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The World of Private Terrorism Litigation

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THE WORLD OF PRIVATE TERRORISM LITIGATION

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Since 9/11, private litigants have been important players in the "fight" against terrorism. Using several federal tort statutes, these plaintiffs have sued foreign states as well as other parties, like non-governmental charities, financial institutions, and social media companies, for terrorism-related activities. While these private suits are meant to address injuries suffered by plaintiffs or their loved ones, they often reinforce and reflect the U.S. government's terrorism-related policies, including the racial and religious discrimination endemic to them. Indeed, much like the U.S. government's criminal prosecutions for terrorism-related activities, private terrorism suits disproportionately implicate Muslim and/or Arab individuals and entities while reinforcing the belief that those groups are predisposed to engage in or support terrorism.

This short Article provides a brief overview of the world of private terrorism litigation. It begins by describing the various federal tort statutes on terrorism—including their fraught relationship with foundational tort law norms. It explains the connection between those laws and the U.S. government's terrorism prosecutions, as well as its other terrorism-related priorities. It ends by demonstrating how private terrorism suits reinforce discrimination and prejudice against Arabs and Muslims that are reflected in criminal terrorism prosecutions. In focusing on private terrorism litigation, this Article highlights how private parties are furthering the government's counterterrorism work, as well as how private terrorism suits reinforce the state's endemic discrimination against Arabs and Muslims in the counterterrorism realm.[1]

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1. *See* Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77, 96-97 (2021) (describing how various U.S. counterterrorism and national security policies systemically discriminate against Arabs and Muslims). For a more in-depth discussion of some of the issues discussed in this Article, see Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77 (2021) and Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U.L. REV. 559 (2018).

BRIEF BACKGROUND ON THE FEDERAL PRIVATE TERRORISM STATUTES

There are several federal terrorism laws available to private plaintiffs:

1) (1)the private right of action under 18 U.S.C. § 2333(a) of the Anti-Terrorism Act ("ATA") ("Section 2333(a)");[2] and

2) (2)the terrorism-related exceptions to the Foreign Sovereign Immunities Act ("FSIA") under 28 U.S.C. § 1605A ("Section 1605A") and 28 U.S.C. § 1605B ("Section 1605B").[3]

Under Section 2333(a), "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs, may sue [responsible individuals or entities] therefor in any appropriate district court of the United States. . . ."[4] In most Section 2333(a) cases, defendant's alleged act of "international terrorism" involves providing "material support" to a terrorist group or activity.[5] Under federal law, material support includes:

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2. While Section 2333(a) cases are primary liability cases, in 2016 Congress amended the ATA to allow defendants to sue for secondary claims of aiding and abetting and conspiracy under Section 2333. Justice Against Sponsors of Terrorism Act of 2016 ("JASTA"). Pub. L. No. 114-222, § 4(a), 130 Stat. 852 (2016). Exploring Section 2333's secondary liability provision, which appears in 18 U.S.C. § 2333(d), is beyond the scope of this short Article.

3. Several of these statutes, namely Sections 2333(a) and 1605A, were passed before 9/11. Section 2333(a) was passed in 1992, while the original version of Section 1605A, which was enumerated as Section 1605(a)(7), was passed in 1996. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506 (enacting Section 2333(a)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (enacting Section 1605(a)(7)). After 9/11, the number of suits under both statutes substantially increased. In particular, Section 2333(a) was largely dormant until after the 9/11 attacks. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 561 n.3.

4. 18 U.S.C. § 2333(a) (2018).

5. Under Section 2333(a), the term "international terrorism" means activities that:

1) (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;
2) (B)appear to be intended—
3) (i)to intimidate or coerce a civilian population;
4) (ii) to influence the policy of a government by intimidation or coercion; or

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[6]

Typically, Section 2333(a) cases have involved a defendant bank accused of providing material support to an entity which is allegedly affiliated with a terrorist group that caused certain injuries.[7] In these cases, the alleged material support has often taken the form of financial services.[8]

While Section 2333(a) is technically an intentional tort, courts have historically approached claims of material support under the statute in ways that depart from tort law norms of fault and causation.[9] In general, to satisfy

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> 5) (iii) to affect the conduct of a government by assassination or kidnapping; and
> 6) (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.

