HOW THE WAR ON TERROR IS TRANSFORMING PRIVATE U.S. LAW

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ABSTRACT

In thinking about the War on Terror's impact on U.S. law, what most likely comes to mind are its corrosive effects on public law, including criminal law, immigration, and constitutional law. What is less appreciated is whether and how the fight against terrorism has also impacted private law. As this Article demonstrates, the War on Terror has had a negative influence on private law, specifically on torts, where it has upended long-standing norms, much as it has done in the public law context.

Case law construing the private right of action under the Antiterrorism Act of 1992, 18 U.S.C. § 2333(a) ("Section 2333"), shines the brightest light on this trend. Using Section 2333, private individuals can bring civil suits against third-parties for injuries purportedly resulting from violence committed by terrorist groups. In deciding these cases, which sound in intentional torts, many courts have treated Section 2333 as a critical component of U.S. counterterrorism efforts. This marriage of tort law and national security has transformed Section 2333 into anything but the traditional tort Congress intended it to be. In the process, a line of jurisprudence has developed under the statute, which carries negative implications for the discipline of torts writ large, reinforces the War on Terror's ideologically-infused narratives about terrorism itself, and ensnares defendants with little to no meaningful connection with terrorism or terrorist groups.

These consequences, which have largely gone unnoticed by both tort scholars and critics of U.S. counterterrorism efforts, are important ones. They highlight the ways America's never-ending war has not only undermined public, but also private, law, and underscore how torts, in particular, have helped perpetuate the political ideology at the root of that

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battle. This Article seeks to uncover and explain these trends, for the first time, and offer some preliminary solutions.

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INTRODUCTION

In cataloguing the War on Terror's impact on U.S. law, what usually comes to mind are its corrosive effects on public law, including on constitutional liberties, principles of criminal liability, and the development of immigration law and policy. What is typically less appreciated, however, is how terrorism policy has also eroded private law. Much as it has done in the public law context, the War on Terror has had a negative impact on private law, specifically on torts, where it has upended long-standing norms. Case law construing the private right of action under the Antiterrorism Act of 1992 (ATA),[1] 18 U.S.C. § 2333(a) ("Section 2333" or "civil statute" or "civil material support statute"), shines the brightest light on this dynamic.

Since September 11th, 2001, the U.S. government has increasingly used criminal prosecutions under the ATA as a key part of its courtroom battle against terrorism.[2] Through Section 2333, private plaintiffs have joined in this war.[3] Using this law, "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs, may sue therefor in any appropriate district court of the United States."[4] As reflected by its legislative history, the civil statute, which sounds in intentional torts, is designed to subvert terrorism by imposing "[tort] liability at any point along the causal chain."[5] The statute provides for substantial monetary recovery, including treble damages, attorney's fees, and litigation costs.[6]

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1. 18 U.S.C. §§ 2331–2339D. The ATA was originally enacted in 1990 but was repealed and reenacted in 1992 due to a technical error. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, S1003, 106 Stat. 4506, 4521 (entitled "Terrorism Civil Remedy").

2. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 5–6 (2005) (noting that prosecutions under the ATA are central to the U.S. government's anti-terrorism efforts).

3. Section 2333 was passed before September 11th, 2001 but remained largely dormant before the attacks. Seth N. Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 32 (2004).

4. 18 U.S.C. § 2333(a).

5. S. Rep. No. 102-342, at 22 (1992); *see* 137 CONG. REC. S4511-04 at 1 (Apr. 16, 1991) ("The ATA accords victims of terrorism the remedies of American tort law . . . .").

6. 18 U.S.C. § 2333(a). The decision to create Section 2333 was triggered, in part, by the 1985 murder of Leon Klinghoffer, an American citizen, by four hijackers on board the *Achille Lauro* cruise liner. *See* Gill v. Arab Bank, PLC, 891 F. Supp. 2d 335, 353 (E.D.N.Y. 2012) [hereinafter *Gill I*] ("[Section 2333's] legislative history indicates that the civil remedy provision became law in large part because of the *Klinghoffer* litigation."). Klinghoffer's wife and daughters had sued the owner of the ship and various parties in U.S. court, seeking damages for Klinghoffer's death. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gesitone Motonave Achille Lauro Amministrazione Straordinaria, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991). Because the incident had occurred abroad, plaintiffs initially faced various jurisdictional hurdles, which they ultimately overcame. *See id.* at 858–59 (holding that subject matter jurisdiction existed under the Death on the High Seas Act, which provided basis for claims of wrongful death in international waters), *vacated on other grounds*, 937 F.2d 44. Nevertheless, the *Klinghoffer* case raised concerns about the absence of clear jurisdiction in U.S. courts over claims relating to foreign terrorist attacks. Section 2333 was meant to fill this gap, by extending

In the years since the War on Terror began, thousands of private plaintiffs have used Section 2333 to bring cases for injuries purportedly resulting from terrorist activities. Their targets have been entities and individuals who allegedly violated the ATA's criminal terrorism laws, specifically 18 U.S.C. § 2339A (Section 2339A) and 18 U.S.C. § 2339B (Section 2339B) (collectively "criminal material support statutes" or "criminal statutes").[7] Sections 2339A and 2339B, which prohibit "material support" for terrorism, are aimed at third-party contributors that have allegedly engaged in activities, ranging from monetary support to educational training, in aid of terrorist groups or activities.[8] A typical Section 2333 case, for example, involves a defendant bank accused of providing financial services to an entity which is allegedly affiliated with a terrorist group that caused plaintiff's injuries. As with most cases under Section 2333, these suits are often based on underlying violations of one or both criminal provisions, each of which may qualify as "acts of international terrorism" under the civil statute.[9]

In adjudicating these cases, courts have described Section 2333 both as embracing "general principles of tort law," and as critically important to the U.S. government's battle against terrorism.[10] This marriage of tort law and the War on Terror has, however, transformed Section 2333 into anything

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that courts' reach to all American victims of overseas terrorism. *See* H.R. REP. 102-1040, at 5 (1992) (noting need for civil statute providing general cause of action for American victims of international terrorism).

7. There are two additional material support statutes: 18 U.S.C. § 2339C, which was added to the ATA in 2002 and prohibits the financing of terrorism; and 18 U.S.C. § 2339D, which was added in 2004 and makes it illegal to receive military training from a designated Foreign Terrorist Organization (FTO). A search conducted in August 2018 showed no civil cases involving Section 2339D. While Section 2339C has been more frequently invoked, examining these cases is beyond the scope of this Article.

8. *See infra* Part II.A for the ATA's definition of "material support." Like Section 2333, Sections 2339A and 2399B were enacted before September 11th, but largely remained dormant until after the attacks. Since then, the government has used both statutes to aggressively prosecute so-called terrorist supporters. Abrams, *supra* note 2, at 5–6.

9. *See* Boim v. Quranic Literary Inst. and Holy Land Found., 291 F.3d 1000, 1015 (7th Cir. 2002) [hereinafter *Boim I*] (concluding that Section 2333 claims can be based on underlying violations of Sections 2339A and 2339B, which constitute acts of "international terrorism"). *But see* Linde v. Arab Bank, PLC, 882 F.3d 314, 326 (2d Cir. 2018) [hereinafter *Linde III*] (holding that material support does not "invariably equate to an act of international terrorism" and only qualifies as such upon a showing that it "involve[d] violence or endanger[ed] human life," appears "intended to intimidate or coerce a civilian population or to influence or affect a government," and "occurred primarily outside the territorial jurisdiction of the United States or transcend[ed] national boundaries."). Defendants do not need to be convicted under Sections 2339A and 2399B, in order to be sued under the civil material support statute. *Boim I*, 291 F.3d at 1015.

10. *See, e.g.*, Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 484, 496 (E.D.N.Y. 2012) [hereinafter *Gill II*] (acknowledging that Section 2333 incorporates "general principles of tort law," but that the statute must be interpreted to serve the struggle against terrorism).

but the typical tort Congress intended it to be.[11] Its byproduct is a line of jurisprudence that carries negative implications for the discipline of torts writ large, reinforces the War on Terror's politically-infused narratives about the nature of terrorism, itself, and often ensnares defendants with little to no meaningful connection to terrorism or terrorist groups.

These dynamics, which have been steadily developing since 9/11, have gone largely unnoticed by both tort scholars and critics of U.S. counterterrorism efforts. They are, however, critically important. They highlight how the War on Terror is undermining not just public, but also private, law, underscore how particular views about terrorism, grounded more in ideology than empirics, are facilitating this process, and demonstrate how private law, specifically torts, is helping to further that normative position. This Article seeks to uncover and explain these trends, for the first time, and offer some preliminary solutions.

At the heart of the War on Terror's impact on tort law is Section 2333's evisceration of scienter and causation—two key components of any intentional tort claim. Typically, to succeed on an intentional tort, plaintiff must establish that defendant possessed two kinds of intention or "scienter": to both commit the act in question *and* bring about its consequences.[12] Plaintiff must also show that defendant's actions were causally connected to her injury, as a matter of fact ("factual causation") and law ("legal causation").[13]

When courts first began to interpret Section 2333, they applied most of these traditional elements. Though nearly all courts took the radical step of eliminating factual causation, most required that defendant possess both kinds of scienter and satisfy the requirements of legal cause. As time passed, however, many courts abandoned their commitment to these norms and adopted more expansive approaches to the statute. While continuing to describe Section 2333 as a traditional intentional tort,[14] these courts began to shy away from demanding that defendant intend both to commit the act

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11. The legislative history behind Section 2333 consistently describes the statute in traditional tort law terms and makes no express claims to depart from those norms. *See, e.g.*, *Antiterrorism Act of 1990, Hearing Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 101st Cong. 136 (1990) (testimony of Joseph A. Morris) (legislative testimony on Section 2333 describing the statute as bringing "all of the substantive law of the American tort law system" to "focus on the problem of terrorism"); *id.* ("Let us make all the tort law in the country available to see what we can do to sort out these [terrorism] suits, all the doctrines of vicarious and shared liability, joint and several liability, and so forth, and let us see if we can't nail all the tort-feasors down the chain . . . .").

12. Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 TEMP. L. REV. 355, 362 (2001)

13. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 cmt. e (AM. LAW INST. 2010).

14. Indeed, as discussed in Part I, courts have been very aware that Section 2333's language and legislative history demand the statute be construed in line with tort law norms.

(providing material support to a terrorist organization or its activities) *and* produce the consequences of the act (terrorist violence), and, instead, required *only* that defendant possess mens rea, though arguably diminished, for committing the act itself. A number of courts also effectively eliminated legal causation in cases where support allegedly went directly to a terrorist organization, its agents, or alter-egos (as opposed to another entity, like a state sponsor of terrorism[15]).

By gutting the requirements of scienter and causation, Section 2333 jurisprudence has departed significantly from the norms of intentional tort law[16] in ways that cannot be explained by prevailing tort law theories.[17] This situation threatens to undermine tort law in several ways. First, it could have a negative, long-term impact on tort law's coherence and consistency. A notoriously convoluted area, the discipline of torts is known for being less than precise, particularly in defining basic concepts. With courts continuing to describe Section 2333 as a typical intentional tort, while treating it exceptionally, the statute's unusual jurisprudence could exacerbate and fuel existing confusion over the proper role of foundational elements, like scienter and causation, in other kinds of intentional tort cases.

Second, Section 2333's approach to scienter and causation blurs the important line between criminal and tort law.[18] Indeed, one key reason why Section 2333 cases defy tort norms is that, in interpreting the statute, courts have relied heavily on the criminal material support laws. [19] This is likely why causation, which is absent from the statutory language of Sections 2339A and 2339B, has been virtually eliminated from the civil statute. It is most probably why the scienter inquiry in Section 2333 cases has evolved

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15. State sponsors of terrorism are those countries determined by the U.S. Secretary of State to "have repeatedly provided support for acts of international terrorism." *See State Sponsors of Terrorism*, U.S. DEP'T OF STATE, (last visited Sept. 12, 2018) https://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/94F6-6Y86]. Currently, there are four state sponsors of terrorism: North Korea, Syria, Sudan, and Iran. *Id.*

16. As discussed in Part I.A, there is some debate over the role of scienter in certain intentional tort cases, specifically with respect to the tort of battery. *See infra* note 47. There is, however, no intentional tort that departs so dramatically from both scienter and causation norms as Section 2333.

17. As described in Part I.B, the theories of tort are generally intended to do just this—describe how tort laws work. Section 2333, however, defies these prevailing philosophies. *See infra* Part II.B.3.

18. While it is not the only tort to upend this division, Section 2333 is a particularly extreme example of this phenomenon. *See infra* Part III.B.

19. Unlike most criminal laws, the criminal material support statutes have a lower liability threshold than traditional intentional torts. This makes it problematic to import the criminal standard into the civil side. As discussed in Part III.B, while this lower liability threshold is somewhat offset by the higher burden of proof required in criminal cases, in torts, there is a lower evidentiary burden, which provides no such backstop.

to focus only on the act itself (and not its consequences), which is also a feature of the criminal material support laws.[20]

The criminal law's pervasive influence over Section 2333 jurisprudence is closely connected to the War on Terror itself. A central component of that war is the normative view that terrorism is existentially threatening to the West, including the United States. In considering Section 2333 cases, many courts have been implicitly, and sometimes explicitly, guided by this belief. To address terrorism's "unique" danger,[21] these courts have looked beyond Section 2333 to the criminal material support statutes' legislative history, which embraces this same ideological view on terrorism. Many of these courts have relied on this history to justify loosening Section 2333's liability standards,[22] thereby ensuring the civil statute reinforces a belief in terrorism's existential danger—a perspective with little to no empirical support.[23]

While the problems with Section 2333 jurisprudence are significant, ameliorating them is straight forward. It involves situating the statute firmly within tort law, resuscitating its nearly abandoned scienter and causation elements, and ending interpretive reliance on criminal law and the War on Terror. If this approach was adopted, Section 2333 would become the traditional intentional tort it was always intended to be. This would also help discourage tendencies to use the statute, which carries a high potential damages award, to pursue deep-pocketed defendants with tenuous connections to terrorism and terrorist organizations.

In discussing these various issues, this Article proceeds in four parts. Part I explores how the War on Terror is undermining particular areas of public law, such as constitutional, criminal, and immigration law and presents Section 2333 cases as evidence of a similar phenomenon in private law, specifically torts. To demonstrate how Section 2333 litigation is eroding tort law, this section provides an operational overview of intentional tort law,

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20. As discussed below, while Section 2339A requires knowledge or intent to support terrorist violence, Section 2339B does not. Neither Section 2339A nor 2339B require the actual occurrence of terrorist violence. *See infra* Part II.A.

21. *See, e.g.*, Linde v. Arab Bank, PLC, 97 F. Supp. 3d 287, 326 (E.D.N.Y. 2015) [hereinafter *Linde II*], *vacated on other grounds by*, 882 F.3d 314, 326 (2d Cir. 2018) (pointing to the importance of "imped[ing] terrorism," in interpreting Section 2333).

22. For example, as discussed in Part IV.B, the courts have relied heavily on the legislative history of Section 2339B to effectively eliminate legal causation from Section 2333 cases.

23. Even if evidence existed that terrorism posed a unique and existential threat, this still would not justify how courts have loosened Section 2333's scienter and causation standards. Because Section 2333 calls for treble damages, courts have been clear that it must be classified as an intentional tort. *See infra* Part II.B.1. Indeed, no court has explicitly argued that Section 2333 should be treated in any other way, meaning scienter and causation are key elements of a claim. *See Boim I*, 291 F.3d at 1012 (noting that nothing in Section 2333's language or history justifies holding defendants liable for providing material support to terrorist activities or groups, without both a showing of intentional action and causation).

focusing on the elements of scienter and causation, while also introducing the prevailing theories of tort. Part II provides background on the relationship between Section 2333 and the two criminal material support statutes and examines how civil terrorism cases defy scienter and causation norms, as well as dominant tort law theories. Part III explains why these circumstances raise serious concerns for the discipline of torts, by looking at the impact on tort law's coherence and the criminal-tort divide. Part IV highlights the ways Section 2333's defiance of tort norms results from and reinforces the ideology at the heart of the War on Terror. The Article concludes by addressing potential solutions to the civil statute's various shortcomings.

Given their plaintiff-friendly character and large potential payouts, Section 2333 cases will remain part of the legal lexicon for as long as America's fight against terrorism continues. Their negative consequences will, as such, also endure. Ignoring and failing to address these effects obscures the War on Terror's pervasive and far-reaching influence on U.S. law, and ensures it continues for the war's duration, if not longer.

I. THE WAR ON TERROR IS UNDERMINING NOT JUST PUBLIC, BUT ALSO PRIVATE, LAW

Much has been written about the War on Terror's erosion of public law, particularly in the areas of constitutional, criminal, and immigration law. Scholars have, for example, examined constitutional concerns raised by the criminal material support statutes.[24] In particular, they have honed in on the statutes' broad definition of "material support" and shown how it threatens paradigmatic free speech and association rights.[25] Others have underscored the criminal material support laws' negative impact on religious freedom

24. *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L REV. 1, 10–15 (2003) (arguing that the government's use of the criminal material support laws, particularly Section 2339B, violates the First Amendment's right to association).

25. *See id.*; WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 65–68 (2015) (discussing judicial interpretations of Section 2339B and their implications for free speech and association rights); Nikolas Abel, Note, United States v. Mehanna, *The First Amendment and Material Support in the War on Terror*, 54 B.C. L. REV. 711 (2013) (arguing that Tarek Mehanna's conviction for providing material support to Al Qaeda by translating the group's propaganda into English violated his First Amendment free speech rights).

protections.[26] Still others have raised alarm bells about the War on Terror's effects on Fourth Amendment privacy rights.[27]

In the area of criminal law, commentators have described the rise of a "terrorism exceptionalism" that is purportedly toppling traditional investigatory practices, notions of liability, due process protections, as well as incarceration norms.[28] As scholars recount, these transformations have involved the rampant use of suspicion-less spying and informants; reliance on laws, like Sections 2339A and 2339B, that criminalize activities, which are not otherwise dangerous or directly linked to the commission of terrorist violence;[29] and the application of terrorism-specific sentencing enhancements mandating exceedingly long prison terms for defendants.[30]

In the immigration context, scholars have described how post-9/11 counterterrorism objectives have reshaped immigration policy.[31] While terrorism concerns played a role in immigration law before September 11th,[32] they had a relatively minimal impact compared to the "near complete . . . subordination of immigration and immigration policy to terrorism policy" after the attacks.[33] Indeed, since 9/11, purported concerns with

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26. *See, e.g.,* Malick W. Ghachem, *Religious Liberty and the Financial War on Terror*, 12 FIRST AMEND. L. REV. 139, 221 (2013) (arguing that the criminal material support laws sweep in "lawful as well as illegal forms of Muslim belief and conduct, unduly narrowing our religious and political discourse").

27. *See, e.g.*, Erik Luna, *The Bin Laden Exception*, 106 NW. U. L. REV. 1489 (2012) (arguing that search procedures used at U.S. airports, which are based on "irrational" fears of terrorism, violate Fourth Amendment protections).

28. *See generally* SAID, *supra* note 25. Others have underscored the ways in which the War on Crime set the stage for the criminal justice system's approach to the War on Terror. *See* James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. L. REV. L. & SOC. CHANGE 331, 339–40 (2009) ("[T]o understand why we as a nation have allowed certain things to go on in our name, even, in some cases, after we learned the truth about abuses in the war on terror . . . . we must pay careful attention to what we do at home, to our own citizens, in our domestic criminal system."). This argument has largely been presented as a "modification," rather than rejection, of the notion that the criminal justice system has taken an extreme approach to the War on Terror. *Id.* at 335.

29. SAID, *supra* note 25. Notably, "only a very small percentage of terrorism prosecutions have reflected an actual security threat, due to the prevalence of the preventative use of § 2339B and relying in great part on the work of informants." *Id.* at 147.

30. *Id.* at 122. As commentators have noted, since "the existence of an unrecognized terrorism exception in criminal cases has no built-in barrier restricting that exception to prosecutions in which terrorism-related crimes are charged," these innovations could spill over into other areas of criminal law. *Id.* at 146. As discussed below, there is at least some evidence suggesting these concerns are justified. *See infra* Part III.A.

31. Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173, 1176 (2004).

32. Before 9/11, anyone who engaged in terrorist activity or was the representative or member of a designated terrorist organization was excludable and removable from the United States. MICHAEL J. GARCIA & RUTH E. WASEM, CONGRESSIONAL RESEARCH SERVICE, RL32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS (Jan. 12, 2010), https://fas.org/sgp/crs/homesec/RL32564.pdf [https://perma.cc/ME8E-53MK].

