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## So Banks are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act


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# SO BANKS ARE TERRORISTS NOW?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act

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TABLE OF CONTENTS



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ABSTRACT

The Anti-Terrorism Act ("ATA") provides for a civil cause of action against terrorists and terrorist groups for acts of terror outside the United States.[1] In actual practice, however, few terrorists have money in the United States. Due to the difficulty in collecting damages, not a single reported decision so much as referenced the ATA's civil suit provision during its first decade in existence.

By the end of its second decade in existence, however, more than one hundred reported decisions cited to the ATA's civil suit provision. In 2012, the Second Circuit Court of Appeals certified two questions relating to the ATA to the New York Court of Appeals for resolution, and in the first two months of 2013, the Second Circuit has already decided appeals from multiple district courts regarding the scope and meaning of the ATA.[2]

This huge reversal of fortune—from no reported decisions to over one hundred—has occurred because courts, sympathetic to victims of terrorism, have sought to creatively interpret the ATA to reach non-terrorists. The perverse result is that in recent years, the "Anti-Terrorism Act" has primarily been used against banks and other financial institutions. These suits often allege that banks committed acts of "international terrorism" by failing to halt wire transfers that allegedly reached terrorist entities. Targets of terrorism suits include such unlikely names as Crédit Lyonnais, UBS, National Westminster Bank, and American Express Bank.[3]

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1. *See* 18 U.S.C. § 2333 (2006).

2. *See, e.g.*, Rothstein v. UBS AG, No. 11-0211, 2013 WL 535770 (2d Cir. Feb. 14, 2013); Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013); Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 75 (2d Cir. 2012) (certifying questions to New York Court of Appeals).

3. In one ATA lawsuit alone, the banking defendants included such names as Deutsche Bank AG, ABN Amro Bank NV, Mizuho Corporate Bank Ltd., BNP Paribas, State Bank of India, BancaCommercialeItaliana, DNB Nor Bank ASA, Bank of Tokyo-Mitsubishi Ltd.,

This article will demonstrate that the current expansive interpretation of the ATA violates both the language of the statute and the intent of Congress. Courts interpreting the ATA to reach banks and other non-terrorist third-parties have frequently pointed to the difficulty of collecting damages from actual terrorists, holding that it would be "bizarre"[4] for Congress to create a statute that could not be used to collect damages. As this article will show, however, Congress explicitly described the ATA as a largely "symbolic" statute that could only rarely be used for the purpose of collecting damages, and certainly not against banks. Congressional intent was to allow victims of overseas acts of terrorism to be able to sue the terrorists for their crimes, even though it was understood that such suits could only rarely result in monetary recoveries. In other words, the ATA's civil suit provision was intended as a "symbolic" jurisdictional statute. Courts have effectively rewritten the ATA so that what Congress described as "symbolic" legislation instead tries to turn banks into terrorists.

To make this leap, courts have creatively reinterpreted the language of the ATA. The ATA's definition of "international terrorism" is "violent acts or acts dangerous to human life."[5] This definition has been stretched to reach financial transactions, which, on their face, are neither "violent" nor "dangerous." In fact, the entire basis for describing banking transactions as "dangerous" acts is nothing more than a single, unsupported analogy in which financial transfers to terrorists are compared to giving a loaded gun to a child. This untethered analogy treats money, a neutral object, equivalently to a loaded gun, a dangerous object. As a three-judge dissent in the Seventh Circuit correctly pointed out, this is "judicial activism at its most plain."[6] In addition to contradicting congressional intent and the clear language of the statute, courts have also frequently ignored the statute's proximate cause requirement.

Moreover, in order to extend liability beyond actual terrorists so as to reach financial transfers, courts have claimed that the ATA's civil suit provision "incorporates by reference" certain other statutes despite those other statutes having been enacted half a decade after the ATA and despite those other statutes making no reference to the ATA. Courts have performed these mental gymnastics in order to reach a desired result:

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Sumitomo Mitsui Banking Corporation, and Korea Exchange Bank. *See* Stutts v. De Dietrich Group, No. 03-Civ-4058 (ILG), 2006 WL 1867060, at *1 (E.D.N.Y. June 30, 2006).

4. Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev. (*Boim I*), 291 F.3d 1000, 1021 (7th Cir. 2002).

5. 18 U.S.C. § 2331.

6. Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 549 F.3d 685, 708–09, 718–19 (7th Cir. 2008) (en banc) (Rovner, J., concurring in part and dissenting in part), *cert. denied*, 130 S. Ct. 458 (2009).

allowing sympathetic plaintiffs harmed by terrorism to recover damages. This creative expansion of the ATA, allowing terrorist victims to sue banks, is reminiscent of the expansion of the Alien Tort Claims Act to sue international businesses for the misdeeds of foreign governments and other third-parties acting in other countries. The Supreme Court recently rejected this expansion of the Alien Tort Claims Act.[7]

This article will discuss the harms caused by this expansive reinterpretation of the ATA. In doing so, this article fills a gap in scholarly studies of terrorism, which to date have focused on criminal prosecutions, not civil litigation.[8]

There is a far better solution to the problem of compensating victims of international terrorism than to place the burden upon innocent third-party companies and banks. Congress could establish a terrorism victims' fund, mirroring the September 11th Victim Compensation Fund. In fact, the September 11th Victim Compensation Fund was instituted in part to avoid inefficient and destructive litigation against third-parties (such as airlines) for the harms caused by terrorists. Such a fund would help victims of terror in a far more efficient manner than the current unfair and economically destructive suits against banks.

## I. THE LANGUAGE, LEGISLATIVE HISTORY, AND INTENT OF THE CIVIL SUIT PROVISION OF THE ANTI-TERRORISM ACT

This paper demonstrates that courts have interpreted the ATA in a way that drastically departs from the original intent and legislative understanding of the statute. For example, courts have allowed to proceed to discovery lawsuits accusing banks and other financial institutions of "international terrorism" despite these suits being premised solely upon the banks' role in processing wire transfers, as opposed to any actual overt acts in support of terrorism.

This Part discusses the origins of the ATA to demonstrate that these recent judicial decisions have departed from the language, intent, and legislative history of the statute. The ATA was passed as a jurisdictional

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7. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013) (holding that the Alien Tort Statute does not allow courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States). The Alien Tort Statute is also often referred to as the Alien Tort Claims Act. Alien Tort Statute. 28 U.S.C. § 1350 (2006).

8. *See, e.g.*, Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 6 n.6 (2005) (describing the "huge output of scholarly treatment" of terrorism issues, which has to date "focused on procedural and constitutional issues").

statute, extending jurisdiction so as to allow suits against terrorists for their violent acts committed overseas. In other words, far from allowing civil suits against non-terrorist third-party banks, the ATA was created as (1) a jurisdictional statute (2) aimed at terrorists.

### *A. The Language of the ATA: A Jurisdictional Statute Aimed At Terrorists*

As the Supreme Court has stated, the role of a court is "to interpret the language of the statute enacted by Congress."[9] "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."[10]

In the case of the Anti-Terrorism Act, the statute's clear language appears to limit civil suits to actions brought against terrorist parties. The statute states: "Any national of the United States injured in his or her person, property or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States . . . ."[11] The term "international terrorism," in turn, is defined as activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal laws" and which also appear to be intended to either "intimidate or coerce a civilian population" or "affect the conduct of a government by intimidation or coercion."[12]

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9. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002).

10. Caminetti v. United States, 242 U.S. 470, 485 (1917); *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

11. 18 U.S.C. § 2333(a) (2006). The full language of Section 2333(a) is as follows:

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

*Id.*

12. *Id.* § 2331. The full language of Section 2331 is as follows:

> As used in this chapter--
>
> (1) the term 'international terrorism' means activities that--
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended--
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion;

The plain language of the ATA makes clear that it is a jurisdictional statute aimed at terrorists. In fact, Section 2333's provision providing a cause of action is entitled "Action and Jurisdiction."[13] The jurisdictional nature of the statute is also clear from the phrase "by reason of an act of *international* terrorism" rather than the simpler and broader "by reason of an act of terrorism." The statute focuses on "international" terrorism because acts of violence committed outside the borders of the United States were (prior to the ATA) generally not subject to the jurisdiction of U.S. courts.[14] As discussed below, the ATA was passed in response to two specific overseas terrorist incidents in which the victims' representatives struggled to bring suit due to jurisdictional challenges.[15]

The language of the statute restricts civil suits to those brought against terrorist actors. (The use of the phrase "by reason of" creates a proximate cause requirement.)[16] Moreover, by defining "international terrorism" as "violent" or "dangerous" acts, the statute restricts suits to violent actors.

The earliest reported ATA decision dealing with banking defendants noted the requirement that injuries be caused "by reason of an act of international terrorism."[17] From this, the court concluded that the plaintiffs must not only show that the defendants committed violent acts or acts

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

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term 'national of the United States' has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term 'person' means any individual or entity capable of holding a legal or beneficial interest in property; and

(4) the term 'art of war' means any act occurring in the course of—

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin.

*Id.*

13. *See id.* § 2333(a).

14. *See infra* Part I.B. An important exception to this rule is admiralty law. *See infra* notes 28–29, 37–39, 43 and accompanying text.

15. *See infra* Part I.B.

16. *See, e.g.*, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265–68 (1992) (stating the "by reason of" language requires showing of proximate cause); Rothstein v. UBS AG, No. 11-0211, 2013 WL 535770, at *12 (2d Cir. Feb. 14, 2013) (applying this language to the ATA).

17. Stutts v. De Dietrich Group, No. 03-CV-4058 (ILG), 2006 WL 1867060, at *2–4 (E.D.N.Y. June 30, 2006). An even earlier *pro se* case filed against banks was dismissed without any significant analysis. *See infra* notes 91–95 and accompanying text.

dangerous to human life, but also that these acts were the proximate cause of the plaintiffs' injuries. Pointing to the "plain language of the ATA," and its definition of "international terrorism," the court concluded that the statute did not encompass non-violent acts by non-terrorist third-parties.[18] Commercial banking activities are not "violent" acts or acts "dangerous to human life," and also cannot be the proximate cause of injuries suffered in independent terrorist attacks conducted by others. For all these reasons, the court concluded that banks cannot be sued as terrorists under the ATA.

Adding yet further support for the view that the ATA was intended to provide jurisdiction over foreign acts of terror, and not to provide pathways to sue financial institutions already present in the United States, Section 2331 of the ATA includes as part of its definition of "international terrorism" the requirement that these acts "transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."[19] This language focuses on the acts as occurring outside the United States, and seems to restrict defendants to actual terrorists, whether individuals or terrorist groups. After all, it is these "perpetrators," not banks and financial institutions, who can "seek asylum" in foreign locales.[20] This language ("perpetrators" who can "seek asylum") simply does not seem intended to reach such entities as multinational banks processing financial transactions. Further supporting this view is Section 2335, which tolls the statute of limitations for civil suits under the ATA during the "time of the absence of the defendant from the United States . . . or of any concealment of the defendant's whereabouts."[21] It is difficult to understand how a corporate defendant would be "concealing" its whereabouts, or leaving and returning from the United States. To the contrary, this language displays a legislative understanding that the ATA defendants are individual terrorists or terrorist groups.

In addition to the plain language of the statute, the structure of the ATA provides further confirmation of the view that jurisdiction concerns were the primary motivation behind the ATA. Section 2334 of the ATA is entirely devoted to jurisdiction and venue.[22] Moreover, the focus on jurisdiction is apparent from the fact that Section 2334's provision on jurisdiction and venue is nearly forty percent lengthier than Section 2333, which contains the provision that provides a civil cause of action against

18. *Id.* at *2–4 (quoting 18 U.S.C. § 2331).
19. 18 U.S.C. § 2331(C).
20. *Id.*
21. *See id.* § 2335.
22. *See id.* § 2334.

terrorist groups.[23] Additionally, Section 2334's provision on venue provides a "more difficult" standard for *forum non conveniens* dismissals in terrorism cases than the generally applicable standard, displaying in yet another way the statute's focus on establishing jurisdiction over terrorist attacks committed overseas.[24]

### *B. Legislative History: A Jurisdictional Statute*

The historical background of the ATA adds further support for the view that Congress intended the ATA as a jurisdictional statute limited to civil suits against terrorist defendants. The original impetus behind the ATA was a pair of terrorist incidents occurring in the 1980s.[25] The first of these two terrorist attacks was the hijacking and murder committed on a cruise ship by members of the Palestinian Liberation Organization.[26] On October 7, 1985, four terrorists captured the Italian cruise liner AchilleLauro, murdering an elderly man in a wheelchair, Leon Klinghoffer, and throwing both his body and the wheelchair into the sea.[27] Leon Klinghoffer's wife and estate brought suit against a group of defendants, and the defendants impleaded the PLO.[28] Two other passengers on the AchilleLauro brought suit against

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23. *Compare* 18 U.S.C. § 2333 (193 words), *with* 18 U.S.C. § 2334 (266 words).

24. 18 U.S.C. § 2334(d); Robert Force, *The Position in the United States on Foreign Forum Selection and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions*, 35 TUL. MAR. L.J. 401, 440–41 (2011). It is somewhat rare for Congress to even address *forum non conveniens* within a statute. *See id.* (stating that Congress "[s]ometimes" addresses *forum non conveniens*).

25. *See, e.g.*, 138 CONG. REC. 33,629 (1992) (stating that the "tragedies of Pan Am 103 and the *Achilles Lauro* still burn in our minds" as the inspiration for the ATA); Lanier Saperstein & Geoffrey Sant, *The Anti-Terrorism Act: Bad Acts Make Bad Law*, N.Y. L.J., Sept. 5, 2012, at 4; *Anti-Terrorism Act of 1990* (C-SPAN television broadcast July 25, 1990) [hereinafter C-SPAN television broadcast], *available at* http://www.c-spanvideo.org/program/13560-1 (testimony from families of the murder victims in the Achille Lauro hijacking and the Pan Am Flight 103 terrorist bombing).

26. *See* 138 CONG. REC. S17,260 (daily ed. Oct. 7, 1992); *see also* Gill v. Arab Bank, PLC, No. 11-CV-3706, 2012 WL 4026941, at *17 (E.D.N.Y. Sept. 12, 2012) (identifying the Achille Lauro litigation as inspiring the ATA); Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 45 (E.D.N.Y. 2007) (same). The PLO insisted that the attack was committed by "renegade P.L.O. members" and was not sanctioned or authorized by the organization. Benjamin Weiser, *A Settlement with P.L.O. over Terror on a Cruise*, N.Y. TIMES, Aug. 12, 1997, at A6; *see also* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991) (discussing PLO denials of responsibility).

27. *Klinghoffer*, 937 F.2d at 47.

28. *Id.*

the PLO directly.[29] These suits were immediately embroiled, however, in a lengthy dispute over jurisdiction.

In the *Klinghoffer*[30] case, because the terrorist attack occurred at sea, the district court eventually concluded that United States admiralty laws applied to the tort claims, providing the court with jurisdiction.[31] Additionally, the court found jurisdiction under the Death on the High Seas Act.[32] Nevertheless, the ability of the plaintiffs to bring suit in the United States regarding this attack was entirely fortuitous; "[a] similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S."[33] Even after establishing that the Court had jurisdiction over a terrorist attack occurring at sea, the jurisdictional battles continued because of uncertainty as to whether jurisdiction existed over the PLO. Explaining that the district court had improperly based jurisdiction on the PLO's U.N. activities, the Second Circuit vacated and remanded to the district court for a new determination of whether jurisdiction existed over the PLO.[34] One dozen years after the terrorist attack and murder, with the case still ongoing, the Klinghoffer family finally settled with the PLO.[35] The difficulties encountered and the sheer length of this saga both demonstrated the enormous jurisdictional hurdles facing victims of terrorism who wished to pursue a civil suit against their attackers. Congress rectified this gap by passing the ATA and extending jurisdiction to cover all U.S. victims of overseas terrorism.[36]

Expert testimony before Congress recognized that the ATA was primarily focused on resolving a problem of jurisdiction. In testimony before a Senate subcommittee, Joseph Morris of the Lincoln Legal Foundation stated that "[v]ictims who have attempted to sue terrorists have

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29. *Id.*

30. 937 F.2d 44 (2d Cir. 1991).

31. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854, 858–59 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991); *see also Weiss*, 242 F.R.D. at 45–48.

32. *Klinghoffer*, 739 F. Supp. at 857–59 (citing Death on the High Seas Act, 46 U.S.C. §§ 761–768 (1982) (current version at 46 U.S.C. §§ 30301–30308 (2006))).

33. *Boim I*, 291 F.3d 1000, 1010–11 (7th Cir. 2002).

34. *See Klinghoffer*, 937 F.2d at 47–48, 51–52, 54.

35. Weiser, *supra* note 26.

36. The actual process of enacting the ATA was complicated. The Civil Remedies for Victims of Terrorism Act was introduced in the 101st Congress by Senator Charles Grassley. The bill was incorporated into the fiscal year 1992 Military Construction Appropriations bill. In Conference, the conferees intended to delete the provisions of Civil Remedies for Victims of Terrorism, but the provisions were mistakenly included in Public Law 101-519 of November 5, 1990. The Civil Remedies sections were repealed in 1991, and Senator Grassley reintroduced the bill as S. 740, and it was passed by the Senate on April 16, 1991. *See* S. REP. NO. 102-342, at 22 (1992).

encountered numerous jurisdictional hurdles and have found the courts reluctant to intrude in the absence of clear statutory mandates showing them what their jurisdictional boundaries are."[37] As this testimony demonstrates, the ATA was concerned with the jurisdictional basis by which victims could "sue terrorists."[38] As will be discussed in detail later, however, this original, limited purpose of the statute would be forgotten as courts creatively and expansively interpreted the ATA as allowing suits against non-terrorist third-party financial institutions.

Mr. Joseph Morris' congressional testimony focused heavily on the jurisdictional challenges in the *Klinghoffer* case: "The *Klinghoffer* case . . . was a case really ultimately decided under American admiralty law, as jurisdiction was extended under admiralty principles."[39] Alan J. Kreczko, the Deputy Legal Advisor of the Department of State, testified to Congress that the ATA bill "expands the *Klinghoffer* opinion. Whereas that opinion rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our federal courts and a cause of action for cases where an American has been injured by an act of terrorism overseas."[40]

Lisa Klinghoffer, the daughter of the murder victim, explained in her congressional testimony that the ATA's purpose was to expand jurisdiction. She discussed her own family's struggles to obtain jurisdiction over the PLO, the fortuitousness of admiralty jurisdiction, and her concern that "the uniqueness of our case and set of circumstances might not be applicable to other families, and probably wouldn't be. That is our concern, and why my sister Ilsa and I are here today."[41] She added: "It's taken our family four and a half years to give us the right to sue the PLO. We're hoping . . . other families in the future won't have to go through the years that we went through, they'll have that . . . right."[42] Emphasizing the fact that the ATA was conceived as (1) extending jurisdiction so as to (2) allow civil suits against terrorists, Lisa Klinghoffer stated that, under the ATA, "Any American victim of terrorism will have legal recourse against those terrorists in any United States federal court."[43]

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37. C-SPAN television broadcast, *supra* note 25.
38. *Id.*
39. *Id.*
40. *Id.*; *see also Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 12 (1990) [hereinafter *Hearing on S. 2465*] (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State).
41. C-SPAN television broadcast, *supra* note 25.
42. *Id.*
43. *Id.*

It was thus a concern with jurisdiction that led to the ATA's cause of action for overseas terrorist acts. An early court opinion made this point explicitly: "To address the concern regarding *federal jurisdiction*, Senator Charles Grassley introduced the Anti-Terrorism Act of 1990 in April of that year."[44] The Congressional Report accompanying the Anti-Terrorism Act focused on the "gap in our efforts to develop a comprehensive legal response to international terrorism," of which the hijacking of the AchilleLauro was stated to be representative: "Only by virtue of the fact that the attack violated certain Admiralty laws and that the organization involved . . . had assets and carried on activities in New York, was the court able to establish jurisdiction."[45]

As this historical background demonstrates, the impetus for creating the ATA was to extend jurisdiction to terrorist acts occurring abroad and not to ensnare seemingly innocent third-party entities within federal terrorism laws.[46]

### C. *Legislative History: Aimed At Terrorists*

The above discussion focused on the ATA's role in extending jurisdiction to overseas terrorist acts, as prompted by the attack on the AchilleLauro. The second of the two terrorist incidents that acted as the impetus for the ATA was the bombing of Pan Am Flight 103,[47] which occurred on December 21, 1988, killing 270.[48] The families of those killed in the bombing received a settlement offer from Pan Am, and attorneys contacted the family members to offer legal services in suing Pan Am or the U.S. government.[49] Family members successfully sued Pan Am for willful

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44. Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 45–48 (E.D.N.Y. 2007) (emphasis added).

45. H.R. REP. NO. 102-1040, at 5 (1992); *see also Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 102nd Cong. 12–13 (1991) [hereinafter *Hearing on H.R. 2222*] (statement of Sen. Feighan).

> [T]he need for this litigation couldn't be clearer . . . The need was demonstrated by the case of Leon Klinghoffer. . . . Only by virtue of the fact that the attack violated certain admiralty laws . . . was the court able to establish jurisdiction over the case. This legislation will fill in the gap in our laws . . . .

46. *See supra* notes 25–45 and accompanying text.

47. *Hearing on H.R. 2222*, *supra* note 45, at 10 (letter of Sen. Charles E. Grassley referencing the "the families of the victims of Pan Am 103").

