), of course, must still be the proximate and factual cause of the injury, a fact presupposed in *Boim II* and this article as well. While *Boim II* and *Ungar* were correct to require some form of “connectivity” between the act of aiding and the eventual tort, joint theories of liability provide such a connection, albeit in a more attenuated fashion. The common-sense justification for this relatively lax causal nexus is clear: when one joins a tortious act in an unrestricted fashion she is essentially demonstrating her intent to further tortious activity and should be held liable for the injuries of the tort. Indeed, money freely flowing to a known terrorist organization, such as Hamas or Al-Quida, creates countless foreseeable risks and an extremely broad class of potential injuries. In order to fully effectuate the purposes of the statutes, courts should construe the foreseeable risks and injuries broadly. As demonstrated below, a general knowledge that the joint tortfeasor will engage in some illegal activity is a necessary, but also a *sufficient* element to impute the remaining joint-tort elements.

The requirement of a knowledge element is well-settled in joint-tort law.²⁰¹ Though some quantum of knowledge is necessary to succeed in both joint-tort theories of civil conspiracy and aiding and abetting, *Halberstam* notes that “there is a qualitative difference between proving an *agreement to participate* in a tortious line of conduct, and proving *knowing action* that

¹⁹⁶ *Id.* at illus. 10. “A and B conspire to burglarize C’s safe. B, who is the active burglar, after entering the house and without A’s knowledge of his intention to do so, burns the house in order to conceal the burglary. A is subject to liability to C, not only for the conversion of the contents of the safe but also for the destruction of the house.”

¹⁹⁷ *Id.* at cmt. on clause (b).

¹⁹⁸ *Id.* at illus. 11: “A supplies B with wire cutters to enable B to enter the land of C to recapture chattels belonging to B, who, as A knows, is not privileged to do this. In the course of the trespass upon C’s land, B intentionally sets fire to C’s house. A is not liable for the destruction of the house.”

¹⁹⁹ Keeton et al., *supra* note 166, at 323 n.7. See also 74 Am. Jur. 2d *Torts* § 61 (2002) (“Generally, two or more persons engaged in a common enterprise are jointly liable for the wrongful acts committed in connection with the enterprise when the enterprise is an unlawful one, although the damage done was greater than was foreseen, the particular act done was not contemplated or intended by them all, or only one of the participants’ acts causes the injury.”); *Payton*, 512 F. Supp. at 1035-37 (joint theory of liability outlined in *Restatement (Second) of Torts* § 876 is an example of tort liability without causation).

²⁰⁰ 705 F.2d at 484; see also *Restatement (Second) of Torts* § 876 cmt. on clause (b); 4 Causes of Action 2d 517 § 15 Proximate Cause (2003).

²⁰¹ See *Restatement (Second) of Torts* § 876 (“[O]ne is subject to liability if he does a tortious act in concert with the other...or knows that the other’s conduct constitutes a breach of duty.”); *Halberstam*, 705 F.2d at 477 (“[T]he defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides assistance.”).

substantially aids tortious conduct.”²⁰² Indeed, in examining the remaining elements necessary to prove secondary liability under section 2333 (knowledge, material aid, and intent) there are subtle differences in the elements of the two primary joint-tort theories, civil conspiracy and aiding and abetting. For that reason, they are examined separately.

IV.B. Civil Conspiracy: Agreement and Overt Act

As previously listed, the elements of a civil conspiracy include an agreement and an overt act in furtherance of the conspiracy that produced an injury or damages.²⁰³ As opposed to aiding-and-abetting liability, “the element of agreement is a key distinguishing factor for a civil conspiracy action.”²⁰⁴ The agreement need not be explicit or expressed in words, an agreement may be implied and understood to exist from the conduct itself.²⁰⁵ The agreement alone does not lead to liability, however, without the performance of some underlying tortious act.²⁰⁶ Though *Boim II* discussed secondary liability solely in terms of aiding-and-abetting liability,²⁰⁷ the elements of civil conspiracy, as outlined above, appear to satisfy the knowledge requirement. Simply stated, an express or tacit agreement to engage in an unlawful act (funding a terrorist attack) with an overt act done in furtherance of the conspiracy (the attack) satisfies both elements of the civil conspiracy. While proving a tacit agreement to commit a terrorist attack may provide evidentiary challenges for plaintiffs, most civil-conspiracy cases are proven by circumstantial evidence. “Mutually supportive activity by parties in contact with one another over a long period suggests a common plan.”²⁰⁸