33. Tumlin, *supra* note 31, at 1177.

terrorism have led to a steep rise in ethnic and religious profiling in immigration law enforcement and an increase in restrictive immigration practices.[34] These practices have impacted other areas of law, including "undercut[ting] equal protection principles by selectively enforcing immigration laws based on national origin and religion," "erod[ing] the traditional requirement of individual culpability in our criminal laws," and "promot[ing] guilt by association."[35]

The War on Terror's distorting effects are not limited to these and other branches of public law. Through Section 2333 of the ATA, U.S. terrorism policy is also impacting private law, specifically torts.[36] In passing Section

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34. *See* Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 672 (2017) ("The prominence of immigration in the national security debate [post-9/11] has . . . legitimized a selective enforcement policy drawn along lines of race, religion, nationality, and citizenship."). These new immigration policies have disproportionately impacted individuals of Middle Eastern, South Asian, and/or Muslim background. Shortly after 9/11, for example, the U.S. government instituted several policies that specifically targeted immigrants from Muslim-majority countries. This included sweeping up and detaining approximately 1200 immigrants, the majority of whom were from countries with large Muslim populations. Tumlin, *supra* note 31, at 1197–1202. Most of these detainees were never charged with any immigration or criminal law violation. *Id.* at 1202–03. In 2002, the government created the National Security Entry-Exit Registration System (NSEERS), which required males over the age of sixteen from twenty-five countries, twenty-four of which were Muslim-majority, to report to local immigration offices for interviews. None of the men who came forward were ever convicted of terrorism-related offenses. Wadhia, *supra* note 34, at 692. Instead, in return for voluntarily complying with NSEERS, over 13,000 individuals were deported for technical violations of immigration law. Tumlin, *supra* note 31, at 1188. The most recent and egregious example of the ethnic and religious targeting of Muslim immigrants is, of course, the Muslim Ban first promulgated by the administration of President Donald Trump on January 27, 2017, and subsequently revised and reissued several times. *See* Amrit Cheng, *The Muslim Ban: What Just Happened*, ACLU (Dec. 6, 2017) (detailing history of the Muslim Ban, including its various iterations and major developments in litigation challenging its legality), https://www.aclu.org/blog/immigrants-rights/muslim-ban-what-just-happened [https://perma.cc/MM3B-ZLLD].

35. Tumlin, *supra* note 31, at 1193. The legal validity of these terrorism-related immigration policies is hotly debated. Because of Congress's plenary power over immigration, scholars have argued that the federal government can lawfully discriminate on the basis of otherwise impermissible factors, like race, ethnicity, religion, national origin, nationality, and political ideology. Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1530 (2010). Still, the plenary power has limits, particularly when immigrants have significant ties to the United States or are present within its borders. Tumlin, *supra* note 31, at 1183.

36. Some commentators have praised Section 2333 precisely because of its relationship to the War on Terror. *See, e.g.*, Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT'L L. 65, 66 (2009) (arguing that damages awards in private law suits, including Section 2333 cases, may be "the most effective weapon of all against the spread of terrorism"); John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 530 (2008) (arguing that private terrorism suits provide additional disincentives for groups carrying out acts of international terrorism); Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679 (2005) (calling on private citizens to join the War on Terror by bringing lawsuits targeting the finances and financial backers of terrorist groups, including under Section 2333); Stratton, *supra* note 3, at 54 (arguing that the ATA's civil provision adds an important weapon to "society's arsenal to fight terrorism"). None of these commentators has, however, explored how interpretations of Section 2333 have skewed tort law norms, or the broad legal implications of this.

2333, Congress made clear that the statute was to be treated as any other tort law would be.[37] But because the statutory language was so broad, courts have been left to articulate the specific components of a Section 2333 claim on their own. In a nod to the statute's legislative history and treble damages provision, courts have consistently described Section 2333 as an intentional tort and claimed to apply the traditional elements of tort law in deciding these cases.[38] In practice, however, many courts have failed to treat Section 2333 as a typical tort provision. Instead, over time, they have gradually undermined basic elements of tort law to ensure Section 2333 serves the War on Terror's interests, first and foremost.

To appreciate how judicial interpretations of the civil material support statute depart from tort norms, it is necessary to understand the basic elements of a typical intentional tort, as well as the dominant tort law theories that explain how the discipline functions. The following section provides this key background, beginning with an overview of intentional tort law and focusing specifically on the role of scienter and causation. The two main tort theories of economic and corrective justice are also discussed. As will be demonstrated later, in Part II, Section 2333 veers from tort law norms in ways that cannot be explained by either of the two prevailing theories of tort.

A. Intentional Torts – Generally

Intentional torts are but one among several types of torts[39] and are themselves subdivided into various categories.[40] Among these subdivisions

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37. The ATA's legislative history establishes a clear connection between Section 2333 and tort law. *See* 137 CONG. REC. S4,511-04 (daily ed. April 16, 1991) (statement of Sen. Grassley) ("The ATA accords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees"); *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. On Courts and Admin. Practice*, 101st Cong. 136-37 (1992) (statement of Joseph A. Morris, former general counsel of the U.S. Information Agency and the U.S. Office of Personnel Management) ("Let us make all the tort law in the country available to see what we can do to sort out these [Section 2333] suits . . . and let us see if we can't nail all the tort-[] feasors down the chain, from the person who starts spending the money to the person [who] actually pulls the trigger.").

38. *See, e.g.*, Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 50 (D.D.C. 2010) (holding that, in Section 2333 cases, "the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability must be satisfied for the plaintiff to obtain a judgment").

39. There are two other broad categories of torts: negligence and strict liability. A person is liable in negligence, which is the most paradigmatic tort, where she fails to exercise the care of a reasonable person and causes injury to another. KEITH N. HYLTON, TORT LAW: A MODERN PERSPECTIVE 112 (2016). Strict liability, on the other hand, does not depend upon fault, and is imposed without regard to the defendant's negligence or intent to cause harm. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 scope note (AM. LAW INST. 2010).

40. Intentional torts are divided into three categories: intentional torts to persons, property, and economic interests. Since Section 2333 is an intentional tort to persons, the remainder of this section shall focus on that category. In discussing this topic, reference will be made to both the Restatement (Second) and (Third) of Torts. This is necessary since parts of the Restatement (Third) of Torts,

are the intentional torts to persons, which involve physical or emotional harm or injury to individuals. An intentional tort to persons, which includes Section 2333, has three prima facie elements: (1) scienter; (2) causation; and (3) injury. Since the first two elements are most central to Section 2333's jurisprudence,[41] this section will focus on these components of an intentional tort.

1. Intentional Torts – Scienter

Usually, to prove an intentional tort claim, plaintiff must show that defendant had two types of scienter, or "dual intent"—namely, the scienter to commit the act itself *and* bring about its consequences.[42] For each of these two categories, different degrees of scienter are required. Where the act is concerned, only deliberate or volitional conduct is necessary.[43] A person must, in other words, have committed the act purposefully. When it comes to the consequences of the act, the requirement is a bit more complex. While there is no need for "a hostile intent" or "desire to do any harm," there must be an intention to cause a result that will "invade the interests of another in a way the law forbids."[44] This intention includes consequences that are both desired, as well as those the actor knows are substantially certain to happen.[45] This latter type of awareness is sometimes referred to as "conscious recklessness," namely, the knowledge that an unreasonable risk of harm would almost certainly, or at least very probably, happen, even if defendant did not intend it.[46]

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including the volume on Intentional Torts to Persons, has not been fully finalized. In accordance with the desires of the (Third) Restatement's publishers, if a particular tort principle is still in draft form, the (Second) Restatement's language will be cited instead. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM intro. note.

41. Injury is typically straightforward in the Section 2333 context.

42. *See* Lawson, *supra* note 12, at 362 ("One of the most common general observations about intent required for an intentional tort is that it refers not only to a purpose to act, but also—and primarily—to a purpose to cause certain consequences through one's act.").

43. Deliberate or volitional conduct is that which outwardly manifests defendant's will. RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (AM. LAW INST. 1965); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1137 (2001) (describing "volition" as the appropriate mens rea requirement for the act itself).

44. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 8 (5th ed. 1984).

45. This concept is captured by the definition of intent in the Restatement (Third) of Torts:

> A person acts with the intent to produce a consequence if:
>
> (a) The person acts with the purpose of producing that consequence; or
>
> (b) The person acts knowing that the consequence is substantially certain to result.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 1. As the Restatement also notes, however, "purpose" clearly provides a "stronger basis for liability." *Id.* § 1 cmt. a.

46. Peter Cane, *Mens Rea in Tort Law*, 20 OXFORD J. OF LEGAL STUD. 533, 537 (2000). To qualify as "intent," conscious recklessness requires both substantial certainty that a certain consequence will occur and actual knowledge by the actor of this risk. *See* KEETON ET AL., *supra* note 44, § 8 (noting

Showing that defendant had the requisite scienter to bring about the consequences of her actions is an important element of an intentional tort claim.[47] It has consistently been part of various paradigmatic intentional torts, like assault,[48] fraudulent misrepresentation,[49] false imprisonment,[50] and intentional infliction of emotional distress.[51] This desire to cause or conscious indifference to doing harm is a stronger basis for liability relative

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that "the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent"); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt c. ("[A] mere showing that harm is substantially certain to result from the actor's conduct is not sufficient to prove intent; it must also be shown that the actor is aware of this"). For the remainder of this Article, I will refer to "intent" and "conscious recklessness" as separate concepts, even though they are usually treated synonymously. *See supra* note 45.

47. Pointing primarily to the tort of battery, some have suggested that intentional torts do not always require intent both to commit the act and cause its consequences. *See, e.g.*, HYLTON, *supra* note 39, at 89 (drawing distinction between intentional torts, like battery, which only require an "intent to execute the act" and other intentional torts that require both an intent to execute the act and an "intent to harm"). There is, however, substantial disagreement, both in case law and scholarly commentary, over the issue. *See* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585 (2012) (examining the judicial and scholarly split over whether battery is a dual intent tort and explaining that dual intent supporters have the better argument, based on the definition of both battery and intent in the Restatement (Second) of Torts, the concept of conscious recklessness, as well as tort laws preference for sanctioning behaviors involving some level of fault); *see also infra* note 234 (noting that, even among those who argue for single-intent, some believe a certain level of fault is required for the consequences of battery); *infra* note 233 (observing that the historical development of the law of intentional torts also displays a trend in favor of the dual-intent view). *But see* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061 (2006) (noting judicial split between a dual- and single-intent view of battery and arguing in favor of the single-intent view). Even conceding that battery may not always require "intent to do harm," this view has typically been limited to situations where "the defendant has diminished capacity such that the defendant herself might not have intended harm or offense from conduct that a reasonable person would recognize was destined to produce it." Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1343 n.45 (2009).

48. *See, e.g.*, Garcia v. U.S., 826 F.2d 806, 809 n.9 (9th Cir. 1987) ("A person commits the tort of assault if he acts with intent to cause another harmful or offensive contact or apprehension thereof, and the other person apprehends imminent contact.").

49. *See, e.g.*, U.S. *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 658 (2d Cir. 2016) ("It is emphatically the case—and has been for more than a century—that a representation is fraudulent only if made with the contemporaneous intent to defraud—*i.e.,* the statement was knowingly or recklessly false and made with the intent to induce harmful reliance.").

50. While false imprisonment does not require that defendant intend the imprisonment, itself, be extralegal, it does require his awareness of the consequences of his action—namely, the unwilling confinement of another person. *See* Keith Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1227 (2010) (noting that the intentional tort of false imprisonment requires not only volitional conduct but also that defendant is aware of the "immediate physical consequences" of his actions); Cooper v. Dyke, 814 F.2d 941, 946 (4th Cir. 1987) (holding that false imprisonment "does not depend on a formal arrest, but rather on defendants' manifest intent to take someone into custody and subject him to their control").

51. *See, e.g.*, Pegg v. Herrnberger, 845 F.3d 112, 121–22 (4th Cir. 2017) ("Under West Virginia law, to establish the tort of . . . intentional infliction of emotional distress, the plaintiff must establish four elements: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted *with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct*; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress and; (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.") (emphasis added) (citation omitted).

to other forms of culpability.[52] It is particularly important where treble or punitive damages are available.[53] The more malicious and outrageous the defendant's desire to cause injury, the more likely courts are to award these elevated damages amounts.[54]

2. *Intentional Torts – Causation*

Establishing a causal connection between conduct and harm ensures only those who "by intervening in the world, have changed the course of events for the worse" are held liable for their actions.[55] In torts, causation generally has two elements: factual causation[56] and legal causation.[57] Typically, plaintiff must establish both types of cause, to prevail on a tort claim.[58]

Factual causation requires plaintiff show defendant brought about her injury, as a matter of fact.[59] According to this requirement's most common formulation, a defendant is not liable, if plaintiff's injury would have been equally likely to occur in the absence of her actions.[60] Legal causation, on the other hand, focuses on the issue of foreseeability—if plaintiff's injury was not a foreseeable consequence of defendant's conduct, then defendant

52. The liability standard for intentional torts is higher than for negligence, which only requires defendant act unreasonably in breaching her duty of care, or strict liability torts, which do not require any fault at all. Cane, *supra* note 46, at 546.

53. *Id.* at 546–48. Treble damages are considered punitive in nature. *Gill II*, 893 F. Supp. 2d at 503.

54. 1 Linda L. Schlueter, *Punitive Damages* § 9.2(A) (7th ed. 2015) (observing that, with respect to assault and battery, "[m]ost jurisdictions permit a jury to consider an award of punitive damages . . . [only] when attended by certain aggravating elements, such as malice, recklessness, insult, or oppression").

55. Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 363, 385 (David Owen ed., 1995).

56. Factual causation is also referred to as "but for" causation. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. b (AM. LAW INST. 2010). While I use the former throughout this Article, the latter may also appear here in language quoted from judicial opinions.

57. Legal causation has alternatively been referred to as "proximate causation" and more recently, in the Restatement (Third) of Torts, as "scope of liability." All of these phrases have their critics. *See id.* ch. 6, special note on proximate cause (explaining criticism of terms "proximate" and "legal" cause); *id.* § 29 cmt. d (describing criticism of phrase "scope of liability"). This Article uses the term legal causation since it provides the clearest terminological foil to factual cause. At the same time, since many courts use "proximate causation," that phrase also appears throughout this Article in various quotations from case law.

58. *Id.* § 33 & cmt. e.

59. *Id.* § 26.

60. *Id.* § 26 cmt. b. This approach to factual causation deselects for acts that are sufficient, but not necessary, to plaintiff's injury. As a result, it has been subject to much criticism and debate, especially in joint tortfeasor cases, where each of two or more wrongful acts suffice to bring about harm, but where neither is necessary. *See* Honoré, *supra* note 55, 364–67 (providing historical overview of debates on meaning of necessary and sufficient conditions in causation). For this reason, as discussed below, courts have relaxed the requirements of factual causation in joint tortfeasor cases. *See infra* note 306.

did not legally cause her injury.[61] This limitation ensures defendant is not held liable for the "infinite stream of consequences" that may result from her tortious action.[62] The requirement may be relaxed, however, in intentional tort cases.[63] As the Restatement (Third) of Torts explains, "[a]n actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur."[64] Even under this looser standard, an actor is only liable where the risk of injury was increased by her conduct.[65] And, of course, she must still be the factual cause of plaintiff's injury,[66] and have dual intent.[67]

B. *Theories of Tort Law*

Theories of tort law provide a scaffolding for understanding existing tort liability rules, developing new ones, and assessing whether these precepts further tort law's purpose. While there are various off-shoots, there are two

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61. HYLTON, *supra* note 39, at 100. Like factual causation, there has been much debate over what legal causation requires. While foreseeability is not the only test that has been developed, most of the alternative formulations are no longer in use or yield similar results. *See* KEETON ET AL., *supra* note 44, § 42 (describing some of the most prominent historical definitions of legal causation, many of which have been abandoned by the courts); Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Results-Within-The-Risk Approaches to Proximate Cause*, 26 CLEV. ST. L. REV. 1003 (2008) (arguing that cases using a substantial factor test, the other common approach to legal cause, yield the same results as foreseeability). Notably, the Restatement (Third) of Torts eschews foreseeability and, instead, limits liability to those harms arising from "risks" created by the tortious conduct. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d ("[A]n actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious."). Nevertheless, foreseeability remains, at least, rhetorically embraced by the vast majority of courts, and is, therefore, the standard applied here. *Id.* § 29 cmt. e.

62. Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 1006 (2001).

63. *See, e.g.*, Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1537 (11th Cir. 1983) ("While a negligent tortfeasor is responsible for all injuries which are proximately caused by his tort, there is 'extended liability' for intentional torts and the rules of proximate causation are more liberally applied than for mere negligence.") (internal citation omitted).

64. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33(a) (AM. LAW INST. 2010).

65. *Id.* § 33(c).

66. *Id.* § 33 cmt. e.

67. *Id.* § 33 cmt. a.

main theories of tort, the economic and corrective justice theories, [68] which shall be discussed here in turn.[69]

1. The Economic Theory of Tort Law

According to the economic theory, tort law is concerned with efficiently allocating resources in the areas of safety and care.[70] Its primary aim is to minimize the social cost of accidents.[71] Deterrence is at the heart of the economic theory of torts,[72] and is based on the assumption that individuals are "risk-neutral," rational actors,[73] who will choose activities that maximize economic utility.[74] If liability rules are efficient, then individuals will be deterred from engaging in disfavored behavior, which is, by

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68. The economic and corrective justice theories of tort, which developed respectively in the early 1960s and 70s, provide both normative and analytical explanations of tort law. Each theory, however, favors one type of explanation over the other. In some circles, the economic theory is, for example, considered more normative and reformist (because it seeks to improve tort law), than analytical (it is supposedly less effective at explaining the actual state of tort law). Jules Coleman, Scott Hershovitz & Gabriel Mendlow, *Theories of the Common Law of Torts*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.3.2, https://plato.stanford.edu/entries/tort-theories (last updated Dec. 17, 2015). *But see* William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981) (purporting to provide a positive account of the economic theory of tort that explains the way tort law actually functions). By contrast, the corrective justice theory has been described as effectively analyzing how tort law works in practice, though it also has a defined normative orientation. *Theories of the Common Law of Torts*, *supra*, at § 3.1.

69. There are, of course, many different variations and approaches to the two main theories of tort law. It is, however, well beyond the scope of this Article to explore other iterations of the economic and corrective theories of tort, or the disagreements over particular concepts within each school. Nevertheless, it is worth noting two other prominent theories of tort law: civil recourse theory and compensation theory. Both theories are more similar to the corrective justice, than law and economic, camp. Civil recourse theory defines tort law as giving victims of legal wrongdoing opportunities to seek remedies for their injuries. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 976 (2010). For proponents of the compensation theory, tort law's primary aim is to compensate injured parties in ways that deter would-be injurers. Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65, 66 (John Oberdeik ed., 2014).

70. Landes & Posner, *supra* note 68, at 851. The economic theory is mostly focused on accidents and, therefore, with the tort of negligence. *Id.* at 859.

71. *Id.* at 868.

72. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 547 (2003)

73. Even though individuals are generally risk-averse, economic theorists argue that, because accident insurance is available, tort law can realistically treat injurers and victims as being risk-neutral. Landes & Posner, *supra* note 68, at 867–68. There is, however, a growing literature challenging this risk-neutral, rational actor model, and exploring how the nuances of non-rational human behavior impact the economic efficiency of liability rules. *See, e.g.*, Hans-Bernd Schäfer & Frank Müller-Langer, *Strict Liability Versus Negligence*, *in* TORT LAW AND ECONOMICS 3, 35–36 (Michael Faure ed., 2009) (arguing that irrational human behavior, such as being overly optimistic or pessimistic about risks, affects whether negligence or strict liability rules are more efficient in a given situation).

74. Landes & Posner, *supra* note 68, at 864–72.

definition, inefficient.[75] In general, a liability rule is efficient if the cost of the precaution is less than the expected injury.[76]

Under the economic theory of torts, causation plays a dubious role, at best, in determining liability. The relationship between the injurer and victim matters only to the extent it illuminates how accident costs can be efficiently reduced.[77] Indeed, as far as the founders of the economic theory are concerned, causation, whether factual or legal, adds no value, in and of itself, to liability assessments.[78] Instead, it is the "least cost avoider" who should always be treated as the guilty party.[79] Unsurprisingly, the economic theory of torts also defines intent in efficiency terms. Rather than focusing on the injurer's mental state and/or moral fault, the economic theory values intent only to the extent defendant's actions are "intentionally wrongful in an economic sense."[80] What this means, in effect, is that "the costs of avoidance to the injurer are low relative to the social [costs] of the activity."[81]

2. *The Corrective Justice Theory of Tort Law*

Rather than locating tort law's purpose in some external good, like efficiency, corrective justice theory describes the discipline as driven by its own internal rule of justice. According to this philosophy, tort law is guided not by the social cost of harm, but by moral principles that aim to correct injustices done by one actor to another. What matters to proponents of this theory is that justice be done between the parties, without regard to society's broader welfare.[82] In focusing on inter-relational fairness,[83] the corrective theory tries to determine whether the relationship between the parties should

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75. *Id.* at 857–58.