48. David Treadwell, *Pan Am Guilty of 'Willful Misconduct'*, L.A. TIMES (July 11, 1992), http://articles.latimes.com/1992-07-11/news/mn-1480_1_willful-misconduct.

49. Christopher W. Robbins, *Finding Terrorists' Intent: Aligning Civil Antiterrorism Law with National Security*, 83 ST. JOHN'S L. REV. 1201, 1234 (2009).

misconduct in failing to properly implement security procedures.[50] However, the families were frustrated by their inability to "find any attorneys . . . willing to sue the perpetrators of the bombing. The families of the victims of Flight 103 pushed for the ATA's passage in order to clearly establish an avenue of legal action . . . against those who actually committed the bombing."[51]

In his testimony before the Senate subcommittee, Paul Hudson, the Chairman of the Families of Pan Am 103, emphasized that the civil suit provision of the ATA was intended to allow suits against terrorists and terrorist organizations. He makes no mention of non-terrorist third-parties such as Pan Am, which the families had been able to sue without difficulty: "The families of Pan Am 103 Lockerbie . . . support in principle this legislation, which would permit victims of terrorism to file civil actions against *terrorists and terrorist organizations*."[52] In other statements, he described the ATA as legislation that "could provide another effective weapon to be used against *terrorist groups*" and as solving the problem of "bringing *terrorists* to justice, the criminal justice bar."[53] Likewise, as discussed above, Joseph Morris referred to the ATA as allowing victims to "sue terrorists." Rick Valentine, the Deputy Assistant Attorney General in the Department of Justice, stated that the ATA "would also provide a means of imposing civil justice on the international outlaws who commit acts of terrorism."[54] This statement, referring to "international outlaws" committing acts of terrorism, further demonstrates that the ATA was not intended to reach international businesses but rather terrorists.

Lisa Klinghoffer testified that the ATA "would provide explicit statutory authority for American citizens such as those involved in the AchilleLauro matter to bring suit in this country against *the terrorist* who harms them overseas. It would facilitate bringing suit against *foreign terrorists*."[55] As this language makes clear, the ATA was envisioned as allowing plaintiffs to bring actions against terrorists, not non-terrorist third-parties. The Klinghoffer family had no trouble bringing suit against non-terrorist third-parties such as "the owner of the AchilleLauro, the charterer of the vessel,

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50. Treadwell, *supra* note 48.

51. Robbins, *supra* note 49, at 1234 (citing ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR 47 (2001)).

52. C-SPAN television broadcast, *supra* note 25 (emphasis added).

53. *Id.* (emphasis added).

54. *Id.*

55. *Hearing on H.R. 2222*, *supra* note 45, at 15, 18 (statement of Lisa Klinghoffer) (emphasis added).

two travel agencies, and various other defendants."[56] There was no trouble obtaining jurisdiction over these non-terrorist third-parties, and the Klinghoffers make no mention of them during congressional testimony. Rather, Lisa Klinghoffer emphasized that the ATA would allow actions to be brought against actual terrorists: "If one such as Abu Abbas [the mastermind of the AchilleLauro attack] or his agents can be found within our borders, he could be made to answer for his deeds."[57]

Senator Grassley, in reintroducing the ATA to Congress in 1991, made similar comments: "[T]his bill provides victims with the tools necessary to *find terrorists' assets and seize them.*"[58] A year later, he stated that the ATA "will allow the victims to pursue renegade terrorist organizations and their leaders, and go after . . . their money."[59] All of this testimony, then, envisioned the ATA as applying to actual terrorists and terrorist groups who may be present or have assets in the United States.

From the statute's plain language and legislative history, it appears clear that the ATA was intended to expand jurisdiction so as to allow victims and their families to sue terrorists responsible for overseas terrorist acts. Yet recent judicial interpretations have departed dramatically from this original purpose.

## II. THE ATA'S FIRST DECADE: NO REPORTED DECISIONS

During the first decade of its existence, not a single reported decision so much as mentioned Section 2333, the provision that creates a civil cause of action against terrorists for attacks occurring abroad.[60] Indeed, as of 2002, the Seventh Circuit stated that it was interpreting "the never-tested 18 U.S.C. § 2333" as a "case of first impression," and that "[n]o court has yet considered the meaning or scope [of the ATA civil suit provision] and so we write upon a tabula rasa."[61] Even as late as two decades after enactment

56. Klinghoffer v. S.N.C. AchilleLauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991) (describing suit brought in late November 1985 against these defendants).

57. *Hearing on H.R. 2222*, *supra* note 45, at 19 (statement of Lisa Klinghoffer). Abu Abbas was eventually captured by U.S. forces in Baghdad in 2003. Abu Abbas died in 2004 while still in U.S. custody. David Johnston, *Leader of '85 Achille Lauro Attack Dies at Prison in Iraq*, N.Y. TIMES (Mar. 10, 2004), http://www.nytimes.com/2004/03/10/world/leader-of-85-achille-lauro-attack-dies-at-prison-in-iraq.html.

58. 137 CONG. REC. 8,143 (1991) (emphasis added); *see also* Gill v. Arab Bank, PLC, No. 11-CV-3706, 2012 WL 4026941, at *19 (E.D.N.Y. Sept. 12, 2012) (quoting this language).

59. 138 CONG. REC. 33,629 (1992).

60. *See infra* notes 61–62 and accompanying text.

61. *Boim I*, 291 F.3d 1000, 1000–01, 1009 (7th Cir. 2002).

of the ATA, a scholar referred to the "admittedly small number of cases" involving ATA civil litigation.[62]

This lack of litigation was by design. In his opening statement during a Senate subcommittee hearing on the ATA, Senator Charles Grassley admitted that "this legislation is, in part, symbolic, I confess."[63] As one commentator put it, "testimony before the Judiciary Subcommittee considering the [ATA] bill highlighted the fact that it would likely be rarely used."[64] Alan J. Kreczko, the Deputy Legal Advisor of the Department of State testified that, "as a practical matter, there are not very many circumstances in which the law can be employed."[65] He explained that the ATA would be rarely used because "Few terrorists travel to the United States and few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment."[66] During congressional hearings on the ATA, very similar statements were made by the sponsors of the bill: "I don't think that we're under any illusions that, in many cases, it may be difficult to get custody of known terrorists or to identify terrorist assets held in this country."[67] The ATA was envisioned as being of rare applicability, serving the largely symbolic function of permitting claims to be brought against terrorists for their overseas crimes.

During a Senate subcommittee hearing on the ATA, Senator Charles Grassley specifically asked the Klinghoffer daughters whether or not the ATA had value despite its symbolic nature. Senator Grassley pointed out that "many skeptics say that even if one could win a suit such as yours and the kind contemplated by our bill, it would be practically useless, because they would never collect a judgment."[68] Lisa Klinghoffer responded that the ATA's purpose was to be able to assign legal blame for terrorist acts even if no money could be collected from the terrorists: "For us, it's a matter of principle. It's not a judgment, it's not money, it's not a price tag. It's to

62. Adam N. Schupack, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 221 (2010).

63. C-SPAN television broadcast, *supra* note 25.

64. Robbins, *supra* note 49, at 1236.

65. *Hearing on S. 2465*, *supra* note 40, at 17 (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State); *see generally* H.R. REP. NO. 102-1040 (1992); *see also Hearing on S. 2465*, *supra* note 40, at 24 (responding to a question submitted by Senator Howell Heflin, Alan Kreczko said: "As I indicated in my written statement, few terrorists or terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment pursuant to S. 2465.").

66. *Hearing on S. 2465*, *supra* note 40, at 17 (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State).

67. *Hearing on H.R. 2222*, *supra* note 45, at 13 (statement of Sen. Feighan).

68. C-SPAN television broadcast, *supra* note 25.

legally set responsibility for who gave the order to murder my father, for who gave the orders to hijack the ship. So that's what it is. It's a search for justice."[69]

The few circumstances in which the ATA was envisioned as being of practical use were those circumstances in which a terrorist organization had substantial wealth in the United States. Daniel Pipes, the Director of the Foreign Policy Research Institute testified before the Senate subcommittee considering the ATA that while "historically, terrorist groups have had very little money," there were exceptions to this rule.[70] Mr. Pipes pointed to the PLO, which he estimated as possessing $6 billion USD in assets and a yearly budget in the hundreds of millions of dollars, as an example of a terrorist actor capable of paying damages.[71] (A more recent example of a wealthy terrorist is Osama bin Laden.[72]) Lisa Klinghoffer and other witnesses emphasized that they wished for the ATA to allow suits against those rare groups, like the PLO, that have assets in the United States. It may be exceedingly rare for a terrorist group to have attachable assets in the United States, but where such a terrorist group exists, it should be subject to suit.

In a remarkable and somewhat pointed exchange during the Senate subcommittee's hearings on the ATA, Senator Charles Grassley rebuked Professor Wendy Perdue of Georgetown University Law Center when she testified that the ATA would have little value because it was mere symbolism.

Professor Wendy Perdue noted in testimony that the definition of "international terrorism" is "violent acts or acts dangerous to human life," thus seemingly limiting the ATA's civil suit provision to a very narrow category of actors: "I don't know whether fundraising for a terrorist is an act of international terrorism. I don't know whether even supplying the guns to a terrorist is an activity that involves violent acts."[73] She explained that, under the language of the ATA, she was unsure whether the direct financiers of terrorists—the ones who "sell the guns knowing that's where that's going" or the individuals who directly "finance the activities"—would be liable.[74] Needless to say, if a direct financier is not liable, it is hard to imagine that a non-terrorist third-party financial institutional would be

69. *Id.*

70. *Id.*

71. *Id.*

72. *Osama bin Laden*, THE ECONOMIST, May 5, 2011, at 93, *available at* http://www.economist.com/node/18648254 (estimating Osama bin Laden's personal wealth as high as $250 million prior to the freezing of his assets).

73. C-SPAN television broadcast, *supra* note 25.

74. *Id.*

liable as a result of merely processing a transaction. Professor Wendy Perdue criticized the statute for its lack of real-world applicability: "My hunch from reading the newspapers is that the individual terrorists do not have money here. . . . [I]f you want to provide an effective remedy, liability has to extend to the organizations that have assets in this country."[75] During a back-and-forth with Senator Charles Grassley, Professor Wendy Perdue acknowledged, "yes, there is symbolic value to judgments" but complained that the statute as written "doesn't hit [terrorists] in their pockets."[76]

Senator Charles Grassley responded forcefully to this critique. Noting the professor's comment that "[a] judgment is not worth anything unless it can be enforced," Senator Grassley pointed to the Klinghoffer family, demanding to know if Professor Wendy Perdue would "still hold that view in light of that testimony, from those family members that they're not in the business of suing for the money, they're in it to find out who's responsible so that the world will know."[77] Senator Grassley also disputed the premise of Professor Perdue's criticism, stating that civil suits could be effective "even without getting money" because the suits could help to identify terrorists and the identification of terrorists would make it harder for those terrorists to get outside support.[78] This position—that the ATA's purpose was in large part to allow victims to help identify terrorists and to establish a historical record—is reflected in scholarly analysis as well. For example, John F. Murphy has written:

> [C]ivil suits [for acts of terrorism] may be more effective than criminal proceedings in establishing the full factual context in which the perpetrators committed their crimes, thereby enhancing the prospects that the victims will have their suffering brought to the attention of the wider community and that a definite, historically accurate account of the atrocities will be provided.[79]

In the Senate subcommittee hearing regarding the ATA, Professor Perdue repeated her concern that "this is a symbolic act" and that victims of terrorism will in fact feel frustrated rather than vindicated when they are told that "you're entitled to a million dollars, but there's no way you'll ever

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 316 (2008). Although John F. Murphy also noted that civil litigation offered the potential for obtaining damages, he mentioned this only secondarily, after first discussing the value of civil suits for creating a historical record and identifying the terrorists. *See id.*

see a dime of that."[80] Pointing once again to the Klinghoffer family, Senator Grassley stated that the family members "have proven that it's much more than symbolism," concluding: "I guess we'll first let the victims get their day in court, and then we'll let those people decide whether [the ATA] is mere symbolism."[81] Senator Grassley, who had begun the hearings by acknowledging that "this legislation is, in part, symbolic," also insisted that symbolic legislation had value, and requested that the other testifying experts "comment on the point of symbolism."[82] Joseph Morris of the Lincoln Legal Foundation took this opportunity to disagree with Professor Perdue's concern that those directly involved in terrorist attacks could nonetheless escape liability. He stated that the statute was "powerfully broad" and that it could reach not only the individuals immediately involved in killing people, but also their helpers, such as those who "bought the gun" or "pointed out the victim" or lured the victim into "a vulnerable place," "all while knowing that that's what the hitman was going to do."[83]

Highlighting his recognition that the ATA would be rarely used, Senator Grassley then asked Professor Perdue if "the predicted frequency that the rights under a proposed statute would be exercised should determine whether the right should be established at all?" She answered that if Congress believed that "a right as granted may only rarely be exercised," this might be "a reason to consider redrafting it, so that it was broader and more useable. . . . [A]s it exists now, it may only serve symbolic purposes."[84]

This exchange has been quoted at length because it demonstrates that Congress was well aware of the fact that the ATA was largely symbolic and could only rarely be used to actually collect damages. Both Senator Grassley, a sponsor of the legislation, and Professor Wendy Perdue, a critic of the legislation as written,[85] agreed that the ATA was largely symbolic. Their disagreement was over whether legislation passed as symbolism had value. Even Joseph Morris, who described the statute as "powerfully broad," envisioned it as reaching a variety of individuals directly involved in the terrorist act, such as those obtaining the weapons or luring victims to their death. Ironically, as will be discussed in detail *infra*, courts would later vastly expand the ATA's scope precisely because the courts assumed that

80. C-SPAN television broadcast, *supra* note 25.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* She stated that she agreed with the idea of creating a civil suit provision for victims of terrorism but wanted those victims to have a realistic chance of receiving payment. *Id.*

Congress could not have intended for the ATA to "have little effect," which the courts describe as "a result so bizarre that Congress could not have intended it."[86]

The legislative history and the Senate hearings show that the ATA was created to allow civil suits to proceed against terrorists in the very rare scenarios where those terrorists have attachable assets in the United States. At most, the ATA could also reach the direct, intentional financiers and weapons suppliers of those terrorists—although Professor Perdue viewed this as uncertain. As late as the mid-2000s, Jack Goldsmith and Ryan Goodman expressed uncertainty as to whether the civil suit provision of the ATA can be applied to "persons, both natural and legal, who have provided financial and other resources to a terrorist organization."[87] Responding to a 2002 federal district court decision that extended ATA liability to direct financiers of terrorism, Goldsmith and Goodman stated that "[t]he reasoning [of the court] is not entirely convincing."[88] Putting aside the issue of whether or not direct financiers of terrorism are civilly liable under the ATA, the congressional hearings certainly did not mention or otherwise foresee the ATA reaching third-party businesses on the basis of commercial banking transactions.

From the outset, then, the ATA's civil suit provision was intended to be a rarely-used legal device. For its first decade of existence, reality matched these intentions. The utter lack of litigation during the first decade of the ATA's existence is support for the view that all concerned—from legislators to commentators to victims to attorneys—originally viewed the ATA's civil cause of action provision as being restricted to suits against actual terrorist actors.[89] Nearly two decades after the ATA's enactment, the Seventh Circuit noted that suits against actual terrorists were extremely rare because actual terrorists—"those who pull the trigger or plant the bomb"—"are unlikely to have assets, much less assets in the United States."[90]

It is telling that the first attempt to bring a civil suit against a bank by means of the ATA's civil suit provision was the somewhat deranged *pro se* case filed by a group of prisoners against "over 50 defendants—including Iran, Iraq, Syria, the Sudan, Libya, Al Qaida, the Taliban, several known or suspected terrorists currently in U.S. custody, and a number of banks and

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

87. Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM 109, 121 (John Norton Moore ed., 2004).

88. *Id.* at 122.

89. *See supra* notes 60–88 and accompanying text.

90. Boim v. Quranic Literacy Inst. (*Boim II*), 511 F.3d 707 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc).

relief organizations suspected of funneling funds to terrorist organizations."[91] The complaint claimed that these entities were trying to kill the plaintiffs, and it demanded millions of dollars in compensatory and punitive damages.[92] The district court *sua sponte* dismissed the action prior to the filing of answers by any of the defendants, and the Seventh Circuit affirmed.[93] That this was the first and only civil action brought under the ATA against financial institutions during the first decade and a half of the ATA's existence further supports the view that the ATA was never intended to extend liability for terrorism to third-party banks.[94] Particularly interesting is that the Seventh Circuit, in affirming the district court decisions, seemed dismissive of the prisoner's attempt to invoke not just Section 2333 but also "a host of other provisions that they interpreted as creating civil liability for acts of terrorism."[95] As discussed below, courts would later creatively adopt the very same line of reasoning as these *pro se* prisoners, and claim that the ATA "incorporated by reference" a "host of other provisions," creating civil liability for run-of-the-mill business transactions.[96]

## III. EARLY COURT DECISIONS RESTRICT SUITS TO TERRORIST ACTORS (AND NOT BANKS)

The earliest court cases to mention the ATA's civil suit provision each envision it as being applied to terrorist defendants, not non-terrorist third-parties. Thus, among the first cases to mention the ATA was a 2003 case from the Seventh Circuit focusing on the possible extraterritorial application of statutes. A four-judge dissent in that case made reference to the ATA as an example of a statute with an explicit extraterritorial application.[97] This dissent briefly paraphrased the ATA in a way that seemingly interpreted its civil suit provision as applicable only to terrorists: "Section 2333 provides a private right of action for civil damages for any national of the United States injured 'by reason of an act of international terrorism' (or the

91. George v. Islamic Republic of Iran, 63 F. App'x 917, 917–18 (7th Cir. 2003).

92. *Id.* at 918. The same year, the Second Circuit rejected an attempt to collect confiscated Iraqi assets to satisfy a judgment under the ATA. *See* Smith *ex rel.* Estate of Smith v. Fed. Reserve Bank of N.Y., 346 F.3d 264 (2d Cir. 2003).

93. *George*, 63 F. App'x at 917–19.

94. A cynic might describe Larry George, Paul Nigl, and Richard Brevitz, the Wisconsin inmates who filed this original civil ATA suit against bank defendants, as legal visionaries.

95. *George*, 63 F. App'x at 917.

96. *See infra* Part V.

97. United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, J., dissenting) (emphasis added).

victim's estate) to sue *those responsible for the act* in a U.S. court for treble damages, no matter where in the world the act occurred, and *no matter what the nationality of the perpetrator was*."[98] The language "those responsible for the act" appears to be a reference to the terrorist actors that caused the incident of terrorism ("the act"); this language fits poorly when applied to a third-party financial institution. The reference to the "nationality of the perpetrator" likewise seems to envision actual terrorists as the defendants, not third-party multinational financial institutions.

Although this description of the ATA's civil suit provision was mentioned in a dissent, there is no reason to believe that the dissent viewed its paraphrase of the ATA as in any way controversial.[99] Rather, the dissent seems to have viewed its paraphrase of the ATA as the natural, non-controversial interpretation of the statute: namely, that the civil suit provision of the ATA allowed actions against terrorists "no matter where in the world the act occurred"—i.e., a jurisdictional statute.

In the case just discussed, the ATA was mentioned only in passing; however, most of the earliest cases to directly analyze the ATA also rejected the idea that claims could be brought against non-terrorist third-parties for the actions of terrorists. These early court decisions reject the expansion of the ATA primarily on two grounds: (1) the ATA has a proximate cause requirement; and (2) the ATA requires that the act be "violent" or "dangerous to human life."

Courts often noted that the statute's language ("by reason of an act of international terrorism"), required the plaintiff to prove that the defendant's actions proximately caused the plaintiff's injury. Thus, for example, the Seventh Circuit decision in 2002 that interpreted the ATA as a "case of first impression," as well as the district court decision it reviewed on appeal, both concluded that the statute creates a proximate cause requirement.[100] Likewise, the earliest courts in the Second Circuit to consider the ATA's civil action provision each concluded that it imposes a proximate cause requirement.[101] Two early opinions in the D.C. Circuit both cited

98. *Id.*

99. The majority's holding made no mention of the ATA. *See id.*

100. *See Boim I*, 291 F.3d 1000, 1011–12 (7th Cir. 2002).

101. *See* Stutts v. De Dietrich Grp., No. 03-CV-4058 (ILG), 2006 WL 1867060, at *4 (E.D.N.Y. June 30, 2006); Strauss v. Credit Lyonnais, S.A., No. CV-06-0702 (CPS), 2006 WL 2862704, at *17 (E.D.N.Y. Oct. 5, 2006). In 2013, the Second Circuit agreed that there was a proximate cause requirement. *See* Rothstein v. UBS AG, No. 11-0211, 2013 WL 535770 (2d Cir. Feb. 14, 2013) (affirming dismissal of suit against international bank).

approvingly to the Seventh Circuit's conclusion that the ATA requires a showing of proximate cause.[102]

Early courts also noted that a civil suit under the ATA must be premised upon an injury that occurred by reason of an act of "international terrorism."[103] "International terrorism" is defined as "violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States."[104] Early courts had no difficulty concluding that routine commercial banking activities are neither "violent acts" nor "acts dangerous to human life."[105]

*Stutts v. De Dietrich Group*[106] is representative of these early civil suits premised upon the ATA and directed at international banks.[107] A group of American soldiers who were injured during the destruction of Saddam Hussein's stockpiles of chemical weapons during the first Iraq war brought suit against the international banks that had provided letters of credit to Iraq. The American soldiers alleged that these letters of credit enabled Iraq to purchase chemical weapons and claimed that the banks were therefore liable under the ATA for their injuries. The court, however, noted the proximate cause requirement within Section 2333, and declared that the issuance of letters of credit to manufacturers did not cause the exploding stockpiles of chemical weapons that injured the soldiers.[108] Pointing to the ATA's definition of international terrorism, the court held that "[t]he plain language of the ATA compels the conclusion that, by engaging in commercial banking activity, the Bank Defendants were not involved in 'violent acts or acts dangerous to human life.'"[109] The court also noted that the banks' actions were not "designed to coerce civilians or government entities as required under Section 2331. Thus, the Bank Defendants' conduct does not constitute international terrorism."[110]

Under both the original intent of Congress and also the original interpretation of the courts, the ATA's civil suit provision is limited to terrorist actors and does not reach non-terrorist third-parties, such as banks.