While the knowledge element appears to be a straightforward requirement for liability in a civil conspiracy, its bearing and relation to foreseeability is more nuanced. While an agreement to engage in some tortious act and an overt act in furtherance of the conspiracy is necessary, it is not necessary that the tortious action taken be the exact tortious action contemplated by the co-conspirator. *Halberstam*’s methodical explication of civil-conspiracy precedent is particularly helpful in illustrating this distinction.²⁰⁹ For example, in *Davidson v. Simmons*,²¹⁰ the defendant was held liable for his co-conspirator’s battery on a police officer during a burglary because the battery was an action in furtherance of the conspiracy to commit burglary. *Davidson*, in turn, cited *Tabb v. Norred*,²¹¹ which held a defendant liable for his co-conspirator’s shooting of a police officer during a burglary because the “shooting was an act which could reasonably have been

²⁰² 705 F.2d at 478 (emphasis in original). *Halberstam* insinuates that a concerted activity that results in an intentional tort would satisfy both tests for liability, whereas the tort of negligence lends itself only to the aiding-and-abetting theory.

²⁰³ *Id.* at 477.

²⁰⁴ *Id.*

²⁰⁵ *Restatement (Second) of Torts* § 876 cmt. on clause (a).

²⁰⁶ *Halberstam*, 705 F.2d at 479.

²⁰⁷ 291 F.3d at 1028.

²⁰⁸ *Halberstam*, 705 F.2d at 481.

²⁰⁹ *Id.* at 480-85.

²¹⁰ 280 N.W.2d 645 (Neb. 1979).

²¹¹ 277 So. 2d 223 (La. App. 1973). A portion of the *Tabb* holding was subsequently superseded by a statutory amendment to the Louisiana Civil Code. The proposition cited remains good law, however. See *Stephens v. Bail Enforcement of Louisiana*, 690 So. 2d 124, 129-30 (La. App. 1997).

anticipated when the conspiracy to commit burglary was executed.”²¹² *Halberstam* aptly summarizes this legal concept:

As to the extent of liability, once the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action...so long as the purpose of the tortious action was to advance the overall object of the conspiracy.²¹³

As a logical result of this holding, the defendant does not need to provide substantial aid in furtherance of the particular tort committed, provided the tort is within the overall scope of the conspiracy.

These distinctions have critical importance in the context of alleging secondary liability for funding a terrorist attack. Presuming a plaintiff could properly prove a conspiracy to engage in a terrorist act through the long relationship of funding and contact between defendants, then the plaintiff need not prove that the exact funding was used in the particular terrorist attack that caused her injury. Based on the law of civil conspiracy, an agreement to further a terrorist attack would not require evidence that the conspiracy planned or contemplated the specific attack that led to the injury. Rather, any attack within the scope of the “overall object of the conspiracy” can lead to liability, hence, *Ungar* incorrectly required a heightened level of evidence and causation. In short, if the object of the conspiracy is terrorist activity, then any terrorist attack committed would be in furtherance of that ultimate object. It would not matter, for example, whether the funding party had particular knowledge or was the factual or proximate cause of David Boim’s murder or the 9/11 attacks. This lesser standard is of particular aid to plaintiffs requesting a default judgment against a defendant. Previously, the *Ungar* plaintiffs were in a Catch-22 situation when, without the benefit of discovery, they were required to produce evidence satisfactory to the court to prove that the defaulting defendants were linked to the act that injured the plaintiff. Conversely, a civil-conspiracy cause of action does not require substantial aid to a particularly contemplated tort. Provided the tort is within the scope of the agreement, this cause of action is the best possibility for relief against international funders of terrorist activities.

IV.C. Aiding and Abetting: Knowledge and Substantial Aid

As stated, *Boim II* directs its attention solely to the joint tort of aiding and abetting a tortious act. *Boim II* indicated that the elements necessary to sustain a cause of action for aiding and abetting an act of terrorism include: knowledge, substantial aid, and an intent to help the illegal

²¹² *Davidson*, 280 N.W.2d at 649 (discussing *Tabb*).