76. Where a rule costs more than the injury, then, it violates the economic approach to tort law. *Id.* at 857–58. The precise economics depends upon the species of tort liability involved. Coleman et al., *supra* note 68, §§2.1–2.2. Strict liability and negligence differ, for example, when it comes to information costs—determining whether the injurer violated the liability rule—and claim costs—the price associated with processing and collecting a legal claim. Landes & Posner, *supra* note 68, at 874–75. The information costs are lower for strict liability torts, because there is no need to determine whether the injurer acted with due care, while the claim costs are higher, because a claim arises every time there is an injury. *Id.*

77. Coleman et al., *supra* note 68, § 2.3.2.

78. Omri Ben-Shahr, *Causation and Foreseeability*, *in* TORT LAW AND ECONOMICS 83, 84–85 (Michael Faure ed., 2009).

79. *Id.* While generally rejecting the need for foreseeability, some economic theorists have pushed back on the total evisceration of causation and insisted that factual cause is necessary to determining socially optimal levels of care. *See generally id.* at 86–87. This argument, however, is largely applied to strict liability torts only. *Id.* at 87–91.

80. WILLIAMS A. LANDES & RICHARD A. POSNER, ECONOMIC STRUCTURE OF TORT LAW 181 (1987).

81. *Id.* at 153.

82. George Fletcher, *Fairness and Utility in Tort*, 85 HARV. L. REV. 537, 540–41 (1972).

83. Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 408 (1989).

be reversed.[84] If justice requires undoing the transaction, then the party who created the injury must compensate the injured party, in some way.[85] In other words, a tort remedy is only appropriate if plaintiff's injury is causally connected to defendant's actions. Ernest Weinrib, one of the founding fathers of corrective justice, has forcefully articulated this requirement: "In bringing an action against the defendant, the plaintiff is asserting that the two are connected as doer and sufferer of the same injustice. What the defendant has done and what the plaintiff has suffered are not independent events."[86]

As this formulation suggests, corrective justice requires a relationship of both legal and factual cause between defendant's actions and plaintiff's injury.[87] It is this dual link that differentiates the fortuitous from the morally culpable wrong, with which corrective justice is concerned.[88] This sense of moral blameworthiness also infuses the theory's approach to intent. According to proponents of corrective justice, one intends to do an act only where one is trying to "bring about something."[89] Where the harm one is attempting to "bring about" is to a person or property, "one is shaping oneself as one who, in the most straightforward way, exploits others."[90] The existence of real or actual intent, as opposed to conscious recklessness, is particularly important here, since the former is more morally meaningful and significant.[91]

Against this backdrop of intentional tort norms and explanatory tort theories, Section 2333 stands apart, as explored in Part II, below. As that section demonstrates, Section 2333's interpretation has gradually distorted the statute's scienter and causation elements, in ways that fail to comport with the economic and corrective theories of tort law.

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84. John Gardner, *What Is Tort Law For? Part I. The Place of Corrective Justice*, 30 L. & PHIL. 1, 9–10 (2011).

85. *Id.* at 18–19.

86. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. OF TORONTO L.J. 349, 350 (2002).

87. As at least one commentator has noted, "[i]t is difficult to see . . . how a test for causation which completely eschews any necessity requirement [equivalent to a but for test] . . . can be compatible with the corrective justice [theory] . . . ." SARAH GREEN, CAUSATION IN NEGLIGENCE 29 (2015).

88. Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407, 408 (1987). Closely related to corrective justice, the civil recourse and compensation theories of tort also treat causation as critical to liability, though the concept carries no moral significance under these other approaches. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1127 (2007) (describing causation as necessary to determining when victims are entitled to take legal action against wrongdoers); Geistfeld, *supra* note 69, at 72 ("The occurrence of foreseeable injury, not any moral shortcoming in the behavior itself, . . . trigger[s] the obligation to pay compensatory damages.").

89. John Finnis, *Intention in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229, 229 (David G. Owen ed., 1995).

90. *Id.* at 244.

91. *Id.* at 242–47.

II. SECTION 2333 AS AN EXCEPTIONAL INTENTIONAL TORT

Section 2333 cases have departed from intentional tort law norms by overly focusing on and, in some cases, substantially loosening the scienter required for doing the act (providing material support), effectively nullifying a scienter requirement when it comes to the consequences of the act (terrorist violence), eliminating factual causation, and quietly removing any requirement of legal cause, where support has allegedly gone to a terrorist organization, its agents, or alter-egos. Neither the economic nor corrective justice theories fully or satisfactorily explain why Section 2333 cases have evolved in these ways.

Before delving into this discussion, and to further foreground the analysis, the first part of this section provides basic background on the relationship between Section 2333 and the two criminal material support statutes, 2339A and 2339B. As will be explored in the second half of this section, and more thoroughly in Parts III and IV, these criminal statutes have helped broaden Section 2333's liability scheme to serve a particular political ideology, at the heart of the War on Terror.

A. Background on the Criminal Material Support Statutes

While Section 2333 has been part of the ATA since it was first enacted in 1992,[92] Sections 2339A and 2339B were added later, in 1994[93] and 1996,[94] respectively.[95] Nearly all Section 2333 cases, brought thus far, involve underlying, alleged violations of at least one (and usually both) criminal statutes.

Section 2339A prohibits the provision of material support in aid of terrorist acts. Under this law, "[w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be

92. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4522.

93. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 2022, 2022.

94. *See* Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996). AEDPA also amended Section 2339A to enlarge the predicate offenses covered by that title and eliminate restrictions that existed on 2339A investigations. *See id.* § 702.

95. Sections 2339A and B have been amended several times since September 11th, through the USA PATRIOT ACT, Pub. L. No. 107-56, §§ 810(c)–(d), 811(d), 115 Stat. 380, 381 (2001); the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762; the Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, §3(d), 123 Stat. 3480, 3481–82; the Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, §§3(6)–(8), 123 Stat. 1607, 1608; and the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Acts of 2015, Pub. L. No. 114-23, tit. VII, §704, 129 Stat. 268, 300.

used in preparation for, or in carrying out" a list of crimes associated with terrorism or "attempts or conspires to do such an act" is guilty of violating the statute.[96] Upon enactment, Section 2339A was lambasted for being too limited. Critics insisted the statute would make prosecutions difficult, by requiring the government prove defendants had the intent or knowledge their aid would support a particular terrorist crime.[97] To address this perceived problem, Congress passed Section 2339B,[98] which prohibits material support to designated foreign terrorist organizations (FTOs) and does not require a connection to terrorist activities, including violence.[99] Under Section 2339B, "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" violates the statute.[100]

Under both laws, material support is defined as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials."[101] While courts have acknowledged that terrorist groups often engage in lawful activities which serve civilian and humanitarian ends, the ban on material support applies to these initiatives, as well.[102]

As commentators have noted, both criminal statutes have effectively turned what are secondary crimes, specifically aiding and abetting terrorism or terrorist groups, into primary liability offenses.[103] The statutes have also

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96. 18. U.S.C. § 2339A(a).

97. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13 (2005); *see also* Wadie Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 556 (2011) (noting that 2339A "the provision criminalized material support in aid of several enumerated crimes of violence, but did not deal with the purportedly pressing problem of foreign terrorist groups raising money in the United States by way of appeals to humanitarian aid").

98. Chesney, *supra* note 97, at 13. At the time it was introduced, Section 2339B was subject to intense backlash, ranging from civil liberties concerns to claims that a wide-scale problem with terrorist fundraising simply did not exist in the United States. *Id.* at 16–17. Because of these criticisms, 2339B was initially removed from the House version of AEDPA. *Id.* at 17. It was, however, reintroduced, under political pressure, on the first anniversary of the 1995 Oklahoma City bombing. *Id.* at 17.

99. For the purposes of § 2339B, an FTO is an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act (INA). Under Section 2339A, there is no requirement that support go to an FTO.

100. 18 U.S.C. § 2339B(a)(1).

101. 18. U.S.C. § 2339A(b)(1).

102. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 29 (2010) (observing that Congress's repeal of an exception to Section 2339B for humanitarian aid to persons not directly involved in terrorist activity demonstrates that "Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.") [hereinafter *HLP III*].

103. Abrams, *supra* note 2, at 9–11.

undone traditional features of complicity liability, including eschewing any need for the substantive offense (terrorist violence) to be completed.[104] This, combined with the wide swath of prohibited conduct covered by the statutes, has made Sections 2339A and 2339B handy tools for criminally prosecuting individuals and entities, regardless of their proximity to terrorism or terrorist groups or the dangerousness of their activities.[105] Through Section 2333, the criminal material support statutes have similarly empowered private parties to pursue actors who have, at best, indirectly contributed to terrorist violence or groups.[106] Indeed, most Section 2333 cases have been brought against third-party defendants which are several degrees removed from terrorist organizations or violence and have often engaged in mundane acts of "support." A prototypical example of a Section 2333 case is a bank accused of providing financial services to a charity which is allegedly affiliated with a terrorist group that caused plaintiff's injuries. Targeting these third-parties is considered more effective than pursuing terrorist organizations themselves, since the former are more likely to have substantial, reachable assets.[107]

B. Section 2333's Exceptionality

Notwithstanding Section 2333's close relationship to the criminal material support laws, courts have repeatedly and correctly described the civil statute as a traditional tort. As they have observed, Section 2333 codifies "general common law tort principles" and extends "civil liability for acts of international terrorism to the full reaches of traditional tort

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104. *Id.* at 10–11, 11 n.24 (noting that, typically, an aiding and abetting charge requires completion of the principal offense). Sections 2339A and 2339B have departed even further from traditional aiding and abetting liability by transforming complicity from a minor offense to one that carries serious criminal penalties and by failing to require the mens rea of purpose. *Id.* at 10–11.

105. This is particularly true of Section 2339B. *See, e.g.*, SAID, *supra* note 25, at 71.

106. In Section 2333 cases, plaintiffs have raised claims for direct or primary violations of the statute, as well as for secondary liability, in the form of aiding and abetting or conspiracy. Though most cases have alleged both primary and secondary violations, this Article focuses only on primary liability claims. For several reasons, judicial opinions on primary claims provide the most comprehensive view of Section 2333's evolution. First, there have been relatively fewer substantive decisions on aiding and abetting and conspiracy claims, because, until recently, the law was unsettled as to whether secondary liability was available under Section 2333. *See* Justice Against State Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4, 130 Stat. 852, 854 (2016) (amending Section 2333 to make aiding and abetting and conspiracy liability available under the statute). Second, and, most importantly, on a theory of secondary liability, defendants must satisfy the elements of an aiding and abetting or conspiracy claim, which are different from the elements of a primary liability claim under Section 2333. *See* Owens v. BNP Paribas, S.A., 897 F.3d 266, 277 (D.C. Cir. 2018); *see also* Freeman v. HSBC Holdings, PLC, No. 14-CV-6601(DLI) (CLP), 2018 WL 3616845, at *14–22 (E.D.N.Y. July 27, 2018) (comparing and contrasting elements of aiding and abetting and conspiracy liability under Section 2333 with elements of primary liability under the statute). Since the focus of this Article is on the elements of Section 2333 itself, primary liability claims are the most relevant and on point.

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

law."[108] Despite this rhetorical commitment to tort norms, however, a growing number of courts have upended basic tort requirements in deciding Section 2333 cases and significantly expanded liability under the statute.

This defiance of tort doctrine developed over time. When courts first started hearing Section 2333 claims, the traditional requirement that defendant intend to commit the act (providing material support to a terrorist organization or its activities) and its consequence (terrorist violence) was maintained. Indeed, during these early days, courts defined scienter under Section 2333 as requiring both intent and knowledge to commit the act and its outcome.[109] And while they did not require factual causation, courts still demanded that defendant's actions be the legal cause of plaintiff's injury.

Gradually, however, many courts chiseled away at Section 2333's tortious elements. Focusing primarily on the deliberateness of the act itself, a number of courts lowered the mens rea standard from intent to conscious recklessness. As for the consequences of defendant's actions, the vast majority of courts eliminated a scienter requirement altogether. Finally, some courts effectively eschewed legal causation where defendant's support allegedly went directly to a terrorist organization, its agents, or alter-egos.

Two decisions from the Seventh Circuit Court of Appeals have been at the heart of this evolution: *Boim v. Quranic Literary Institute and Holy Land Foundation for Relief and Development*, known as *Boim I*, which was decided in 2002, and *Boim III*, a 2008 decision in the same litigation.[110] Both opinions have exerted substantial influence over other courts and how they have approached scienter and causation under Section 2333. They also represent opposite ends of the spectrum when it comes to interpretations of the statute. While *Boim I* adopted a view on Section 2333 that is more (though not wholly) in line with traditional approaches to scienter and causation, *Boim III* embraced some of the most expansive views on these concepts to date.

This section will begin by examining the development of Section 2333's scienter and causation elements and explore the ways they have expanded, moving farther from *Boim I* and closer to *Boim III*. While there have been exceptions to these trends, Section 2333's scienter and causation elements

108. *Id.* at 1010.

109. Though the scienter requirement articulated by these early cases was relatively robust, even these courts did not require plaintiffs to allege defendants specifically intended to cause their injuries, a trend that has consistently been reflected in the case law. *See* Abecassis v. Wyatt, 704 F. Supp. 2d 623, 665 (S.D. Tex. 2010) [hereinafter *Abecassis I*] (canvassing the case law and concluding that "[a]ll the courts apparently agree that [in Section 2333 cases] there is no need to allege that when a defendant contributed money, it was aware of a particular planned attack or intended to further that attack").

110. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008) [hereinafter *Boim III*]. There was a second Seventh Circuit decision in *Boim*, known as *Boim II*, which was vacated by *Boim III*. Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707 (7th Cir. 2007) [hereinafter *Boim II*], *vacated en banc*, 549 F.3d 685 (7th Cir. 2008).

have generally evolved in a more expansive direction. The section will conclude by exploring how this evolution has failed to comport with tort law norms and theories. Overall, this discussion sets the stage for Parts III and IV, where Section 2333's potentially negative impact on tort law is discussed, along with the interrelated role played in the statute's development by the criminal material support laws and the War on Terror.

1. Section 2333's Exceptional Scienter Requirement

Although Section 2333's text does not include an explicit mens rea element, courts have consistently held that scienter is required because of the statute's automatic treble damages award.[111] In articulating the specifics of that mens rea requirement, courts have taken somewhat divergent routes. Some have created an independent scienter element for the statute. Others have simply imported Sections 2339A and 2339B's mens rea. Still others have combined the two approaches. Regardless of the route taken, however, Section 2333's scienter has been progressively loosened. As the law currently stands, in many cases, plaintiff need only show that defendant knew or consciously and recklessly disregarded the fact that she was providing support to a terrorist group, whether directly or indirectly, and need not prove defendant had the intent to support terrorist violence or consciously and recklessly disregarded the risk her support would facilitate such violence.

This section will explore the three avenues for defining Section 2333's mens rea and the similar ways in which the statute's scienter requirement has developed under each of these approaches.[112]

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111. *See, e.g.*, *Boim III*, 549 F.3d at 692 ("[W]e can assume that since section 2333 provides for an automatic trebling of damages it would require proof of intentional misconduct . . . ."). The court's decision to treat the statute as an intentional tort is consistent with general tort doctrine, requiring a heightened mens rea for punitive or treble damages awards. Keith N. Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1225–26 (2010). The courts have sanctioned departures from this standard only where expressly intended by the legislature and reasonable. *See, e.g.*, Gennari v. Weichert Co. Realtors, 672 A.2d 1190, 1205–07 (N.J. Super. Ct. App. Div. 1996) (holding that strict liability statute carrying treble damages award did not offend the due process requirements of the Fifth Amendment where it was clearly intended by legislature and driven by reasonable public policy concerns); Harris v. Manor Healthcare Corp., 489 N.E. 2d 1374, 1381–83 (Ill. 1986) (holding that negligence statute carrying treble damages award did not offend due process requirements where clearly intended by the legislature and driven by reasonable public policy concerns).

112. The division between these three types of cases is often far from clear and neat. Nevertheless, this tripartite framework most closely captures the analysis on Section 2333's scienter requirement, across and within jurisdictions.

a. An Independent Scienter Requirement under Section 2333

The very first case to consider Section 2333 in any depth was also the first to create an independent mens rea requirement for the statute.[113] *Boim I* involved claims relating to the murder of a U.S. citizen in May 1996 in Israel, by two men who were purportedly members of Hamas.[114] In their complaint, the victim's parents sued various U.S. charities and individuals under Section 2333, for primary, as well as aiding and abetting, liability, alleging defendants funneled money to Hamas in support of its terrorist activities.[115]

In considering plaintiffs' allegations, the court articulated the mens rea required to maintain a Section 2333 action. As the court held, plaintiffs had to establish that defendants deliberately engaged in an act of material support, by "knowingly *and* intentionally suppl[ying] the funds to the persons who committed the violent acts,"[116] and also demonstrate that defendants "knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities."[117] To be liable under the statute, in other words, defendants needed to have dual intent, first, to commit the act, and, second, to bring about its consequences. The court explicitly rejected the notion that simply

113. Before the seminal decision of *Boim I*, it was unclear who could be sued under Section 2333 and for precisely what sort of activities. ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 55 (2016).

114. *Boim I*, 291 F.3d 1000. Hamas is a Palestinian group, with both military and political wings, that was designated as a FTO in October 1997. U.S. Dep't of State, Bureau of Counterterrorism, Country Reports on Terrorism 2013 (April 2014) https://www.state.gov/j/ct/rls/crt/2013/224829.htm [https://perma.cc/J8P9-VSKS].

115. Plaintiffs claimed that Hamas's military wing depended on foreign money, with "approximately one-third of its multi-million dollar annual budget coming from fund-raising in North America and Western Europe." *Boim I*, 291 F.3d at 1003. With respect to U.S. based-defendants, Quranic Literacy Institute and the Holy Land Foundation for Relief and Development, plaintiffs alleged they were Hamas fronts, and that the "humanitarian functions" of the two NGOs, which were registered as charitable organizations, "mask[ed] their core mission of raising and funneling money and other resources to Hamas operatives in support of terrorist activities." *Id.*

116. *Id.* at 1021 (emphasis added). Although this part of the court's decision was made in the context of plaintiffs' aiding and abetting claim, its analysis arguably also applied to their claims of primary liability under the statute. *Id.* at 1015. Indeed, other courts have interpreted *Boim I*'s scienter analysis as relating to both primary and secondary liability under Section 2333. *See* Abecassis v. Wyatt, 785 F. Supp. 2d 614, 639–40 (S.D. Tex. 2011) [hereinafter *Abecassis II*] (describing *Boim I* as setting "the standard for direct liability suits" under the ATA and requiring support be made "knowingly and intentionally"); Rothstein v. UBS, AG, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009) [hereinafter *Rothstein I*] (citing to *Boim I*, in holding that aiding and abetting theory, under Section 2333, requires that defendant "knew that its funds would be used to sponsor terrorist acts by [terrorist organizations], but also intended to do so").

117. *Boim I*, 291 F.3d at 1023.

providing funding to a terrorist organization, without any knowledge of its violent activities, violated Section 2333.[118]

Other early cases embraced *Boim I*'s scienter ruling. In a 2003 decision, the U.S. District Court for the District of Columbia held that, to have a viable claim under Section 2333, plaintiffs must allege defendants had knowledge and intent to further terrorist violence. Citing to *Boim I*, the court observed that "[i]t is not funding by itself that constitutes international terrorism . . . but funding provided with knowledge of and intent to further violent acts. . . ."[119] In a 2005 decision, the District Court for the Southern District of New York also adopted *Boim I*'s requirement and required plaintiffs allege that defendants deliberately provided material support with knowledge of the terrorist group's violent activities and with intent to further those acts.[120]

Then came *Boim III*, [121] which substantially departed from *Boim I*'s approach to the necessary scienter for committing the act, as well as its consequences.[122] Unlike *Boim I*, the *Boim III* court did not require defendant act with the purpose of providing material support to a terrorist group or its activities. Instead, the court held that Section 2333 only required awareness or conscious and reckless disregard of the fact that the organization, which received the support, engaged in terrorism.[123] A defendant did not even need to know or intend that her money would ultimately reach a terrorist group.

The court also eliminated a mens rea for the consequences of defendant's actions. For the *Boim III* court, it did not matter how defendant intended her

118. *Id.* at 1012. As the court explained, "[t]o hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability," a result that was not supported by the language of the statute or its legislative history. *Id.*

119. Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 106 (D.D.C. 2003) (citing to *Boim I*).

120. *In re* Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005) (citing *Boim I*) ("To adequately plead the provision of material support under this section, a plaintiff would have to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities.").

121. After issuing its decision in *Boim I*, the appellate court remanded the case to the district court, which awarded hundreds of millions of dollars to plaintiffs in 2004. Matt O'Connor, *$156 Million Award in Terrorist Killing*, CHICAGO TRIBUNE (Dec. 9, 2004), http://articles.chicagotribune.com/2004-12-09/news/0412090101_1_anti-terrorism-texas-based-holy-land-foundation-david-boim [https://perma.cc/JBM7-GWSN]. Defendants appealed the decision to the Seventh Circuit which issued a decision in *Boim II*, reversing the lower court's award. Plaintiffs moved for a rehearing *en banc*, which was granted, and resulted in the *Boim III* decision. *Boim III*, 549 F.3d at 688.