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102. Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1130 (D.C. Cir. 2004) (concluding that the terrorism exception to the Foreign Sovereign Immunities Act requires a showing of proximate cause, and citing to the Seventh Circuit's *Boim I* decision); Sisso v. Islamic Republic of Iran, No. 05-0394 (JDB), 2007 WL 2007582, at *11 (D.D.C. July 5, 2007).

103. 18 U.S.C. § 2333 (1994).

104. *Id.* § 2331.

105. *See, e.g.*, *Stutts*, 2006 WL 1867060, at *2.

106. No. 03-CV-4058 (ILG), 2006 WL 1867060 (E.D.N.Y. June 30, 2006).

107. *Id.* at *2.

108. *Id.* at *2–4 (citing 18 U.S.C. § 2333).

109. *Id.* at *2.

110. *Id.*

This seemingly natural interpretation of the ATA is also reflected in an amicus brief filed by the United States in an ATA case: "Congress established in Section 2333(a) a civil cause of action . . . under which United States nationals can sue *those who injure them through acts of international terrorism*."[111] This language, "those who injure them," like the language used by the Seventh Circuit in 2003, "those responsible for the act," appears to restrict civil suits under the ATA to those directly responsible for the terrorist act. In both cases, the language is directed at the terrorist perpetrators rather than third-party banks.

In 2004, a pair of influential law professors surveying the field of "U.S. Civil Litigation and International Terrorism" apparently did not envision that civil litigation could or should be directed at third-party commercial institutions. The article considered three categories of defendants in terrorist-related civil actions: terrorist states; individual government officials or government-connected entities acting as terrorists; and "[a] third and final category of defendants" consisting of "persons (including organizations with legal personality) who commit acts of terrorism."[112] The professors described this category as consisting of "persons who commit acts of terrorism in a private capacity," giving as examples "Timothy McVeigh, the Shining Path (Peru), the LTTE (Sri Lanka)" as well as Al Qaeda.[113] In a chart, the professors added as other examples the IRA and the Kurdish Workers' Party.[114] As is obvious from this list of examples, the professors rightly envisioned defendants in terrorism-related civil suits to be actual terrorist organizations, not third-party businesses.[115]

These professors were not alone. In 2001, a comprehensive survey of civil litigation by Deborah M. Mostaghel noted that the ATA is largely symbolic: "[S]ince individual perpetrators will rarely be identifiable, it *may be a moot point* that . . . victims [are] *theoretically* enabled to seek restitution."[116] As this language makes clear, Deborah Mostaghel envisioned

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111. Brief for the United States as Amicus Curiae at 2, *Boim III*, 549 F.3d 685 (7th Cir. 2008) (en banc) (emphasis added). The United States amicus brief also envisioned liability extending to a narrow class of aiding and abetting. *See id.*

112. Goldsmith & Goodman, *supra* note 87, at 112.

113. *Id.*

114. *Id.* at 113.

115. *Id.* In the original 2002 version of their paper, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312451 (last visited Oct. 12, 2012), the professors did not make any reference to individuals or groups as potential defendants other than recognized terrorist groups. For a 2004 book publication, the professors updated their chart to include the recent *Boim* decision, but criticized its reasoning.

116. Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 113 (2001) (emphasis added).

the ATA as limited to the actual terrorist perpetrators ("individual perpetrators") and correctly noted that the statute would rarely be used.

## IV. SYMPATHY FOR VICTIMS OF TERROR HAS IMPROPERLY INFLUENCED COURTS

Courts, sympathetic to victims of tragic acts of terrorism, appear to have creatively interpreted the ATA so as to allow these victims to pursue civil suits against third parties.[117]

It has long been an adage of American law that "bad facts make bad law."[118] More than one century ago, Justice Holmes remarked that the reason "hard cases[] make bad law" is because "some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment."[119]

One sign that the horrific facts behind terrorism-related lawsuits may have "appeal[ed] to the feelings and distort[ed] the judgment" of the courts is that many courts have used their opinions to describe, in emotional language, the virtues of the terrorists' victims.[120]

To be sure, the mere fact that court opinions take account of victims is not necessarily a sign that the court has been swayed by emotions. Congress and the states have unanimously found that it is appropriate for victims' voices to be included in the court process.[121] "One of the animating purposes of the victims' rights movement has been to give victims a meaningful voice in the criminal justice process . . . ."[122] While once controversial, this position is now enshrined into law in all fifty states, as well as in federal law.[123] The American Bar Association has endorsed victim

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117. *See supra* notes 111–16 and accompanying text; *infra* notes 118–32 and accompanying text.

118. Haig v. Agee, 453 U.S. 280, 319 (1981); *see also* Saperstein & Sant, *supra* note 25, at 4 (citing this language).

119. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); Saperstein & Sant, *supra* note 25, at 4 (citing this language).

120. *See infra* notes 127–29 and accompanying text.

121. *See* 18 U.S.C. § 3771(a)(4) (2006) (federal statute guaranteeing the right of victims to be "reasonably heard" at sentencing); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305 (2003); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612–16 (2009) (describing the acceptance of all fifty states and the federal government of victim impact statements).

122. Cassell, *supra* note 121, at 644.

123. *Id.*; *see* Mostaghel, *supra* note 116. For a recent concrete example, consider "Marsy's Law," a California constitutional amendment intended to provide victims with expanded access to the judicial process. CAL. CONST. art. 1, § 28, subsec. b (2008); *see also* Geoffrey Sant, *"Victimless Crime" Takes On a New Meaning*, 39 J. LEGIS. (forthcoming 2013).

impact statements because "good decisions require good—and complete—information. . . . [I]t is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision-maker."[124] Similar justifications would seemingly apply to the inclusion of information about the victim within court decisions. As one federal district court stated: "'[A]llocution is both a rite and a right.' Part of the rite is a chance for the participants—the defendant, the prosecution, and now the victim—to have their say . . . ."[125] Arguably, it is inappropriate to present the victim "as a shadowy abstraction" while the defendant is treated "as a living, breathing human being."[126]

Nevertheless, the degree to which courts have chosen to paint emotionally moving portraits of the victims of terrorism is unusual, and the contrast between the use of these emotional descriptions within ATA cases, and their absence from other cases, may be a sign that courts have been influenced by sympathy for victims of terrorism. In other words, it is not merely the presence of these descriptions of victims but the *contrast* between the presence of these descriptions in ATA cases and their absence in non-ATA cases that leads one to suspect that courts have creatively interpreted the ATA to advance a desired result. By way of example, one district court decision in an ATA case described the deceased victim as "an incredible father and a 'larger-than-life figure.'"[127] The court further wrote: "Long before it became popular, [the victim] taught his children about conservation and environmentalism. He taught them to be mindful of how their conduct would affect the world. They were taught never to litter."[128] Meanwhile, a Seventh Circuit Court of Appeals decision in an ATA case describes the murder victim in a moving portrait that includes these lines: "'His trademark was his hug and his smile' . . . . His mother described him as a peacemaker."[129] Many of the emotional descriptions of victims of terrorism are either non-objective or else quote the emotional, non-objective statements made by others.

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124. A.B.A. Guidelines for Fair Treatment of Crime Victims and Witnesses, 1983 A.B.A. Sec. Crim. Just. 18, 21; *see also* Cassell, *supra* note 121, at 620 (quoting and discussing this language).

125. United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005) (internal citation omitted).

126. David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993).

127. Pugh v. Socialist People's Libyan Arab Jamahiriya, 530 F. Supp. 2d 216, 228 (D.D.C. 2008).

128. *Id.* at 229.

129. *Boim II*, 511 F.3d 707 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc).

Descriptions of this sort generally do not appear even in criminal cases, much less in civil suits.[130] For example, in contrast to the Seventh Circuit's description of the terrorist victim's "trademark" hug and smile, most Seventh Circuit decisions—even in murder cases—do not describe the victim at all, not even to provide factual information about the victims' lives and families, unless this information is directly related to the murder. Thus, in *United States v. Thompson*,[131] the Seventh Circuit refers to the victim (an undercover agent) only as follows: "Marcus Willis, working on behalf of law-enforcement officials, arrived on the scene. He worked for law enforcement for approximately eight months (through June of 1997) until he was murdered in one of the defendant's vehicles."[132] No other description of the murder victim is provided.[133] In *United States v. Ray*,[134] the Seventh Circuit describes the murder victim Charles Banks only as follows: "[G]ang leadership became aware that one member, Charles Banks, was cooperating with federal law enforcement authorities in an investigation of the Gangster Disciples . . . ."[135] No other description of Charles Banks is provided other than that he was shot to death.[136] In *Dressler v. McCaughtry*,[137] the Seventh Circuit's description of the murder victim's life is limited to the following: "James Madden was last seen alive during the early evening hours of June 26, 1990, in the town of Raymond, Wisconsin . . . . Prior to his disappearance, Madden was soliciting door-to-door for the Citizens for a Better Environment."[138] No further description of James Madden (aside from the discovery of his mutilated body) is provided.[139] In these examples, the Seventh Circuit only mentions the victims' lives to the extent that it provides the background or explanation of the murder itself: an undercover officer killed during his work; a gang member killed for cooperating with police; a canvasser killed while canvassing.[140]

As can be seen, then, the extensive and emotional descriptions of the victims in civil cases under the ATA contrast sharply with the absence of such descriptions in most other murder cases. On the one hand, ATA cases

130. An empirical study of the use of descriptions of victims and the correlating verdicts is beyond the scope of this paper.

131. 286 F.3d 950 (7th Cir. 2002).

132. United States v. Thompson, 286 F.3d 950, 956 (7th Cir. 2002).

133. *Id.*

134. 238 F.3d 828 (7th Cir. 2001).

135. United States v. Ray, 238 F.3d 828, 831 (7th Cir. 2001).

136. *Id.*

137. 238 F.3d 908 (7th Cir. 2001).

138. Dressler v. McCaughtry, 238 F.3d 908, 909–10 (7th Cir. 2001).

139. *Id.*

140. *See supra* notes 131–39 and accompanying text.

describe, among other things, an "incredible" and "larger-than-life" father who taught his children about environmentalism before it was popular and instructed his children to never litter, and on the other hand, in non-ATA cases, murder victims are largely unidentified and without description. This distinction may be a sign that the terrorism cases may have "appeal[ed] to the feelings and distort[ed] the judgment" of courts.

## V. EXPANSION OF THE ATA'S CIVIL SUIT PROVISION

In the mid-1990s, approximately half a decade after the ATA was first passed, Congress enacted two statutes criminalizing material support for terrorism.[141] At the time, it seemed clear that these were purely criminal statutes, but (as will be shown) courts would eventually use these two provisions to dramatically expand the scope of the ATA's civil suit provision.[142] First, in 1994, Congress enacted Section 2339A, criminalizing the knowing provision of material support or resources for use in preparing or carrying out terrorist attacks.[143] Second, in 1996, Congress enacted Section 2339B, criminalizing the knowing provision of material support or resources to a designated foreign terrorist organization.[144] Importantly, as Jack Goldsmith and Ryan Goodman point out, "Congress enacted these criminal prohibitions without any explicit connection to civil liability."[145] Likewise, Alan O. Sykes writes, albeit in a different context, "[i]t is not obvious that . . . standards for *criminal* aiding and abetting, which afford a basis for criminal sanctions against individuals . . . are the appropriate standards in relation to *civil* liability."[146]

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141. Goldsmith & Goodman, *supra* note 87, at 121–22.

142. In addition, Congress passed Section 2339C in 2002. A full discussion of Section 2339C is beyond the scope of this paper. In brief, because Section 2339C was not passed until 2002, it seems unlikely that Congress "incorporated by reference" this statute within the civil suit provision passed one decade earlier. Section 2339C appears to be a pure criminal statute, unconnected to any civil cause of action. Section 2339C prohibits the unlawful and willful provision or collection of funds with the intent or knowledge that the funds will be used in a terrorist attack against non-militarized civilians where the act is intended to cause death or serious bodily injury, and where the purpose is to intimidate a population or to compel a government or international organization to act (or refrain from acting).

143. Goldsmith & Goodman, *supra* note 87, at 121–22.

144. *Id.* at 122.

145. *Id.*

146. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2172 (2012) (emphasis in original) (discussing claims under the Alien Tort Claims Act, supposedly predicated upon international criminal standards).

There is no reason to believe that Congress intended or suspected that these statutes could be used to expand the scope of the ATA's civil suit provision, enacted half a decade earlier. Nevertheless, this is what eventually occurred. The Seventh Circuit, in a creative ruling, decided that the civil suit provision of Section 2333 incorporated by reference the material support provisions, enacted half a decade later.

It is important to note that these statutes were passed with a "limited scope" in the aftermath of massive terrorist attacks, with only the attacks propelling Congress to pass material support statutes that had been repeatedly rejected by Congress in years prior. Congress had long rejected a variety of proposed material support statutes.[147] As merely one example, in 1992, Senator Thurmond submitted material support legislation only to see it die in committee.[148] In 1993, however, the first terrorist bombing of the World Trade Center led to passage of Section 2339A, albeit even then the statute was drafted with a "limited scope."[149] In 1996, Congress passed Section 2339B in response to the bombing of the Alfred P. Murrah building in Oklahoma City one year earlier.[150] In other words, these statutes only passed in the wake of emotional national tragedies, and even then were intended to be "limited" criminal provisions.

Section 2339A punishes the provision of "material support or resources" with the knowledge or intention that the aid is "to be used in preparation for, or in carrying out" any of more than two dozen violent crimes.[151] Commenting on the "limited scope" of the provision, a legal scholar wrote (prior to the explosion of ATA litigation and the creative reinterpretation of these statutes) that "[a] person could donate thousands of dollars to Hamas or Hezbollah . . . so long as he or she thought the money might be spent on the political or social services those groups provided."[152] The seemingly narrow scope of the law was also emphasized in a statement by the staff of the 9/11 Commission that criminal prosecution under Section 2339A would require "tracing donor funds to a particular act of terrorism—a practical

147. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 5–12 (2005).

148. S. 2305, 102d Cong. (1992); *see also* Chesney, *supra* note 147, at 12 n.65 (discussing legislation during this period).

149. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Chesney, *supra* note 147, at 13.

150. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* Chesney, *supra* note 147, at 16–17 (discussing this legislative history).

151. 18 U.S.C. § 2339A(a) (Supp. 2009).

152. Chesney, *supra* note 147, at 13.

impossibility."[153] As discussed below, however, courts would later find creative means of expanding the narrow scope of Section 2339A, purportedly to bring justice to victims of terrorism.

In apparent confirmation of the "limited scope" of Section 2339A, this provision "may have been used on as few as two occasions as a predicate for criminal prosecution" prior to the 9/11 terrorist attacks.[154] Only one of those two cases even involved a foreign terrorist organization.[155]

Section 2339B, passed shortly after the Oklahoma City bombing, appears to focus on acts of terrorism by *foreign terrorists* committing acts of "violence."[156] Significantly, however, Section 2339B does not use, reference, or otherwise cite to the term "international terrorism"—the phrase used and defined in Sections 2333 and 2331, i.e., the civil cause of action provision. Rather, Section 2339B uses the term "foreign terrorist organization," which is then defined as an organization that engages in "terrorism" as defined in the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B) and 22 U.S.C. § 2656f(d)(2).[157] Thus, Section 2339B refers to a string of other statutes but not to the ATA civil suit provisions. In fact, Section 2339B was defined in a way that avoids referencing the ATA's civil suit provision, seemingly with the purpose of avoiding any trigger of the civil suit provision. Given that 2339B was passed six years after the ATA's civil suit provision, that 2339B was passed in response to a specific terrorist bombing, and that it contains no reference to either Section 2331 or 2333 (and even seems to avoid referencing these statutes), it seems apparent that Section 2339B and the civil suit provision are not linked.[158]

It might seem that a seldom-used criminal statute with no explicit civil suit provision, passed years after the ATA civil suit provision, given a "limited scope," and with the requirement that prosecutors trace donated funds to actual terrorist acts, would be an unlikely cause of the current flood of ATA civil litigation against third-party financial institutions. Yet that is what has occurred.

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153. JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 31–32 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf; *see also* Chesney, *supra* note 147, at 13 (citing this language and quoting other sources as describing Section 2339A as having an "exacting intent requirement").

154. Chesney, *supra* note 147, at 19 (citing United States v. Haouari, No. S4000CR.15 (JFK), 2001 WL 1154714 (S.D.N.Y. Sept. 28, 2001).

155. *Id.*

156. 18 U.S.C. § 2339B (criminalizing the provision of aid to a "foreign terrorist organization").

157. *Id.*

158. *See id.*

In the years after the 9/11 terrorist attacks, the government turned to the material support statutes out of necessity, pushing the interpretation of these statutes to their limit in order to be able to fight potential acts of terror before they occurred. Norman Abrams, among others, has criticized the "strained interpretations of §2339B . . . and §2339A" and has described these statutes as "catch-all offenses that can be invoked in widely varying situations where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses."[159] The statutes are "ubiquitous" and are used "for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud."[160]

As discussed below, courts, apparently moved by the plight of victims of terrorism, began to creatively interpret the civil suit provision of the ATA as "incorporating by reference" the material support statutes, that is, Sections 2339A and 2339B. These court decisions, and their rationales, will be discussed in more detail below.

For present purposes, however, the notable issue is that by linking the civil suit provision of Section 2333 with the material support statutes of Sections 2339A and 2339B, the courts have dramatically expanded the scope and power of Section 2333. Instead of limiting civil suits to actions against actual perpetrators of terrorism, the courts are allowing civil suits to be brought against those merely providing "material support." What is more, with the government pushing the definitions of material support to the limit in order to prosecute conduct before terrorist attacks actually occur, Sections 2339A and 2339B have gained an extreme and originally unintended breadth. That is, minimal and minor acts have repeatedly been roped into the scope of the material support statutes in order to allow the government to act against suspected terrorists, and now these "strained" interpretations have been set loose in the civil context.[161] As one commentator noted, Sections 2339A and 2339B "can be used to impose punishment for conduct remote from the commission of criminal harms, often conduct involving minimal and outwardly non-criminal acts."[162]

As criminal statutes, Sections 2339A and 2339B at least required a high degree of proof, and offered the further check of prosecutorial discretion. In fact, in the case of Section 2339B, any federal prosecutor seeking to prosecute under the statute must first obtain approval from the Attorney

159. Abrams, *supra* note 8, at 7, 16.
160. *Id.* at 7.
161. *Id.* at 7, 16.
162. *Id.* at 6.

General's Office.[163] This offered a *de facto* check against misuse of the statutes. But once courts linked these material support statutes to a civil suit provision, this "strained" catch-all criminal provision gained the relaxed standards of civil litigation. "Compared to criminal litigation, civil litigation lowers the burden of proof and makes it easier to apply legal norms retroactively."[164] Plaintiffs in civil suits also have greater discovery tools.[165] This creates the danger that plaintiffs misuse discovery as a litigation weapon by tactically creating conflicts between U.S. discovery demands and foreign bank secrecy laws. The Second Circuit described one bank as caught between "conflicting legal obligations," with the U.S. district court demanding documents even though three foreign authorities stated that "the bank would face legal action if it violated national bank secrecy laws."[166]

By combining the lax, catch-all criminal provisions of Section 2339 with a civil suit provision, and taking away the checks and balances of prosecutorial discretion, courts have created the perfect recipe for abuse. This Frankenstein's monster has been used to extend the originally "symbolic" civil suit provision of the ATA to reach non-terrorist banks and financial institutions, apparently because they have the deep pockets needed to pay these massive judgments. As Willie Sutton is alleged to have said when asked why he robbed banks, "Because that's where the money is."[167]

There are many other reasons to doubt that the material support provisions were intended to make banks liable as terrorists.[168] For example,

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163. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.136 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136; *see also* Noah Bialostozky, *Material Support of Peace? The On-The-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision*, 36 YALE J. INT'L L. ONLINE 59, 66 (2011).

164. Goldsmith & Goodman, *supra* note 87, at 141; *see also Hearing on S. 2465*, *supra* note 40, at 3 (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State) ("Because a different evidentiary standard is involved in a civil suit, the bill may provide another vehicle for ensuring that terrorists do not escape justice.").

165. John F. Murphy, *Civil Lawsuits as a Legal Response to International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM 44 (2004); Murphy, *supra* note 79, at 315–16.