²¹³ 705 F.2d at 481; see also *David Waksman, Student Author, Causation Concerns in Civil Conspiracy To Violate Rule 10b-5*, 66 N.Y.U. L. Rev. 1505, 1513-30 (1991). Waksman criticizes the absence of causation in civil conspiracy and argues that a proximate-causation element should be introduced into the civil-conspiracy cause of action. Waksman focuses his discussion of civil conspiracy in the area of securities violations. Though the Supreme Court denied joint-tort liability for 10b-5 violations in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), Waksman’s thesis is equally applicable to cases applying civil conspiracy in other contexts, such as funding for a terrorist action.

activity succeed.²¹⁴ As discussed in the context of the joint tort civil conspiracy, some quantum of knowledge about some illicit activity is necessary for the application of this tort. Similar to the analysis of civil conspiracy, the element of knowledge in the aiding-and-abetting context is intimately tied into reasonable foreseeability and proximate causation. Though there is a practical difference between knowledge of the illicit act and legal causation, cases applying aiding and abetting, including *Boim II*, insinuate that knowledge and material aid—even without legal cause *per se*—will suffice to assess liability.²¹⁵

It is easiest to describe the quantum of knowledge necessary to assess liability for aiding and abetting using case precedent as an illustrative guide. The first principle gleaned is that ignorant assistance or aid, or assistance simpliciter, as *Boim II* phrased it, is insufficient for liability.²¹⁶ For example, in *Investors Research Corp. v. SEC*,²¹⁷ the District of Columbia Circuit vacated a district court’s finding of aiding-and-abetting liability against a broker for securities violations because the district court had made no finding regarding the broker’s “general awareness” of the illegal activity.²¹⁸ *Investors Research* explained that “any [act of aiding and abetting] can be performed in complete good faith by an actor unaware that anything improper is occurring. Where the activities of the alleged aider and abettor are in this respect innocent, it would be unjust to utilize secondary liability to impose punishment. . . .”²¹⁹

On the other end of the knowledge continuum would be the instance in which an aider and abettor has knowledge of a specific illegal act and substantially assists that act, which is eventually carried out. In this instance, liability clearly would be assessed. The Restatement offers several examples of this scenario: “A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice.”²²⁰ In a similar fashion, in *Rael v. Cadena*,²²¹ the defendant gave verbal encouragement to an assailant during a battery — thus, the *Rael* defendant knew of the illicit activity, gave encouragement to engage in that exact activity, and the encouraged activity occurred.²²² *Rael* is also a fine example of how joint liability can attach without a finding of factual cause. As *Halberstam* notes: “The court explained that liability did *not* require . . . that the injury had directly resulted from the encouragement.”²²³

While cases that fall neatly within these two extremes will yield a certain result, there is a third category of aiding-and-abetting knowledge in which most section 2333 cases will lie. The precise question is whether one may be liable as an aider and abettor if he has knowledge of some illegal activity, but no knowledge of the exact activity that eventually occurred. As *Halberstam* phrases this question: “When is a defendant liable for injuries caused by the acts of the person

²¹⁴ 291 F.3d at 1020; see also *Halberstam*, 705 F.3d at 477; *Restatement (Second) of Torts* § 876(b) & cmt. on clause (b).

²¹⁵ *Boim II*, 291 F.3d at 1016-21; *Halberstam*, 705 F.2d at 487-89; *Davidson*, 280 N.W.2d at 808-10; *Tabb*, 277 So. 2d at 227-30; *Am. Fam. Ins. Co.*, 440 P.2d at 625-26; *Keel*, 331 P.2d at 400-01; *Thompson*, 180 F.2d at 433-34.

²¹⁶ 291 F.3d at 1009-12.

²¹⁷ 628 F.2d 168 (D.C. Cir. 1980).

²¹⁸ *Id.* at 178.

²¹⁹ *Id.* at 178 n.61.

²²⁰ *Restatement (Second) of Torts* § 876 illus. on clause (b) 4-8.

²²¹ See *Rael*, 604 P.2d at 822-23.

²²² *Id.*; see also *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (aiding-and-abetting liability assessed when company sold model’s picture to a company knowing that the company would eventually defame the picture).