122. It is worth emphasizing that, even though it departed starkly from *Boim I*, the *Boim III* court did not dispute Section 2333's status as an intentional tort. *Id.* at 692.

123. *Id.* at 693. Some courts have suggested that *Boim III* both established an independent scienter standard and required that the mens rea for the underlying criminal statutes be satisfied. *See Gill I*, 891 F. Supp. 2d at 365 (arguing that *Boim III* "conceded the applicability of [the criminal material support] statutes' scienter requirements" in Section 2333 cases). While *Boim III* does allude to satisfying the criminal mens rea standards, the court ultimately defined scienter under Section 2333 as exclusive and independent of the criminal statutes underlying plaintiffs' civil claims. 549 F.3d at 692.

support be used, or, indeed, whether she specifically directed her funding to non-violent activities.[124] As long as she was "reckless in failing to discover" that her money would go to a terrorist entity, Section 2333's scienter requirement was satisfied in full.[125]

In short, to meet the civil statute's mens rea requirement, *Boim III* demanded only that defendant know or recklessly disregard the character of the organization, which ultimately received her support, even if it was not the organization she intended to help.[126] No independent mens rea for the consequences of her actions was required. In the court's view, knowing or deliberate indifference to the "terrorist" character of an organization essentially amounted to knowledge or reckless indifference to the fact that terrorist violence would most likely result from one's assistance to that group.[127]

In adopting this perspective, the *Boim III* court effectively collapsed the scienter for the consequences of the act (terrorist violence) with the mens rea for committing the act itself. In a dissenting opinion, Judge Ilana Rovner, who wrote the *Boim I* decision,[128] rejected this attempt to eliminate scienter for the consequences of providing material support, arguing that it was key to establishing a defendant's culpability.[129]

While many courts have since adopted *Boim III*'s scienter analysis,[130] others have shared Judge Rovner's concerns and concluded that "the limits

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124. *Id.* at 698; *see Abecassis I*, 704 F. Supp. 2d at 658 (observing that *Boim III* does not require that "defendant *intend* its contribution to be used for terrorist activities or even *know* that its contribution specifically would be used for terrorism," and that "defendant could 'earmark' its contribution for humanitarian purposes and nonetheless be liable if it knew that the organization's activities included terrorism.").

125. *See Boim III*, 549 F.3d at 702 ("Donor *A* gives to innocent-appearing organization *B* which gives to innocent-appearing organization *C* which gives to Hamas. As long as *A* either knows or is reckless in failing to discover that donations to *B* end up with Hamas, *A* is liable.").

126. *Id.* at 695. As discussed in Part II.B.1.d, the court's approach to conscious recklessness arguably loosens even that mens rea standard.

127. *See id.* at 693 ("To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.").

128. To the extent it does not conflict with *Boim III*, *Boim I* remains good law in the Seventh Circuit. Outside the circuit, courts have continued to rely on *Boim I*. *In re* Chiquita Brands Int'l, Inc., Alien Tort Statute and Shareholder Derivative Litig., 690 F. Supp. 2d 1296, 1309–10 (S.D. Fla. 2010) [hereinafter *Chiquita Brands I*]; *Rothstein I*, 647 F. Supp. 2d at 295.

129. *See Boim III*, 549 F.3d at 706, 713 (Rovner, J., dissenting) (expressing concern about "just how far the majority's liability rule extends" and arguing that "proof of a donor's intent to support terrorism would help to confirm the donor's culpability in instances where the terrorist nature of the organization receiving aid is less clear than it would be if a donor were making out a check payable to Hamas").

130. In *Strauss v. Credit Lyonnais, SA*, the district court cited to *Boim III* in holding that plaintiffs could prevail on their Section 2333 claim, as long as they showed defendant knew or was deliberately indifferent to the fact that a charity to which it provided banking services was supporting terrorist organizations. 925 F. Supp. 2d 414, 428 (E.D.N.Y. 2013) [hereinafter *Strauss II*]; *see Linde II*, 97 F.

of liability are unclear under [*Boim III*], which removes . . . an intent, or purpose, or knowledge requirement and only demands awareness that the organization that ends up receiving the funds is a terrorist group."[131]

But even for those courts troubled by *Boim III*, the needle has moved far from *Boim I*. In a 2010 decision in *Abecassis v. Wyatt* ("*Abecassis I*"), for example, the court rejected *Boim III*'s holding but still adopted a scienter requirement that was closer to that decision than to *Boim I*'s mens rea analysis.[132] In its opinion, the *Abecassis I* court defined scienter as demanding only that defendant "know (or intend) that its money is going to a group engaged in terrorist acts *or* is being used to support terrorist acts."[133] Though it stopped short of adopting *Boim III*'s conscious recklessness standard, the *Abecassis I* court eschewed any requirement that defendant independently possess scienter, of some kind, for the consequences of her actions.

b. Importing Scienter from the Criminal Material Support Statutes

Though the *Abecassis I* court articulated an independent scienter requirement for Section 2333, its approach was influenced, in part, by the scienter requirements for Sections 2339A and 2339B.[134] Going even further than *Abecassis I*, some courts have wholeheartedly adopted the criminal statutes' mens rea standards in lieu of developing an independent scienter requirement for Section 2333.[135] In the process, they have come far closer to *Boim III*'s, than to *Boim I*'s, approach to Section 2333 mens rea and, in

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Supp. 3d at 331 ("An organization's knowing provision of material support to a terrorist organization (or its deliberate indifference as to whether or not it provided material support to a terrorist organization) qualifies as intentional misconduct" under Section 2333).

131. *Abecassis I*, 704 F. Supp. 2d at 664.

132. *Id.* In *Abecassis I*, survivors and heirs of those killed in various suicide bombings in Israel brought claims, including under Section 2333, accusing defendants of financing terrorism by illegally purchasing oil from then-Iraqi president, Saddam Hussein. *Id.* at 626–27. Defendants were various U.S. companies and individuals involved in the oil business. *Id.* at 627. Plaintiffs claimed these entities and individuals purchased oil from Iraq, either directly from the government or through third-parties. *Id.* This money was then purportedly used by the Iraqi state to make "reward payments" to the families of suicide bombers and others killed in carrying out terrorist attacks. According to plaintiffs, these payments "were important to recruiting terrorists," thereby creating liability for defendants under Section 2333. *Id.*

133. *Id.* at 664 (emphasis added).

134. Because the criminal statutes do not demand both knowledge and intent, the *Abecassis I* court held that Section 2333 also had no such requirement. *Id.*

135. *See, e.g.*, Hussein v. Dahabshiil Transfer Servs. Ltd., 230 F. Supp. 3d 167, 171 (S.D.N.Y. 2017) ("Because the material support statutes require the same (or a greater) showing of mens rea than does Section 2333(a), a plausible allegation of a violation of the material support provisions establishes both 'unlawful action' and scienter for purposes of Section 2333(a).").

some cases, have even loosened the scienter requirement for the criminal statutes themselves.[136]

i. Importing Section 2339B's Mens Rea Standard

Where Section 2339B has been implicated, a number of courts hearing civil material support cases have relied exclusively on the criminal statute's mens rea requirement.[137] In these matters, the *Humanitarian Law Project* ("*HLP*") litigation, which definitively established 2339B's scienter requirement, has been particularly influential.[138] Although *HLP* neither involved nor discussed Section 2333, examining the relationship between the *HLP* case law and Section 2333 jurisprudence illuminates how 2339B's mens rea has been used in the civil context to eschew any requirement that defendant possess mens rea for the consequences of her actions.

The *HLP* litigation began a few years before September 11th when several plaintiffs filed a complaint, seeking to prevent the U.S. government from prospectively prosecuting them for violating Section 2339B.[139] Plaintiffs sought to support the non-violent political and humanitarian activities of two designated FTOs,[140] but had refrained from doing so because they feared federal prosecution under the criminal statute.[141] In seeking declaratory and injunctive relief preventing their prosecution, plaintiffs brought various constitutional challenges to Section 2339B, including under the Fifth Amendment's due process clause for failure to

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136. There appears to be a mutually corrosive relationship between Sections 2339A and 2339B, and the *Boim III* decision. While the criminal material support statutes have had a substantial impact on expanding Section 2333's scienter, the *Boim III* case has, in some instances, served to loosen the mens rea standard for the criminal statutes, in the civil context. *See, infra* note 152.

137. *See, e.g.*, Sokolow v. Palestine Liberation Org., 60 F. Supp. 3d 509, 521–22 (S.D.N.Y. 2014) (Section 2333 case relying on Section 2339B's scienter requirement); Strauss v. Credit Lyonnais, S.A., CV-06-0702 (CPA), 2006 WL 2862704, at *9–13 (E.D.N.Y. Oct. 5, 2006) [hereinafter *Strauss I*] (same).

138. Ghachem, *supra* note 26, at 162 (observing that the *HLP* decisions have woven their way "through both civil and criminal cases" involving material support).

139. Plaintiffs filed their complaint on March 19, 1998. Humanitarian Law Project v. Dep't of Justice, 352 F.3d 382, 392 (9th Cir. 2003) [hereinafter *HLP II*], *vacated on other grounds by* 393 F.3d 902 (9th Cir. 2004).

140. In the *HLP* case, some plaintiffs hoped to support the Kurdistan Workers Party (PKK) in Turkey, while others wanted to support the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka. Both the PKK and the LTTE "engaged in a broad range of activities, from terrorist violence to peaceful political advocacy to humanitarian aid." *HLP II*, 352 F.3d at 388.

141. Before Section 2339B was enacted, lead plaintiff, Humanitarian Law Project, had provided various types of support to the PKK. *Id.* at 389–90. In moving for an injunction, the group aimed to resume its support for the group, including advocating on its behalf before the United Nations, training PKK members on political advocacy techniques and international law, and providing housing to PKK members in connection with those activities. *Id.* at 390. As for the LTTE, various plaintiffs claimed that, but for fear of prosecution under Section 2339B, they would support the LTTE's peaceful efforts to promote the human rights and well-being of Sri Lanka's Tamil population. *Id.* at 391.

require proof of "personal guilt."[142] In a 2003 decision, the Ninth Circuit rejected plaintiffs' Fifth Amendment claim and concluded that Section 2339B already required personal culpability. According to the court, in order to violate the statute, defendant had to either know an organization was a designated terrorist group or that it engaged in terrorist activities.[143] Soon after this decision, some courts hearing Section 2333 cases began adopting this mens rea standard in suits implicating Section 2339B. In line with the Ninth Circuit's ruling, these courts required only that defendant knowingly provide material support to a terrorist group, in order to satisfy Section 2333's scienter element.[144]

In 2004, Congress amended Section 2339B to codify the Ninth Circuit's mens rea holding. Under this amendment, in order to violate 2339B, "a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism. . . ."[145] Despite this change, the *HLP* plaintiffs continued to challenge 2339B's constitutionality. In 2010, the Supreme Court weighed in on the dispute and addressed whether 2339B required that defendant intend to support terrorist violence.[146] As the Supreme Court held, a violation of the statute did not require such intent. Citing to the 2004 amendment, the Court held that "Congress plainly spoke to the necessary mental state for a violation of Section 2339B and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's [violent] terrorist activities."[147]

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142. *Id.* at 392 (citing Scales v. United States, 367 U.S. 203, 224–28 (1961)). Specifically, plaintiffs argued that Section 2339B "runs afoul of the Fifth Amendment's right to due process of law because the statute does not require proof that a person charged with violating the statute had a guilty intent when he or she provided 'material support' to a designated organization." *Id.* at 394. In addition to their Fifth Amendment claim, plaintiffs argued that Section 2339B violated their freedom of association and speech under the First Amendment. *Id.* at 393. In a decision issued in 2000, the Ninth Circuit rejected these arguments. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133–36 (9th Cir. 2000) [hereinafter *HLP I*].

143. *HLP II*, 352 F.3d at 400.

144. *See, e.g.*, *Strauss I*, 2006 WL 2862704, at *13–14 (Section 2333 case alleging violations of Section 2339B, in which court adopted scienter requirement for criminal statute and required only that defendant knowingly provide material support or resources to a foreign terrorist organization); Weiss v. Nat'l Westminster Bank PLC, 453 F. Supp. 2d 609, 625 (E.D.N.Y. 2006) [hereinafter *Weiss I*] (same); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 586–88 (E.D.N.Y. 2005) [hereinafter *Linde I*] (same).

145. Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3764. According to various courts, "the amendment was not intended to change the knowledge standard under 2339B, but only to clarify the standard which Congress had always intended to apply." *Weiss I*, 453 F. Supp. at 626 (citation omitted).

146. In their arguments to the court, plaintiffs claimed that, when applied to speech, 2339B mens rea required that defendant intend to further a terrorist organization's illegal activities. *HLP III*, 561 U.S. at 16 (2010).

147. *Id.* at 16–17.

For many courts, the Supreme Court's decision in *HLP III* affirmed that there was no mens rea requirement for the consequences of providing material support in Section 2333 cases involving 2339B. Citing to the *HLP III* decision, for example, the Second Circuit held that Section 2333 "incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of *any* material support to terrorist organizations without regard to the types of activities supported. Its application is not limited to the provision of support to the terrorist activities of a terrorist organization."[148]

The Second Circuit, in fact, went even further than *HLP III* and expanded the statute's mens rea to include deliberate indifference to an organization's terrorist connections. Under this formulation, which is similar to *Boim III*'s conscious recklessness standard, a civil defendant satisfies 2339B's scienter threshold where she either "has actual knowledge [that an organization engages in terrorist activity] *or* if [she] exhibited deliberate indifference to whether the organization engages in such activity."[149] While not all Section 2333 courts have strayed this far afield,[150] those that have directly incorporated Section 2339B's mens rea have consistently eschewed any requirement that defendant possess scienter for the consequences of her actions.

ii. Importing Section 2339A's Mens Rea Standard

Like 2339B, 2339A's mens rea has been directly incorporated into a number of Section 2333 cases involving underlying violations of that statute. In various instances, 2339A's mens rea has been interpreted so expansively that it has departed from its statutory language and become more similar to 2339B. Overall, the trend in these cases exhibit the same tendencies found in other Section 2333 litigation—a gradual evolution in

148. Weiss v. Nat'l Westminster Bank, PLC, 768 F.3d 202, 207–08 (2d Cir. 2014) [hereinafter *Weiss II*].

149. *Weiss II*, 768 F.3d at 208 (emphasis added); *see* Sokolow v. Palestine Liberation Org., 60 F. Supp. 3d 509, 521–22 (S.D.N.Y. 2014) (Section 2333 case incorporating mens rea from Section 2339B and defining the requirement as "actual knowledge of [terrorist] activity or . . . deliberate indifference to whether the organization engages in such activity") (citation and internal quotations omitted). *Cf.* United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011) (citing to Supreme Court decision in *HLP III* in holding that Section 2339B requires "defendant know the organization he is aiding is a terrorist organization or engages in acts of terrorism"); Assi v. United States, No. 98-80695, 2015 WL 3680459, at *3 (E.D. Mich. June 12, 2015) (holding that to sustain a conviction under Section 2339B it is enough that "a defendant has acquired 'knowledge' through whatever means, that a specific organization has engaged in terrorist activities").

150. *See, e.g.*, Stansell v. BGP, Inc., No. 8:09-cv-2501, 2011 WL 1296881, at *8 (M.D. Fla. Mar. 31, 2011) (describing Section 2339B's mens rea as requiring defendant know the organization receiving the material support was a terrorist group or engaged in terrorist activity).

favor of eschewing intent for the consequences of providing material support.

In the early days of civil material support litigation, cases incorporating 2339A's scienter took a narrower approach. In a 2005 decision, for example, the District Court for the Eastern District of New York held that Section 2339A required "knowledge or intent *that the resources given to terrorists are to be used* in the commission of terrorist acts."[151] As the jurisprudence developed, however, courts began to adopt a more liberal attitude toward 2339A. In these later decisions, 2339A's scienter element was satisfied, as long as defendant knew the organization she was supporting engaged in terrorist activity, was a terrorist organization, or was supporting such activities or organizations.[152] This requirement was so similar to 2339B's scienter component that, at times, the courts collapsed the mens rea for the two criminal statutes into one another.[153]

This approach to Section 2339A is clearly more expansive than criminal interpretations of the statute, and effectively equates its mens rea with knowingly providing support to organizations that engage in terrorism.[154] In

151. *Linde I*, 384 F. Supp. 2d at 586 n.9 (emphasis added).

152. In *Ofisi v. BNP Parisbas, S.A.*, the court transformed Section 2339A's mens rea requirement from its original definition of "provid[ing] material support or resources [to terrorists] . . . knowing or intending that they are to be used in preparation for, or in carrying out" terrorist activities to knowledge that support was provided to an alter ego of a terrorist group or that the ultimate beneficiary was a terrorist organization. 278 F. Supp. 3d 84, 100 (D.D.C. 2017), *vacated in part*, 285 F. Supp. 3d 240, 244 (D.D.C. 2018). Though *Ofisi* appears to adopt a hybrid approach to mens rea, the case is relevant here because it primarily focuses on the scienter standard for the applicable criminal material support statutes without exploring Section 2333's separate mens rea requirement in much detail.

153. In *Owens v. BNP Paribas S.A.*, the court defined Sections 2339A and 2339B mens rea requirements in the same way:

> [I]n order to satisfy the requirements of §§ 2339A or 2339B, plaintiffs must allege sufficient facts to show either that (1) defendants knew Sudan was acting as an agent of al Qaeda or of an individual terrorist; or (2) that defendants knew the ultimate beneficiaries of the financial services would be a terrorist organization or terrorist.

235 F. Supp. 3d 85, 98–99 (D.D.C. 2017) [hereinafter *Owens I*], *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). Like *Ofisi*, *Owens* takes a hybrid approach to mens rea, but only discusses and applies the scienter requirements for Sections 2339A and 2339B.

154. In a concurring opinion in *Estate of Parsons v. Palestinian Auth.*, Judge Karen Henderson noted the difference between interpretations of Section 2339A's scienter requirement on the civil and criminal sides:

> Section 2339A criminalizes the provision of material support *knowing or intending* that such support is used to aid crimes of terrorism. . . . The knowledge required to violate section 2339A in the context of the ATA's *civil* liability provision has [however] been subject to debate. [In *Boim III*,] [t]he Seventh Circuit, sitting en banc, held that criminal recklessness suffices.

651 F.3d 118, 127–28 (D.C. Cir. 2011) (Henderson, J., concurring) (citations omitted). Judge Henderson also noted that, unlike in the criminal context, Section 2333 cases involving an underlying violation of Section 2339A only required defendant "know (or intend) that its money is going to a group engaged in terrorist acts." *Id.* at 128.

As Judge Henderson suggests, the *Boim III* decision, which involved underlying violations of Section 2339A, seems to have had some impact on loosening the mens rea standard for the criminal

so doing, it eliminates any need for plaintiff to independently establish that defendant intended or was consciously and recklessly indifferent to supporting terrorist violence.

c. A Hybrid Approach: Establishing Scienter under Both the Civil and Criminal Statutes

Still other courts have held that Section 2333 claims have multiple scienter requirements that must be met—one for the civil statute and one for violations of each of the criminal material support laws implicated in the case. Again, as with other Section 2333 cases, these suits have evolved in favor of loosening the scienter standard to eliminate any mens rea for the consequences of defendant's actions.

In *Wultz v. Islamic Republic of Iran*, for example, the court held that Section 2333 "requires allegations of intentional misconduct—in addition to *other state-of-mind requirements* incorporated in [the criminal material support statutes]. . . ."[155] In concluding that plaintiffs had adequately pled violations of the predicate material support laws and also satisfied Section 2333's separate mens rea requirement,[156] the court strongly suggested that, as long as defendant allegedly knew it was providing support to a terrorist organization or its agent or alter-egos, all applicable mens rea elements were satisfied.[157]

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statute. Even though *Boim III* articulated an independent scienter requirement for Section 2333, some courts have either implicitly or explicitly treated the court's holding as applicable to Section 2339A's mens rea itself. *See Chiquita Brands I*, 690 F. Supp. 2d at 1312–13 (Section 2333 case quoting *Boim III* in concluding that "[t]he mental element required to fix liability on a donor to [a terrorist organization] [under Section 2339A] is . . . present if the donor knows the character of that organization [or consciously avoids that knowledge]"). In *Ahmad v. Christian Friends of Israeli Communities*, a Section 2333 case involving underlying violations of Section 2339A, the court held that the criminal statute provided the applicable mens rea but defined that element in terms quite similar to *Boim III*. No. 13-civ-3376 (JMF), 2014 WL 1796322, at *3 (S.D.N.Y. May 5, 2014) (holding that to meet Section 2339A's scienter requirement "there must be some evidence—for instance, that the recipients of the aid have publicly stated terrorist goals or are associates of established terrorist organizations").

155. Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 42 (D.D.C. 2010) (emphasis added). In *Wultz*, the court based its approach to mens rea on the belief that, in bringing a Section 2333 claim, plaintiffs must affirmatively establish that an act of international terrorism had occurred. *Id.* at 43 ("[In Section 2333 cases], plaintiffs must allege an act of international terrorism, which, in turn, requires that plaintiffs allege . . . violations of [the criminal material support statutes]"). This rationale is common amongst courts taking a hybrid approach to Section 2333's mens rea. *See, e.g.*, Goldberg v. UBS AG, 660 F. Supp. 2d 410, 426–33 (E.D.N.Y. 2009).

156. *Wultz*, 755 F. Supp. 2d at 44–48, 50.

157. *Wultz* arguably cuts both for and against a broad mens rea standard under Section 2333. On the one hand, the court's articulation of Section 2339A's scienter requirement is consistent with the statute's wording and requires knowledge or intent to facilitate terrorist activities (as opposed to simply knowing the character of the organization). *Id.* at 44–45. On the other hand, the court took a more expansive approach to Section 2333's "overarching" scienter requirement. Citing to *Boim III*, the court held that the civil statute's mens rea is satisfied where defendant knows it is providing material support to a terrorist organization or its agent, thereby "risking the use of those funds in the furtherance of [the

In *Goldberg v. UBS AG*, the court based its scienter analysis on whether plaintiffs had adequately alleged that defendant possessed the requisite mens rea for the underlying criminal material support statute, as well as for Section 2333 itself.[158] In concluding that all mens rea elements had been satisfied,[159] the court held that allegations defendant knew it was providing material support to the agent of a terrorist group fulfilled each of the applicable scienter standards.[160]

Like the independent mens rea cases, as well as those relying exclusively on Sections 2339A and 2339B's scienter requirements, in these hybrid matters, as long as defendant knowingly supports a terrorist organization, its agents, or alter-egos, she is potentially liable for violating the civil material support statute.

d. Departing from Traditional Scienter Principles

Under the dominant scienter framework for Section 2333, plaintiff can conceivably prevail against a defendant, without showing the latter actually intended to provide material support to terrorist activities. If defendant donated money to a third party allegedly affiliated with a terrorist group, she does not need to desire her money be used to support the terrorist organization or its initiatives. To satisfy the scienter requirement, defendant simply needs to have knowingly supported, or, in some cases, consciously and recklessly disregarded the risk that her support would ultimately reach an organization that was a designated terrorist group, engaged in terrorist activity, or itself supported terrorists.[161] In effect, plaintiffs have been freed of the need to allege or prove that defendants intended or consciously and

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terrorist organization's] terrorist attacks." *Id.* at 50. In *Wultz*, plaintiffs alleged defendant had knowingly provided material support to the agent of a terrorist organization *and*, quite unusually, presented specific allegations that defendant was likely aware its support would further terrorism. *Id.* at 44–48, 50–52. On these allegations, plaintiffs satisfied both the higher scienter threshold for Section 2339A and the lower standard for Section 2333. Nevertheless, given the court's observation that as long as defendant "knew that it was providing financial services to the [agent of a terrorist organization] and continued to do so, defendant engaged in the sort of intentional misconduct prohibited" by Section 2333, it is conceivable the court would have been satisfied with a weaker scienter showing, if there had been no specific allegations defendant possessed mens rea for the consequences of its actions. *Id.* at 52.

158. Goldberg, 660 F. Supp. 2d at 426–33.

159. *Id.*

160. *Id.* at 428, 433. In *In re Chiquita Brands Int'l, Inc.*, the court similarly held that Section 2333 had multiple mens rea requirements, including to establish an "act of international terrorism" had occurred under the civil statute itself, as well as for the underlying criminal material support provision. 284 F. Supp. 3d 1284, 1307 (S.D. Fla. 2018) [hereinafter *Chiquita Brands II*]. In that case, which involved an underlying violation of Section 2339A, the court held that all mens rea requirements could be satisfied "[w]here support is given to a known terrorist group having only violent organizational goals." *Id.* at 1320.

161. *Boim III*, 549 F.3d at 702; *Strauss v. Crédit Lyonnais, SA*, 925 F. Supp. 2d 414, 429 (E.D.N.Y. 2013) [hereinafter *Strauss II*].

recklessly disregarded the risk that their actions would contribute to terrorist violence.

For several reasons, this scienter standard fails to comport with traditional tort principles. First, because Section 2333 cases focus exclusively on the act itself, they stand in stark contrast to the typical intentional tort case, where the mens rea analysis is concerned more with the consequences of tortious action.[162] Putting aside any policy-based reasons for this inversion,[163] this is a clear departure from the tort law norm.

Second, in most Section 2333 cases, as long as defendant provided material support intending or consciously reckless to the fact that the ultimate beneficiary was a terrorist organization or a group engaged in terrorist activities, then courts seem to either explicitly or implicitly assume defendant intended to assist or consciously and recklessly disregarded the risk of contributing to terrorist violence. As tort commentators have noted, however, the notion that "'all acts lead to intended consequences' is far too broad a construct" and "tells us nothing about the particular consequences of that act, nor the actor's state of mind regarding those consequences," which remain important.[164] By focusing on the mens rea for the act and collapsing it into the mens rea for its consequences, many Section 2333 decisions misapprehend the work scienter is supposed to do in intentional tort cases.

Third, the conscious recklessness standard adopted in some Section 2333 cases does not satisfy the requirements of tort law. In tort, recklessness can serve as a "proxy for intent" only where "defendant was subjectively aware of the consequences of his act—not necessarily that it would cause the exact injury, but at least that it was certainly likely to cause an injury to plaintiff."[165] In the Section 2333 context, however, the conscious recklessness standard only demands that "the donor knows the character of th[e] organization,"[166] which can be satisfied where defendant "strongly suspect[s] the truth but [does] not car[e] about [it]."[167] This is far from

162. Henderson & Twerski, *supra* note 43, at 1137 (noting that, in intentional tort law, intent is meant to focus more on the consequences of the act than the act itself).

163. Some courts have justified Section 2333's expansive scienter requirement on the concern that a more robust mens rea standard would make civil material support cases harder to bring. *See Boim III*, 549 F.3d at 698–99 (refusing to require proof that defendant *intended* her material support be used for terrorism as this "would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent"). This concern is not necessarily an accurate one, however. *See infra* note 297.

164. Henderson & Twerski, *supra* note 43, at 1137–38.

165. Saba v. Compagnie Nationale Air France, 78 F.3d 664, 668 (D.C. Cir. 1996); *see* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding that recklessness, when equated with willful or intentional conduct, requires that defendant "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

166. *Boim III*, 594 F.3d at 695.

167. *Id.* at 699.

evidence of defendant's "subjective state of mind" about the consequences of her actions.[168]

Related to this, the conscious recklessness standard in Section 2333 cases arguably weakens the "deliberateness" associated with the act itself. It is true this standard is a fairly low one and that "[e]very act that is not literally compelled by the physical act of another . . . or the result of an involuntary muscle spasm, is a deliberate . . . one."[169] But, as conceived by tort law, acting deliberately still requires behaving in accordance with one's own will and purpose. In some Section 2333 cases, deliberateness may be satisfied by something less than such purposeful action. For example, according to the logic of *Boim III*, a person who acted purposefully in supporting a charity's humanitarian work is treated as deliberately sustaining a terrorist organization, as long as she consciously and recklessly disregarded an affiliation between the two groups.[170] While this may be more than an "involuntary muscle spasm," it is hard to argue that defendants in these situations are providing material support to terrorist entities, in accordance with their own will and purpose.[171]

In all these ways, Section 2333's mens rea has evolved to defy traditional expectations for an intentional tort. The courts' increasingly liberal approach to this critical element of a civil material support claim expands

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168. *See, e.g.*, *Farmer*, 511 U.S. at 844 (holding that defendants may show that they did not behave recklessly by, for example, demonstrating "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent"). There are also other problems with using conscious recklessness in the Section 2333 context. In discussing the concept's limits, the Restatement (Third) notes that conscious recklessness "loses its persuasiveness when the identity of potential victims becomes vaguer and when, in a related way, the time frame involving the actor's conduct expands and the causal sequence connecting conduct and harm becomes more complex." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 1 cmt. e. Courts hearing Section 2333 claims tend to discount such mitigating factors, including defendant's lack of awareness about the identity of victims or relevant act of terrorism, as well as the passage of time between the act and its alleged consequences. *See, e.g.*, *Linde I,* 384 F. Supp. 2d at 586 (holding that defendant need not have specific intent to cause the act of terrorism that injured plaintiff, in order to be liable under Section 2333); *Boim III*, 549 F.3d at 699–700 ("To the objection that the logic of our analysis would allow the imposition of liability on someone who with the requisite state of mind contributed to a terrorist organization in 1995 that killed an American abroad in 2045 . . . the imposition of liability in the hypothetical case would not be as outlandish, given the character of terrorism, as one might think.").

169. *In re* Geiger, 113 F.3d 848, 852 (8th Cir. 1997).

170. *Boim III*, 549 F.3d at 698.

171. The weakening of deliberateness, as well as the collapsing of the mens rea analysis for the act and its consequences, are partially a result of congressional "findings" contained in the ATA's legislative history relating to the "fungibility of money" and the "tainted" nature of terrorist organizations. *See infra* Part IV.B. As for those cases requiring knowledge of the terrorist character of an organization, there is an argument to be made that this standard is more robust than deliberateness. Even assuming this is correct, it does not compensate for eliminating mens rea for the consequences of providing material support. It is, after all, this scienter element that is most important in intentional tort law.

liability in unusual ways and leaves little justification for the statute's automatic trebling of damages.[172] These problems are further aggravated by the simultaneous loosening of Section 2333's causation element, which is explored in the next section.

2. Section 2333's Exceptional Causation Requirement

Under Section 2333, a U.S. national may bring a claim for injury "*by reason of* an act of international terrorism."[173] This language is generally and widely understood to require a causal showing in civil material support cases. In practice, however, many courts have taken an approach to causation that effectively nullifies this requirement.

On the issue of factual causation, there is effectively unanimous agreement that Section 2333 does not require this element.[174] As the courts have held, demanding factual causation "at least in the material support context, . . . would come up against the basic problem of the fungibility of money."[175] The "fungibility of money" refers to the fact that money (and, by extension, support more generally) can be used to facilitate innumerable activities; as the logic goes, because of fungibility, it is impossible to know whose funds (or support) brought about plaintiff's injury by a terrorist organization and, therefore, inappropriate to expect plaintiffs to establish factual causation in civil material support cases.[176]

On the issue of legal causation, the courts have exhibited more disagreement. A minority has explicitly held that legal causation need not

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172. By gutting the scienter requirement, the courts have eviscerated the main justification for permitting treble damages in Section 2333 cases—namely that defendant's behavior was deliberately wrongful and aimed at causing harm.

173. 18 U.S.C. § 2333(a) (emphasis added).

174. *Linde I*, 384 F. Supp. 2d at 584–85; *Weiss I*, 453 F. Supp. 2d at 631. In *Boim II*, however, the court did require causation in fact:

> On remand, the Boims will have to demonstrate an adequate causal link between the death of David Boim and the actions of [defendants]. This will require evidence that the conduct of each defendant, be it direct involvement with or support of Hamas's terrorist activities or indirect support of Hamas or its affiliates, helped bring about the terrorist attack that ended David Boim's life. . . . [T]he plaintiffs must be able to produce some evidence permitting a jury to find that the activities of [defendants] contributed to the fatal attack on David Boim and were therefore a *cause in fact* of his death. Absent such proof, [] appellants will be entitled to judgment in their favor.

Boim II, 511 F.3d at 710–11 (emphasis added). The *Boim II* decision is considered an outlier on the issue of factual causation.

175. *Gill I*, 891 F. Supp. 2d at 367.

176. *Boim III*, 549 F.3d at 698. As with the justifications used to eviscerate scienter, this argument is rooted in the ATA's legislative history. Part IV.B explores how the courts have deployed this legislative history in ways that are unusual, inappropriate, and suffused by a particular political perspective on terrorism.

be established.[177] Most courts have taken the opposite position, however, and insisted that legal causation is required. Even amongst these courts, however, legal causation has effectively been abandoned where material support has allegedly been directly given to a terrorist organization, its agents, or alter-egos.

Because the approach to factual causation is largely consistent in Section 2333 cases, the remainder of this section will explore the contours of legal causation, including its contested and evolving nature.

a. Legal Causation under Section 2333

In *Boim I*, the Seventh Circuit clearly held that legal causation was necessary to sustain a Section 2333 claim. Pointing to the language of the statute, the court concluded that "a plaintiff must be injured 'by reason of' an act of international terrorism," which "[t]he Supreme Court has interpreted . . . [as] requir[ing] a showing of proximate cause."[178] Elaborating on its holding, the court explained that "[f]oreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions."[179] Since *Boim I*, the vast majority of cases have required legal causation in Section 2333 suit, and have typically described that requirement in terms of foreseeability.[180]

The *Boim III* court stands apart from this jurisprudence, by effectively rejecting legal causation as a requirement of Section 2333. While the court conceded that "[i]t is 'black letter' law that tort liability requires proof of causation,"[181] it argued that "like much legal shorthand, the black letter is inaccurate if treated as exceptionless."[182] The court went on to insist that legal causation was essentially unnecessary because, as a rule, material

177. Notably, those courts explicitly rejecting legal causation have not claimed that Section 2333's "by reason of" language creates anything other than a causal requirement. *See Boim III*, 549 F.3d at 695–99 (eliminating proximate causation without challenging the meaning of Section 2333's "by reason of" language).

178. *Boim I*, 291 F.3d at 1011.

179. *Id.* at 1012.

180. *See, e.g.*, *Wultz*, 755 F. Supp. 2d at 53 ("To satisfy the ordinary tort requirement of causation and foreseeability, as well as the textual requirement that injury be suffered 'by reason of' an act of international terrorism, plaintiffs must plead that an alleged act of international terrorism proximately caused their injury."); *Abecassis I*, 704 F. Supp. 2d at 665 (holding that legal causation was required in Section 2333 causes and that "[f]oreseeability is the cornerstone of proximate cause . . .") (internal quotations and citation omitted). *But see* Fields v. Twitter, 881 F.3d 739, 748 (9th Cir. 2018) ("[F]or purposes of the ATA, it is a direct relationship, rather than foreseeability, that is required.").

181. *Boim III*, 549 F.3d at 695.

182. *Id.*

support "significantly enhance[s] the risk of terrorist acts and thus the probability [of injury]."[183]

Because *Boim III* took such an extreme position, numerous courts expressly rejected its rationale and continued to require legal cause in Section 2333 cases.[184] In one influential post-*Boim III* decision on causation, the Second Circuit in *Rothstein v. UBS AG* held that "if, in creating civil liability through § 2333, Congress had intended to allow recovery upon a showing lower than proximate cause, we think it either would have so stated expressly or would at least have chosen language that had not commonly been interpreted to require proximate cause for the prior 100 years."[185] Despite this strong rationale and rhetorical support for legal causation across most jurisdictions, many courts have, in fact, mimicked the holding of *Boim III* by adopting a per se rule on legal cause, in cases involving direct support to terrorist organizations, their agents, or alter-egos. According to this rule, an act of terrorist violence that follows the alleged provision of material support to a terrorist organization, its agents, or alter-egos is, as a matter of law, the natural and foreseeable result of that support.[186] No additional showing of legal cause is necessary.[187] In fact, courts have been adopting this approach, since before the *Boim III* decision. In 2003, for example, the U.S. District Court for the District of Columbia held that because "[a]ny terrorist act . . . might have been the natural and probable consequence of knowingly and intentionally providing financial support" to a terrorist organization, legal causation was satisfied.[188] A few years later, the District Court for the Eastern District of New York concluded that, to establish legal causation under Section 2333, plaintiffs need not show they were harmed

183. *Id.* at 698. To justify its analysis, the court drew parallels with joint tortfeasor jurisprudence and argued that "[i]n all [those] cases the requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Id.* at 697. The court failed to mention, however, that joint tortfeasor cases relax the standard for factual, not legal, causation, as discussed below in Part II.B.2.b. *See Boim III*, 549 F.3d at 721–24 (Wood, J., dissenting) (noting that majority's analysis of joint tortfeasor cases was incorrect and failed to appreciate that the standard for factual, rather than legal, causation was loosened in those cases).

184. *See, e.g.*, *Abecassis I*, 704 F. Supp. 2d at 664–65 (rejecting *Boim III*'s approach to legal causation and requiring that plaintiffs establish legal cause in Section 2333 cases).

185. Rothstein v. UBS AG, 708 F.3d 82, 95 (2d Cir. 2013) [hereinafter *Rothstein III*]. In *Rothstein III*, plaintiffs brought a Section 2333 claim for aiding and abetting against UBS for providing the Iranian government with financial assistance that was allegedly used to fund terrorist attacks committed by Hezbollah and Hamas.

186. In analyzing proximate causation, the *Rothstein III* court disallowed precisely this sort of rule. *See id.* at 96 (rejecting plaintiffs' argument that proximate cause was established after UBS provided material support to Iran because "that would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state").

187. *Id.*

188. Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 105 (D.D.C. 2003).

by reason of defendant's actions, but only that they were injured by an act of international terrorism committed by a terrorist organization that defendant materially supported.[189] Building on this case law, the District Court for the Eastern District of New York held in a post-*Boim III* decision that "proximate cause may be established by a showing only that defendant provided material support to, or collected funds for a terrorist organization which brought about plaintiffs' injuries."[190]

By collapsing the causation inquiry into a showing that defendant provided material support to a terrorist group, its agents, or alter-egos, many courts have effectively abandoned legal causation in Section 2333 cases.[191]

b. Departing from Traditional Causation Principles

As with scienter, Section 2333 cases have broken with traditional tort norms on causation. On the element of factual cause, this is true for the vast majority of civil material support suits. As for legal causation, cases involving alleged direct support to terrorist organizations, their agents, or alter-egos are also out-of-line with traditional tort approaches.

At first blush, there seems to be some precedent for dispensing with factual causation in Section 2333 cases. In joint tortfeasor suits, for example, courts have not demanded a literal showing of factual cause, if it

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189. *Linde I*, 384 F. Supp. 2d at 581, 585.

190. Goldberg v. UBS AG, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) (internal quotations and citations omitted). *See Weiss I*, 453 F. Supp. 2d at 631–32 (concluding that proximate causation is established where plaintiff alleges that defendant provided material support to a terrorist group that caused plaintiff's injuries, before those injuries were suffered); *Strauss I*, 2006 WL 2862704 at *18 ("[I]t is clear that proximate cause may be established by a showing only that defendant provided material support to, or collected funds for a terrorist organization which brought about plaintiffs' injuries."). Though they appear to be outliers, a few recent cases, involving alleged material support to terrorist organizations, their agents, or alter-egos, did not adopt a per se rule. *See* Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1127 (N.D. Cal. 2016), *aff'd* 881 F.3d 739 (9th Cir. 2018) (holding that allegations defendant provided material support to a terrorist organization are insufficient, in and of themselves, to establish proximate causation); Gill *II*, 893 F. Supp. 2d at 556 ("[T]he court rejects the contention that *any* reckless contribution to a terrorist group or its affiliate, no matter how attenuated, will result in civil liability, without the demonstration of a proximate causal relationship to the plaintiff's injury.") (internal quotations and citation omitted).

191. By contrast, where defendant has provided material support to a government, rather than to a terrorist organization, its agents, or alter-egos, the courts have been more reticent to adopt a per se causation rule. For example, in *Rothstein III*, the court parsed the allegations in plaintiffs' complaint to determine whether legal causation had been properly pled:

> The Complaint does not allege that UBS was a participant in the terrorist attacks that injured plaintiffs. It does not allege that UBS provided money to Hizbollah or Hamas. It does not allege that U.S. currency UBS transferred to Iran was given to Hizbollah or Hamas. And it does not allege that if UBS had not transferred U.S. currency to Iran, Iran, with its billions of dollars in reserve, would not have funded the attacks in which plaintiffs were injured.

Rothstein III, 708 F.3d at 97. As discussed below, this difference in approach has much to do with the ATA's legislative history. *See infra* note 297.

would absolve all defendants of liability.[192] But even in these situations, courts have not dispensed with factual causation altogether. Indeed, a joint tortfeasor is only liable if her actions would have been the factual cause of plaintiff's injury, in the absence of other competing causes.[193] By rejecting factual causation altogether, then, Section 2333 cases step far outside what tort law typically allows.

As for legal cause, explicitly abandoning this requirement is, of course, out of keeping with tort norms. For several reasons, the adoption of a per se rule also eviscerates customary tort approaches to causation. First, it effectively does away with the in-depth fact-finding typically undertaken by courts to determine whether defendant's actions caused plaintiff's injury.[194] While there is still some need in the per se case for fact-finding, for example, to show that the terrorist organization actually caused plaintiff's injury and that defendant provided material support to the group, its agents, or alter-egos, this is a far cry from demanding evidence that defendant's actions themselves legally caused plaintiff's harm.[195] Second, by declaring as a matter of law that terrorist violence is the probable consequence of any and all material support previously provided, the per se rule creates potentially limitless liability, which is out of step with foreseeability.[196] Even though foreseeability is generally less rigorous in intentional tort cases, it assumes the existence of factual causation[197] and mens rea for the consequences of

192. Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1129 (D.C. Cir. 2004).