166. Linde v. Arab Bank, PLC, 706 F.3d 92, 98, 114 (2d Cir. 2013). When the Bank did not produce the documents, the district court sanctioned the bank by permitting a jury to infer the Bank knowingly provided "services to designated foreign terrorist organizations . . . ." *Id.* at 95. The Second Circuit did not review the validity of the decision due to "limited jurisdiction." *Id.*

167. Sam Roberts, *Deconstructing a Celebrated Outlaw*, N.Y. TIMES, Sept. 23, 2012, at MB4.

168. As just one example, in comparing the Torture Victims Protection Act with the ATA, the Supreme Court "decline[d] petitioners' suggestion to construe the TVPA's scope of liability to conform with other federal statutes that petitioners contend provide civil remedies to victims of torture or extrajudicial killing." Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1709 (2012). The Court and the petitioners identified 18 U.S.C. §§ 2333, 2334(a)–(b), 2337, but not Sections

Section 2339B(a)(2) requires that "any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent has an interest, shall—(A) retain possession of, or maintain control over, such funds; and (B) report to the Secretary the existence of such funds."[169] The punishment for failing to freeze terrorist funds is $50,000 per violation or twice the amount the financial institution was required to keep in its possession. This requirement would make no sense if the bank itself is a terrorist simply by providing banking services to a terrorist organization. Among other logical problems, ATA civil liability under the material support statutes would be duplicative of 2339B(a)(2)'s requirements, while providing wildly different punishment for the same failure: the same acts that 2339B(a)(2) describes as a mere "violation" punishable by a modest fine would simultaneously be a crime of "international terrorism" with the potential for bankrupting civil penalties. Such a statutory regime is self-contradictory and implausible.

## VI. THE *BOIM* CASES: COURTS CREATIVELY INTERPRET THE ATA TO EXTEND ITS SCOPE

During the first decade of the 2000s, the Seventh Circuit issued a string of decisions in the *Boim* cases, eventually extending the civil suit provision of the ATA such that victims of terrorist acts could recover damages from direct financial donors. The *Boim* lawsuits focused on liability for the murder of David Boim in Israel, allegedly by members of Hamas.[170] The Boim family sued a slew of purported Islamic charities, each of which the Boims alleged were "fronts for Hamas in the United States," funneling money to that terrorist group.[171] The Boims based their suit upon a variety of theories. First, the Boims argued that making donations, by itself, was an act of "international terrorism" giving rise to liability under Sections 2333 and 2331 of the ATA. Second, the Boims argued that the defendants could be held liable civilly for violations of Sections 2339A and 2339B, the material support statutes. Third, the Boims argued that the defendants could be held liable for aiding and abetting terrorists.[172]

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2339(A) or 2339(B), as creating civil liability in connection with an extrajudicial killing. *See id.* The implication is that Sections 2339(A) and 2339(B) are not civil causes of action.

169. 18 U.S.C. § 2339B(a)(2).

170. *Boim I*, 291 F.3d 1000, 1002 (7th Cir. 2002). Hamas is described as an "extremist, Palestinian militant organization that seeks to establish a fundamentalist Palestinian state." *Id.*

171. *Id.* at 1003.

172. *Id.* at 1005.

While the Boims were sympathetic plaintiffs, their ability to bring suit faced a number of hurdles. The allegation that the charities had committed "international terrorism" by donating money to Hamas seemed blocked by the statute's requirement that the acts involved be "violent" or "dangerous." Indeed, the district court concluded that funding, by itself, did not "involve violent acts or acts dangerous to human life."[173] The claim based on aiding and abetting seemed thwarted by the ATA's lack of an aiding and abetting provision. The Supreme Court has held that an aiding and abetting claim does not exist unless explicitly created.[174] Lastly, as described in the previous Part, there is no reason to believe that the material support statutes were somehow incorporated by reference within the ATA's civil suit provision passed half a decade earlier. Among other things, acts of material support are not "violent acts or acts dangerous to human life."

In 2002, the Seventh Circuit rejected the first of the theories advanced by the Boims, namely, that fund transfers could be interpreted as an act of international terrorism. The 2002 majority seemed tempted by this theory, noting that the "Boims liken payments to Hamas to murder for hire: the person who pays for the murder does not himself commit a violent act, but the payment 'involves' violent acts in the sense that it brings about the violent act and provides an incentive for someone else to commit it."[175] Nevertheless, the court rejected this theory, explaining that such an interpretation would create "a very broad definition of 'involves' that would include any activity that touches on and supports a violent act."[176] "To say that funding *simpliciter* constitutes an act of terrorism is to give the statute an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor's intent, could be construed to 'involve' terrorism."[177] The Seventh Circuit also pointed to the proximate cause requirement in the ATA, stating that foreseeability is the cornerstone of proximate cause, and that "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."[178] "To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability."[179]

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173. Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1012–13 (N.D. Ill. 2001).

174. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 183 (1994).

175. *Boim I*, 291 F.3d at 1009.

176. *Id.*

177. *Id.* at 1011.

178. *Id.* at 1012.

179. *Id.*

The 2002 Seventh Circuit decision linked Section 2333's civil suit provision to Sections 2339A and 2339B on the theory that the material support provisions "*involve* violent acts or acts dangerous to human life."[180] "We are using sections 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by 'international terrorism.'"[181] The Seventh Circuit also found that aiding and abetting liability was available to the plaintiffs. Despite the Supreme Court restriction finding that aiding and abetting claims exist only where they are explicitly created, the Seventh Circuit stated that "failing to extend section 2333 liability to aiders and abettors is contrary to Congress' stated purpose of cutting off the flow of money to terrorists at every point along the chain of causation."[182]

This conclusion, that Congress intended for Section 2333 to have a broad and ever-growing reach, actually contradicts Congressional intent, as demonstrated by Senator Grassley's statement that the statute was "in part, symbolic," as well as by extensive congressional testimony that the statute targeted terrorists and would be rarely used.[183] In fact, even the congressional testimony cited in the court's decision refers to terrorists and not to donors. For example, the court cited Senator Grassley's statement that, "[i]f terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them."[184]

The court also quoted from the official congressional statement on the ATA, which contained the brief (and, in retrospect, misleading) out-of-context statement that the ATA was intended to impose "liability *at any point along the causal chain of terrorism*."[185] The court interpreted this language broadly, assuming that the seemingly expansive phrase "any point

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180. *Id.* at 1014–15 (emphasis added).

181. *Id.* at 1016.

182. *Id.* at 1019.

183. *See supra* Parts I, II.

184. *Boim I*, 291 F.3d at 1011 (citing 136 CONG. REC. S4568-01 (daily ed. Apr. 19, 1990) (statement of Sen. Charles Grassley)).

185. *Id.* (citing S. REP. NO. 102-342, at 22 (1992)). The report's description of the bill is very brief. Following two short paragraphs providing the legislative history is this statement:

> Title X would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By its provisions for compensatory damages, [treble] damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.

S. REP. NO. 102-342, at 22. This is the entirety of the description of the ATA. Many courts have seized upon the language "at any point along the causal chain of terrorism" to interpret the statute broadly.

along the causal chain of terrorism" must extend as far back as donors. In actuality, the reference to the "causal chain of terrorism" appears to refer to the statements made by Joseph Morris during the Senate subcommittee hearing. Joseph Morris explained that, by extending liability across "the causal chain of terrorism," he meant "nail[ing] all of the tortfeasors down the chain, from the person who starts spending the money to the person who actually pulls the trigger."[186] As this testimony makes clear once read in context, "the causal chain of terrorism" commences with "the person who *starts spending the money*" (i.e., spending money on planning or preparing the terrorist act). There is no sign that anyone intended or foresaw the ATA extending to earlier and even more remote acts.

If this language was not clear enough, Joseph Morris also listed the individual members of the "causal chain of terrorism" that he felt could or should be reached by the civil suit provision: "You may not be the person who pulled the trigger, but if you handed the gun, if you bought the gun, if you pointed out the victim, if you arranged for the victim to be in a vulnerable place, if you paid the expenses of the hitman, if you encouraged the hitman, all while knowing that that's what the hitman was going to do, then you're criminally liable."[187] All of these examples are individuals actively involved in the terrorist attack itself.

Not long after *Boim I*,[188] a New York district court allowed both primary and aiding and abetting claims under the ATA against Arab Bank, citing to and adopting the reasoning of the Seventh Circuit's *Boim I* decision.[189]

In 2007, when the Seventh Circuit dealt for the second time with the *Boim* litigation, the panel reaffirmed its insistence that the plaintiffs must show proximate causation between the funding and the terrorist attack; that is, "demonstrate an adequate causal link between the [terrorist killing] and the actions of [the defendants]. This will require evidence that the conduct of each defendant, be it direct involvement . . . or indirect support of Hamas . . . helped bring about the terrorist attack."[190] The court expanded upon its 2002 decision, emphasizing that the plaintiffs must prove a causal link between donations and terrorist acts: "by saying that [the murder] must have been a type of harm that was foreseeable to the defendants, and that the plaintiffs were obligated to prove this, we in no way implied that the

186. C-SPAN television broadcast, *supra* note 25; *cf.* Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013) (slip op. at 7) (finding that the Alien Tort Statute has a very limited scope despite the statute's use of the phrase "any civil action").

187. *Id.*

188. *Boim I,* 291 F.3d at 1000.

189. *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 581 (E.D.N.Y. 2005).

190. *Boim II*, 511 F.3d 707, 710 (7th Cir. 2007), *vacated*, *Boim III*, 549 F.3d 685 (7th Cir. 2008) (en banc).

plaintiffs were relieved of the obligation to establish that the defendants' actions were a factual cause of [the] death."[191] The court "reiterate[d] that recovery . . . is conditioned on proof of causation in fact" and the language "by reason of" "requires a showing of proximate causation."[192] The court also repeated its earlier holding that aiding and abetting liability was available.

In 2008, an en banc panel of the Seventh Circuit vacated the 2007 *Boim* decision in a sharply divided 4-3 decision. The 2008 *Boim* majority found that there could be no aiding and abetting liability because the statute did not explicitly create it: "statutory silence on the subject of secondary liability means there is none."[193] However, the majority then seemed to search for a means of nevertheless imposing liability upon the defendants.

In a remarkable and seemingly revealing passage, the Seventh Circuit wrote that "an alternative *and more promising ground* for bringing donors . . . within the grasp of section 2333" would be by means of a chain of statutory incorporations by reference.[194] The description of this "alternative" theory of liability as being "more promising" creates the impression that the court may have been searching for a means of reaching a predetermined result. The American Heritage Dictionary of the English Language defines "promising" as "[l]ikely to develop *in a desirable manner*."[195] It did not go unnoticed at the time that the Seventh Circuit described its preferred result as a desirable one; the dissent criticized the majority for this language and for its seemingly results-driven decision-making.[196] Commentators have described the Seventh Circuit's decision as "peculiar," creating "an unclear standard that awkwardly combines" a mish-mash of theoretical justifications.[197]

Much as the original *Boim* panels had done, the en banc panel justified its expansive holding by claiming that to do otherwise would be to thwart the intentions of Congress: anything less than strict enforcement and

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191. *Id.* at 737.

192. *Id.* at 738–39.

193. *Boim III*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)).

194. *Id.* at 690 (emphasis added).

195. HOUGHTON MIFFLIN HARCOURT PUBLISHING CO., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) (emphasis added), *available at* http://www.ahdictionary.com/word/search.html?q=promising.

196. *Boim III*, 549 F.3d at 720 (Wood, C.J., concurring in part and dissenting in part).

197. Stefanie Dresdner Lincoln, *Drawing the Line:* Buckley*'s Impact on the Intersection of Contributions and the First Amendment*, 7 FIRST AMEND. L. REV. 445, 459–61 (2009). Dresdner Lincoln's essay focuses primarily on the First Amendment analysis within the *Boim III* decision—a topic that is beyond the scope of this paper. The important point is that she too concludes that *Boim III* is results-driven.

"[d]onor liability would be eviscerated, and the statute would be a dead letter."[198] This rationale simply begs the question. Congress did not create "donor liability" when it enacted Section 2333; to the contrary, Congress stated that the civil suit provision would be primarily symbolic. Moreover, there was no "donor liability" at the time of passage because Sections 2339A and 2339B were not enacted until half a decade later, and in any case, the material support provisions were created as criminal statutes, with no reference to Section 2333's civil suit provision.

As previously discussed, there are many reasons for doubting that Sections 2339A and 2339B are linked to the civil suit provision of Section 2333. Chief among these reasons may be the ATA's definition of "international terrorism," which restricts civil suits to "violent acts or acts dangerous to human life that are a violation of the criminal laws."[199] In order to nevertheless link Section 2333 to Sections 2339A and 2339B, the *Boim III*[200] court relied on a rhetorical device, declaring: "Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life.'"[201] The court made only a cursory attempt at supporting this analogy: "[I]f 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."[202] The Seventh Circuit cited two cases for this proposition—*Pratt v. Martineau*[203] and *Bowen v. Florida*[204]—both of which dealt purely with liability for giving a gun to a child, and neither of which mentions or compares this act to donations to terrorist organizations.

The Seventh Circuit majority's analogy of donations to giving a child a gun is clearly "strained."[205] There is no logical link between giving a child a gun and donating funds other than the majority's simple assertion that these are the same thing. There is no explanation of why a child is equivalent to a terrorist, or why a loaded gun is the same as money. The cases cited by the *Boim III* majority actually make this exact point: that a loaded gun, by its nature, is a dangerous instrumentality that must be handled in a different manner than one would handle a neutral object, such as money. As stated in *Pratt v. Martineau* (the first case cited by the Seventh Circuit majority), the

198. *Boim III*, 549 F.3d at 702.

199. 18 U.S.C. § 2331 (2006); *see also supra* Part V.

200. *Boim III*, 549 F.3d at 685.

201. *Id.* at 690.

202. *Id.* at 693 (citing Pratt v. Martineau, 870 N.E.2d 1122 (Mass. App. Ct. 2007); Bowen v. Florida, 791 So. 2d 44, 48–49 (Fla. Dist. Ct. App. 2001)).

203. 870 N.E.2d 1122 (Mass. App. Ct. 2007)

204. 791 So. 2d 44, 48–49 (Fla. Dist. Ct. App. 2001).

205. Saperstein & Sant, *supra* note 25, at 4.

reason negligence can exist for entrusting a gun to a child is because "a 'firearm is a dangerous instrumentality' requiring those dealing with it to exercise a 'heightened' degree of care."[206] The Restatement (Second) of Torts has stated that, because of their "greater . . . danger," guns require "the closest attention and the most careful precautions."[207] "Courts recognize that firearms present extraordinary risks and that those who possess them must exercise an extremely high degree of care."[208] Meanwhile, the *Bowen* case—the other case cited by the Seventh Circuit—appears to be entirely irrelevant. In *Bowen*, the court concluded that, where it was impossible to determine who shot a child, there could be no finding of culpable negligence.[209] The inaptness of this case further supports the view that the Seventh Circuit was looking for justifications to reach a predetermined result.

It goes without saying that, unlike a gun, money is not a "dangerous instrumentality." Money is not inherently dangerous. Courts discussing guns as a "dangerous instrumentality" have explained: "A commonsense corollary to this proposition is that a person with even limited responsibility for or control over a dangerous instrumentality, like a firearm, may have a duty to exercise care in a situation where no such duty would exist if the instrumentality was not considered highly dangerous."[210]

Money is not "highly dangerous" and therefore there is no duty of care regarding money similar to what exists with a loaded gun. This makes sense: a bank should not be sued if someone withdraws money from an ATM and uses that money to buy a gun and kill people. Likewise, a person who gives a panhandler money (even knowing that the panhandler had recently been released from prison) should not be sued if the panhandler uses that money to obtain weapons and then rob and kill someone. Not only is money not a loaded gun, terrorists are not children. The analogy is entirely untethered: other than the assertion that they are alike, there is nothing actually linking the giving of money to giving a loaded gun. Furthermore, unlike the standard of *Pratt v. Martineau* and *Bowen v. Florida*, the standard for liability under the ATA is not one of negligence.[211]

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206. *Pratt*, 870 N.E.2d at 1128 (citing Jupin v. Kask, 849 N.E.2d 829, 838 (Mass. 2006)).

207. RESTATEMENT (SECOND) OF TORTS § 298 cmt. b (1965).

208. Andrew J. McClurg, *Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms*, 32 CONN. L. REV. 1189, 1215 (2000).

209. *Bowen*, 791 So. 2d at 62.

210. Jupin v. Kask, 849 N.E.2d 829, 838 (Mass. 2006).

211. Even the Seventh Circuit majority concedes this point, writing of the liability in cases involving giving guns to children: "That would just be negligence." *Boim III*, 549 F.3d 685, 693 (7th Cir. 2008).

If there were any doubt that the term "dangerous to human life" does not extend to fund transfers, that doubt should be dispelled by the definition of "terrorist activity" in the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iii). As noted above, Section 2339B references not the definition of "international terrorism" given in 18 U.S.C. § 2333 but rather the definition of "terrorist activity" given in the Immigration and Nationality Act.[212] (Again, the fact that Section 2339B avoids citing to the definition of terrorism given in Section 2331 implies that Congress did not intend for Section 2339B to be a basis for ATA civil liability.) The Immigration and Nationality Act defines "terrorist activities" as involving such actions as hijacking, kidnapping, "[a] violent attack upon an internationally protected person," an assassination, and the use of any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger [individuals or property]."[213] Thus, the very definition of terrorism referenced by Section 2339B equates "dangerous" devices with explosives, firearms, and weapons. It would be completely incongruous to include money in this list as a "dangerous device." This is because, according to the principle of *noscitur a sociis*, words in a series should be interpreted in relation to one another.[214] The Supreme Court has called *noscitur a sociis* "an interpretive rule as familiar outside the law as it is within, for words and people are known by their companions."[215] "The maxim *noscitur a sociis* . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."[216] Here, where the term "dangerous device" appears in the midst of a list of weapons, firearms, and explosives, it would be illogical to interpret the phrase "dangerous device" as extending beyond violent objects.[217] Thus, contrary to the *Boim III* decision, giving money should not be considered a "dangerous act" and money is not a "dangerous" object.

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212. *See* 18 U.S.C. § 2339B(a)(1) (2006).

213. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

214. *See, e.g.*, Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003) (citation and internal quotation marks omitted) (stating that words are "known by their companions"); Gutierrez v. Ada, 528 U.S. 250, 255 (2000) ("[A] word is known by the company it keeps.") (citation and internal quotation marks omitted).

215. *Gutierrez*, 528 U.S. at 255.

216. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

217. *Cf. Gutierrez*, 528 U.S. at 255 (despite the seemingly broad scope of the words "any election," the Supreme Court limited the scope of these words to gubernatorial elections because the series of terms in the statute contained many references to gubernatorial elections and none to other elections).

This is not all. The definition of "terrorist activities" in the Immigration and Nationality Act explicitly states that "terrorist activities" do not encompass the use of any "explosive, firearm, or other weapon or dangerous device . . . for mere personal monetary gain."[218] This language was clearly intended to avoid making firearms dealers liable as terrorists for their business operations. In other words, this definition is intended to exclude the profit-focused activities of merchants and third-party vendors. Considering that the definition of terrorism referenced within Section 2339B specifically carves out third-party businesses, it is nothing short of stunning that courts have used this same Section as a basis for extending liability to banks and other third-party businesses.

The problems with the Seventh Circuit's analogy continue. A child who harms others with a loaded gun most likely does so by accident because the object itself is dangerous. A terrorist organization chooses to use money—which is a neutral object—in a way that harms others. The terrorist is an independent actor who breaks the chain of causation. Moreover, even when an individual improperly sells a gun to a minor, and the minor commits murder, the salesperson is not considered an accomplice, much less a murderer. In the case of Mark Manes, who sold guns to the teenagers who committed the Columbine massacre, "officials had no reason to think that Manes knew, much less intended, that the Columbine shootings would occur. Thus, liability for the murders as an accomplice of the two boys was not an option."[219] Courts have concluded that shootings are not proximately caused by selling a gun to a juvenile. In an action against the man who sold a gun to a juvenile mass-murderer, the court held that "[t]he actions of [the murderer] were an independent, intervening cause which broke the necessary chain of causation. . . . [T]hat harm is not sufficiently connected to [the] offense of unlawfully selling a firearm to a minor for this court to consider [the seller's] actions to be the direct and proximate cause of the harm."[220] The same is undoubtedly true when a terrorist organization chooses to misuse money in a violent manner. And if it is inappropriate to hold a direct donor liable for an act of terrorism, it is absurd to hold a bank liable—as a terrorist—for merely processing a transaction that ended up reaching a terrorist group.

To flip the analogy, forcing a bank to pay damages for terrorist acts simply because a terrorist donor transferred money through the bank is akin

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218. 8 U.S.C. § 1182(a)(3)(B)(iii).

219. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 601 (8th ed. 2007).

220. United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah Jan. 3, 2008).

to forcing a bank to pay damages for a shooting just because the killer bought the gun with money withdrawn from the bank.[221] This sort of expansion of the ATA essentially holds a bank liable for potentially hundreds of millions of dollars in damages simply because a murderer purchased a gun with money withdrawn from the bank's ATM.