28 U.S.C. § 2331(1) (2018) ("Section 2331(1)"). Until recently, most judicial analyses of Section 2333(a) focused on establishing that defendant had provided material support to a terrorist group or activity that was causally connected to the injuries in question; analysis of subsections (A), (B), and (C) of Section 2331(1) was either collapsed into that analysis or ignored all together. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 562 & n.9; *see, e.g.,* Boim v. Holy Land Found. for Relief and Dev., 549 F.3d 685, 692-94 (7th Cir. 2008) [hereinafter *Boim II*] (holding that "given the foreseeable consequences" of providing material support to a known terrorist organization such support "would 'appear to be intended . . . to intimidate or coerce a civilian population' or to 'affect the conduct of a government by . . . assassination'"). Then, in February 2018, the Second Circuit issued a decision that made the definition of international terrorism under Section 2331(1) an important part of the Section 2333(a) analysis for some courts. *See, infra* note 14 and accompanying text.

6. 18 U.S.C. § 2339A(b)(1) (2009). This definition of material support has been incorporated into Section 2333(a) cases. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law, supra* note 2, at 577-79.

7. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 562.

8. *See, e.g.*, Owens v. BNP Paribas, S.A., 235 F. Supp. 3d 85, 98-99 (D.D.C. 2017), *aff'd* 897 F.3d 266 (D.C. Cir. 2018) (Section 2333(a) suit alleging that defendant bank had conspired to provide financial services to a terrorist organization); Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 19 (D.D.C. 2010) (Section 2333(a) suit alleging that defendant bank knowingly and intentionally provided financial services to agent of a terrorist organization).

9. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 562-64.

the fault element of an intentional tort, plaintiff must show not only that defendant intended to commit the act in question but also to bring about its consequences.[10] To satisfy the causation element of an intentional tort, plaintiff must show that defendant's action was both the factual and proximate cause of plaintiff's injuries.[11]

In stark contrast to these norms, much of the Section 2333(a) case law has not historically required plaintiff establish that defendant knew or intended that their material support would further terrorist violence—instead, plaintiff only needs to show that defendant knew or recklessly disregarded the fact that its support would go to a terrorist group or activity.[12] Recently, however, some courts have focused on the definition of international terrorism embedded within Section 2333(a)[13] and imposed an additional fault requirement that is arguably more demanding.[14]

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10. *Id*. at 570-72. While there are arguably exceptions to the requirement defendant both intend to commit the act and bring about its consequences, the majority of common law intentional torts require both elements. *Id*. at 571.

11. *Id*. at 572-73. While proximate causation is more flexibly applied to intentional tort (as compared to negligence) claims, it remains a key element of an intentional tort. *Id*. at 573.

12. *Id*. at 583-84.

13. In February 2018, the Second Circuit issued a decision in *Linde v. Arab Bank* that emphasized the importance of independently satisfying the statutory definition of international terrorism to Section 2333(a) analysis. *See* Linde v. Arab Bank, PLC, 882 F.3d 314, 326 (2d Cir. 2018) (citing to Section 2331(1) and holding that material support does not "invariably equate to an act of international terrorism" and only qualifies as such upon a showing that it "involve[d] violence or endanger[ed] human life," appears "intended to intimidate or coerce a civilian population or to influence or affect a government," and "occurred primarily outside the territorial jurisdiction of the United States or transcend[ed] national boundaries"). Unsurprisingly, *Linde* has had the most substantial impact on cases in the Second Circuit, though it also appears to be influencing other circuits as well. *See, e.g.,* Colon v. Twitter, 14 F.4th 1213, 1219-20 (11th Cir. 2021) (citing to *Linde* in holding that all the elements of the definition of international terrorism must be satisfied to succeed on a Section 2333(a) claim); Gonzalez v. Google, LLC, 2 F.4th 871, 899-900 (9th Cir. 2021) (citing to *Linde* in holding that material support does not "invariably equate to an act of international terrorism" and that "[a]cts constituting international terrorism must also 'appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping'"). While all three elements of Section 2331(1) are in play under the *Linde* approach, this Article only addresses, albeit briefly, judicial interpretations of fault under Section 2331(1)(B). *See infra* note 15 and accompanying text.