193. *See, e.g.*, Maxwell v. KPMG LLP, 520 F.3d 713, 716 (7th Cir. 2008) ("There are also cases in which a condition that is not necessary, but is sufficient, is deemed the cause of an injury, as when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself and so was not a necessary condition; yet each of the firemakers (if negligent) is liable to the plaintiff for having 'caused' the injury."). In her dissent in *Boim III*, Judge Wood vociferously argued for applying this version of factual causation in Section 2333 cases. 549 F.3d at 722–23 (Wood, J., dissenting) (arguing that, in joint tortfeasor cases "plaintiff cannot win without showing that the defendant's act would have been *sufficient* to cause the injury, even though it may be the case that other acts might also have been sufficient. . . . So, too, must we insist that [defendants'] actions amounted to at least a sufficient cause of the terrorist act that killed David Boim, even if, on these facts, there were multiple such causes.") (emphasis added).

194. *See* Stapleton, *supra* note 62, at 954–55 (discussing causation generally as a "question of fact" to be submitted to a jury, in individual cases). This does not, of course, mean the law has no role to play—indeed, legal rules, like foreseeability, are an important part of analyzing the appropriate scope of liability. Rather, the point is that a per se rule of liability cannot substitute for the factual evidence typically required to establish causation.

195. In her *Boim III* dissent, Judge Rovner highlighted this issue, arguing that the majority's decision, "rather than requiring plaintiffs to present evidence of causation and allowing the factfinder to determine whether causation has been shown, . . . deems it a given, declaring as a matter of law that any money knowingly given to a terrorist organization . . . is a cause of terrorist activity, period." 549 F.3d at 705 (Rovner, J., dissenting).

196. *See* Stapleton, *supra* note 62, at 984 ("The law's concern that a defendant not be held liable for the infinite stream of consequences flowing from tortious conduct requires the limitation of every obligation to a finite set of consequences.").

197. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 cmt. e (AM. LAW INST. 2010).

one's actions.[198] Since Section 2333 claims require neither of these two factors, there is no legal justification for expanding causation in these cases beyond the traditional definition of foreseeability. Finally, Section 2333's approach to factual and legal causation is out of step with other tort-based statutes that contain the same "by reason of" language.[199] In examining the meaning of this phrase, the Supreme Court has held that it requires a showing of both kinds of causation.[200] On this score, judicial interpretations of the civil material support statute are, obviously, deficient.[201]

By eliminating factual causation, and effectively reducing legal cause to a per se rule of liability whenever direct support has allegedly gone to a terrorist group, its agents, or alter-egos, Section 2333 cases have established "as a matter of law that any money given to [a terrorist] organization," regardless of whether it also engages in non-violent activities, "necessarily enables its terrorism, regardless of the purpose for which the money was given or the channel through which the organization received it."[202] This, combined with the statute's substantially weakened mens rea standard, creates a liability framework that erodes many of the conceptual and practical limits typically demanded by tort law.

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198. As the Restatement (Third) of Torts makes clear, it is because a tortfeasor *intended* to cause harm that she is liable for a broader range of consequences than she would be if she had acted negligently. *Id.* § 33 cmt. a. Indeed, in determining the appropriate scope of liability in these cases, the Restatement has counseled that "the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, [and] the seriousness of harm intended and threatened by those acts" be taken into consideration. *Id.* § 33(b).

199. Statutes with the "by reason of" language include the private right of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as the anti-trust statutes, the Sherman and Clayton Acts. Under RICO's private right of action, "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (emphasis added). Under the Clayton and Sherman Acts' private right of action, "any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (emphasis added).

200. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992).

201. It is worth noting that, in construing claims under these other statutes, courts do not resort to per se rules of legal causation and, instead, regularly parse the facts to determine if defendant's actions were the legal cause of plaintiff's injury. *See* Anza v. Ideal Steel Supply, 547 U.S. 451 (2006) (examining facts of case in concluding that plaintiff's injuries were too attenuated from defendant's alleged RICO violations to satisfy proximate causation); *In re* Flonase Antitrust Litig., 798 F. Supp. 2d 619 (E.D. Pa. 2011) (examining evidence presented on summary judgment, in concluding that no genuine issue of material fact existed as to whether defendant's alleged violation of the Clayton Act proximately caused plaintiffs' injuries).

202. *Boim III*, 549 F.3d at 709 (Rovner, J., dissenting).

3. *How Section 2333 Defies Theories of Tort Law*

Section 2333 is not only out-of-step with traditional intentional tort jurisprudence. It also fails to comport with the prevailing theories of tort law. While the economic and corrective justice theories may each provide a partial explanation for the statute's development, neither fully describes how and why Section 2333 cases operate as they do.[203] This further underscores the unique and unusual way in which Section 2333 has developed.

a. *The Economic Theory of Tort Law*

The economic theory of torts would seem to, at least partially, illuminate Section 2333 case law.[204] With its general disdain for causation, the theory provides a rationale for the effective elimination of this concept in many civil material support cases.[205] Because it puts little emphasis on individual culpability as distinct from efficiency, the theory would also seem to support the elimination of a mens rea requirement for the consequences of providing material support.[206] Finally, with the actual perpetrators of terrorist activity largely beyond the reach of U.S. courts, the economic theory would appear to justify the presumption that third-party supporters of terrorist organizations or their activities are best positioned to reduce the social costs of terrorist violence.

There are, however, economic costs created by Section 2333, which suggest the statute may not, in fact, be an efficient one. Specifically, the statute may over-deter actual and prospective defendants. Over-deterrence occurs where, for example, a weak mens rea standard coupled with high penalties, like treble damages, induce precautions that chill wholly legitimate activities.[207] In the case of Section 2333, more often than not,

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203. Some commentators have suggested that the economic and corrective justice theories of tort are themselves flawed because some torts are explained by one theory, but not the other. *See* Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369 (2005) (focusing on automobile accidents and medical malpractice claims to argue that none of the prevailing theories of tort provide a unified explanation of the discipline because they cannot explain *both* these types of claims). Without taking a position on this issue, this argument is different from the one being made here, namely, that *neither* of the prevailing theories explain why Section 2333 cases function the way they do.

204. Indeed, Judge Richard Posner, a major figure in developing the economic theory of torts, wrote the majority opinion in *Boim III*.

205. As discussed above, according to the economic theory of torts, it is the "least cost avoider" and not the person who legally and factually caused plaintiff's injury who is liable. *See supra* Part I.B.1.

206. *Id.*

207. *See* Keith N. Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1225–26, 1235 (2010) (arguing that where an intentional tort carries a punitive damage award, a higher mens rea, namely "foresee[ing] or intend[ing] the immediate harm or ultimate physical consequence of [defendant's]

claims are brought against groups, like charitable organizations and banks, which indisputably provide a host of innocent and often critical assistance, like routine banking services and funding for humanitarian efforts, to a diversity of communities and individuals. Being held liable under Section 2333 can have a substantial, adverse impact on these organizations and their ability to continue serving these clients, most of whom have no ties to terrorism or terrorist organizations.[208] Even the mere accusation of providing material support to terrorist groups, their agents, or alter-egos can negatively impact the reputation and economic viability of these institutions.[209] Where organizations operate in regions associated with terrorism, the risk of liability under Section 2333 may leave them with little option other than to shutter operations.[210] For charities working in these regions, the statute may have an even broader impact. As commentators have shown, the criminal material support laws have created a chilling effect on donations to these groups and, as a result, have negatively impacted their humanitarian work.[211] Given its close relationship to these laws, Section 2333 may conceivably have a similar effect.

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actions," is required and that, without this higher mens rea, the liability rule may over-deter such that the "benefits foregone by constraining the activity exceed the costs avoided").

208. Arab Bank, which is the third largest lender in the Arab world, is an example of an organization with a substantial and diverse customer base that has likely been negatively impacted by Section 2333 litigation. In September 2014, the jury in *Linde v. Arab Bank* returned a verdict holding Arab Bank, which is headquartered in Jordan, liable for dozens of attacks committed by Hamas in the West Bank, Gaza, and Israel, between 2001 and 2004. A year later, Arab Bank settled the case for $1 billion, though the settlement remained contingent on the bank's pending appeal before the Second Circuit. Stephanie Clifford, *Arab Bank Reaches Settlement in Suit Accusing It of Financing Terrorism*, N.Y. TIMES, Aug. 14, 2015, https://www.nytimes.com/2015/08/15/nyregion/arab-bank-reaches-settlement-in-suit-accusing-it-of-financing-terrorism.html?_r=0. In February 2018, the Second Circuit overturned and vacated the jury verdict. *Linde III*, 882 F.3d at 332. Per the parties' previous agreement, the settlement remained in place, though payout amounts to plaintiffs were adjusted as a result of Arab Bank's victory. *Id.* at 332–33. Regardless of this outcome, irreversible reputational damage to Arab Bank has likely been done. *See* Motion for Leave to File Brief of Amicus Curiae Hashemite Kingdom of Jordan In Support of Petitioner at 17, Arab Bank, PLC v. Linde, 134 S. Ct. 2869 (2014) (No. 12-1485) (arguing that a verdict against Arab Bank would devastate the organization because "[b]anks depend on doing business with other banks—and no bank wants to do business with a bank labeled a terrorism-financier by the United States"). Harm to Arab Bank's business also hurts the countless individuals and institutions that depend on its services. *Id.* at 18. ("The damage to Arab Bank's reputation as a sound and reliable financial institution could also threaten . . . its role as . . . an important depository institution for many corporate and individual clients with ties to the [Middle East] region.").

209. *See* Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 103 (D.D.C. 2003) ("The use of the privileged medium of a lawsuit to publicly label someone an accomplice of terrorists can cause incalculable reputational damage. Placing that person in a situation in which he must retain counsel and defend himself has dramatic economic consequences as well.").

210. *See* Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Ac*t, 45 ARIZ. ST. L.J. 533, 586 (2013) (noting that the risk of liability under Section 2333, and its attendant treble damages award, may drive international banks operating in troubled regions out of business or force them to abandon those areas).

211. The criminal material support laws have had a complex effect on charitable giving to Muslims and Arab charities and, by extension, on their humanitarian work. In examining the laws'

Further exacerbating these inefficient results, there is no empirical evidence that pursuing charities, banks, or other institutions that have purportedly provided support to terrorist organizations alongside their many other legitimate activities, reduces the incidence of or otherwise has any impact on terrorism. In the absence of such evidence, targeting these organizations arguably creates more social costs[212] and fewer benefits.[213]

Finally, though it may over-deter inadvertent supporters of terrorist groups or activities,[214] Section 2333 has a questionable deterrent effect on an important category of individuals and groups, namely, those intentionally providing material support. These actors challenge the notion of a risk-neutral, self-interested person upon which the economic theory relies. Instead, they are presumably engaged, at least in some cases, in an ideological project that may or may not impact their personal satisfaction.[215] As a result, they may calculate the costs and benefits of providing material

impact on American Muslim charitable groups, Malick Ghachem notes that the effects have fluctuated over time and been both direct and indirect:

> By nearly all accounts, the crackdown on Muslim American charities did cause a significant drop in charitable giving and expenditures in the years after 9/11. More recently, during the period from 2005 or 2006 to the present, there have been indications of a significant rebound that suggest the earlier drop has, over time, been counterbalanced by correspondingly greater amounts of giving to the handful of Muslim American charities that have survived the post-9/11 era unscathed, such as Islamic Relief USA. But the fate of the operational side of Muslim charitable activity remains uncertain. This appears to be due to ongoing restrictions on the ability of religious and secular organizations to deliver humanitarian aid to conflict zones, and the reluctance of banks and other financial institutions to work with Muslim charities for fear of sanctions in the event that money laundering or terrorism financing charges are brought.

Ghachem, *supra* note 26, at 166.

212. These costs include the time and effort needed to identify the prohibited material support. *See, e.g.*, FIN. ACTION TASK FORCE, EMERGING TERRORIST FINANCING RISKS 21 (2015), http://www.fatf-gafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf [https://perma.cc/Z5Q6-CTZY] ("[T]errorism financing through the banking sector is often small-scale and can be difficult to distinguish from the large number of legitimate financial transactions undertaken each day.").

213. In particular, without empirical evidence that terrorism is being furthered by specific charitable organizations, stopping financial flows to these groups has substantially inefficient consequences. *See* IBRAHIM WARDE, THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR 149 (2007) (noting that the government "crackdown" on Islamic charities in the United States after 9/11 had a negative effect on donations "just as welfare and humanitarian relief needs were most needed").

214. Samuel Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U L. REV. 830, 836 n.23 (2014).

215. This is not meant to suggest that terrorists are undeterrable because they are irrational, even evil, actors. *Id.* at 832. Rather, the point, here, is that the economic theory's deterrence model, which is based on maximizing economic utility, may not work with certain actors. Generally, deterrence is about engaging "motivations, decisionmaking, and intentions." Alex Wilner, *Contemporary Deterrence Theory and Counterterrorism: A Bridge Too Far?*, 47 N.Y.U J. INT'L L. & POL. 439, 451 (2015). For these reasons, literature on deterrence's role in counterterrorism generally "'rejects . . . unitary rational actor assumptions'" in favor of "tailored deterrence" strategies that appreciate how different actors, from "terrorist foot soldiers" to financiers, have different motivations and behave differently. Rascoff, *supra* note 214, at 837–38. Such tailoring is absent from the deterrence model embraced by the economic theory of tort, making it less effective with some groups.

support in different ways from individuals seeking to maximize economic utility.[216]

b. Corrective Justice Theory of Tort Law

The corrective justice theory of torts also has some explanatory power where Section 2333 cases are concerned. Most obviously, it helps elucidate why notions of morality seem to play an enormous role in these legal decisions.[217] It is less effective, however, in explaining the absence of mens rea for the consequences of providing material support. If defendant did not intend to "bring about" the results of her actions, then arguably she should not be required, according to the principles of corrective justice, to "reverse the transaction" that led to plaintiff's injury.

The corrective justice theory also falls short in explaining why causation has been effectively written out of the statute.[218] Far from being "the doer and sufferer of the same injustice," parties in Section 2333 cases are indirectly connected to one another by a terrorist group (or, in some cases, by a group that was connected to a terrorist organization), which was the actual "doer" that caused plaintiff's "suffering."[219] Since that suffering need not be factually connected to defendant's actions, defendant is not obliged, under the theory of corrective justice, to compensate plaintiff, financially or otherwise. This conclusion is even more true in cases involving direct material support to a terrorist organization, its agents, or alter-egos, where both factual and legal causation has been eliminated. In these circumstances, there is no more than a "serendipitous causal connection between the

216. There may also be other non-economic efficiency factors, aside from politics and ideology, motivating someone to intentionally support a terrorist organization. *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1548 (2017) (noting "there is no single profile of why one chooses to participate in terrorist activity," and that "potential factors include political grievances, mental illness . . . trauma, and a sense of belonging, adventure, and notoriety").

217. Courts often use stark, moral language in discussing the purported acts of terrorism involved in Section 2333 cases. *See, e.g.*, *Boim III*, 549 F.3d at 718 (Rovner, J., dissenting) (describing the death of plaintiffs' son as "an unspeakably brutal and senseless act"); *id.* at 719 (Wood, J., dissenting) (noting that "this is a heart-breaking case" and that "[n]o parent can fail to empathize with [plaintiffs], who lost their son to the evil of terrorism just as he was on the brink of all of life's promise."). As commentators have noted, "the degree to which courts have chosen to paint emotionally moving portraits of the victims of terrorism is unusual [in Section 2333 cases]" and is "absent from other cases," including murder cases. Sant, *supra* note 210, at 556.

218. Because causation is also a necessary component of the civil recourse and compensation theories of torts, Section 2333 cases cannot be fully explained by these approaches either.

219. Weinrib, *supra* note 88, at 353.

tortious aspect of the actor's conduct and the other's harm,"[220] which falls far short of corrective justice's liability requirements.[221]

4. Limitless Liability

In *Boim I*, the court explicitly rejected the possibility that simply providing funds to a terrorist organization, without establishing scienter and causation, could satisfy Section 2333.[222] As the court explained, allowing the statute to apply in those circumstances would mean "[a]ny act [by defendant] which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor's intent" would expose defendant to liability.[223] As courts have moved away from *Boim I* and closer to *Boim III*, this result has effectively come to pass.[224] With scienter often reduced to conscious recklessness about the terrorist nature of the recipient organization and causation all but eliminated in most cases, the limits of liability are, at best, uncertain and, at worse, nearly nonexistent under Section 2333. This state of affairs makes the civil material support statute an outlier in intentional tort law, a reality further underscored by its failure to comport with prevailing theories of tort.

As discussed in Part III, below, this exceptional doctrinal cocktail has the potential to create adverse effects for the discipline of tort law, writ large.

III. HOW SECTION 2333 CASES MAY ERODE TORT LAW

For two reasons, Section 2333's exceptionalism could have a long-term, negative impact on tort law as a field. First, Section 2333 could plausibly create more confusion about the meaning of key concepts, like scienter and causation. Though there are prevailing definitions for both, disagreement exists about how scienter and causation apply in some circumstances. Insofar as Section 2333 contributes to and exacerbates this, it could, to some

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220. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 30 cmt. b (AM. LAW INST. 2010).

221. Because causation is centrally important to the theory of corrective justice, it is inappropriate to pursue defendants simply because they have "deep pockets" or are "in a position to distribute losses broadly." Weinrib, *supra* note 88, at 351. It is often, however, precisely these factors, rather than defendants' causal connection to plaintiffs' injuries, that drive Section 2333 cases. *See infra* note 302.

222. *Boim I*, 291 F.3d at 1011–12.

223. *Id.*

224. As the *Abecassis I* court noted, the implications of *Boim III* are so broad that, "if taken to [their] logical extension, [they] could make any person liable if that person knows that (or is deliberately indifferent to whether) Hamas commits terrorist attacks in Israel, if even $1 of that person's money ends up in Hamas's bank account." 704 F. Supp. 2d at 664.

degree, further erode the clarity of these terms and the coherence of tort law, more generally.

Should national security objectives become more pervasive in tort law, Section 2333's approach to scienter and causation could also have a substantive effect on other torts. A parallel trend is playing out in criminal law, where concerns with national security and especially terrorism have gradually played a larger role in the discipline.[225] As a result, even though anti-terrorism laws, tactics, and prosecutions are a miniscule part of the national criminal docket, they have had a spillover effect on other areas of criminal law and policing.[226] Despite the relatively small universe of Section 2333 cases, judicial decisions in these matters could similarly have a more direct influence on developments in tort.

Second, Section 2333 litigation has effectively produced a high-octane, hybrid criminal tort statute, or "extreme crimtort,"[227] which blurs the line between tort and criminal law. The doctrinal separation between the two disciplines is one most scholars of criminal law and torts consider important, for both normative and practical reasons. In Section 2333 cases, however, courts have disregarded the differences between the two areas, and essentially treated the statute as a civil analogue to the criminal material support provisions. Indeed, in many cases, courts have either expanded or eliminated the statute's scienter and causation elements, by subsuming the tortious character of Section 2333 under the criminal material support statutes.

This section begins by exploring Section 2333's potential impact on the coherence and clarity of tort law, as a discipline, before exploring its status as an extreme crimtort. As discussed more fully in Part IV, the influence of criminal law in Section 2333 cases is closely tied to and a result of the War on Terror, itself.

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225. Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. POL'Y REV. 129 (2011) (arguing that there has been a national security paradigm shift in criminal law over the last several decades).

226. *Id.* at 136.

227. The term "crimtort" was first coined by Michael Rustad and Thomas Koenig. Thomas Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 734 (2008). According to their definition, a "crimtort" blends torts and criminal law by combining tort actions with punitive damage awards. *Id.* at 736. Even though Section 2333 carries a treble, rather than punitive, damages award, the statute still qualifies as a crimtort. *See supra* note 53 (noting that treble damages are punitive in nature). In fact, as discussed in Part III.B, Section 2333 goes far beyond a traditional crimtort. The term is useful here, as it linguistically captures the hybrid criminal-tort nature of the civil material support statute. The qualifier "extreme" has been added, however, in order to highlight Section 2333's departure from the standard crimtort.

A. Section 2333's Potential Impact on Tort Law's Coherence and Clarity

As a centuries old area of law, tort jurisprudence has historically been a mix of heterogeneous and miscellaneous causes of action, ranging from matters of individual privacy and interference with land use to competition amongst businesses and industrial accidents. In the late nineteenth-century, scholars attempted to impose some discipline on this disorganization, by developing a unified set of doctrines and theories of tort.[228] It was through this ordering process, which continues to this day, that the field of tort law took shape.[229]

While these efforts have been far from perfect, and hampered by tort's laws own ad-hoc origins,[230] for most tort scholars, it has remained important to locate and define nodes of confusion and either resolve or define these points as exceptions to the norm.[231] Even where conceptual inconsistencies may have only a limited impact on the discipline, there is an appreciation that "doctrine matters and that, whenever possible, both courts and commentators should attempt to understand and explain as clearly as possible" why certain tort cases come out the way they do.[232] Indeed, the various Restatements of Torts, particularly the Restatement (Second) and Restatement (Third), have attempted to define and bring clarity to the sometimes conflicting parts of this area of law.