By extending the ATA civil suit provision to encompass donations, the Seventh Circuit's en banc decision simply writes out of the statute its requirement that the acts at issue be "violent acts or acts dangerous to human life." This requirement of violence is central to the requirements of Section 2333 for good reason. As many scholars have noted, "terrorism" is extraordinarily difficult to define, so much so that a working definition of terrorism has been described as "the Holy Grail of political violence scholarship."[222] Yet, as this very quote reveals, the one aspect of the definition of terrorism that is largely accepted is that terrorsim involves violence. Likewise, although federal laws include many different definitions of "terrorism," nearly all of these either include the word "violent" or else name specific violent acts (such as assassinations and biological attacks).[223] Alex Peter Schmid and Albert J. Jongman's seminal work on the definition of terrorism analyzed 109 definitions of terrorism and found that the single most common concept within these definitions was that of "violence, force" which appeared in 83.5% of all definitions. The next most frequent terms were "political" (appearing in 65% of definitions) and "fear, terror emphasized" (appearing in 51%).[224] No other word category appeared in more than half of the definitions.[225] One might argue that a combination of these three terms—"violence that induces fear for political purposes"—is a

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221. Saperstein & Sant, *supra* note 25, at 4.

222. Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 119 (1996); *see also* OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM xvii (2000); Robert J. Beck & Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 161 (1994); Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249 (2004); James A. R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L L. & POL'Y 1, 10 (2002) (each describing attempts at defining terrorism as tantamount to a search for the Holy Grail); Pamella Seay, *Practicing Globally: Extraterritorial Implications of the USA Patriot Act's Money-Laundering Provisions on the Ethical Requirements of US Lawyers in an International Environment*, 4 S.C. J. INT'L L. & BUS. 29, 50 (2007); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 24 (2006).

223. *See* Perry, *supra* note 222 *passim* (analyzing twenty-two federal definitions of terrorism).

224. ALEX P. SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES, & LITERATURE 5 (2005).

225. *Id.*

decent working definition of terrorism. This is, in fact, very similar to the definition of terrorism in the statute requiring the State Department to prepare annual country reports on terrorism: "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[226]

Legal scholars have likewise considered "violence" to be central to the concept of terrorism. Robert J. Beck and Anthony Clark Arend argue that "[a] terrorist act is distinguished by at least three specific qualities: (1) *violence*, whether actual or threatened; (2) a '*political*' objective . . . and (3) an *intended audience* . . . ."[227] Beck and Arend state that "[v]irtually all formal definitions of terrorism include these essential elements."[228] James Nafziger has stated that "there is little agreement on a definition of terrorism" with the exception of two elements, for which there is "substantial agreement," namely, "the use of violence against innocent persons and the intent to frighten them into action or inaction according to the perpetrator's purpose."[229] Emanuel Gross writes that "the majority of the definitions have a common basis—terrorism is the use of violence and the imposition of fear to achieve a particular purpose . . . ."[230] In any case, with "violence" so central to the definition of terrorism, it is striking that the Seventh Circuit, and courts following the Seventh Circuit, essentially struck the term from the ATA's definition of "international terrorism." To put it another way, the Seventh Circuit managed to isolate the sole aspect of the definition of terrorism upon which nearly all have agreed—the concept of "violence"—and read it out of the statute, so as to extend liability to money transfers. Prior to the Seventh Circuit's creative interpretation of "dangerous acts" to include money transfers, scholars and commentators had simply taken for granted that the ATA required a violent act. Thus, writing in 2004, one scholar stated that the language of the ATA "requires a violent, unlawful act that is done for political purpose."[231]

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226. 22 U.S.C. § 2656f(d)(2) (2006); *see also* Perry, *supra* note 222, at 264.

227. Beck & Arend, *supra* note 222, at 162.

228. *Id.* (citing, *inter alia*, GERHARD VON GLAHN, LAW AMONG NATIONS 347 (1992); JONATHAN INSTITUTE, TERRORISM: HOW THE WEST CAN WIN 9 (Benjamin Netanyahu ed., 1986); OFFICE OF COMBATTING TERRORISM, U.S. DEP'T. OF STATE, PATTERNS OF INTERNATIONAL TERRORISM: 1982 (1983); Oscar Schachter, *The Extra-Territorial Use of Force against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 309 (1989)).

229. Nafziger, *supra* note 222, at 9.

230. Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97 (2001).

231. Perry, *supra* note 222, at 260. This language appears in the context of a discussion of the definition of terrorism within 18 U.S.C. § 921(a)(22). However, the key language is the same as the ATA: "involves violent acts or acts dangerous to human life which would be a

Despite the struggling nature of the Seventh Circuit's analogy of giving money to handing over a loaded gun, it is the foundation upon which "much recent case law has been premised."[232] The ad hoc, results-oriented decision was criticized immediately, including by the three-judge dissent, which accused the majority of "judicial activism at its most plain," motivated by "zeal to bring justice to bereaved parents."[233] The dissenters noted the sympathetic nature of the plaintiffs, which they believed motivated the majority's results-oriented decision: "The murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents. Terrorism is a scourge . . . ."[234] "This is a heart-breaking case. No parent can fail to empathize with Joyce and Stanley Boim . . . . Nothing can bring David Boim back . . . ."[235] Again, as discussed previously, this sort of emotional language simply does not appear in most criminal cases, much less in civil cases, and its presence signals the degree to which courts have been affected by the emotional nature of the terrorism cases. According to the dissent, the *Boim III* majority, out of its desire to reach a certain result, ignored "traditional legal standards" and chose to "re-write tort law."[236]

According to the dissent, the majority got around the Supreme Court's prohibition on judicially-created aiding and abetting liability (that is, secondary liability) by means of the semantics trick of simply calling secondary liability by the name of primary liability. The dissent accused the majority of creating aiding and abetting liability through the backdoor to escape "what the majority believes was Congress's failure in section 2333(a) to authorize the imposition of secondary liability on those who aid or abet terrorist acts or conspire with terrorists."[237] To reach a predetermined result, the majority worked its way

> through a chain of statutes—from § 2333(a) (treble damages action for person injured by an act of international terrorism), to § 2331(1) (definition of international terrorism), to § 2339A (providing material support for something that violates a federal criminal law is itself a crime), to § 2332 (criminalizing the killing of any American citizen outside the United States)—[and based on

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criminal violation if committed within the jurisdiction of the United States." 18 U.S.C. § 921(a)(22) (2000).

232. Saperstein & Sant, *supra* note 25.

233. *Boim III*, 549 F.3d 685, 708–09 (7th Cir. 2008) (Rovner, J., concurring in part and dissenting in part); *id.* at 718–19 (Wood, J., concurring in part and dissenting in part).

234. *Id.* at 718 (Rovner, J., concurring in part and dissenting in part).

235. *Id.* at 719 (Wood, J., concurring in part and dissenting in part).

236. *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).

237. *Id.* at 707.

> this,] concludes that there is *primary* liability under § 2333(a) for someone who donates money "to a terrorist group . . . ."[238]

This chain seems to require a few too many links to be the actual intent of Congress, much less a reasonable basis for imposing primary liability. One might say that this attenuated chain of incorporation is symbolic of the very attenuated causal chain linking the routine processing of wire transfers by financial institutions to violence committed by terrorist actors.

Remarkably, the majority appeared to concede that it was creating aiding and abetting liability through the backdoor. According to the majority, this "chain of incorporations by reference . . . impose[s] [primary] liability on a class of aiders and abettors."[239] In other words, even while recognizing there is no aiding and abetting liability under the ATA, the majority managed to impose liability upon aiders and abettors by calling it primary liability.

Further highlighting the ad hoc, constructed nature of the majority's reasoning, the dissent commented that the "conceptual problems with this approach . . . may help to explain why the plaintiffs have long since abandoned any theory of primary liability and have relied solely on theories of secondary liability . . . ."[240] In other words, even the plaintiffs had given up on their theory of primary liability prior to it being resurrected by the *Boim III* majority. The dissent called the majority's efforts "all the more extraordinary" because it has "gone out on a limb to craft [this] liability standard."[241]

In addition to the many logical flaws in the majority's holding, the dissent also emphasized that this was not as clear-cut a case of terrorist financing as the majority portrayed. "[M]uch of the money . . . provided to Hamas apparently was directed . . . to a variety of zakat committees and other charitable entities, including a hospital in Gaza, that were controlled by Hamas."[242] The dissenters felt uncomfortable with the idea that somebody donating to a charity, such as a hospital, could be held liable for terrorism even if the money was actually used for the hospital, simply because the hospital had links to Hamas. Taken to the extreme, the majority's holding seemed to be that

> even if an independent day care center receives $1 from organization H known to be affiliated with Hamas, not only the day care center but also anyone who gave to H is liable for all acts

238. *Id.* at 721 (Wood, J., concurring in part and dissenting in part).
239. *Id.* at 692.
240. *Id.* at 708 (Rovner, J., concurring in part and dissenting in part).
241. *Id.*
242. *Id.*

> of terrorism by Hamas operatives from that time forward against any and all Americans who are outside the United States.[243]

The dissent called this a "proposition of frightening, and I believe unwise, breadth."[244]

The "bad facts" of the *Boim* case, with its sympathetic plaintiffs and unsympathetic defendants, led to an extremely broad interpretation of the ATA, and it is this "frightening" and "unwise" ruling that has now been turned against third-party financial institutions. Once turned upon banks, the logic of the *Boim III* majority created an extreme result. Any bank found liable for even one wire transfer reaching terrorists would become liable for all terrorist acts committed by that terrorist group, apparently until the end of time. In other words, any finding of liability is an automatic death penalty for the bank—a truly shocking result that could create havoc in the global economy.

As can be seen, the Seventh Circuit issued three separate and contradictory rulings in the *Boim* cases, involving multiple and shifting rationales for permitting ATA claims against donors. The first two opinions of the Seventh Circuit in *Boim* concluded that an ATA claim could seek aiding and abetting terrorism liability notwithstanding the fact that the ATA does not mention aiding and abetting liability. In its own words, the panel reached this conclusion because without aiding and abetting liability, the statute would have "little effect."[245] Actual terrorists "are unlikely to have assets, much less assets in the United States."[246] The finding of aiding and abetting liability is thus admittedly a results-oriented decision (ironically, contradicting the actual intention of Congress). Likewise, the 2008 holding appears results-oriented, and is based upon a "promising" theory of incorporation, an unsupported analogy between terrorists and children, and the creation of aiding and abetting liability through the backdoor.

## VII. THE ATA IS EXPANDED BEYOND DONATIONS TO TERRORISTS

The *Boim III* holding required a lengthy chain of statutory incorporations by reference, playing hopscotch across multiple statutes (2333 to 2331 to

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243. *Id.* at 724–25 (Wood, J., concurring in part and dissenting in part). *But see, e.g.*, Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 457 (2012) (citing cases for the principle that financial contributions to a terrorist group's charitable activities nevertheless serve to support terrorism due to the money being fungible).

244. *Boim III*, 549 F.3d at 725 (Wood, J., concurring in part and dissenting in part).

245. *Boim II*, 511 F.3d 707, 715 (7th Cir. 2007).

246. *Id.*

2339A or 2339B to 2332 to 2333) to reach a desired result. The extreme nature of this ruling was pointed out not only by the dissent but also by federal prosecutors. In *United States v. Simpson*,[247] prosecutors argued that a man convicted of lying to the FBI (about whether or not he intended to travel to Somalia) should receive a sentence enhancement because the lie involved international terrorism under Section 2331(1).[248] Although the 2331(1) definition of "international terrorism" requires that the activities "involve violent acts or acts dangerous to human life," the prosecutors pointed to *Boim III*, where the Seventh Circuit had found acts of "international terrorism" despite the fact that the offenders had "merely" donated money.[249] If donations could be interpreted as "dangerous acts," why not intentional misstatements? Here we see an example of the unfortunate side effects of results-oriented decision-making.

In *Stansell v. B.G.P.*,[250] a group of plaintiffs who had been kidnapped by FARC guerrillas in Columbia sued a company that had made extortion payments to FARC in order to avoid similar attacks against its employees.[251] The theory was that by making extortion payments to FARC, the company was transferring funds to a terrorist group, which *Boim III* had considered a "violent" or "dangerous" act.[252] This example perhaps displays just how far the actual use of the ATA has strayed from its original purpose. As discussed above, the ATA was passed to allow victims the right to sue terrorists in those rare instances where the terrorists or their property were reachable in the United States.[253] Here, by contrast, the victims of FARC terrorist kidnappings are suing the victims of FARC extortion; thus, the victims of FARC extortion end up paying not only extortion, but also legal fees, and possibly damages to FARC's kidnapping victims. This example of victims suing victims reveals the perverse results of expanding the breadth of the ATA's civil suit provision. Following the Seventh Circuit's analogy of money transfers to giving a loaded gun to a child, the *Stansell* court

247. No. CR 10-055-PHX-MHM, 2011 WL 905375 (D. Ariz. Mar. 15, 2011).

248. United States v. Simpson, No. CR 10-055-PHX-MHM, 2011 WL 905375, at *1 (D. Ariz. Mar. 15, 2011)

249. *Id.* at *6. The *Simpson* court rejected this interpretation, however. *Id.* at *7.

250. No. 8:09-cv-2501-T-30AEP, 2011 WL 1296881 (M.D. Fla. Mar. 31, 2011).

251. Stansell v. B.G.P., No. 8:09-cv-2501-T-30AEP, 2011 WL 1296881, at *1–2 (M.D. Fla. Mar. 31, 2011).

252. *Id.* at *6–7.

253. *See supra* Part I.

found that a company that made extortion payments to a terrorist group qualified as assisting terrorists.[254]

Commentators had predicted that courts could expansively interpret the material support statutes in exactly this manner. One group of commentators had forewarned that the material support statutes could be misused so as to target "the payment of ransoms."[255] In *Stansell*, this seemingly absurd interpretation (i.e., allowing one group of terrorist victims to sue another group) came true. This was far from the only instance of questionable lawsuits bursting forth as a result of the creative interpretation of the ATA. Another group of plaintiffs sued the Al Jazeera television network under the ATA for purportedly "televising the precise impact locations in Israel of Hizballah's rockets in order to assist Hizballah with aiming its attacks more accurately."[256] In another case, plaintiffs sued oil companies under the ATA for purchasing oil from Iraq under the United Nations' Oil-for-Food Program during the period of economic sanctions after the first Iraq war. Despite purchasing oil through a specific UN-authorized program, the defendants were sued for terrorist attacks occurring in Israel on the theory that Iraqi leader Saddam Hussein gave money to the families of suicide bombers, thereby encouraging attacks. The plaintiffs claimed that allegedly excessive oil payments could be tied to the terrorist attacks in Israel through Saddam Hussein's actions.[257] While these cases might seem facially absurd, and indeed each was eventually dismissed, they still involved costly litigation for the businesses targeted as defendants. These frivolous suits have come in direct response to courts' willingness to creatively interpret the ATA to provide relief to victims of terrorism.

In the Second Circuit, a string of district court cases adopted the questionable "incorporation by reference" analysis of the Seventh Circuit. As the Second Circuit summarized (without itself taking a position):

> The Seventh Circuit, and several district courts in this Circuit, have concluded that a defendant's violation of the criminal material-support statutes . . . constitutes an act of "international terrorism" within the meaning of section 2331(1). According to

254. *Stansell*, 2011 WL 1296881, at *7. The court also found, however, that the extorted company had not acted with the intention of intimidating the public or influencing the government, and so dismissed on those grounds. *Id.* at *9.

255. Lawrence Rutkowski, Bruce G. Paulsen & Jonathan D. Stoian, *Mugged Twice?: Payment of Ransom on the High Seas*, 59 AM. U. L. REV. 1425, 1439–40 (2010).

256. *See* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 57 n.5 (2d Cir. 2012) (discussing the suit); Kaplan v. Al Jazeera, No. 10 Civ. 5298, 2011 WL 2314783 (S.D.N.Y. June 7, 2011).

257. Abecassis v. Wyatt, 669 F. Supp. 2d 130, 131 (D.D.C. 2009).

> these courts, victims of terrorism therefore may bring civil suits against violators of those statutes under section 2333(a).[258]

As courts have expanded the ATA's civil suit provision, the statute has managed to hurdle several logical barriers. First, the statute was extended beyond violent acts to mere payments of money. Soon, some courts would take a further leap and allow suits to move forward against deep-pocketed financial institutions, imposing massive liability for the alleged failure to halt transfers of money that reached terrorist entities. In *Goldberg v. UBS AG*,[259] the plaintiffs sued UBS, one of the world's largest banks, essentially for failing to stop transfers that allegedly reached terrorists.[260] Emphasizing the extreme results caused by this expansive interpretation of the ATA is the "stunning"[261] statement by the court that "plaintiffs have sufficiently alleged that defendant [bank] UBS committed acts of international terrorism."[262]

This leap from allowing suits against charities for funneling money to terrorists to allowing civil suits against third-party banks for not recognizing that certain transactions are tied to terrorists is a huge expansion of ATA liability in its own right. One early court decision noted this difference:

> [T]he *Boim* [*I*] court required plaintiffs to allege that defendants knew about the terrorists' illegal operations and provided funds with the intent to further those activities. . . . In contrast, plaintiffs . . . allege no facts to suggest that the Bank Defendants intended to further Saddam Hussein's activities.[263]

Some district courts, to their credit, have continued to reject attempts to make international banks act as the financial guarantors of terrorist groups. Thus, a court in New York recently held that "the events giving rise to the physical injuries and deaths for which Plaintiffs seek redress are missile attacks in Israel, not funds transfers in New York."[264] Another problem facing these ATA suits against banks is the problem of standing. A plaintiff only has standing if an injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action

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258. *Licci*, 673 F.3d at 68–69.

259. 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

260. Goldberg v. UBS AG, 660 F. Supp. 2d 410, 427 (E.D.N.Y. 2009)..

261. *See generally* Saperstein & Sant, *supra* note 25.

262. *Goldberg*, 660 F. Supp. 2d at 427.

263. Stutts v. De Dietrich Group, No. 03-CV-5048 (ILG), 2006 WL 1867060, at *5–6 (E.D.N.Y. June 30, 2006).

264. Tamam v. Fransabank SAL, 677 F. Supp. 2d 720, 728 (S.D.N.Y. 2010); *see also, e.g.*, Licci v. Am. Express Bank, Ltd., 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010) (similar language).

of some third party not before the court."[265] Needless to say, it seems self-evident that injuries caused by terrorist attacks are the result of independent actions by the terrorists—and not the result of basic banking activities.

It is doubtful whether the provision of basic banking services should ever be considered the basis of a tort claim for terrorism. The Restatement (Second) of Torts states that one may be liable for the actions of another if one "knows that the other's conduct constitutes a breach of duty and [nevertheless] gives substantial assistance or encouragement to the other."[266] By contrast, as courts have long recognized, "[t]he maintenance of a bank account and the receipt or transfer of funds does not constitute substantial assistance" to criminals who happen to keep accounts at a bank.[267]

### *A. Courts Misrepresenting Congressional Intent*

In contrast to the statute's actual legislative history, courts have claimed that they must provide an expansive interpretation of the ATA in order to fulfill the supposed intentions of Congress. Thus, in *Strauss v. Credit Lyonnais, S.A.*,[268] the court stated: "Because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun. If plaintiffs were required to make such a showing, 2333(a) enforcement would be [so] difficult that the stated purpose would be eviscerated."[269] In *Gill v. Arab Bank*,[270] the court followed other decisions in rejecting aiding and abetting liability, but nonetheless wanted to ensure that plaintiffs would still be able to bring suit in some way, in line with what the court assumed was the original intentions of Congress.[271] The *Gill* court expressed satisfaction that "tort-law concepts might take up much

265. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alteration in original) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)). *But see* Rothstein v. UBS AG, No. 11-0211, 2013 WL 535770, at *8-10 (2d Cir. Feb. 14, 2013).

266. RESTATEMENT (SECOND) OF TORTS § 876(b) (1965).

267. Strauss v. Credit Lyonnais, S.A., No. CV-06-0702 (CPS), 2006 WL 2862704, at *9 (E.D.N.Y. Oct. 5, 2006); Ryan v. Hunton & Williams, No. 99-CV-5938 (JG), 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000); Renner v. Chase Manhattan Bank, No. 98 Civ. 926 (CSH), 2000 WL 781081, at *12 (S.D.N.Y. June 16, 2000); Nigerian Nat'l Petrol. Corp. v. Citibank, N.A., No. 98 Civ. 4960 (MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999); Williams v. Bank Leumi Trust Co., No. 96 Civ. 6695 (LLM), 1997 WL 289865, at *5 (S.D.N.Y. May 30, 1997).

268. No. CV-06-0702 (CPS), 2006 WL 2862704, at *11–12 (E.D.N.Y. Oct. 5, 2006).

269. *Id.* at *18.

270. No. 11-CV-3706, 2012 WL 4026941 (E.D.N.Y. Sept. 12, 2012), *amended and superseded by* Gill v. Arab Bank, PLC, No. 11-CV-3706, 2012 WL 4960358 (E.D.N.Y. Oct. 17, 2012).

271. *Id.* at *5.

of the slack left by the elimination of aiding and abetting as a basis for section 2333(a) liability."[272] The *Gill* court, like others, noted Joseph Morris's testimony that tort law should reach "all the tort-[ ]feasors down the chain" but did not notice his further testimony that this "chain" only extends from "the person who starts spending the money to the person [who] actually pulls the trigger."[273]

Likewise, and as discussed *supra*, the Seventh Circuit majorities each insisted that it was the intention of Congress to cut off the flow of money to terrorists at "every point along the chain of causation"[274] while ignoring the congressional testimony that the "chain of causation" is limited to persons actually involved in the terrorist act. The 2008 majority stated that without an expansive interpretation of the ATA, "[d]onor liability would be eviscerated, and the statute would be a dead letter."[275] The 2002 majority wrote that the ATA had to be read expansively because "a literal reading would lead to a result so bizarre that Congress could not have intended it."[276] These interpretations of congressional intent fly in the face of congressional language that the ATA would be a "symbolic" statute, and misrepresent the testimony of Mr. Morris. In an ATA lawsuit against the unlikely defendant National Westminster Bank, the court insisted that "Congress intended these provisions [of the ATA] to impose[] 'liability at any point along the causal chain of terrorism.'"[277] Here, the court, like other courts, misinterprets the testimony about the "causal chain" as extending to fund transfers. Highlighting the extreme results of this "judicial activism"[278] is one district court's conclusion that "even the 'provision of basic banking services may qualify as material support' [for terrorism]."[279] In the court's own words, banks are potentially liable for hundreds of millions of dollars in damages as international terrorists as a result of "basic banking services." The court claimed to base this expansive ruling upon "[t]he legislative history of the ATA . . . [which] reveal[s] this country's profound and compelling interest in combating terrorism at every level, including

272. *Id.*

273. *Id.* at *21.