²²³ 705 F.2d at 481 (emphasis in original) (discussing *Rael*).

assisted when the acts were not specifically contemplated by the defendant at the time he offered aid?”²²⁴ In this difficult third category, the issue of reasonable foreseeability previously alluded to enters the analysis. As outlined above, the concept of joint-tort liability does not necessarily require the actions of both parties to be the factual and legal causes of the eventual injuries. While the Restatement offers examples indicating that specific knowledge of the particular tort is not necessary for liability, provided there is general knowledge of illegal activity,²²⁵ it creates considerable tension by stating that an aider and abettor would not incur liability for acts “not foreseeable by him.”²²⁶ The Restatement, in an effort, perhaps, to account for this tension, includes a caveat which lends credence to either interpretation.²²⁷ Despite the Restatement’s ostensible schizophrenia concerning this question, it appears settled that a defendant need not have particular knowledge of the tort accomplished, provided that the defendant has general knowledge of tortious activity and the tortious act was a reasonably foreseeable event based upon that knowledge.

The fact pattern of *Halberstam* fittingly illustrates this subtle legal principle. In *Halberstam*, the defendant’s live-in boyfriend engaged in a burglary enterprise for approximately four years. During this time, the defendant had knowledge that her boyfriend was engaged in some sort of illegal theft activity and she also helped administrate the illicit business involved with selling the stolen items. The boyfriend eventually killed one of his burglary victims and the defendant was sued for engaging in a civil conspiracy and aiding and abetting the murder. *Halberstam* affirmed the finding of the district court that “Hamilton knew about ... Welsh’s illicit enterprise” and “had a general awareness of her role in a continuing criminal enterprise.”²²⁸ While Hamilton had no knowledge of the murder specifically, “it was enough that she knew he was involved in some type of personal property crime at night...because violence and killing is a foreseeable risk in any of these enterprises.”²²⁹ Similarly, in *Thompson v. Johnson*,²³⁰ the court held the defendants liable for aiding and abetting an act of battery when they prevented others from stopping the attack. Though the *Thompson* defendants claimed ignorance that the altercation would lead to serious bodily injury, the court held that “all are answerable for any injury done by any one of them, although the damage done was greater than was foreseen or the particular act done was not contemplated or intended by them.”²³¹

In summary, the knowledge element of aiding-and-abetting liability under sections 2333 and 1605 contains an element of foreseeability that provides enough leeway for plaintiffs to sue

²²⁴ *Id.* at 483.

²²⁵ *Restatement (Second) of Torts* § 876 cmt. on clause (b); illus. 10 on clause (b).

²²⁶ *Id.* at cmt. on clause (b); illus. 11 on clause (b).

²²⁷ *Id.* at caveat.

²²⁸ *Halberstam* at 488; see also *Investors Research*, 628 F.2d at 176-79 (discussing the general awareness element in aiding-and-abetting liability).

²²⁹ 705 F.2d at 488.

²³⁰ 180 F.2d 431 (5th Cir. 1950) (applying Mississippi tort law).

²³¹ *Id.* at 434. This language could be read to mean that an aider and abettor is liable even for acts that were not reasonably foreseeable results of the aid proffered. For the purposes of this citation, however, it, at a minimum, stands for the proposition that an aider and abettor does not need particular knowledge of the eventual tortious act. Similarly, in *Keel*, 331 P.2d at 400-01, the court held the defendant liable for the plaintiff’s loss of her eye due to the defendant handing an eraser to another student to throw across the room. Though the defendant had no intent or prior knowledge that the girl was going to be hit by the eraser, the court implies that such a result was reasonably foreseeable based on the defendant’s general knowledge of the tortious activity taking place.

monetary contributors while still satisfying the elements of a section 2333 action as outlined in *Boim*.²³² Based upon the fact that certain groups have been designated international terrorist organizations by the Secretary of State,²³³ it is improbable that a defendant could claim that he was unaware of a certain organization's involvement with acts of terrorism. Likewise, based on the settled law of aiding-and-abetting liability, a defendant need not have particular knowledge of the exact terrorist attack in order to be held liable. Rather, if a plaintiff can show that a defendant had general knowledge of the activities of the terrorist organization (and provided substantial aid, as discussed below), then the defendant should properly be held liable for every act of terrorism that was funded, or could have been funded, by their money – as any violent act was the reasonably foreseeable result of unchecked funding to an organization devoted to terrorism.²³⁴