Tort law's endemic doctrinal inconsistencies may, themselves, have enabled Section 2333's unusual jurisprudence. That being said, the statute's departure from tort norms is so dramatic that it may aggravate existing problems within the discipline.[233] Though one might expect the extreme

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228. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3–4 (Expanded ed., 2003). It was not until the late nineteenth century that tort law was considered a separate and discrete discipline, rather than a catch-all subject for causes of action that did not fit into the more "pure" areas of criminal law, contracts, and property. Robinette, *supra* note 203, at 390–93.

229. Over the course of tort law's development as a discrete discipline, some scholars have challenged attempts to create a coherent organizational structure. *See, e.g.*, Robinette, *supra* note 203 (charting the historical roots and evolution of attempts to develop a unified theory of torts, as well as backlash toward them). Their efforts have, however, largely given way to the more pervasive belief that tort law benefits from ordering principles and rationales. *Id.*

230. WHITE, *supra* note 228, at 8.

231. *See, e.g.*, Stapleton, *supra* note 62, at 943–45 (criticizing the "incoherent" treatment of causation in the Restatements); Henderson & Twerski, *supra* note 43, at 1136 (noting that the "concept of intent is too fundamental to be allowed to shift meanings across different factual contexts" and that, in defining the term in the Restatement (Third), it "must be kept stable in the sense that [it] must have the same meaning whenever employed in defining tortious acts").

232. Moore, *supra* note 47, at 1594.

233. In fact, Section 2333 could create confusion where little currently exists. By suggesting there is no mens rea for the consequences of an act, for example, Section 2333 arguably muddies historical developments in intentional torts. As intentional tort law has evolved, there has been a move away from, not toward, more robust intent requirements. The writ of trespass, which included battery, assault, false imprisonment, as well as intentional torts to property, was the first tort to emerge out of English common law and did not require fault. *Id.* at 1607. But, as the law developed, especially over the course of the

nature of Section 2333 case law to limit its broader application, this may be less likely, as courts continue to describe the statute as a traditional intentional tort. Indeed, since the law on Section 2333 is so plaintiff-friendly, enterprising litigants would be well-served to rely on the continued normalization of this jurisprudence and use these decisions to support expansive interpretations of scienter and causation in other intentional tort actions. For example, where a lack of clarity exists over the mens rea for an intentional tort, plaintiffs could argue and courts might conceivably adopt, or at least look to, Section 2333's scienter standard, in conducting their analysis.[234] In fact, some courts have already displayed a willingness to look to the statute's mens rea for guidance in such cases.[235] Section 2333 could create similar opportunities to expand the definition of legal causation.[236] By effectively eliminating legal cause in most cases, Section 2333 distorts the bedrock norm that an actor, even one that behaved intentionally, is only liable for those harms the likelihood of which were increased by her tortious conduct. This is an enticing prospect for any plaintiff looking to prevail in a tort matter. In fact, at least one court construing a different intentional tort

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nineteenth century, courts began to require some degree of fault for a number of old trespass writs, like battery. *Id.* at 1607–09; *see also* Fletcher, *supra* note 82, at 539 (noting the general ascendancy of fault in nineteenth century tort law). The single-intent requirement took shape, at this stage. Moore, *supra* note 47, at 1609–10. Over the course of the twentieth century, doctrinal developments shifted away from single-intent and toward dual-intent for intentional tort claims. *See* RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) ("The word 'intent' is used throughout the Restatement . . . to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."). By embracing a single-intent approach to the statute, prevailing case law on Section 2333 could create confusion over this fairly well-established normative evolution.

234. As noted above, debate exists over whether battery requires intent to make bodily contact, as well as an intent to cause harm. *See supra* note 47. Even when the single-intent rule is applied, however, some level of fault must still be shown, though it is more akin to negligence than intent. *See* Simons, *supra* note 47, at 1092 (arguing that, even on the single-intent view, battery requires two kinds of fault, namely, the intent to commit the act itself, as well as negligence as to the victim's lack of consent). With most Section 2333 cases requiring only intent to commit the act, and no fault for causing its consequence, this jurisprudence could be useful to plaintiffs challenging even the negligence-like fault standard used in single-intent battery jurisdictions. Of course, this is not to suggest that Section 2333 cases would be particularly persuasive for courts considering these or other intentional torts. Rather, the claim made here is more modest, namely, that Section 2333 cases could influence other areas of intentional tort law, particularly where there is existing confusion or dispute over concepts.

235. *See, e.g.*, SEB S.A. v. Montgomery Ward & Co., Inc., 594 F.3d 1360, 1376 (Fed. Cir. 2010) (in case involving dispute over mens rea requirement for intentional inducement of patent infringement, citing approvingly to *Boim III*'s holding that intentional misconduct equates to knowledge or deliberate indifference).

236. The concept of legal causation is not only subject to much confusion. *See supra* note 60. It is also notoriously susceptible to manipulation by creative plaintiffs. Generally, courts have pushed back against these attempts to expand the contours of the concept. Stapleton, *supra* note 62, at 953. In so doing, they have taken pains to define legal causation "sharply, in fine detail, and, to the extent possible, . . . secured by precedent." *Id.* at 955. What is concerning about Section 2333 cases is that courts appear to be moving in the opposite direction, and are sanctioning, rather than limiting, expansions of legal cause. With courts reticent to police this evisceration, it remains possible that Section 2333 cases could engender further confusion over the precise nature of legal causation.

has cited to Section 2333 jurisprudence to suggest legal causation could, in some circumstances, be eliminated.[237]

Finally, civil material support cases could have an even greater impact on tort doctrine, if a national security paradigm takes firmer root in the discipline. There is already evidence tort law is assuming a more prominent place in dealing with terrorist violence.[238] It is possible, if not probable, therefore, that national security objectives could become a more important feature of this area of law. On the criminal side, national security has had a growing influence, permeating criminal justice and policing even in non-terrorism cases.[239] As a result, national security goals[240] have increasingly shaped various criminal law doctrines and approaches.[241] For example, judicial interpretations of "the scienter requirement of the 'material support for terrorism' statute [have] generate[d] binding precedent for non-terrorism cases that use identical phrasing."[242] While the parallels are not exact, Section 2333 could have an analogous impact on scienter and causation norms in other tort cases, particularly if those cases have a national security bent. While this may seem unlikely now, the shift to a national security mindset in criminal law was no more inevitable and occurred gradually.[243] Driven by such a mindset, in which community safety is valued over individual liability, courts could, for example, look to Section 2333 to

237. *See* Breeden v. Novartis Pharmaceutical Corps., 714 F. Supp. 2d 33, 36 (D.D.C. 2010) (noting that "by reason of" the language in Family and Medical Leave Act incorporates a proximate causation requirement, but suggesting possible exceptions to this standard by citing to *Boim III*'s adoption of a "'relaxed' causation element, based on policy considerations").

238. Besides Section 2333, there are other tort-based avenues available to private plaintiffs who want to bring terrorism-related claims. Cases can, for example, be brought under the Torture Victims Protection Act of 1991, § 1 *et seq.*, 28 U.S.C. § 1350 note, the Alien Tort Claims Act, 28 U.S.C. § 1350, and a USA PATRIOT ACT amendment to RICO, 18 U.S.C. § 1961 *et seq. See* USA PATRIOT ACT, P.L. 107-56, § 813 (2001) (amending RICO to include "any act that is indictable under any provision listed" in the ATA's criminal liability section). Plaintiffs can also sue designated state sponsors of terrorism under Section 1605A of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* Plaintiffs can and often do supplement these statutory claims for terrorism-related injuries with various common law tort claims, including battery, assault, infliction of emotional distress, wrongful death, false imprisonment, as well as aiding and abetting or conspiracy related to these or other applicable torts. Strauss, *supra* note 36, at 714–18.

239. Stevenson, *supra* note 225, at 131 (arguing there has been a "gradual advent of a new phase in which the national security emphasis permeates our *entire* criminal law framework") (emphasis added).

240. These objectives include privileging the peace and safety of society over individual liability and dangerousness and emphasizing the elimination of risks and incapacitation of threats. *Id.* at 154.

241. The specter of national security has helped move criminal law away from its traditional deterrence and retribution models toward prevention. It has also inspired new criminal statutes that, like the criminal material support laws, prohibit non-dangerous activities that may lead to crime. On the policing and prosecution front, surveillance and infiltration by undercover agents have taken on greater importance. *See id.* at 137–40.

242. *Id.* at 151.

243. While a deeper look at this issue is beyond the scope of this Article, one of the goals here is to encourage scholars and practitioners to pay attention and follow national security developments in tort law, in the long term, and be aware of their potentially broader reach in the discipline.

broaden the scienter element for tort claims, in terrorism-related matters and, perhaps, even in non-terrorism-related cases.

B. Section 2333 as an Extreme Crimtort

Across most countries and cultures, criminal and civil law have long been treated as separate and distinct domains. In the words of one scholar, "every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle."[244] Nevertheless, within civil law, torts enjoy the closest historical relationship to crime. In early English common law, for example, the same wrong, from rape to burglary to unpaid debts, could be pursued as either a crime or a tort.[245] The distinction between the two areas of law, during this period, was primarily one of procedures and penalties.[246] Over time, however, the division between criminal and tort law became more pronounced, affecting who could bring suit, what sort of harm could be prosecuted,[247] available penalties, and the proportional relationship (or lack thereof) between the penalty and the wrong.[248]

Academics have long discussed the normative value of maintaining this separation between criminal and tort law systems. Some have focused on the distinction's social utility, with criminal law described as imposing the highest cost (imprisonment) for the least socially beneficial activities.[249] Others have justified the distinction between tort and criminal law, by pointing to the latter's role "as an instrument of moral socialization" that prohibits and punishes, while describing tort law as focused more on

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244. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 202 (1996).

245. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59–60 (1996).

246. Crimes and torts, both of which could be brought by private victims, carried different consequences for the accused. Crimes were usually punishable by death, while torts typically involved payment of damages to the victim, as well as imprisonment and fines. *Id.*

247. In tort law, there is no harm without an injury—whether to person (physically or emotionally), property, or business interests. By contrast, criminal law punishes acts that harm oneself, dangerous acts that have yet to cause harm, and acts that are considered immoral, even if not harmful. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 720 (2008).

248. In criminal law, the "[p]unishment should be proportional to the culpability of the actor and the seriousness of the harm or wrong he has committed or threatened." *Id.* at 721. Tort law, by contrast, does not attempt to make remedies proportional to harm. While punitive damages are an exception to this rule, they "are not nearly as sensitive to differences in degrees of culpability as criminal law sanctions are." *Id.*

249. *See* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) (arguing that the "main differences between substantive criminal law and substantive tort law can be derived from the differences in (1) the social costs of criminal and tort sanctions and (2) the social benefits of the underlying conduct regulated by these two bodies of law").

compensation.[250] Combining the moral with the utilitarian, still others have argued that there is a universal "human desire to make moral judgements," "that there is practical value in giving formal legal expression to this human desire . . . and that a distinct criminal justice system [separate from torts] is the only way to effectively express condemnation and to gain the practical benefits of doing so."[251]

In addition to these normative arguments, there are meaningful doctrinal reasons for maintaining criminal and tort law as two distinct fields. Criminal law is primarily focused on the criminal act and actor.[252] While the consequences of an offense are not irrelevant, victimless crimes are numerous and prevalent.[253] By contrast, tort law focuses less on the actor and her unlawful actions, and more on the consequences of the act and injury to victim.[254] There are also different evidentiary norms. In the civil context, plaintiff is usually held to the lower preponderance of the evidence standard, while in the criminal context, the state must prove guilt beyond a reasonable doubt. These differences make blending the two areas of law highly problematic. To import elements of a criminal statute into the tort context, for example, ignores the fact that those criminal concepts were developed with a higher standard of proof in mind.

Despite the many justifications for separating the two areas, the line between tort and criminal law does sometimes blur.[255] On the tort side, this phenomenon is embodied in the crimtort.[256] The prototypical crimtort is a

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250. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 221–38 (1991).

251. Robinson, *supra* note 244, at 207–08. While most commentators have supported a division between tort and criminal law, there are some who see value in loosening this boundary. *See, e.g.*, Koenig, *supra* note 227, at 738–39 (arguing for an end to the "false dichotomy between criminal and tort law").

252. Cane, *supra* note 46, at 553.

253. *Id.*

254. Rather than focusing on the consequences of defendant's actions, Section 2333 is almost exclusively concerned with the problematic nature of the actions, themselves, namely the provision of material support. This is reflected, most clearly, in the effective elimination of causation from Section 2333, as discussed earlier.

255. Various commentators have sounded the alarm bells about the increasing convergence of criminal and tort law. *See, e.g.*, Coffee, *supra* note 250, at 193 (noting with concern that "substantive federal criminal law over the last decade has seen the disappearance of any clearly definable line between civil and criminal law"). The key point, however, is not that there is or should be a rigid and absolute line between criminal and tort law, or that particular, long-held features of one discipline must be eliminated because they embody the normative justifications of the other, though there are those who make that argument. *See generally* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984) (arguing that punitive damages, which are designed to punish, have no place in tort law, which is designed to compensate). Rather, the concern is that the normative and practical reasons for maintaining a separation between tort and criminal law are generally being undermined with negative effects on both sides.

256. On the criminal side, the blurring of the crime/tort divide can be seen in the increasing use of criminal law to sanction wrongs that arguably should be treated as torts. *See* Coffee, *supra* note 250, at 202–10 (discussing various examples of criminal sanctions being applied to areas of tort law, like

cause of action in tort law that seeks to vindicate broad societal interests through punitive damages awards.[257] Section 2333 case law is a version of this hybrid phenomenon, albeit an extreme one thanks to its active incorporation of criminal law doctrine.[258] Section 2333's extreme crimtort credentials are reflected, in part, in its lack of mens rea for the consequences of providing material support. This innovation directly parallels the criminal material support statutes, especially Section 2339B. In embracing a similar standard, Section 2333 jurisprudence reflects a criminal, rather than tort, law approach to liability, in which desire to cause terrorist violence is unnecessary. On causation, Sections 2339A and 2339B, again, seem influential. Generally, in criminal law, when injuries or victims are not an element of the crime, as is the case with the two criminal statutes, causation is irrelevant and unnecessary. In rejecting factual causation and substantially weakening legal causation in some cases, Section 2333 jurisprudence appears far closer to the criminal material support laws than to other intentional torts.[259]

Section 2333's criminal law-like tendencies are notable, even when compared with other extreme crimtorts, like the civil RICO statute. RICO targets organized criminal networks in the business community,[260] and, like the ATA, includes a private right of action. Under this provision, persons injured in their business or property as a result of a criminal RICO violation may bring a tort suit.[261] Like Section 2333, civil RICO carries a treble damages award, and is silent on mens rea.[262] In construing the statute, courts

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fiduciary duties). Tort principles are also increasingly being incorporated into some traditional areas of criminal law *See, e.g.*, Noah M. Kazis, *Tort Concepts in Traffic Crimes*, 125 YALE L.J. 1131 (2016) (arguing that, where traffic crimes are concerned, criminal law is increasingly adopting tort principles).

257. Koenig, *supra* note 227, at 736. For Koenig, crimtorts are necessary, rather than problematic, innovations.

258. Crimtorts do not import substantive principles of criminal law into tort causes of actions. *See generally id.* In Section 2333 cases, however, some courts have been fairly explicit in their view that the statute incorporates criminal law principles. In *Gill v. Arab Bank*, the court described Section 2333 as a "unique" statute in which "tort and criminal law have become closely intertwined. . . ." *Gill II*, 893 F. Supp. 2d at 482, 484. In *Boim III*, the court also grounded its Section 2333 analysis in both tort and criminal law. For example, while the court concluded that Section 2333 did not recognize aiding and abetting liability, it held that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability" and that "when [] primary liability is that of someone who aids someone else, so that functionally the primary violator is an aider and abettor or other secondary actor, a different set of principles come into play . . . [which] are most fully developed in the criminal context." *Boim III*, 549 F.3d at 692.

259. As discussed in Part IV.B, the courts have also heavily relied on Section 2339B's legislative history to effectively eliminate legal causation from Section 2333 cases involving direct support to terrorist groups, their agents, or alter-egos.

260. RICO was enacted as part of the Organized Crime Control Act of 1970, which sought to eradicate organized crime in the United States. Statement of Finding and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

261. 18 U.S.C. § 1964(c) (2012).

262. Genty v. Resolution Trust Corp., 937 F.2d 899, 908 (3d Cir. 1991).

have held that, in order to prevail, plaintiff must establish that defendant committed one of RICO's predicate criminal acts.[263] This means the mens rea attached to the relevant criminal offense is also an element of a civil RICO claim.[264] While this approach seems quite similar to Section 2333 cases, there is a particularly important difference between the jurisprudence. In contrast to Section 2333 cases, courts have consistently required causation, both factual and legal, in civil RICO suits.[265]

For these various reasons, Section 2333 takes the increasing convergence between tort and criminal law even further than other torts with a criminal cast. There is nothing in Section 2333's text that makes this result an inevitable one.[266] As the *Boim I* court insisted, the civil statute operates independently from the underlying criminal material support laws.[267] Even the *Boim III* court warned that "we must be careful in borrowing from criminal law because the state-of-mind and causation requirements in criminal cases often differ from those in civil cases."[268]

In fact, criminal law's integration into Section 2333 jurisprudence appears to be guided less by these legal concerns and more by policy. As the case law demonstrates, courts are concerned that Section 2333 liability be, at least, as broad as culpability under the criminal material support laws. At first blush, this position may seem reasonable, since guilt is usually harder to establish in the criminal, rather than civil, context. The criminal material support statutes, however, have a lower liability threshold compared to traditional intentional torts. While to a limited extent, the criminal law's higher evidentiary standard makes up for this looser benchmark, these protections do not exist on the civil side. In adopting the liability framework for the criminal statutes, the courts have ignored these red flags, while also disregarding Section 2333's text, legislative history, and the requirements of tort law. This willingness to abandon legal norms

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263. Rep. of Panama v. BCCI Holdings, 119 F.3d 935, 948 (11th Cir. 1997).

264. Depending upon the circuit, plaintiff must prove either one or two types of mens rea. Regardless of the circuit, plaintiff must show defendant had "the specific intent associated with the various underlying predicate offenses." *Genty*, 937 F.2d at 908. Some circuits also require that plaintiff prove that defendant acted "with the specific intent to participate in the overall RICO criminal enterprise." Zolfaghari v. Sheikholeslami, 943 F.2d 451, 454 (4th Cir. 1991).

265. *See* Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 265–68 (1992) (holding that civil RICO requires a showing of factual and legal causation).

266. Section 2333 provides a cause of action for "acts of international terrorism." 18 U.S.C. § 2331(1) (2012). While those acts are, in part, defined and set by the criminal law, there is nothing in Section 2333 or its legislative history that suggests those criminal laws determine the scienter and causation elements of the civil statute itself.

267. *Boim I*, 291 F.3d at 1016 ("We are using section 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by 'international terrorism.'").

268. *Boim III*, 549 F.3d at 692. The *Boim III* court clearly did not heed its own advice.

is rooted, in large part, in a particular political ideology on terrorism—an issue explored in the next section.

IV. HOW SECTION 2333 HAS BEEN IMPACTED BY THE WAR ON TERROR

While the criminal material support statutes have played an important role in Section 2333's jurisprudence, this phenomenon is closely tied to the War on Terror and its influence over judicial perceptions of the civil statute. As a general matter, since 9/11, there has been an ideological trend, both within the judiciary and broader American society, in favor of treating terrorism as a uniquely dangerous, existential threat to the United States. In the context of Section 2333, courts have used aspects of the ATA's legislative history, which embrace this same ideological view and are directly tied to the criminal, rather than civil, material support statutes, to justify expanding liability under Section 2333.

This section begins by explaining the political ideology on terrorism, which has been influential in Section 2333 cases and otherwise, and ends by examining how courts have manipulated the ATA's legislative history to enlarge the civil statute's liability framework, to serve that normative perspective.

A. Views about Terrorism's "Unique, Existential" Threat & Their Impact on Section 2333 Cases

As a general matter, since September 11th, many courts have come to view terrorism as *sui generis*, or "in a class by itself."[269] This belief has galvanized courts to ensure Section 2333 is an effective tool in the War on Terror. Far from an inevitability, however, this view about the existential danger of terrorism has little to no empirical basis.[270] It is, instead, the product of a politically and historically-driven conceptual shift that has

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269. *Id.* at 698.