14. This additional intent requirement relates to Section 2331(1)(B), which requires that an act of international terrorism appear to be intended: "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping." While the case law is in its early stages, courts adopting the *Linde* approach have appeared, at first blush, to embrace an intent requirement for Section 2331(1)(B) that is not particularly robust. *See, e.g.*, Weiss v. Nat'l Westminster Bank, PLC, 993 F.3d 144, 161 (2d Cir. 2021) (holding that an "assessment of what an observer could reasonably find '*appeared to be intended*'

As for causation, Section 2333(a) plaintiffs are not required to demonstrate that defendant's support was the factual cause of any specific violent act or injury.[15] Most courts do, however, require that plaintiff establish defendant's actions were the proximate or legal cause of their injuries.[16]

For its part, Section 1605A allows private parties[17] to sue countries, their agencies and instrumentalities, as well as their officials, employees, and agents for terrorism-related crimes if the foreign state is designated by

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[undersection 2331(1)(B)] depends on whether the consequences of the defendant's activity were reasonably foreseeable. . .and reasonable foreseeability depends largely on what the defendant knew [about the aims of the terrorist organization]"); Cabrera v. Black & Veatch Special Projects Corp., No. 19-cv-3833, 2021 WL 3508091, at *19 (D.D.C. July 30, 2021) ("Whether a defendant 'appeared' to have intended its activity to intimidate or coerce is not a question of the defendant's subjective intent but rather a question of what its intent objectively appeared to be"). In reality, however, courts have taken a more demanding approach to Section 2331(1)(B). They have, for example, held that, unlike the fault requirement for material support, the intent requirement for Section 2331(1)(B) is not satisfied by deliberate indifference. *See* Cabrera, 2021 WL 3508091, at *19 (holding that being 'deliberately indifferent. . .to the risk that the transferred funds would end up in the hands of terrorists'. . . . does not lead an objective observer to reasonably infer that Defendants' goal was to intimidate or coerce a government or civilian population") (internal citations and quotations omitted); Strauss v. Credit Lyonnais, S.A., 379 F. Supp. 3d 148, 161 (E.D.N.Y. 2019) (holding that defendant's deliberate indifference as to whether it provided financial services to organizations that support terrorist groups does not satisfy the fault requirement for Section 2331(1)(B)) [hereinafter *Strauss I*]. In some cases, courts have assessed fault under Section 2331(1)(B) by looking to the motives for defendant's material support—an approach that contextualizes defendant's actions and, often, makes the fault requirement harder for plaintiffs to satisfy. *See* Kemper v. Deutsche Bank AG, 911 F.3d 383, 391 (7th Cir. 2018) (holding that defendant Deutsche Bank's provision of banking services to Iranian entities did not satisfy the fault requirement for Section 2331(1)(B) because "[t]o the objective observer, [defendant's] interactions with Iranian entities were motivated by economics, not by a desire to 'intimidate or coerce'"); Cabrera, 2021 WL 3508091 at *19 (holding that defendants did not satisfy Section 2331(1)(B) because their alleged payments to the Taliban were not motivated by a desire to intimidate or coerce a civilian population or government but rather to "maximiz[e] profits and ensur[e] their own safety").

15. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 594.

16. *Id*. at 595-97. Historically, courts have disagreed over what proximate causation under Section 2333(a) requires, with some cases taking a more flexible approach and others imposing a more demanding standard. *See* In re Chiquita Brands Int'l, Inc., 284 F. Supp. 3d 1284, 1312-13 (S.D. Fla. 2018) (canvassing different approaches, some more flexible, others more rigid, to proximate causation under Section 2333(a)). As described below, more recently courts appear to favor a more demanding approach to proximate causation. *See infra* note 53.