The second element of an aiding-and-abetting cause of action is the requirement of “substantial aid.”²³⁵ *Boim II* imparted a key distinction and slight alteration to the traditional elements of aiding-and-abetting liability concerning what constitutes “substantial aid.” This distinction is also applicable in assessing what constitutes material aid under section 1605. The traditional inquiry regarding what constitutes substantial aid depended upon five basic factors: the nature of the act encouraged; the amount (and kind) of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor; and the defendant's state of mind.²³⁶ *Boim II*, however, explicitly rejects the proposition that the aid offered the act in question must be substantial, as required by traditional aiding-and-abetting law.²³⁷ Rather, the language of the statute clearly contemplates “the type of aid provided rather than whether it is substantial or considerable.... Even small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333.”²³⁸

While this portion of the holding certainly benefits plaintiffs in a section 2333 (and section 1605) action, funding a terrorist organization could also reach the level of substantial aid under the traditional elements outlined in the Restatement. The first two factors, the nature of the act and amount and kind of assistance, are closely interrelated. *Halberstam* indicates that the inquiry

²³² In Alan Bromberg & Lewis B. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 Alb. L. Rev. 637, 668-727 (1988), the authors examine the joint tort of aiding and abetting in the securities domain. Though the Supreme Court eventually held in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), that rule 10b-5 does not provide a cause of action for aiding and abetting, Bromberg and Lowenfels' examination of aiding-and-abetting liability as a cause of action is instructive. The article actually argues that the “reasonably foreseeable” element of the cause of action is rooted in the “substantial aid” element rather than the knowledge element, as this article argues. Their argument, however, is not applicable to a section 2333 violation because, as *Boim II* explains, the statute prohibits a type of aid (such as money) rather than an amount of aid (a substantial amount). 291 F.3d at 1015.

²³³ 8 U.S.C. § 1189 (1996).

²³⁴ Supporting this conclusion is Prosser and Keeton's “long and firm insistence ‘that...proximate causation is a noncausal policy issue.’” Robertson *supra* note 182, at 1766 (internal citation omitted). Indeed, in the seminal case regarding proximate causation, *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928), Judge Andrews remarked: “What is cause in the legal sense, still more what is proximate cause, depend in each case upon many considerations.... What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.” The policy against supporting terrorism is clearly evidenced in sections 2331, 2333, 2339A, and 2339B, as well as the legislative history for section 2333.

²³⁵ *Halberstam*, 705 F.2d at 484.

²³⁶ *Id.* at 483-84 (citing *Restatement (Second) of Torts* § 786 cmt. on clause (b)).

²³⁷ 291 F.3d at 1015.

²³⁸ *Id.*

should focus on how essential the aiding and abetting was to the ultimate tortious action.²³⁹ In executing a terrorist attack, funding plays an indispensable role. As *Boim II* explained, the funding is necessary to finance training, weapons, lodging, explosives, personnel, and compensation to the families of suicide terrorists.²⁴⁰ Considering the second inquiry (the amount and kind of assistance) in detail, the statute obviously places the kind or type of assistance above the amount.²⁴¹ Nonetheless, because terrorist organizations receive up to one-third of their budgets from overseas fundraising,²⁴² the amount of assistance is a substantial factor in the attacks. The third and fourth factors, the presence at the time of the tort and the relation to the tortfeasor, admittedly would not favor liability against an overseas funder. The fifth factor in the inquiry regarding substantial aid assesses the state of mind of the aider and abettor. This element corresponds directly to two other elements in the aiding-and-abetting context, knowledge and intent. While knowledge of the tort in question has been addressed above, the intent element warrants further discussion.