274. *See, e.g.*, *Boim I*, 291 F.3d 1000, 1019 (7th Cir. 2002).

275. *Boim III*, 549 F.3d 685, 702 (7th Cir. 2008).

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

277. Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 49 (E.D.N.Y. 2007) (alteration in original) (quoting Weiss v. Nat'l Westminster Bank, PLC, 453 F. Supp. 2d 609, 631 (E.D.N.Y. 2006)).

278. *Boim III*, 549 F.3d at 708–09, 718–19 (Rovner, J., concurring in part and dissenting in part).

279. Weiss v. Nat'l Westminster Bank, PLC, 453 F. Supp. 2d 609, 625 (quoting Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005).

disrupting the financial underpinnings of terrorist networks."[280] Similarly, a separate court decision involving the unlikely banking defendant Crédit Lyonnais also insisted that "basic banking services" could potentially lead to liability for international terrorism.[281]

### *B. Difficulty of Stopping Wire Transfers to Alleged Terrorists*

The expansion of ATA liability to punish banks for not recognizing and halting transfers of money to terrorists is highly problematic given that these wire transfers generally do not carry any overt signs of being connected to terrorists. Terrorists take great precautions to disguise the flow of money. As the Seventh Circuit explained in *Boim I*, "it is illegal to provide financial support to recognized terrorist groups, [and so] the money flows through a series of complicated transactions, changing hands a number of times, and being commingled with funds from the front organizations' legitimate charitable and business dealings."[282] That the terrorists' money laundering rendered their transactions highly confusing was one point upon which the en banc *Boim III* majority and the dissenters agreed. The majority explained that "terrorists and their supporters launder donations through a chain of intermediate organizations."[283] The court described a typical chain of transfers as "Donor *A* gives to innocent-appearing organization *B* which gives to innocent-appearing organization *C* which gives to Hamas."[284] A bank typically only sees a small piece of these transactions, as a single wire transfer often involves multiple intermediary banks. Thus, an instance of money laundering through multiple intermediaries could involve funds flowing through dozens of banks. Moreover, in bank-to-bank transactions, it is often the case that the intermediary bank has little or no information about the entity behind the original transfer or the ultimate beneficiary. Financial institutions deal with hundreds of thousands of transactions per day, and do not have the logistical capability to analyze individual transactions except for when they happen to be flagged by computer systems for further review. Alan O. Sykes's observations about the difficulty of corporations monitoring the misbehavior of employees applies with even greater force here, where the corporations are trying to monitor the potential misbehavior of banking

280. *Weiss*, 242 F.R.D. at 46.

281. Strauss v. Credit Lyonnais, S.A., No. CV-06-0702 (CPS), 2006 WL 2862704, at *12 (E.D.N.Y. Oct. 5, 2006).

282. *Boim I*, 291 F.3d 1000, 1004 (7th Cir. 2002).

283. *Boim III*, 549 F.3d at 701–02.

284. *Id.* at 702.

clients.[285] Just as making corporations vicariously liable for employee misbehavior can do little to discourage that behavior if the corporation cannot actually monitor the employees, so too is there no benefit from making banks responsible for the misbehavior of clients if they cannot actually monitor those clients.[286]

Adding to the extreme nature of these suits, the final recipient of the fund transfers is not a bank account labeled "Al Qaeda" or "Hamas" but rather an individual or entity later alleged to be linked to a terrorist group. In many cases, the plaintiffs seek to hold the defendant banks liable for not realizing that certain individuals or groups were terrorists despite their absence from government terrorist watch lists. For example, Lebanese Canadian Bank and American Express Bank were sued in relation to a series of international wire transfers to an entity "that at all relevant times . . . was not designated as a terrorist organization on official U.S. government lists."[287] The plaintiffs seemingly expect international banks to identify terrorist entities more quickly than the U.S. government's own intelligence agencies. In many cases, even donors to charity groups are unaware that the charities have a connection to terrorism, with one commentator noting that "it is not uncommon for domestic donors to give money without knowing that some of these organizations have ulterior motives to support violence."[288] "The fear of being an unwitting donor to such an organization may be as prevalent a concern as the risk that the government will lump all donors to an ostensible charity as willing donors to terrorist organizations."[289]

As merely one example, a suit against National Westminster Bank alleged that the bank committed acts of international terrorism by maintaining bank accounts for "Interpal, a/k/a Palestinian Relief and Development Fund," even though "Interpal describes itself as a charitable organization." The plaintiffs alleged that this ostensible charity was actually funneling money into a separate organization which in turn was allegedly connected to the Muslim Brotherhood, and through them to Hamas.[290] Even if this lengthy chain of connections is true, one wonders whether it is fair to

285. Sykes, *supra* note 146, 2172.

286. *Id.* at 2186–87.

287. Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 56 n.4 (2d Cir. 2012).

288. Aloke Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 W. NEW ENG. L. REV. 295, 319 (2010).

289. *Id.*

290. Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 36–37 (E.D.N.Y. 2007) (plaintiffs' claims are that Interpal funnels money to the Union of Good, which plaintiffs allege was established by the Muslim Brotherhood, and that this in turn acts as a fundraising mechanism for Hamas).

expect a bank to decipher these connections at the risk of facing billion-dollar judgments and possible bankruptcy.

In a lawsuit against Crédit Lyonnais, the bank attempted to make a similar point, namely, that it cannot be held responsible for failing to see through alleged "front" organizations for terrorists. Even putting aside the issue of whether an ATA claim can be based on the material support provisions, and even putting aside the question of whether the provision of banking services can be considered an act of "international terrorism," the bank argued that any suit alleging the bank had materially supported terrorists should require the plaintiffs to prove the bank actually supplied banking services to *terrorists*—as opposed to providing banking services to non-terrorist intermediaries that passed money along to terrorists. The bank argued that "plaintiffs have failed to adequately allege that Crédit Lyonnais provided material support *directly* to [a foreign terrorist organization,] but rather have alleged only that it provided material support to organizations with alleged ties to the [foreign terrorist organization] HAMAS."[291] Regrettably, in this instance, the court did not seem to understand the bank's argument. The court correctly pointed out in response that terrorist organizations often disguise their identities and that the terrorist organization "could not escape [designation as a foreign terrorist organization] merely by adopting an alias."[292] This is certainly true: the foreign terrorist organization should not be able to escape liability by changing names or using a string of front operations. What is unclear, however, is why a bank should be held liable for failing to see through that string of front operations. The court in *Credit Lyonnais* stated that a bank may be held liable for terrorism as a result of performing banking services for one entity if that entity was then sending money to a separate terrorist organization (in this case, Hamas).[293] The court does not explain—or, apparently, even think to ask—why it is fair or reasonable to expect a bank to see through a string of disguises, including such seemingly harmless entities as the "Orphan Care Society."[294]

When many terrorist groups "apply a veneer of nonviolence"[295] through the use of charity disguises,[296] it is unreasonable to expect third-party

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291. Strauss v. Credit Lyonnais, S.A., No. 11-CV-3706, 2006 WL 2862704, at *10 (E.D.N.Y. Oct. 5, 2006).

292. *Id.*

293. *Id.* at *10–11.

294. *Id.* at *11.

295. Margulies, *supra* note 243, at 457.

296. Chakravarty, *supra* note 288, at 321 n.88.

As reported through a wide range of media sources, terrorist organizations deliberately establish, infiltrate, or otherwise exploit charitable organizations

companies to see through those disguises—especially when the charities' own donors and even the intelligence agencies of the U.S. government have not been able to do so. What is more, the punishment for failure to see through these front group disguises is massive civil liabilities that could destroy the bank. The injustice here is even more apparent when one considers that corporations subject to suit in the United States "face potentially *discriminatory* liability standards, imposing the costs of litigation and any resulting judgments on them for alleged conduct that actual and potential competitors can undertake without fear of liability."[297]

## VIII. THE HARMS CAUSED BY EXPANSIVELY INTERPRETING THE ATA

On a basic level, interpreting the ATA to reach not only terrorists but also third-party companies and banks violates the clear language and intent of the statute. If Congress wishes for the ATA to extend to non-terrorist third parties, it should be given the opportunity to amend the ATA in this way.

Additionally, there is another danger with punishing banks for processing routine wire transfers. If courts begin to allow the imposition of massive damages upon a bank for allowing a wire transfer that ended up in the hands of a terrorist group, it is not hard to foresee banks simply refusing to do business with certain classes of people, including those belonging to the "wrong" religion, country, or ethnic group. Crédit Lyonnais is simultaneously facing suit in the United States under the ATA for having maintained accounts for a Muslim charity (with alleged links to terrorism), while also facing threatened litigation in France for "religious discrimination" due to the bank's closing of those same accounts.[298]

Under the Seventh Circuit's *Boim III* rationale, it seems that a bank that has been found liable for one improper transfer that reached a terrorist group could well be sued based on that transfer for all subsequent attacks

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> to build terrorist support networks . . . such as the exploitation by Lashkar e Tayyiba (a.k.a. Jamaat-ud-Dawa) and other terrorist entities/charitable fronts of relief efforts following the October 2005 earthquake in South Asia, the critical role of Hamas-associated charities in building popular support in the Palestinian territories for the terrorist organization, and Hezbollah's substantial control of charitable distribution networks in southern Lebanon . . . .

297. Sykes, *supra* note 146, at 2194 (emphasis in original). Indeed, it may be that the plaintiffs in these cases intend to force banks to take on the role of intelligence agencies and enforcement agencies. I thank Norman Abrams bringing this specific point to my attention.

298. Strauss v. Crédit Lyonnais, S.A., No. CV-06-0702 (CPS), 2013 WL 751283, at *5 (E.D.N.Y. Feb. 28, 2013); Saperstein & Sant, *supra* note 25 (discussing problem generally).

committed by that terrorist group. As the dissent summarized, "[t]he majority itself acknowledges that under its approach a contribution to a terrorist organization in 1995 might render the donor liable for the murder of an American citizen committed by that organization fifty years later."[299] This would effectively impose a death penalty upon any bank or financial institution ever found liable under the ATA for even a single transaction. Such extreme results seem unfair in their own right. When combined with the massive potential liabilities in ATA cases—some suits seek hundreds of millions of dollars—the impact of these ATA claims may be for international banks to avoid any transactions with disfavored ethnic or religious groups, or troubled regions. International banks already operating in troubled regions may well be driven out of business (or forced to abandon the region) to be replaced with banks that simply evade entirely the international sanctions regime.

In fact, this has already happened to some extent, with Hamas (for example) establishing the Islamic National Bank in the West Bank to avoid sanctions.[300] Alan O. Sykes notes an instance of litigation against a Western company, Talisman Energy, in which it was alleged that the company, by doing business in the Sudan, was effectively supporting human rights violations in the Sudan. Even though the Second Circuit eventually dismissed the lawsuit, the cost and reputational damage of the suit caused Talisman Energy, a Canadian company, to pull out of operations in the Sudan, whereupon it was replaced by non-Western companies. Alan O. Sykes notes that the effect of the suit was to replace a Canadian company with a Chinese company, "all in the name of human rights. There is little reason to think that such developments will improve the human rights situation in Sudan."[301]

When applied to the situation of financial institutions and the ATA, the likely result is that the ATA will drive legitimate international banks out of troubled regions, with "terrorist-controlled banks" taking over their market

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299. *Boim III*, 549 F.3d 685, 710 (7th Cir. 2008) (Rovner, J., concurring in part and dissenting in part); *see also id.* at 699–700.

> To the objection that the logic of our analysis would allow the imposition of liability on someone who . . . contributed to a terrorist organization in 1995 that killed an American abroad in 2045, we respond . . . that the imposition of liability in the hypothetical case would not be as outlandish, given the character of terrorism, as one might think. . . . Terrorism campaigns often last for many decades. . . . Seed money for terrorism can sprout acts of violence long after the investment.

300. *See* Anup Kaphle, *Seeing War in Gaza Through Our Correspondent's iPhone Lens*, WASH. POST (Nov. 22, 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/22/photos seeing war in gaza through-our-correspondents-iphone-lens/.

301. Sykes, *supra* note 146, at 2195–96.

share. Alan O. Sykes makes this exact point in the context of the Alien Tort Claims Act, writing that "corporate liability may simply cause the diversion of business opportunities to firms not subject to suit in the United States . . . while accomplishing nothing to reduce misconduct abroad."[302] But even if one assumed that terrorist banks did not fill the vacuum, the result would be that regions with high levels of terrorism would lose all access to banks, even for legitimate businesses. (After all, when a single mistaken transaction could destroy an international bank, banks would presumably refuse to undertake any transactions in the region rather than run such an extreme risk.) The ironic result would be to create an enclave outside the global financial system, where business opportunities do not exist. Legitimate businesses could not realistically succeed with no means of accepting payments, maintaining bank accounts, or interacting with the outside world. Would creating such a situation in an already troubled region result in more or less terrorism?

There is also the problem that allowing civil suits for processing donations could lead to massive punishments for minor, unintentional failings by minor employees. Norman Abrams has written that a "statute that simply made knowing aid a basis for serious criminal liability would be likely to meet opposition on the ground that it went too far, possibly reaching the 'minor employee' or the 'vendor who supplies materials readily available upon the market.'"[303] As Alan O. Sykes points out, "[e]ven if corporate agents have committed bad acts and even if other corporate agents have perhaps been neglectful in failing to prevent those bad acts, the diffuse shareholders of a modern public corporation generally bear no culpability and are not an appropriate target of 'punishment.'"[304] The extreme nature of imposing massive liability in these scenarios is captured by the fact that "50 years ago the American Law Institute rejected even a standard of knowledge plus *substantial* aid."[305] Similarly, in a slightly different context, Alan O. Sykes has written that the standard should be "a combination of substantial assistance, knowledge, and an inability of the primary wrongdoer to turn elsewhere for the same assistance."[306] Courts that have broadly interpreted the material support statutes "would effectively

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302. *Id.* at 2165.

303. Abrams, *supra* note 8, at 18 (internal citations omitted).

304. Sykes, *supra* note 146, at 2182.

305. Abrams, *supra* note 8, at 19 (emphasis in original).

306. Sykes, *supra* note 146, at 2203. Note that Alan O. Sykes was discussing what the standard should be under the Alien Tort Claims Act. However, as discussed below, in Section VIII, the Alien Tort Claims Act and the Anti-Terrorism Act are extremely similar in all relevant ways.

allow everyday minor acts to be covered by one of these statutes,"[307] essentially imposing a death penalty upon banks for minor failings. "Similarly . . . any kind of involvement with an FTO [foreign terrorist organization] or an accused terrorist could amount to providing 'material support' without any consideration of the nature of the involvement or the aid provided. . . . [T]he most mundane forms of communication and cooperation would fall within the statute."[308] Such severe results are in tension with the way material support is normally treated, which is to punish it as a minor offense, if at all. For example, in New York, criminal facilitation of a felony is a misdemeanor.[309] In addition, as described *supra*, Section 2339B(a)(2) punishes the accidental release of funds to a terrorist entity as a mere "violation" and a $50,000 fine.[310] Creatively interpreting the ATA to extend liability to banks for the acts of terrorists would devastate entire multinational companies, harming thousands of employees, solely for the mistake of a minor employee in not spotting a transfer as being possibly connected to a terrorist entity.

Norman Abrams has argued that there should not be liability at all where "the putative accomplice may have knowledge of the principal's criminal purpose but have another motive for providing aid, such as when she is a vendor in the business of selling goods or providing services."[311] In these cases, there may be a public policy concern that imposing liability "impose[s] too great a burden on commerce in comparison with the benefits in crime prevention."[312] This could also cause "the door of criminal liability [to] open too wide—exposing the general population to the risk of complicity charges and a jury verdict against them whenever they might be viewed as having been aware of the criminal purposes of those to whom they provide some aid."[313] And in fact, as discussed previously, the definition of "foreign terrorist organization" referenced in Section 2339B specifically excluded for-profit businesses selling weapons and dangerous devices.

During the Nuremberg trials, the court set the principle that, "[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a

307. Abrams, *supra* note 8, at 19.
308. *Id.*
309. *Id.* at 10 (citing N.Y. PENAL LAW § 115.08 (McKinney 2004)).
310. *See supra* note 169 and accompanying text.
311. Abrams, *supra* note 8, at 24.
312. *Id.*
313. *Id.* at 25.

crime."[314] In its Nuremberg trial, Dresdner Bank was accused of providing loans to businesses "knowing that the funds would be used to finance enterprises that employed slave labor."[315] The Nuremberg decision held: "A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise."[316]

Unfortunately, with the advent of ATA litigation, "the type of broad interpretation . . . approved by some . . . courts" has "move[d] the definition of material support strongly in the direction of simply 'support,' effectively eliminating the idea that the aid must be substantial or material."[317] This is directly in contrast to traditional conceptions of liability, which have been "reluctan[t] simply to extend a knowledge-plus-aid approach to complicity or complicity-like crimes. Some additional indication of culpability, such as substantial aid or other limiting factor, has usually been required."[318] There should not be "liability based on knowing aid alone."[319]

Norman Abrams was focused on the use of the material support statutes as criminal statutes, and so he emphasized the importance of prosecutorial discretion. Only through the exercise of prosecutorial discretion would the "net of criminal liability" not "spread too wide."[320] "Given the wide discretion left to prosecutors whether to charge, the risk of prosecution could extend far beyond those who have actual knowledge."[321] As a specific example of the need for prosecutorial discretion, Norman Abrams cited the case of parishioners who donate food to a group that turns out to have terrorist ties.[322] Prosecutors should not charge all entities that provide monetary support: "[W]hen the government prosecutes donors to [foreign terrorist organizations] for providing support consisting of 'currency or monetary instruments,' whether that support is 'substantial' will depend on the amount provided, the size and nature of the organization, and similar

314. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (quoting United States v. von Weizsaecker (*The Ministries Case*), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 308, 622 (William S. Hein & Co., Inc. 1997) (1949)).

315. *Id.*

316. United States v. von Weizsaecker (*The Ministries Case*), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 308, 622 (William S. Hein & Co., Inc. 1997) (1949).

317. Abrams, *supra* note 8, at 20.

318. *Id.* at 24.

319. *Id.* at 24–25.

320. *Id.* at 18–19.

321. *Id.* at 25.

322. *Id.*

factors. . . . [T]he aid will [not] be substantial in each and every instance."[323] By turning the material support statutes into a basis for civil suits, courts have eliminated the check of prosecutorial discretion. Now, well-funded groups can bring suits against as many defendants as they like, with virtually no check at all.[324]

To fully appreciate Norman Abrams' concern about punishing businesses as if they were terrorists, one need only recall that lawsuits and reputational damage from the Lockerbie bombing helped lead to the collapse of Pan Am, going from America's largest airline to a defunct entity within a few years. To economically destroy banks as "punishment" for the acts of third-party terrorist groups is not only unfair and economically destructive, it appears to be an instance of slicing off one's nose to spite one's face: that is, wrecking economic destruction upon the global financial system in response to violence by individuals largely outside this system.

Nor should one overlook the harm caused by unfairly smearing a financial institution and its employees as "international terrorists." For the individuals laboring honestly on behalf of an international bank, it is personally painful to be tainted for supposed involvement in the crimes committed by terrorists. As one circuit judge noted, the mere word "terrorism" carries "far-reaching connotations," and is as emotionally charged as the word "treason" was at the time of the Constitutional Convention.[325] One bank employee informed me that being accused of allowing money to reach terrorists was equivalent to being accused of child molestation. Alan O. Sykes notes that the harm "suffered by firms subject to discriminatory liability is not limited to their litigation costs plus any actual judgments. Allegations of complicity in human rights abuse and similar conduct can seriously damage corporate reputations."[326]

When claims are brought against international banks, and the banks are unable to gather evidence because of "an undeveloped legal system that does not, or cannot, cooperate with discovery or . . . a government that is hostile to the litigation and associated discovery," it can be difficult to defend even meritless claims. Moreover, "when information is poor, juries may be more inclined (and able) to indulge any predilections and biases. . . . Trial lawyers are all too familiar with the problems that can arise

323. *Id.* at 18–19.

324. *See, e.g.*, Shurat HaDin Israel Law Ctr., http://www.israellawcenter.org/page.asp?id=335&show=reports2 (last visited Oct. 12, 2012) (describing its mission as "The Civil War on Terror" and as "Lawfare: Fighting Back").

325. United States v. Graham, 275 F.3d 490, 537 (6th Cir. 2001) (Cohn, J., dissenting); *see also* Perry, *supra* note 222, at 274 (citing this language).