270. Many have written critically about the belief that terrorism is an existential threat. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1039–40 (2004) (arguing that while terrorism may pose a threat to physical safety, it does not represent a danger to the future existence of the United States or its political system). This criticism is supported by empirical research, which shows that terrorism is far from an existential danger to the United States. *See* Peter Bergen, Albert Ford, Alyssa Sims & David Sterman, *Terrorism in America After 9/11*, NEW AM. FOUNDATION, https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/#americas-layered-defenses [https://perma.cc/4ZN9-MS64] (last visited Sept. 17, 2018) (concluding, based on comparisons with other forms of violence, that terrorism is not an existential threat to the United States); John Mueller & Mark G. Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFFAIRS (Apr. 2, 2010), https://www.foreignaffairs.com/articles/north-america/2010-04-02/hardly-existential?page=show [https://perma.cc/GJF9-MKQ5] (applying risk assessment techniques and concluding that "[a]s a hazard to human life in the United States, or in virtually any country outside of a war zone, terrorism under present conditions presents a threat that is hardly existential").

gradually permeated American society, as well as the judiciary, over the last several decades.[271] Understanding this phenomenon is critical to unpacking how and why America's battle against terrorism has shaped Section 2333 case law.

It all began in the late 1960s, when terrorism increasingly became the subject of mainstream political debate; in the process, it went from being seen as a tactic, without deep moral significance, used by different, rational actors, for rational reason, to a form of pure evil, beyond explanation or comprehension.[272] In the 1980s, in response to the Cold War, views on terrorism evolved even further, with the concept becoming synonymous with the Soviet Union's civilizational "threat" to Western democracies.[273] During this same period, military responses to terrorism grew in popularity.[274] After the Cold War ended, Islam replaced the Soviet Union as the West's new enemy.[275] A new paradigm of "Islamic terror" developed, altering the discourse on terrorism and inspiring language more extreme and moralistic than before.[276] By the time 9/11 came along, the narrative of evil, irrational "Islamic terrorists," threatening the "Western way of life," was well established.[277] It was, nevertheless, substantially strengthened by the attacks, and more firmly rooted within American consciousness.

U.S. jurisprudence has generally reflected this evolving ideology on terrorism. Examining Supreme Court case law, Wadie Said has noted, for instance, that, for most of the twentieth century, the Court approached terrorism as a "tactic" used to further a diverse set of "political" goals.[278] Beginning in the late 1960s,[279] this perspective began to shift somewhat, as the Court started to view terrorism as a particular danger to U.S. national security, though it stopped short of classifying it as a "worldwide existential threat to free societies everywhere."[280] After 9/11, the Court's views

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271. Mueller & Stewart, *supra* note 270 (noting that, despite evidence to the contrary, "[a]n impressively large number of politicians, opinion makers, scholars, bureaucrats, and ordinary people hold that terrorism . . . poses an existential threat to the United States.").

272. LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED "TERRORISM" 49–82 (2013).

273. *Id.* at 109–10.

274. By contrast, during the 1970s, the U.S. government approached terrorism from the perspective of law, risk, and crisis management. *Id.* at 108.

275. *Id.* at 140–46.

276. According to proponents of this inflammatory polemic, there was now a "new type of terrorist, extraordinarily irrational in both goals and actions, and prone to committing unprecedented levels of violence." *Id.* at 140.

277. *Id.* at 175.

278. Wadie E. Said, *Humanitarian Law Project and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455, 1473 (2011).

279. *Id.* at 1476.

280. *Id.*

transformed dramatically, as it came to see terrorism as an "existential threat to American civilization."[281]

In post-9/11 America, courts hearing Section 2333 matters have sometimes explicitly adopted this view on terrorism. In one civil material support case, for example, the court engaged in a long soliloquy about fashioning the right kind of tort regime to deal with terrorism's unprecedented dangers:

> This country is now involved in a world-wide battle with a range of enemies, spanning from those organized on the largest scale, supported by nations, to individuals motivated by egocentric hatred. The resulting struggle has led to the development of new military techniques, new concepts of criminal law projected abroad, and new civil tort liability problems, both procedural and substantive. In applying the general tort law theory to requite [sic] injured individuals' damages . . . new wine must be carefully poured into old civil litigation bottles.[282]

In another Section 2333 case, the court pointed to the importance of "imped[ing] terrorism," to support its expansive interpretation of causation.[283]

To align Section 2333 with this particular ideological perspective, courts have relied heavily on Section 2339B's legislative history. That record makes sweeping generalizations, without any evidentiary basis, about terrorist organizations and their so-called nature. Courts have, nevertheless, seized upon these normative claims and used them in Section 2333 cases to expand liability, in the service of the War on Terror's ideological interests.

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281. *Id.* at 1485. As Said argues, the Court began to develop and express this view in the early 2000s, in a line of habeas corpus cases brought by so-called enemy combatants captured by the U.S. military and held at Guantanamo Bay. *Id.* These include *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), *Rasul v Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2007). It is, however, the *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), case that represents the high watermark in the Court's existential approach to terrorism. As Said argues, by prohibiting support for the non-violent activities of FTOs that presented no direct threat to the United States or American citizens, the Court came "as close as it can to stating that terrorism—regardless of target and place—is the enemy." Said, *supra* note 278, at 1505–06.

282. *Gill II*, 893 F. Supp. 2d at 484. In *Boim III*, the court implicitly emphasized the importance of fighting terrorism, over the need to adhere to traditional tort principles on scienter:

> Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor intended that his contribution be used for terrorism—to make a benign intent a defense—would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.

Boim III, 549 F.3d at 698.

283. *Linde II*, 97 F. Supp. 3d at 326. In her dissent in *Boim III*, Judge Rovner described the majority's decision to effectively eliminate legal causation as a byproduct of its belief that terrorism was an exceptional phenomenon. 549 F.3d at 705–06 (Rovner, J., dissenting).

B. Manipulating the ATA's Legislative History

Section 2339B's legislative history reinforces the belief that terrorism is an existential threat. The House Judiciary Committee report on the AEDPA amendments, for example, describes terrorism as the most "potentially threatening" and "destructive" thing to all Americans, at home or abroad.[284] In Section 2333 cases, the courts have used two particular legislative "findings" from this record to align the civil statute with the prevailing ideological narrative on terrorism. Though these so-called findings have nothing to do with Section 2333 itself, they have been regularly relied upon by courts hearing these cases.

The first "finding" relates to the supposedly tainted nature of all terrorist organizations. In passing 2339B, Congress concluded 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."[285] The second "finding" concerns the "fungibility of money." According to this theory, [a]llowing an individual to supply funds, goods, or services to an organization or to any of its subgroups, that draw significant funding from the main organization's treasury, helps defray the costs to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can be spent on terrorist activities.[286]

As David Cole has observed, there are various problems with these assertions. The "taint" theory, for example, is a normative claim, rather than a finding of fact.[287] Most terrorist groups "do not exist for the purpose of engaging in terrorism" and instead have a political purpose, which they try to achieve using both lawful and unlawful means.[288] "It simply does not follow [as a factual matter]," Cole argues, "that all organizations that use or threaten to use violence will turn any donation that supports their lawful activities into money for terrorism."[289] On the fungibility theory, Cole notes that, because it effectively applies to money going to any organization or group, it proves too much and goes too far.[290] The theory cannot, for example, be used to criminalize all kinds of support to terrorist groups, including for non-violent, humanitarian activities, without also criminalizing contributions to other organizations that may engage in a

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284. H.R. REP. NO. 104-383, at 41 (1995).

285. Anti–Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1247 § 301(a)(7) (1996).

286. H.R. REP. NO. 104-383, at 81.

287. Cole, *supra* note 24, at 12.

288. *Id.*

289. *Id.*

290. *Id.*

menu of legal and illegal acts. [291] As Cole argues, if "fungibility" was enough to establish liability, [t]he state could make it a crime to provide newspapers or social services to gang members, to pay dues to the Communist Party, or to make a donation to the Republican Party, on the grounds that each of these organizations has engaged and may in the future engage in illegal activity and that giving them material support would free up resources that could then be used to further the group's illegal ends.[292]

While in the *HLP III* case the Supreme Court effectively concluded that, in terrorism support cases, the fungibility theory was a strong basis for establishing liability,[293] in other contexts, it has rejected, on First Amendment grounds, the idea that any support to organizations, engaging in legal and illegal work, necessarily frees up resources.[294] At the very least, this inconsistency suggests that, even under the Court's jurisprudence, fungibility is, at best, a dubious liability principle.[295]

Though there is no evidence to support either the taint or fungibility theory,[296] courts have used both "findings" to effectively eliminate causation in Section 2333 cases, where the direct recipient of aid is a terrorist organization, its agents, or alter-egos.[297] For example, in *Boim III*, the court held that, because of money's fungibility and the tainted nature of

291. *Id.*

292. *Id.*

293. *HLP III*, 561 U.S. at 29–36 (2010).

294. As Cole argues, the U.S. government unsuccessfully argued in *U.S. v. Scales*, 367 U.S. 203 (1961), that "knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself." Cole, *supra* note 24, at 12 n.48. Though Professor Cole raised these arguments several years before the Supreme Court decision in *HLP III*, as counsel in that case, he presented those same points to the Court. *See generally Holder*, 561 U.S. 1.

295. In a dissenting opinion in *HLP III*, Justice Breyer highlighted the inconsistencies between the majority opinion's view on fungibility and Supreme Court precedent, while also describing its problematic implications for First Amendment free speech rights. *Holder*, 561 U.S. at 47–53 (Breyer, J., dissenting).

296. *Id.*

297. The importance of the ATA's legislative history, as a stand in for causation, is underscored by cases where it has not been applied, namely, where a country, rather than a terrorist group or its affiliates, is the direct recipient of material support. Though these nations are typically designated state sponsors of terrorism, courts have explicitly distinguished these recipients from terrorist organizations, their agents, or alter-egos and refused to use the ATA's legislative history as a short cut to establishing causation. In *Rothstein v. UBS, AG*, for example, the district court held that "the Supreme Court's finding that FTOs are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct is specific to FTOs. . . . [and] does not necessarily, or even probably, apply to state sponsors of terrorism." 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011) [hereinafter *Rothstein II*] (internal quotation marks omitted). The court went on to reject plaintiffs' argument that "providing any material support to a designated terrorist entity furthers international terrorism as a matter of law" and reaffirmed its earlier holding that plaintiffs had failed to establish causation. *Id.* at 517–18; *see also Owens I*, 235 F. Supp. 3d at 99–100 (concluding that plaintiffs had failed to establish that defendant's processing of funds for Sudan caused their injuries and observing that "Congress's finding [on the tainted nature of terrorist organizations] [are] specific to foreign terrorist organizations, and did not include state sponsors of terrorism").

terrorist organizations, donations to support Hamas's social welfare services were an inherent cause of the group's terrorist activities.[298] In *Linde v. Arab Bank*, the court explained that, because of the fungibility of money, factual causation should not be required in Section 2333 cases.[299] The court took a similar approach in *Goldberg v. UBS*, basing its expanded notion of causation, again, on money's purported fungibility.[300] As these examples demonstrate, the courts' ideological commitment to the War on Terror has not only helped shape Section 2333 liability,[301] in complete disregard of the limits of statutory interpretation.[302] It has also ensured that Section 2333 serves the war's narrative about the unique and existential threat posed by terrorism.

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298. *Boim III*, 549 F.3d at 698–99.

299. *Linde II*, 97 F. Supp. 3d at 324. The court in *Gill v. Arab Bank* reached a similar conclusion, holding that factual causation should not be required in the Section 2333 context because "[i]n most instances, if a particular contribution was not made, money from other sources could be redistributed to make up for the shortfall, and an attack could take place without a substantial donation." *Gill II*, 893 F. Supp. 2d at 507.

300. *See* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009) ("Common sense requires a conclusion that Congress did not intend to limit recovery to those plaintiffs who could show that the *very dollars* sent to a terrorist organization were used to purchase the implements of violence that caused harm to the plaintiff.").

301. The ATA's legislative history has arguably been used to help expand scienter, as well. In incorporating conscious recklessness into Section 2333, for example, the *Boim III* court equated providing support to a terrorist group to giving a gun to a child. "If you give a gun you know is loaded to a child, you know you are creating a substantial risk of injury and therefore your doing so is reckless and if the child shoots someone you will be liable to the victim," the court reasoned. *Boim III*, 549 F.3d at 691. In other words, because a terrorist organization will inevitably use any and all support to further terrorism, because it is so deeply "tainted," providing any assistance to such a group is inherently reckless.

302. By relying on Congress's so-called findings on taint and fungibility, the courts have perverted the way legislative history, especially Congressional fact-finding, is traditionally used. In interpreting and applying statutes, courts regularly look to a law's history to discern legislative intent or clarify vague language. They are not, however, permitted to use this history to displace the statutory text itself. *See* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 844 (1991) (noting that, in interpreting statutes, courts may use legislative history "as evidence of legislative intent" or to construe ambiguous words but not as a "substitute" for statutory language). Where a case involves issues within the domain of the political branches, like national security, courts may defer to Congressional fact-finding but must not abdicate their "judicial role" in interpreting the law. *See Holder,* 561 U.S. at 33–34 (noting that deference should be given to Congress's finding "that all contributions to foreign terrorist organizations . . . further their terrorism" but also observing that "concerns of national security and foreign relations do not warrant abdication of the judicial role"). In relying on the fungibility and taint "findings," Section 2333 cases have gone far beyond these norms. First, when it comes to the statute itself, neither Section 2333's text nor its legislative history suggests that Congressional findings about terrorism or terrorist organizations ought to serve as a substitute for causation or other prevailing tort law norms. To the contrary, as previously discussed, Section 2333's legislative history makes crystal clear that it should be construed as a traditional tort. *See* S. REP. NO. 102-342, at 45 (1992) ("The substance of [a Section 2333] action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts."). Second, the "findings" on taint and fungibility relate to a completely different statute, Section 2339B, which has no causation requirement. Applying them to Section 2333 as a substitute for legal cause is, as such, inappropriate.

CONCLUSION

In her dissent in *Boim III*, Judge Rovner captured the essential question raised by Section 2333 litigation: "Are we going to evaluate claims for terrorism-inflicted injuries using traditional legal standards, or are we going to re-write tort law on the ground that 'terrorism is *sui generis*'?"[303]

Since September 11th, the tension between these two alternatives has continuously played out in case law on the civil material support statute. On the one hand, courts have conceded that traditional tort principles apply to Section 2333 claims. On the other hand, they have been eager to ensure these cases serve broader national security interests. In the process, the courts have divided over the proper balance to strike. Those courts that have chosen to stick to traditional principles of legal liability have taken a narrower approach to defining Section 2333's scienter and causation elements. Other courts, especially those concerned with the "existential threat" of terrorism, have taken a more liberal approach to Section 2333 and have sought guidance from the criminal statutes, rather than tort law, in assessing liability.

Over the years, courts committed to developing a civil statute with a muscular national security purpose appear to have won out. As a result, Section 2333 cases have increasingly targeted defendants that often have tenuous, and usually serendipitous, connections to terrorist groups or activities, instead of for intentionally supporting terrorist violence. Indeed, the statute has facilitated and encouraged cases against third-parties with deep pockets, but little to no connection to the harms suffered by plaintiffs.[304] This is an unusual posture for a tort-based cause of action and has been facilitated by the erosion of scienter and causation norms that have traditionally protected against such expansive forms of civil liability.

From a legal perspective, fixing this situation is straightforward, and simply requires a return to the traditional principles of tort in Section 2333 cases. This means applying scienter both to the act of providing material support and its consequences.[305] It also means resurrecting factual

303. *Boim III*, 549 F.3d at 705 (Rovner, J., dissenting).

304. Sant, *supra* note 210, at 562, 576–78 (arguing that Section 2333 plaintiffs have largely brought "frivolous lawsuits" and targeted banks and financial institutions not because they have caused harm, but because they have the "deep pockets needed to pay these massive judgments").

305. Conscious recklessness should also require actual knowledge of risk, as opposed to the looser "suspicion" requirement articulated by *Boim III*, 549 F.3d at 699. Similarly, deliberateness in committing the act should accord with defendant's will and purpose. On a more general note, requiring this sort of traditional tort law analysis on mens rea does not mean plaintiffs can never succeed on Section 2333 claims. In fact, in her dissent in *Boim III*, Judge Rovner rejected this assumption and observed that "in other areas of the law where proof of a defendant's intent is required[,] . . . there is rarely direct proof of . . . intent, and yet [it] can be proved circumstantially." *Boim III*, 549 F.3d at 715 (Rovner, J., dissenting).

causation,[306] demanding a meaningful showing of legal causation in all Section 2333 cases,[307] and requiring courts to engage in traditional fact-finding work. From a political and ideological perspective, these fixes may be harder to implement. Changing the deeply ingrained view that terrorism is a unique, existential danger requiring extraordinary measures is challenging to say the least. This perspective is, however, a relatively new one and came in response to particular political and historical developments. It was not inevitable and certainly is not irreversible.

Nevertheless, for those who fear that more closely aligning Section 2333 with tort norms will penalize plaintiffs and imperil the fight against terrorism, there are two responses. First, as mentioned earlier, Section 2333's legislative history repeatedly emphasizes that the statute be treated as a traditional tort. The adjustments to Section 2333's interpretation proposed here are, therefore, both legally and Congressionally mandated ones. Any efforts to avoid them or generally weaken the statute's tortious character should be directed at Congress, not the courts. Second, even though liability has been broadly defined under the statute, the vast majority of Section 2333 cases have not resulted in judgments against third-party supporters of terrorist groups or their activities. Currently, there are only a handful of cases, out of over sixty brought under the statute, in which plaintiffs have been awarded damages by the courts.[308] This suggests that,

306. As with scienter, requiring factual causation in Section 2333 cases does not mean plaintiffs will never be able to prevail on their claims. Indeed, in other kinds of cases, like joint tortfeasor matters, courts have adopted an evidentiary approach to proving factual causation that substantially eases the burden on plaintiffs. As formulated by the Restatement (Third) of Torts, where plaintiff sues

> multiple actors and proves that each engaged in tortious conduct that exposed the plaintiff to a risk of harm and that the tortious conduct of one or more of them caused the plaintiff's harm but the plaintiff cannot reasonably be expected to prove which actor or actors caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 28 (AM. LAW INST. 2010). According to this rule, each defendant has the burden of persuading the fact finder either that it did not cause plaintiff's injury or that another defendant was exclusively responsible. *Id.* § 28 cmt. n. Putting aside the ostensible requirement that plaintiff sue "multiple" tortfeasors, this approach would preserve the requirement of factual causation without creating an unsurmountable evidentiary obstacle for plaintiffs in Section 2333 cases.

307. As mentioned earlier, where there is factual causation and intent to bring about the consequences of one's actions, legal causation may be relaxed in intentional tort cases. Nevertheless, plaintiff must still show defendant's actions increased the likelihood of her injuries. *See supra* note 64.

308. In *Boim v. Holy Land Foundation* 549 F.3d 685 (7th Cir. 2008) and *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2015), plaintiffs won their case at trial and received substantial damages from the court. As previously noted, the *Linde* verdict was recently overturned by the Second Circuit. *See supra* note 208. *Sokolow v. PLO*, 04 CIVIL 00397 (GBD), 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015), also resulted in a damages award for plaintiffs, which was later overturned by the Second Circuit. Waldman v. Palestine Liberation Organization, 835 F.3d 317 (2d Cir. 2016). Though some cases have settled, many other ATA suits have been dismissed for lack of subject matter or personal jurisdiction, for failure to state a claim, or on summary judgment. Plaintiffs have been more successful where they have sued terrorist organizations themselves, since those groups, unsurprisingly, fail to

even where liability is stretched far beyond tort law's limits, the types of claims being brought under Section 2333 are simply too thin to pass muster. In effect, then, basic elements of tort law are being warped and mishandled without purpose. While holding Section 2333 to the rigors of tort law is unlikely to change the outcome in most cases, it stands a far greater chance of rehabilitating the statute's legal coherence and minimizing its adverse effects on the discipline of torts.

The War on Terror may be a unique challenge,[309] but this is less because of terrorism's *sui generis* nature and more because of how we have decided to treat it. Already, it has undermined various areas of public law and poses a similar threat to the private law domain. As we contemplate how to respond to this situation, we would do well to recall the challenge Judge Diane Wood articulated in her dissent in *Boim III*: "[I]t is our responsibility to ask whether [terrorism] presents so unique a threat as to justify the abandonment of [] time-honored [legal] requirements. . . . [After all,] [o]ur own response to a threat can sometimes pose as much of a threat to . . . the rule of law as the threat itself."[310]

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appear, triggering default judgments against them. *See, e.g.*, Sisso v. Islamic Republic of Iran, 448 F. Supp. 2d 76 (D.D.C. 2006) (granting default judgment against Hamas on ATA claims). Given the difficulties involved in reaching the assets of FTOs, these awards are largely symbolic ones, however.

309. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 1 (3d ed., 2006).

310. *Boim III*, 549 F. 3d at 718–19 (Wood, J., dissenting).