The question of intent in the joint-tort context shades into the analysis previously conducted concerning causation and knowledge. As demonstrated above, while knowledge of some general illegal activity is necessary, liability for aiding and abetting may be assessed even without previous, particular knowledge of a specific tort. In a similar fashion, a defendant may be liable for aiding and abetting an act even if the aid offered was not the factual or proximate cause of the act. As a corollary to these principles, it follows that if a defendant can be held liable without specific knowledge of an act for which he is neither the factual nor proximate cause of, then the aider and abettor can also be held liable without personally intending the tortious act. While this formulation may appear to border on strict liability, the element of some “general knowledge” of a criminal act and the provision of “aid” appear to suggest that the eventual tort was reasonably foreseeable and intended.²⁴³ The link between knowledge and intent in traditional tort theory is well established. Indeed, the very definition of intent involves *knowing* with a substantial certainty that a tort will occur.²⁴⁴ Though “knowing with a substantial certainty” indicates a higher burden to meet in cases involving an intentional tort, case law has applied more the “reasonably foreseeable” standard to intentional torts that exceed the specific knowledge of the aider and abettor.²⁴⁵

The ambiguities concerning causation, knowledge, and now, intent, in joint-tort theory may all be traced back to the Restatement caveat and contradictory examples concerning joint-tort liability for unforeseen, unknown, and unintended torts committed by a compatriot.²⁴⁶ Consistent with the formulation outlined in this article, joint-tort case law has assessed liability to an aider and abettor by generally inferring, from the presence of knowledge, some general intent to further the tort committed. For example, in *Halberstam*, though the defendant had no knowledge and

²³⁹ 705 F.2d at 484-85.

²⁴⁰ 291 F.3d at 1004.

²⁴¹ *Id.* at 1015.

²⁴² *Id.* at 1003.

²⁴³ For example, *Boim II* examined the allegations of the plaintiffs’ complaint in order to determine if they had pleaded an intent element. Though the plaintiffs did not specifically plead intent, they did plead knowledge and material aid. *Boim II* concludes that “these allegations also implicitly assert that the defendants had the intent to further the illegal aims of Hamas...” *Id.* at 1025.

²⁴⁴ See, e.g., *Garret v. Daily*, 279 P.2d 1091, 1093-95 (Wash. 1955).

²⁴⁵ See, e.g., *Halberstam*, 705 F.2d at 488.

²⁴⁶ See text accompanying *supra* notes 225-27.

evidenced no intent to aid and abet murder, she was found liable as an aider and abettor for her co-conspirator's act of murder because "her continuous participation [in the burglary venture] reflected her intent and desire to make the venture succeed."²⁴⁷ Similarly, in *American Family Mutual Insurance Company v. Grim*, the court assessed liability against an aider and abettor who had no knowledge of the underlying tort (burning a building during a robbery).²⁴⁸ *Grim*, having acknowledged the defendant's knowledge of the general burglary scheme, inferred the presence of intent: "it could be inferred that he [defendant] actively participated in the accomplishment of the overall mission ... it would appear that he intended to reap the same benefits..."²⁴⁹ Lastly, *Thompson*, discussed above in the context of knowledge and causation, also assessed liability on aiders and abettors for a battery that exceeded the intent of the defendants who offered the aid.²⁵⁰

Boim II created a further inconsistency regarding the intent requirement by holding that conduct that violates sections 2339A and 2339B creates liability under section 2333.²⁵¹ Criminal sections 2339A and 2339B, however, do not contain any intent requirement.²⁵² Nonetheless, *Boim II* appears to add an intent requirement in addition to the elements of section 2339 in order to assess civil liability.²⁵³ As demonstrated above, such a requirement was unnecessary to remain with the requirements of traditional joint-tort liability and the statutory language of section 2333. *Boim II* likely included the intent requirement in order to satisfy the defendants' First Amendment challenges.

IV.D. Intent and The First Amendment

QLC and HLF raised two separate, but closely related First Amendment freedom of association challenges to imposing liability for their alleged provision of material support to Hamas. First, they argued that the Boims sought to hold them liable for their mere association with Hamas, though they lacked any intent to further Hamas' illicit goals. Second, they argued that criminal section 2339B, which *Boim II* examined tangentially in relation to section 2333,²⁵⁴ failed First Amendment scrutiny for its failure to consider "the intent and associational rights of contributors who donate money for humanitarian purposes."²⁵⁵

Boim II began its analysis with the well-established proposition that "in order to impose liability on an individual or association with a group, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims."²⁵⁶ Having already held that liability for aiding and abetting an act of terrorism under section 2333 required knowledge, intent, and material aid in furtherance of an illegal act, *Boim II* logically concluded that such a showing would also satisfy the First Amendment freedom to associate as construed in *Claiborne Hardware*.²⁵⁷ Any of Hamas' alleged humanitarian efforts

²⁴⁷ 705 F.2d at 488.