326. Sykes, *supra* note 146, at 2195.

when the defendant is a wealthy, faceless corporation and the plaintiff presents as a sympathetic individual." The result is that innocent defendant corporations may "settle for substantial sums even in weak cases against them."[327]

### *A. An Expansive ATA Can Be Misused Domestically, and Replicated Abroad*

Courts creatively justifying the expansion of the ATA have done so out of sympathy for victims of terrorist attacks. For the most part, the plaintiffs in these suits have been victims of terrorist attacks in Israel.[328] Yet the same justifications for ATA liability can be applied in the opposite direction in suits against Israeli institutions and Americans doing business there.[329] At the time of the passage of the ATA, Alan J. Kreczko, the deputy legal advisor of the Department of State, warned that some of the practices of the British and Israeli "governments in Northern Ireland and the West Bank respectively have been criticized by some American groups as 'terrorism'"[330] and that because of the threat of misuse, the ATA should be crafted in a restrictive manner. He explained that unless the ATA was limited in scope, "most litigation will be brought against officials of friendly governments."[331] In conjunction with this analysis, he noted the reality that "[f]ar more British or Israeli officials travel to the United States than Iraqi or Syrian officials."[332] In other words, individuals and entities from friendly countries are far more likely to have funds in the United States available for attachment. Courts sympathetic to the plight of victims of terrorism in Israel have unwittingly undone these congressional efforts to craft restrictive ATA language.

Civil suits have already been attempted against Israeli General Moshe Ya'alon for the shelling of Qana.[333] In another case, a group of Palestinians, including U.S. citizens, sued Israeli leaders, Israeli settlers, and American

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327. *Id.* at 2190–91.

328. *See* Shurat HaDin Israel Law Ctr., *supra* note 324 (listing twenty-one civil suits the Israel Law Center has financed against entities with purported relationships to terrorism, including such seemingly unlikely defendants as Crédit Lyonnais, National Westminster Bank, UBS, and American Express Bank).

329. *See, e.g.*, Schupack, *supra* note 62, at 207.

330. *Hearing on S. 2465*, *supra* note 40, at 5 (statement by Alan J. Kreczko, Deputy Legal Adviser, Department of State).

331. *Id.*

332. *Id.*

333. Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

supporters of Israel for alleged genocide, war crimes, and conspiracy.[334] That case was originally brought under RICO and the Alien Tort Claims Act, but the plaintiffs later attempted to amend the complaint to add an ATA claim.[335] The family of Rachel Corrie, a young American woman killed when Israeli forces ran over her body with a bulldozer, sued Caterpillar for selling the bulldozers to Israel.[336] Rachel Corrie's family argued that the Israeli forces intentionally killed her, emphasizing that she had worn an orange, high-visibility jacket and was using a megaphone.[337] The family also sued in Israeli court, seeking one dollar in symbolic damages.[338] (Incidentally, this example illustrates the point made by the Klinghoffer family decades earlier: many victim families seek to bring suits for purely symbolic reasons, and thus a "symbolic" ATA is perfectly coherent.)

Perhaps even more disconcerting than the threat of ATA litigation running amuck against non-terrorist companies, individuals, and friendly entities is the danger that other countries will create their own version of the ATA. These foreign versions of the ATA are certain to be far less favorable to U.S. interests than the ATA itself has been. Iran has already created a statute allowing individuals to sue the United States for acts of "terrorism."[339] Many of the world's governments are far more critical of Israel than is the United States.[340] Should these governments create their own parallel ATA legislation, these countries may be hospitable to suits against Israeli and American companies and individuals for purported acts of terrorism against Palestinians.

At the time of the ATA's passage, the Department of State noted that "[u]se of the U.S. judicial system to bring charges of terrorism against foreign states or officials has obvious potential to create serious frictions

334. Doe I v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005).

335. *Id.* at 119 n.11.

336. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1023–24 (W.D. Wash. 2005), *aff'd* 503 F.3d 974 (9th Cir. 2007).

337. *Rachel Corrie: Court rules Israel not at fault for death*, BBC NEWS (Aug. 28, 2012), http://www.bbc.co.uk/news/world-middle-east-19391814.

338. *Id.*

339. Michael T. Kotlarczyk, Note, *"The Provision of Material Support and Resources" and Lawsuits Against State Sponsors of Terrorism*, 96 GEO. L.J. 2029, 2045 (2008).

340. *See, e.g.*, *Israeli settlements: US vetoes UNSC resolution*, BBC NEWS (Feb. 18, 2011), http://www.bbc.co.uk/news/world-middle-east-12512732 (noting that the United States vetoed a resolution condemning Israeli settlements despite the support for the resolution of all 14 other members of the Security Council, and the sponsorship of the resolution by "at least 130 countries").

and tensions with other nations."[341] "We would be concerned about the reciprocal implications. . . . Such legislation could lead courts in hostile states to entertain suits alleging that legitimate U.S. military activities constitute 'terrorism.'"[342] American companies may be sued in foreign countries for purported support for various U.S. policies. A recent publication notes that "Congress had good reason to be cautious about the range of defendants ensnared by the ATA, including the fear that other nations would allow similar claims to be brought against U.S. entities for merely processing transactions."[343] In its decision dramatically curtailing Alien Tort Claims Act, the Supreme Court commented upon "the danger of unwarranted judicial interference in the conduct of foreign policy," which are concerns "all the more pressing when the question is . . . conduct within the territory of another sovereign."[344]

Emblematic of the foreign relations problems created by expansive interpretations of the ATA is one recent suit in the United States against a French bank for allowing an organization (CBSP) to maintain a bank account. The French bank emphasized that the CBSP had been investigated three times by the French government and that each time the French government concluded that the CBSP was not a terrorist organization—and indeed, France continues to take the position that the CBSP is not a terrorist organization. Nevertheless, the U.S. court found that "the fact that the French government has not found CBSP to be a terrorist organization is not dispositive of the question whether the bank knew that CBSP was a terrorist organization under the standards of this country [i.e., the United States]."[345] If the United States is willing to possibly saddle French banks with damages claims in the hundreds of millions of dollars simply for allowing entities to maintain bank accounts when the French government itself has concluded the entities are legitimate, it is not hard to imagine foreign governments

341. *Hearing on S. 2645*, *supra* note 40, at 3 (statement by Alan J. Kreczko, Deputy Legal Adviser, Dep't of State).

342. *Id.* at 4.

343. Saperstein & Sant, *supra* note 25, at 4. As the article notes, "a relatively repressive government might choose to force U.S. companies to compensate 'victims' of local dissident groups." *Id.*

344. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013) (slip op. at 5–6).

345. Strauss v. Crédit Lyonnais, S.A., No. CV-06-0702 (CPS), 2006 WL 2862704, at *15 (E.D.N.Y. Oct. 5, 2006); *see also* Strauss v. Crédit Lyonnais, S.A., No. CV-06-0702 (CPS), 2013 WL 751283, at *13, 32 (E.D.N.Y. Feb. 28, 2013) ("[N]either France nor the European Union have ever sanctioned CBSP or charged it with supporting terrorists, and French authorities cleared CBSP of any crimes . . . [but this] does not mean that CBSP was not supporting a terrorist organization for purposes of the ATA"; "CBSP still is a lawfully registered charity in France.").

retaliating with similar, economically destructive policies of their own. During the ATA hearings, Senator Strom Thurmond expressed concern about foreign governments taking retaliatory action as a result of the bill.[346] There have already been suits filed against Barack Obama and other officials for supposedly committing acts of terrorism under the ATA, and while these cases have been dismissed, they confirm that suits targeting U.S. behavior as "terrorism" are not merely theoretical.[347]

Foreign nations may well find the ATA to be deeply offensive in that it purports to regulate criminal conduct occurring in foreign nations. In the case of China, for example, there are historical influences that make the ATA especially distasteful. During the 1800s and early 1900s, Western nations imposed "unequal treaties" upon China, which (among other things) stated that Westerners who committed crimes within China could not be punished by the Chinese government, but would instead be handled by the Western powers themselves.[348] The ATA, in many ways, presents a return to the unequal treaties, with the U.S. government handling litigation over crimes occurring abroad, and purporting to adjudge the foreign policies of those other nations. As Michael D. Ramsey writes in the context of the Alien Tort Claims Act, which (as discussed below) is similar in many ways to the ATA, "the United States' purported assertion of legislative jurisdiction over events having no connection to it is viewed with doctrinal suspicion and outrage."[349] Alan O. Sykes notes that "extraterritorial application of the statute . . . threatens to offend foreign sovereigns."[350] U.S. attempts to litigate events occurring abroad could "precipitate[] a strategic reaction by foreign sovereigns."[351]

Even if other countries do not retaliate against U.S. companies by creating their own expansive "terrorism" statute, there is the problem that foreign governments may not recognize civil judgments under the ATA against multinational corporations. Foreign countries may reject enforcement of judgments that would require banks to pay hundreds of millions in damages simply because an independent terrorist group used

346. C-SPAN television broadcast, *supra* note 25.

347. *See, e.g.*, Hogan v. United States, No. 10-Civ-1093, 2010 WL 2612612, at *1 (D.D.C. June 29, 2010).

348. For in-depth discussion of the unequal treaties, see, e.g., GARY L. SCOTT, CHINESE TREATIES: THE POST-REVOLUTIONARY RESTORATION OF INTERNATIONAL LAW AND ORDER (1975); PETER WESLEY-SMITH, UNEQUAL TREATY 1898–1997; CHINA, GREAT BRITAIN AND HONG KONG'S NEW TERRITORIES (1998).

349. Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361, 361 (2001).

350. Sykes, *supra* note 146, at 2178.

351. *Id.* at 2192.

these banks prior to committing an act of violence.[352] "The most effective reform to the current system of civil litigation regarding terrorism actually may be a reduction in its scope."[353]

### B. *Parallel Legislation Shows That the ATA Was Intended To Have a Narrow Scope*

This concern that an overly expansive interpretation of the ATA could harm U.S. international relations is confirmed by the legislative history of a number of related statutes. When Congress enacted the terrorism exception to the Foreign Sovereign Immunities Act, a provision that is conceptually similar to the ATA,[354] it did so in an extremely limited manner. "While such legislation had long been sought by victims' groups, it had been consistently resisted by the executive branch. Executive branch officials feared that the proposed amendment to FSIA might cause other nations to respond in kind."[355] Part of the "delicate legislative compromise"[356] was that "only a defendant that has been specifically designated by the State Department as a 'state sponsor of terrorism' is subject to the loss of its sovereign immunity" and "even a foreign state listed as a sponsor of terrorism retains its immunity unless (a) it is afforded a reasonable opportunity to arbitrate . . . and (b) either the victim or the claimant was a U.S. national." Currently, only four countries are listed as state sponsors of terror.[357] It seems unlikely that the same Congress that allowed suits to proceed only against specifically designated terrorist nations, and even then allowed those claims to proceed only under certain conditions, would have intended to allow third-party financial institutions to be sued as if they were terrorists.[358]

It may be instructive to compare the banks being scapegoated for terrorist attacks with the punishment meted out to actual terrorist states. In *Certain Underwriters at Lloyds London v. Great Socialist People's Libyan*

352. Robbins, *supra* note 49, at 1254.

353. *Id.* at 1255.

354. For example, the theory of passive personality is used as the justification for the assertion of extraterritorial jurisdiction in both the ATA and the FSIA's terrorism exception. *See Id.* at 1218.

355. Price v. Socialist People's Libyan Arab Jamahirya, 294 F.3d 82, 92 (D.C. Cir. 2002) (citing, *inter alia*, ALAN GERSON & JERRY ADLER, THE PRICE OF TERROR 212–16 (2001); H.R. Rep. No. 102-900, at 3–4, 11 (1992)).

356. *Id.*

357. *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm (last visited Feb. 16, 2013); *see also* Robbins, *supra* note 49, at 1249.

358. Saperstein & Sant, *supra* note 25, at 4.

*Arab Jamahiriya*,[359] the plaintiffs sued Libya (among others) for directly sponsoring a terrorist hijacking by the Abu Nidal Organization and for specifically providing the hijackers with "a variety of monetary, material, diplomatic, and logistical support."[360] Libya was among the handful of specifically designated terrorist states, and it did not lack an arbitration opportunity, therefore, the suit could theoretically proceed. Nevertheless, even in this case, the action against Libya was dismissed because claims against Libya had been resolved through the Libyan Claims Resolution Act.[361] As this example demonstrates, claims against actual terrorist states rarely proceed, and when they do, they tend to result in symbolic judgments. By contrast, the terrorist claims against banks—which merely processed banking transactions—have the potential to destroy centuries-old institutions, bankrupt the world's financial institutions, and throw tens of thousands of employees out of work—all for the actions of a third party.[362]

Similarly, one can look to the Torture Victim Protection Act, because (as the Supreme Court put it) "the very same Congress that enacted the TVPA also established a cause of action for U.S. nationals injured 'by reason of an act of international terrorism.'"[363] "[T]he Departments of State and Justice opposed the State Sponsor of Terrorism Amendment to the FSIA out of concern that it would interfere with the executive branch's conduct of foreign policy and make the United States an outlier among the international community."[364] Justice Breyer noted that Congress was concerned about a potential "flood of lawsuits" and so carefully circumscribed the TVPA to require "that an individual has to identify his or her precise torture[r] and they have to be both in the United States."[365] It would be remarkable if the same Congress that limited lawsuits against torturers by requiring, among other things, that the plaintiffs identify the

359. 677 F. Supp. 2d 270 (D.D.C. 2010).

360. Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya, 677 F. Supp. 2d 270, 272 (D.D.C. 2010).

361. *Id.*

362. It may also be worth comparing the present suits against international banks to the fate of suits against actual alleged terrorist groups. In one suit in response to a terrorist bombing, the terrorist organization that allegedly claimed responsibility for the attack won on a motion for summary judgment because the claim of responsibility was hearsay, and an individual who had admitted to planting the bomb claimed he hadn't actually exploded it. *See* Estate of Parsons v. Palestinian Auth., 715 F. Supp. 2d 27, 31–32 (D.D.C. 2010).

363. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1707 (2012).

364. Schupack, *supra* note 62, at 236.

365. *Mohamad*, 132 S. Ct. at 1711 (Breyer, J., concurring) (citing *Hearing on S. 1629 et al. before the Subcommittee on the Judiciary*, 101st Cong. 75 (1990)).

precise torturer, nevertheless intended for plaintiffs to sue international companies as terrorists for merely processing transactions.[366]

This is not the first time that a statute allowing symbolic judgments for international claims was converted by aggressive plaintiffs lawyers into a means of suing deep-pocketed corporations. The Alien Tort Claims Act states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[367] The Alien Tort Claims Act of 1789 "was little used until 1980," whereupon suits premised on this statute began to "often result[] in enormous though entirely symbolic awards."[368] These "symbolic awards . . . generated little controversy until human rights lawyers started to sue multinational corporations that they contended had aided in human rights violations."[369] Much like the ATA, the Alien Tort Claims Act is often based on claims that the corporation aided and abetted wrongful conduct by others.[370] Like the ATA, the Alien Tort Claims Act involved a dormant statute used in suits against foreign corporations, a use that, "quite clear[ly] . . . its drafters did not have in mind."[371] Also similar to the ATA is the "sheer number of controverted points upon which corporate ATCA litigation rests."[372] Michael D. Ramsay has argued that the "expansive application of ATCA liability [resulted from] judicial sympathy [toward victims of human rights violations]."[373] An intriguing similarity between the ATA and the ATCA is that both received impetus from expansive decisions by the Seventh Circuit's Judge Posner (the author of the *Boim III* decision). Alan O. Sykes describes Judge Posner's Alien Tort

366. *See also, e.g.*, Peter Schuyler Black, Kadic v. Karadzic*: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281 (1996) (discussing "the policy decision to limit potential TVPA defendants to state actors" and the fact that international human rights crimes "are not difficult to prosecute within the jurisdiction in which they were committed" and so they should only give rise to U.S. litigation in cases where the crimes are "committed or condoned by a state").

367. 28 U.S.C. § 1350 (1948); An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

368. Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, at A1; *see also* Black, *supra* note 366 (noting that the ATA had only been cited once in 150 years prior to the Second Circuit's 1980 *Filartiga* decision).

369. *Id.*

370. Sykes, *supra* note 146, at 2162.

371. Ramsey, *supra* note 349, at 362–63; *see also* Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013) (slip op. at 8–10) (finding that "the historical background against which with the ATS was enacted . . . provide no support for the proposition that Congress expected causes of actions to be brought under the statute" for such a broad range of conduct).

372. *Id.* at 364.

373. *Id.*

Claims Act decision as "essentially embrac[ing] all of the arguments for corporate liability."[374]

In 1997, a federal district court in California held that a corporation—Unocal—could be sued for human rights abuses perpetrated by Myanmar's military, allegedly on the company's behalf.[375] In the following years, there has been "an enormous increase in litigation against corporate defendants under the U.S. Alien Tort Statute."[376] One of the defenders of suits premised on the Alien Tort Claims Act did so on the basis that no actual damages had been paid up until that time: "The corporate hysteria about the Alien Tort Claims Act is really something to see. We're talking about a litigation trend that has led to zero cents in damages, and based on this they want the statute repealed?"[377] This response is puzzling, because it implies that companies should simply continue paying massive legal fees defending suits for actions committed by others and that they should not take any action to repeal or change a problematic law until some have been bankrupted by judgments.[378]

On October 1, 2012, the Supreme Court heard oral arguments regarding the proper scope of the Alien Tort Claims Act, and on April 17, 2013, the Court held that the ATCA does not provide a cause of action "for violations of the law of nations occurring outside the United States." Moreover, "even where the claims touch and concern the terroritory of the United States, they must do so with sufficient force . . . ."[379] During oral argument, Justice Kennedy highlighted the problematic nature of civil suit provisions that allow claims against defendants for torts committed elsewhere: namely, that foreign countries could subject U.S. corporations to the same treatment. He pointedly asked, "if a U.S. corporation commits an international law violation in the United States, [can] that U.S. corporation . . . be sued in any court in the world?"[380] The expansive interpretation of the ATA exactly

374. Sykes, *supra* note 146, at 2176.

375. Doe I v. Unocal Corp., 963 F. Supp. 880, 884 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932, 947 (9th Cir. 2002).

376. Sykes, *supra* note 146, at 2162.

377. Liptak, *supra* note 368, at A1 (quoting Harold Hongju Koh).

378. In addition, it should be noted that corporate defendants had already paid out settlements in order to put an end to Alien Tort Claim Act litigations. *See, e.g.*, Wiwa v. Shell Petrol. Dev. Co. of Nigeria, 335 F. App'x 81 (2d Cir. 2009); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).

379. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013) (slip op. at 14); *see also* Jess Bravin, *Justices Probe 'Alien Tort' Law*, WALL ST. J., Oct. 1, 2012, at A4 (describing the oral argument).

380. Transcript of Oral Argument at 5, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 569 U.S. __ (Apr. 17, 2013); *see also Kiobel*, 569 U.S. __, slip op. at 13 ("[A]ccepting petitioners' view would imply that other nations, also applying the law of nations, could hale

mirrors what has occurred with the Alien Tort Claims Act.[381]

An example of the problems caused when U.S. courts attempt to serve as the world's arbiters took place in 2007, when the Second Circuit, in an ATCA case, permitted "three class actions on behalf of all persons who lived in South Africa between 1948 and the present and who suffered damages as a result of apartheid to go forward in a United States court against American, Canadian, and European corporations that sold goods and materials or made loans to the Union of South Africa during the apartheid era."[382] The decision ignored "the vigorous objections of the United States, its allies, and, most notably, the Republic of South Africa."[383] In striking down extraterritorial application of the ATCA, and limiting its application domestically, the Supreme Court noted "recent objections . . . by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom" and commented that the Alien Tort Claims Act appears to have generated "diplomatic strife."[384]

In a recent case involving the Terrorism Risk Insurance Act, the amicus brief by the United States criticized a district court that had expansively interpreted the text to provide victims with damages, describing this as "improperly disregard[ing] the legislative determination, thereby not only departing from the statute's text but also causing harms including the imposition of potentially heavy costs on non-terrorist property owners whom Congress did not contemplate as sources for collection."[385] If one replaces the phrase "property owners" with "international banks," one has the exact situation presented with the ATA: namely, by disregarding legislative determinations and departing from the statute's text, courts are allowing heavy costs to be imposed on non-terrorist banks whom Congress never intended as sources of collection.

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our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.").

381. Notably, the Alien Tort Claims Act, like the ATA, can result in litigation against entities such as Britain and Israel for purported human rights violations. *See* Ramsey, *supra* note 348, at 365 (discussing possibility of ATCA claims "against Israel for violation of the alleged international right of displaced Palestinian refugees to return to their homes in Israel" and a "claim against Britain for violation of an alleged international rule against imperialism and colonialism, premised upon Britain's occupation of Northern Ireland").

382. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 292 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part).

383. *Id.*; *see also* Murphy, *supra* note 79, at 320–21. The Supreme Court appeared to express its disapproval of this ruling when, during oral argument on the scope of the Alien Tort Claims Act, Justice Kagan stated "we should fix that [ruling]." Transcript of Oral Argument at 31, Kiobel v. Royal Dutch Petrol., No. 10-1491, 569 U.S. __ (Apr. 17, 2013).

384. *Kiobel*, 569 U.S. __, slip op. at 13.

385. Brief for United States of America as Amicus Curiae, Hausler v. JPMorgan Chase Bank, N.A., No. 12-civ-1264(L), at *23 (2d Cir. July 9, 2012).