²⁴⁸ 440 P.2d at 625-26 (boy who broke into church was jointly liable when his co-conspirator set fire to the building).

²⁴⁹ *Id.*

²⁵⁰ 180 F.2d at 434 (citation omitted).

²⁵¹ 291 F.3d at 1016.

²⁵² 18 U.S.C. §§ 2339A (1994) & 2339B (1996).

²⁵³ 291 F.3d at 1023.

²⁵⁴ See *supra* notes 80-97 and accompanying text.

²⁵⁵ 291 F.3d at 1021.

²⁵⁶ *Id.* at 1022 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920-21 (1982)).

²⁵⁷ *Id.* at 1023; *Claiborne Hardware Co.*, 458 U.S. at 920-21.

were also irrelevant for First Amendment purposes “if HLF and QLC knew about Hamas’ illegal operations, and intended to help Hamas accomplish those illegal goals when they contributed money to the organization.”²⁵⁸

The defendants also challenged the facial constitutionality of section 2339B, alleging that it “imposes liability without regard to the intent of the donor.”²⁵⁹ *Boim II* first noted that the criminal prohibition of section 2339B was not directly implicated in the present civil litigation.²⁶⁰ The court reformulated the challenge in such a manner to provide the defendants with the proper standing to assert a challenge: whether a section 2333 claim founded solely on conduct that would render a person criminally liable under section 2339B would violate the First Amendment.²⁶¹ Relying on the reasoning of the Ninth Circuit in *Humanitarian Law Project v. Reno*,²⁶² *Boim II* found that section 2339B passed First Amendment scrutiny.²⁶³

In conducting its analysis, *Boim II* first identified what section 2339B prohibits: the provision of material support.²⁶⁴ While *Claiborne Hardware* discussed liability stemming from association alone,²⁶⁵ section 2339B “does not implicate associational or speech rights.”²⁶⁶ Under both sections 2339 and 2333, anyone may join Hamas, “praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 2339B prohibits only the provision of material support (as the term is defined) to a terrorist organization.”²⁶⁷ While advocacy warrants a high level of scrutiny under the First Amendment,²⁶⁸ a donation of money only symbolically represents advocacy and may be limited by the government accordingly.²⁶⁹ Specifically, the constitutional standard for government regulation of monetary donations is whether the state “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”²⁷⁰

Applying this standard, *Boim II* found that the “government’s interest in preventing terrorism is not only important but paramount.”²⁷¹ In so holding, *Boim II* made its lone reference to the events of September 11, 2001, noting understatedly: “[T]hat interest has been made all the more imperative by the events of September 11, 2001... .”²⁷² The court also held that section

²⁵⁸ 291 F.3d at 1024.

²⁵⁹ *Id.* at 1025.

²⁶⁰ *Id.* (“[S]ection 2339B is relevant to the Boims’ claim only to the extent that it helps define what conduct Congress intended to include in its definition of ‘international terrorism.’”).

²⁶¹ *Id.*

²⁶² 205 F.3d 1130 (9th Cir. 2000) (holding that section 2339B does not unconstitutionally abridge the First Amendment freedom of association), *cert denied sub nom. Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001), and *Ashcroft v. Humanitarian Law Project*, 532 U.S. 904 (2001).

²⁶³ 291 F.3d at 1027. John Walker Lindh, an American citizen accused of aiding the Taliban in Afghanistan against United States forces, alleged a similar First Amendment argument in a motion to dismiss several counts alleging violations of 18 U.S.C. § 2339B (1996). *United States v. Lindh*, 212 F. Supp. 2d 541, 568-73 (E.D. Va. 2002). *Lindh* also followed the lead of *Humanitarian Law Project* in denying the First Amendment challenge to section 2339. *Id.*

²⁶⁴ 291 F.3d at 1026.

²⁶⁵ 458 U.S. at 908.

²⁶⁶ *Boim II*, 291 F.3d at 1026.

²⁶⁷ *Id.*

²⁶⁸ See, e.g., *Claiborne Hardware*, 458 U.S. at 907-08.

²⁶⁹ *Boim II*, 291 F.3d at 1026 (citing *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976)).

²⁷⁰ *Id.* at 1027 (citing *Buckley*) (internal quotation marks omitted).

²⁷¹ *Id.* at 1027 (citation omitted).

²⁷² *Id.*

2339B was narrowly tailored to avoid unnecessary abridgement of associational freedoms. “Congress did not attach liability for simply joining a terrorist organization or zealously espousing its views.”²⁷³ Instead, “Congress carefully limited its prohibition on funding as narrowly as possible in order to achieve the government’s interest in preventing terrorism.”²⁷⁴

While *Boim II* did nothing more than affirm the basic reasoning of *Humanitarian Law Project*, the discussion was arguably unwarranted as the First Amendment challenges were not included in the questions certified for appeal.²⁷⁵ Additionally, the First Amendment argument the defendants posited claimed that secondary liability under section 2333 assessed liability without intent to further the organizations’ illegitimate aims.²⁷⁶ Because *Boim II* maintained that an aiding-and-abetting action required intent, there was no real need to engage in the analysis of *Humanitarian Law Project* outlined above. As stated in the previous section, it appears that *Boim II* instead contemplated that the intent requirement could be imputed from a showing of a general awareness of the criminal activity and a provision of some aid. This interpretation likely explains the presence of *Humanitarian Law Project*, as it clearly held that “the First Amendment does not require the government to demonstrate a specific intent to aid an organizations’ illegal activities before attaching liability to the donation of funds.”²⁷⁷

CONCLUSION

For the innocent victims of terrorism, monetary recovery will never fully heal the emotional, psychological, and physical wounds that terrorism suddenly and senselessly inflicted.²⁷⁸ As Congressman Steven Rothman has noted, the war on terrorism is not a typical war – it is fought each day on untypical fronts by soldiers and citizens alike.²⁷⁹ In the arena of civil lawsuits, federal statutes 2333 and 1605 provide two valuable weapons against the financial sources of terrorism. In a similar fashion, the joint-tort theories of civil conspiracy and aiding-and-abetting liability allow plaintiffs to reach beyond the deranged attackers and gunmen themselves to the hidden funders and sources of monetary support. The union of joint-tort theory and these statutes, like any new marriage, is filled with a few problems and misunderstandings. Although, in the end, the potential for great things far outweighs the initial difficulties.

This article has examined both *Boim* and *Ungar*, cases that have both struggled to reconcile a rather unsettled concept of tort law with statutes seldom interpreted. As this article has demonstrated, *Boim* and *Ungar* set a valuable precedent for the application of joint-tort theory to acts of international terrorism. Litigants, attorneys, professors, and judges are certain to debate, contemplate, and evaluate many of the issues raised by these opinions as litigation surrounding

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1008.

²⁷⁶ *Id.* at 1021-25.

²⁷⁷ Jason Binimow & Amy Bunk, Annotation, *Validity, Construction and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA) 8 U.S.C.A. § 1189*, 178 A.L.R. Fed. 535 (2002) (discussing *Humanitarian Law Project*).

²⁷⁸ For one of the more disturbing accounts of terrorist activities and their effects see *Higgins v. The Islamic Republic of Iran*, 2000 U.S. Dist. LEXIS 22173 (D.D.C. Sept. 21, 2000).

²⁷⁹ 147 Cong. Rec. E2111-01 (daily ed. Nov. 16, 2001) (extension of remarks of Rep. Rothman).

the events of 9/11 continues.²⁸⁰ While both of these cases reach cogent conclusions, this article has offered an analysis of joint-tort theory in the context of the pertinent statutes that differs from these opinions in certain contexts. This article articulates arguments to, hopefully, maximize the potential for a plaintiff's recovery. Though the two theories of joint torts and the two statutes discussed have certain differences, this article illustrates that secondary liability for terrorist activities should focus on the defendant's general awareness of the illegal activity. Because of the unique requirements of joint torts, this article demonstrates that this general knowledge, coupled with the provision of material aid, provides enough connectivity to the tort to satisfy the statutory requirements of knowledge, causation, and intent.

²⁸⁰ One group has already sued a Saudi royal family, the Sudanese government, and a Chicago-based Islamic charity for damages stemming from 9/11. Unsurprisingly, the plaintiffs' attorneys in the case cite *Boim* as a valuable precedent. Franklin & Cohen, *supra* n.59, at 1.