### C. *Turning Banks Into Financial Guarantors Of Terrorists Effectively Immunizes Terrorists From Liability*

Yet another problem with expansively interpreting the ATA so as to allow terrorism victims to collect damages from companies is that this effectively turns financial institutions into the financial guarantors of terrorists. The United States government, in an amicus brief, pointed to legislative history as evidence that anti-terrorism legislation was intended to hit *terrorists* in their pocket books: "As Senator Harkin observed, 'making the state sponsors [of terrorism] actually lose' money will be a particularly effective deterrent against future terrorist acts."[386] By contrast, allowing plaintiffs to obtain damages from non-terrorist banks simply turns the financial institutions into the guarantors of the terrorists, and in fact, immunizes the terrorists from paying those damages themselves: "[P]aying judgments from assets that are not owned by the terrorist party does not impose a similar cost on the terrorist party. It does, however, impose a heavy cost on non-terrorist property owners—and not a cost that Congress demonstrably chose to impose."[387] Forcing banks to pay multimillion dollar judgments for the injuries caused by terrorists does not in any way punish or harm the actual terrorists, but merely destroys financial institutions.

As discussed above, much of the motivation behind courts' willingness to expand the ATA appears to be the desire to bring relief to sympathetic victims of terrorism. Although the ATA was intended as "symbolic" legislation, courts unaware of that legislative history have repeatedly complained that the ATA does not provide victims with the ability to actually recover damages. The 2002 *Boim I* decision by the Seventh Circuit stated that "[t]he statute would have little effect if liability were limited to the persons who pull the trigger or plant the bomb because such persons are unlikely to have assets, much less assets in the United States, and would not be deterred by the statute."[388] The Seventh Circuit argued that Congress could not have intended for the statute to have little effect: "[P]olicy considerations may be used to interpret the text and structure of a statute when a literal reading would lead to a result so bizarre that Congress could not have intended it."[389] Thus, despite recognizing that a literal reading of the ATA would restrict liability to actual terrorists, the Seventh Circuit in *Boim I* decided to extend liability further, on the basis that the statute would otherwise have "little effect" and a statute with little effect is "a result so

386. *Id.* at *27 (citing 148 CONG. REC. S11,527 (daily ed. Nov. 19, 2002)). The amicus brief is discussing the Terrorism Risk Insurance Act, but its logic applies to the ATA as well.

387. *Id.*

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

389. *Id.*

bizarre that Congress could not have intended it." Six years later, Judge Posner found a different path to liability, explaining that 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."[390] These are remarkable rewritings of a statute originally intended as "symbolic."

It is unreasonable to expect civil litigation in the United States to be able to compensate victims for every violent crime that occurs abroad. If victims are unable to collect from the actual terrorists who committed these acts, that does not mean that civil litigation should be manipulated so as to allow the victims to collect their damages from whatever multinational company had the misfortune of coming into contact with the terrorist group. As the Second Circuit stated in the context of an FSIA claim, "Deterrence (or punishment) does not begin and end with civil litigation brought by individual plaintiffs. Our government has other means at its disposal—sanctions, trade embargos, diplomacy, military action—to achieve its foreign policy goals and to deter (or punish) foreign sovereigns."[391]

In the context of the ATS, the Eleventh Circuit similarly explained that it would be inappropriate for the United States to try to regulate every act of murder committed abroad. "If it were enough to allege under the ATS a single murder committed by private actors in the course of an armed conflict, our courts would be open to effectively every incident of violence in every unstable region of the world."[392] "The federal courts are empowered to open the door only "'to a narrow class' of claims . . . and the tort asserted by the Amergis—a single murder . . .—is anything but narrow."[393] Quoting the Supreme Court, the Eleventh Circuit added that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary" of allowing litigation over foreign acts of violence, especially where the defendant is not the terrorist actor but a mere third party.[394]

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390. *Boim III*, 549 F.3d 685, 697 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009).

391. *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 90 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009).

392. Estate of Amergi *ex rel.* Amergi v. Palestinian Auth., 611 F.3d 1350, 1363 (11th Cir. 2010).

393. *Id.* at 1364.

394. *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)).

## IX. A TERRORISM VICTIMS' FUND IS A FAR BETTER SOLUTION

Courts and commentators have repeatedly complained that civil suits have failed to bring actual financial relief to victims of terrorism. A district court called civil litigation "a failed policy" and stated that "these cases do not achieve justice for victims, are not sustainable and threaten to undermine the president's foreign policy initiatives."[395] One commentator described civil suits under the ATA as "hollow rights" because they do not lead to actual compensation or results.[396] According to another, it is "[a]dding insult to injury" that "victims are very often unable to recover financial damages anyway, when the perpetrators are indigent or otherwise judgment-proof."[397] Another stated that "the number of uncompensated plaintiffs undermines the compensation rationale for these suits."[398] Yet another has pointed out that "plaintiffs have been largely unsuccessful in bringing suit for international acts of terrorism with the exception of when the opposing party fails to appear."[399] When defendants win expensive litigations, the plaintiff victims collect no damages, and the defendant companies also spend heavily on attorney fees, creating negative results for all but the attorneys. William H. Taft IV, the Legal Adviser to the Department of State, stated, "The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to the foreign policy and national security goals of this country."[400]

If the goal is to achieve relief for victims of terrorism, there is a far more efficient and effective means of doing so than by allowing victims to proceed in lawsuits against non-terrorist third-party companies. The current system, in addition to all its other faults, requires the banks and victims to do battle in court, with the victims playing a form of Russian roulette hoping for a sufficiently sympathetic court and jury. "Cases may last for years and, because the stakes are high, defendants will naturally be led to invest a great deal of resources. . . . [L]itigation costs can increase out of proportion to any plausible benefit."[401] Even if successful, much of any

395. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (focusing on the FSIA state sponsor of terrorism exception).

396. Jonathan Fischbach, Note, *The Empty Pot at the End of the Rainbow: Confronting "Hollow-Rights Legislation" After* Flatow, 87 CORNELL L. REV. 1001, 1004 (2002).

397. Mostaghel, *supra* note 116, at 89.

398. Schupack, *supra* note 62, at 239.

399. Robbins, *supra* note 49, at 1255–56.

400. *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 4 (2003) (statement of William H. Taft, IV, Legal Adviser, Department of State); Liptak, *supra* note 368, at A1 (quoting William H. Taft, IV).

401. Sykes, *supra* note 146, at 2189–90.

recovery goes to attorneys. In the wake of the September 11 terrorist attacks, Georgene Vairo, among many others, asserted that "[l]awyers ought not get rich off this disaster" and that "victims should receive reasonable compensation within a short time frame." Neither is accomplished through civil litigation.[402]

As Alan O. Sykes writes, "civil litigation is an extremely expensive mechanism for shifting money around from one person's pocket to another."[403] There are also "clearly practical reasons" to support the use of a single overarching fund to handle all victim compensation.[404] Georgene Vairo compares terrorism litigation to the notoriously massive and messy asbestos litigation, noting that "the Supreme Court in . . . those cases essentially begged Congress to intervene in the resolution of the 'elephantine' asbestos mess."[405] John F. Murphy remarks that "[t]here is a serious debate over whether lawsuits are the appropriate vehicle for providing compensation to the victims of terrorism, especially so-called 'catastrophic terrorism,' where the total damage suffered numbers in the millions."[406] A more efficient scheme would be to create a terrorism victims' fund, similar to the September 11th Victim Compensation Fund.

In fact, the September 11th Victim Compensation Fund was instituted in part to avoid inefficient litigation against third-party airlines for the damages caused by terrorists.[407] Notably, Pan American World Airways, the principal and largest international air carrier in the United States from 1927 through 1991, went defunct on December 4, 1991, just a few years after the terrorist bombing over Lockerbie. The terrorism lawsuits were one major factor in killing the airline. Banks and airlines are not the only industries facing potential destruction through terrorism lawsuits. "[B]ecause of the burden the 9/11 attacks placed on insurance and reinsurance companies, on November 26, 2002, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA)."[408] Citing to the asbestos litigation as an example, Georgene Vairo has noted that there may be "a need to keep entire industries afloat to ensure that staple products are available to people across the country."[409]

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402. Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1268 (2002).

403. Sykes, *supra* note 146, at 2181.

404. Vairo, *supra* note 402, at 1286.

405. *Id.*

406. Murphy, *supra* note 79, at 339.

407. *See, e.g.*, *id.* at 340 (describing the act as having "a requirement intended to limit airline liability"); Vairo, *supra* note 402, at 1288 ("One obvious reason for coming up with the compensation scheme . . . was the need to protect the airline industry.").

408. Murphy, *supra* note 79, at 340.

409. Vairo, *supra* note 402, at 1288.

She adds that, in the case of airline defendants, "the bankruptcy of an entire industry critical to our nation's economy loomed large" while in the case of asbestos litigation, "many of the traditional defendants are now bankrupt," which has led plaintiff law firms to expand the range of defendants.[410] "If the goal is compensation, the U.S. may provide such compensation more effectively through its own coffers and the seized assets of terrorist organizations, without resort to civil trials."[411]

Historically, where victims of terrorism have obtained compensation for their injuries, it is not through litigation but rather through government compensation schemes. "Money has changed hands after verdicts in these cases only a few times, and even then generally because Congress has intervened."[412] To date, these compensation schemes have been created through "ad hoc" statutes covering specific terrorist incidents.[413] For example, the Hostage Relief Act of 1980 provided compensation to the former hostages held at the American Embassy during the Iranian Revolution.[414] (Notably, the Hostage Relief Act of 1980 mandated that the victims of the hostage-taking could not sue Iran.[415]) In 2000, Congress passed a statute, the Justice for Victims of Terrorism Act, that provided some compensation to certain victims of terrorist acts by Cuba and Iran.[416] In particular, Congress directed the Treasury Department to use frozen Cuban assets to pay almost $100 million to relatives of passengers in two airplanes shot down by Cuba's air force.[417] Congress also directed the Treasury Department to pay more than $350 million to victims of terrorism with claims against Iran.[418] The September 11th Compensation Fund, of course, responded to the September 11th terrorist attacks. Congress required that the victims receiving compensation through this fund relinquish the

410. *Id.* at 1291.

411. Robbins, *supra* note 49, at 1257.

412. Liptak, *supra* note 368, at A1.

413. Mostaghel, *supra* note 116, at 103; *see also* Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L. REV. 726, 732–35 (1992).

414. Hostage Relief Act of 1980, 5 U.S.C. § 5561 (1982); Rosenfeld, *supra* note 413, at 732 n.21.

415. Mostaghel, *supra* note 116, at 90 (citing Exec. Order No. 12,283, 3 C.F.R. 114–15 (1982), *reprinted in* 50 U.S.C. § 1701, note (1994) (Non-Prosecution of Claims); Exec. Order No. 12,294, 3 C.F.R. 139–40 (1982), *reprinted in* 50 U.S.C. § 1701, note (1994) (Suspension of Litigation Against Iran)).

416. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1543 (2000).

417. Liptak, *supra* note 368, at A1.

418. *Id.*

right to bring civil suits.[419] In 2008, Libya paid $1.5 billion to the families of terrorism victims, an amount that had been negotiated with the United States, and which exempted Libya from any civil liability for the acts of terrorism.[420]

In the case of Alisa Flatow, an American woman murdered during an April 9, 1995, terrorist attack, her father won a court judgment of approximately one quarter of a billion dollars, but was stymied in attempts to collect those damages.[421] The U.S. federal government intervened in multiple cases to urge against allowing the Flatow family to attach funds belonging to Iran, in part due to the negative impact the attachments would have upon international relations.[422] In the end, the Flatow family received money through a government compensation scheme.

To date, these instances of "legislation [passed] in the emotional aftermath of a terrorist event [have not been] necessarily concerned with how, or even whether, these laws coordinate with other similar laws."[423] The result, as John F. Murphy has noted, is that "[t]here is . . . currently no comprehensive program in place for ensuring equitable compensation for the victims of terrorism."[424] This is despite the reality that "[t]he need for such a comprehensive program would become especially acute" if there were another catastrophic terrorist event, in which case "relief through the normal procedures of the tort system would clearly be inadequate."[425]

The lack of a comprehensive compensation scheme seems to be responsible for the courts creatively expanding the ATA's scope so as to allow sympathetic victims to have a chance to recover damages.[426] The lack of a comprehensive program has led to patchwork legislation from Congress, and to misguided judicial activism. Moreover, the scattershot attempts at providing compensation to victims are generally focused upon specific terrorist incidents, as opposed to the overall needs of terrorism victims generally. For example, each of the individual compensation programs discussed above involved compensation payments made to victims of specific terrorist attacks and failed to account for future victims.

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419. Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, § 405(c)(3)(B)(i), 115 Stat. 230 (2001).

420. *Libya pays $1.5 billion to settle terrorism claims*, CNN (Nov. 21, 2008, 4:16 AM), http://edition.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html.

421. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 5, 7 (D.D.C. 1998).

422. *See* Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

423. Mostaghel, *supra* note 116, at 83.

424. Murphy, *supra* note 79, at 342.

425. *Id.*

426. Mostaghel, *supra* note 116, at 83.

Moreover, even attempts at comprehensive programs of compensation often fail due to their narrow focus upon the most recent instance of terrorism.[427] By way of example, in the years after the Iranian hostage crisis, Congress created a national compensation scheme for individuals taken hostage while working on behalf of the United States government. Although intended as a comprehensive scheme, in actual practice, this statute has essentially gone unutilized during the several decades since its passage, in which terrorist attackers killed rather than kidnapped their victims. With Congress authorizing compensation to victims on an ad hoc, case by case basis, the payments have been highly inconsistent, with (for example) some individual victims receiving nothing or minuscule amounts. Among those on the low end, the victims of the Iran hostage crisis received a cash payment of a mere $50 per day of captivity.[428]

Indeed, among the strongest criticisms of the September 11th Victims' Compensation Fund was that no such scheme was "created after the bombing in Oklahoma City, Nairobi, or . . . the bombing of Pan Am Flight 103. The quick creation of the [September 11th compensation fund] was seen as a betrayal for many of the victims' relatives in these other tragedies who have unsuccessfully sought compensation from the government."[429] "Victims of early attacks received little or no aid targeted to them as victims of terrorism. As terrorist attacks have increased, lawmakers have incorporated more generous and more diverse kinds of aid for victims or their survivors."[430] In other words, compensation has come only through direct efforts by Congress, but due to the vagaries of politics and the emotionally charged nature of certain terrorist attacks, the actual compensation provided to victims has varied enormously. A truly comprehensive compensation scheme is needed.

The idea of a comprehensive victims' compensation fund should, in theory, be relatively uncontroversial. Congress itself has concluded that it has an "obligation" to provide compensation to victims of terrorism, stating that "the United States Government has a special obligation to United States victims of acts of terrorism directed against this Nation and should . . . assure that fair and prompt compensation is provided to such victims and their families."[431] One scholar has argued that "where a judicial

427. *Id.* at 103 ("Congress reacts with legislation in response to a terrorist act. The legislation reflects the event that precipitated it . . . .").

428. H.R. REP. NO. 99-494, at 31 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1865, 1897; Mostaghel, *supra* note 116, at 94.

429. Vairo, *supra* note 402, at 1281.

430. Mostaghel, *supra* note 116, at 83.

431. 22 U.S.C. § 5501 (Supp. 1991) (Congressional findings); Mostaghel, *supra* note 116, at 105 (quoting and discussing this language).

resolution appears inadequate . . . Congress may and should act," adding that the September 11th victims can be viewed as "victims of war being cared for by the government."[432] As Deborah M. Mostaghel has asserted, "[i]ncluding aid for victims is entirely proper."[433] She writes that "[b]ecause massive attacks such as the World Trade Center bombing or the Oklahoma Federal Building bombing exact huge economic and psychological tolls on the community and on the nation, the federal government provides billions of dollars in aid at the community and state level. The economic and psychological toll is equally devastating to individual victims, and it is equally necessary to provide aid at this level."[434] Deborah Mostaghel also points out that aid to victims of terrorism simply mirrors the aid that all fifty states provide to victims of crime.[435]

Members of Congress have made attempts at creating an overarching victims' terrorism fund. As noted above, there is already a comprehensive fund for victims of hostage-taking (albeit this statute fails to account for other forms of terrorism).[436] In 2003 Senator Richard Lugar introduced a bill that would have created a compensation scheme called the "Benefits for Victims of International Terrorism Program."[437] The Antiterrorism and Effective Death Penalty Act authorized the Director of the federal government's Crime Victims Fund to make supplemental grants to states to provide compensation and assistance to residents of states who become victims of terrorism, whether overseas or in the United States.[438] Yet even this attempt at a comprehensive solution in fact requires an executive decision to make a supplemental grant, as well as for the state victim compensation fund to make the specific payment. Furthermore, just as the ad hoc attempts by Congress to compensate victims of distinct terrorist attacks resulted in widely varying compensation amounts, here too there are substantial differences in the victim compensation provided by the various states, and dramatic differences between payments made by a state victim compensation fund and the payments provided by acts of Congress. By way of example, New York State's victim compensation scheme provides

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432. Vairo, *supra* note 402, at 1290.

433. Mostaghel, *supra* note 116, at 85.

434. *Id.* at 86.

435. *Id.* at 86–87 (citing Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 334 (1994)).

436. Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967 (codified as amended at 5 U.S.C. § 55621 (1994 & Supp. 1999)).

437. JENNIFER K. ELSEA, CONG. RESEARCH SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 23 (2008); Murphy, *supra* note 79, at 341.

438. 42 U.S.C. § 10603b (Supp. 2001).

payments for medical expenses, counseling services, burial expenses (up to $6,000), and lost earnings or loss of support of no more than $600 per week, up to a maximum of $30,000.[439] This is in sharp contrast to many individual compensation awards made by Congress, such as the payment of $100 million to the families of four Cuban-Americans killed by the Cuban military.[440]

A terrorism victims' compensation fund is not without controversy. As Georgene Vairo has noted, "such legislation presents complex separation of powers and federalism problems."[441] There may also be complaints about the expense of such a program (notwithstanding the fact that Congress already offers grants to support states' victim compensation funds, and that Congress has sporadically passed massive compensation awards for individual victims of terrorism). Others may argue that claims about the damage to the banking industry and to individual banks are overstated. Yet experience shows that mass tort litigation can quickly devastate industries; Georgene Vairo notes that although opponents of the 2000 Asbestos Compensation Bill argued that concerns about mass bankruptcies were overstated, a mere two years later "[a]ll but one or two" of the named defendants, as well as "many others," were driven into bankruptcy.[442] The result of litigation-induced bankruptcies is a snowball effect: once some defendants are forced into bankruptcies, the plaintiffs focus increasingly on a shrinking pot of remaining defendants, pushing them into bankruptcy as well. As Georgene Vairo wrote in the case of asbestos litigation, "hundreds of new defendants, including smaller local defendants" must cover "a larger and larger share of the damage because most of the traditional defendants are in Chapter 11."[443]

It is easy to see that similar problems would result from allowing ATA claims against banks. First, individual terrorism claims often demand hundreds of millions of dollars in damages, and so even one or two cases could capsize a bank. Moreover, under the *Boim III* theory, whereby transferring even a minimal amount of money to a terrorist group makes one financially liable for all of the terrorist group's forthcoming terror attacks (perhaps for the next fifty years), a single finding of liability would almost certainly be a death sentence for the bank.

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439. *See Compensation*, N.Y. STATE OFFICE OF VICTIM SERVS., http://www.ovs.ny.gov/services/VictimCompensation.aspx (last visited Nov. 26, 2012).

440. Liptak, *supra* note 368, at A1.

441. Vairo, *supra* note 402, at 1285.

442. *Id.* at 1292.

443. *Id.*

Compensation schemes have worked in the past and accomplish the goals of compensating victims without burdening non-terrorists with expensive litigation. They are far more efficient than litigation, ensuring that payments go to victims instead of attorneys. Creating a consistent, ongoing compensation scheme would be an ideal resolution to the problem of providing relief to victims of terrorism. Although the U.S. government established a compensation fund for the victims of the September 11 attacks, "no such fund is available to the victims of smaller terrorist attacks or their families."[444] Tragically, some scholars have asserted that it may require that "the United States suffer[] another 'catastrophic terrorism' attack" before "alternatives to civil litigation [become] the primary focus of attention as a means to compensate victims of terrorism."[445] In the words of Senator Patrick Leahy, "terrorism and mass violence [could] overwhelm the resources of a State's crime victims compensation program or its victims assistance services."[446] Now may be the time to create a terrorist victims' compensation fund, to help victims without destroying innocent third-party businesses.

## X. CONCLUSION

The civil suit provision of the Anti-Terrorism Act was initially intended as a jurisdictional statute, allowing victims to bring claims against international terrorists for crimes occurring outside the United States. In recent years, however, courts moved by sympathetic victims of terrorism have creatively expanded the ATA's scope, permitting actions for "international terrorism" to proceed against international banks guilty only of providing routine banking services. The ATA has been expanded dramatically beyond its original purpose in the same way as has occurred with the Alien Tort Claims Act. In so doing, courts have ignored the ATA's requirement that the acts at issue be "violent" or "dangerous to human life." Courts have also creatively tied the civil suit provision to unrelated material support statutes. The results not only violate the language and intent of the ATA, they also harm innocent businesses, promote discrimination, encourage other nations to create retaliatory statutes, and wreck economic destruction upon our global banking system. A far better solution is to create a terrorist victims' compensation fund.

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444. Schupack, *supra* note 62, at 238–39.

445. Murphy, *supra* note 79, at 342.

446. S. REP. NO. 104-179 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 940; *see also* Mostaghel, *supra* note 116, at 109.

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