17. To bring a claim under Section 1605A, the claimant or victim must be "(1) a national of the United States, (2) a member of the armed forces, or (3) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment." 28 U.S.C. § 1605(a)(2)(A)(ii) (2016).

the U.S. State Department as a state sponsor of terrorism.[18] While an earlier version of Section 1605A was only jurisdictional in nature,[19] Section 1605A is now both a jurisdictional and substantive law—it gives U.S. courts the authority to hear cases against state sponsors of terrorism *and* provides an independent federal cause of action for those claims.[20]

Under the statute's jurisdictional provision, "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[21]

Under the statute's substantive provision, "[a] foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable . . . for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages."[22]

As with Section 2333(a), suits under Section 1605A[23] have typically alleged that state sponsors of terrorism provided material support[24]—from technical advice and training to logistical support and financing—to

18. *Id*. at § 1605A(a).

19. Owens v. Republic of Sudan, 864 F.3d 751, 764 (D.C Cir. 2017), *vacated and remanded on other grounds*, Opati v. Republic of Sudan, 140 S.Ct. 1601 (2020) [hereinafter *Owens I*]. In 2008, Congress passed legislation replacing Section 1605(a)(7) with Section 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 11803, 122 Stat. 3, 338 (2008). Overall, Section 1605A is a "much more expansive provision [than Section 1605(a)(7)], one which provides. . . many [] statutory entitlements" to plaintiffs. In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 40 (D.D.C. 2009). That being said, while 1605A's jurisdictional clause did expand the category of litigants who could bring claims, the clause remains largely identical to Section 1605(a)(7)." *Owens I*, 864 F.3d at 765.

20. Opati, 140 S.Ct. at 1606.

21. 28 U.S.C. § 1605A(a) (2008).

22. *Id*. at § 1605A(c).

23. Because most cases under both Sections 1605A and 1605(a)(7) have been brought in the D.C. federal courts, this Article focuses on this body of case law in analyzing judicial interpretations of the statute.

24. Section 1605A uses the same definition of material support used in the Section 2333(a) context. *See* 28 U.S.C. § 1605A(h)(3) (incorporating the definition of material support found in 18 U.S.C. § 2339A(b)(1) (2009)).

terrorist groups or activities.[25] Courts have taken a relatively plaintiff-friendly approach to construing Section 1605A's jurisdictional and substantive prongs. For example, plaintiffs can establish jurisdiction under Section 1605A as long as they show that defendant provided material support that proximately caused the terrorist violence and injuries in question,[26] without needing to show that defendant's material support was the factual cause of the specific terrorist act or injury.[27] As for fault, Section 1605A's jurisdictional requirement does not have its own independent fault component.[28] As a result, many material support cases do not explicitly address fault as part of the jurisdictional analysis.[29] The material support cases that

25. *See, e.g.*, Owens v. Republic of Sudan, 826 F. Supp. 2d 128 (D.D.C. 2011) (Section 1605A case in which plaintiffs alleged that Iran and Sudan had provided material support, including training and technical advice, as well as safe haven, to al Qaeda in its bombing of two U.S. embassies in Africa) [hereinafter *Owens II*]; Collett v. Socialist People's Libyan Arab Jamahiriya, 362 F. Supp. 2d 230 (D.D.C. 2005) (Section 1605(a)(7) case against Libya alleging it provided material support, which seems to have been financial, to a terrorist organization that caused injuries to plaintiffs' family members); Weinstein v. Islamic Rep. of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002) (Section 1605(a)(7) case in which plaintiffs alleged Iran provided material support, including funding and training, to Hamas, which was allegedly responsible for violence against an American citizen).

26. The threshold for establishing proximate causation under Section 1605A is arguably low. One court described the various avenues for establishing proximate causation in 1605A claims for material support as follows:

> [Material] support has been found to have contributed to the actual terrorist act that resulted in a plaintiff's damages when experts testify that the terrorist acts could not have occurred without such support . . . ; or that a particular act exhibited a level of sophistication in planning and execution that was consistent with the advanced training that had been supplied by the defendant state . . . ; or when the support facilitated the terrorist group's development of the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the attack. . . .

Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 67–68 (D.D.C. 2008), *aff'd*, 646 F.3d 1 (D.C. Cir. 2011). *See also* Estate of McCarty v. Islamic Republic of Iran, 19-cv-853, 2020 WL 7696062, at *4 (D.D.C. Dec. 28, 2020) (noting that "most courts" have interpreted Section 1605A's jurisdictional causation requirement "loosely"); Allan v. Islamic Republic of Iran, 17-cv-338, 2019 WL 2185037, at *4 (D.D.C. May 21, 2019) (same).

27. *Owens I*, 864 F.3d at 799; Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48, 85 (D.D.C. 2018); Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 66 (D.D.C. 2010).

28. *See* Braun v. Islamic Republic of Iran, 228 F. Supp. 3d 64, 75-77 (D.D.C. 2017) (describing Section 1605A's jurisdictional requirement without including a fault requirement); Stansell v. Republic of Cuba, 217 F. Supp. 3d 320, 337-39 (D.D.C. 2016) (same); Worley v. Islamic Republic of Iran, 75 F. Supp. 3d 311, 332-34 (D.D.C. 2014) (same); *Owens II*, 826 F. Supp. 2d at 149-51 (same); Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 63-64 (D.D.C. 2010) (same); Valore, 700 F. Supp. 2d at 65-66 (same).

29. To the extent fault is part of the jurisdictional analysis, it depends upon the predicate act(s) defendant allegedly engaged in under Section 1605A(a), which include "act[s] of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material

have considered the issue, however, have rejected any requirement under the jurisdictional clause that a defendant intend its support be used to engage in a specific act of terrorism.[30] Notably, in determining that Section 1605A's jurisdictional prong requires neither specific intent nor factual causation, some courts have cited to leading Section 2333(a) case law.[31]

Judicial approaches to 1605A's substantive cause of action reflect a similarly pro-plaintiff posture. To bring a substantive claim under Section 1605A, plaintiff must plead the elements of an underlying tort,[32] such as battery, wrongful death, or intentional infliction of emotional distress.[33] In

support or resources for such an act. . . ." 28 U.S.C. § 1605A(a). So, for example, the definition of extrajudicial killing requires fault (namely deliberate killing) while the definition of material support does not. *See* Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 35-37 (D.D.C. 2016) (analyzing Section 1605A's jurisdictional requirements and noting fault requirement for extrajudicial killing, but not for material support).

30. *Owens I*, 864 F.3d at 798-99; Doe v. Syrian Arab Republic, 18-cv-0066, 2020 WL 5422844, at *11 (D.D.C. Sept. 10, 2020); Hamen v. Islamic Republic of Iran, 401 F. Supp. 3d 85, 104 (D.D.C. 2019); Salzman v. Islamic Republic of Iran, No. 17-2475, 2019 WL 4673761 at *14 (D.D.C. Sept. 25, 2019); Fritz, 320 F. Supp. 3d at 85; Estate of Hirshfeld v. Islamic Republic of Iran, 330 F. Supp. 3d 107, 135 (D.D.C. 2018). While some material support cases suggest intent *is* part of the jurisdictional analysis, these decisions do not address or explicitly state that a showing of fault is required. *See* Karcher v. Islamic Republic of Iran, 396 F. Supp. 3d 12, 54-58 (D.D.C. 2019) (holding that Section 1605A's jurisdictional clause was satisfied in material support case against Iran because Iran had "purpose" of facilitating specific acts of terrorist violence, without explicitly stating that such intent is required); Lee v. Islamic Republic of Iran, 19-cv-00830, 2021 WL 325958 at *13-14 (D.D.C. Feb. 1, 2021) (same). While there may be no fault requirement under Section 1605A(a) for material support, it is likely that most courts presume state sponsors of terrorism have knowledge their material support is going to a terrorist group since the material support is often allegedly direct and recipient organizations, like ISIS and al Qaeda, are usually well-known for their terrorist activities.

31. *See Owens I*, 864 F.3d at 798-99 (citing to *Boim II,* a key case construing the tort law requirements of Section 2333(a), in rejecting requirement under Section 1605A(a) that defendants specifically intend or be the factual cause of a particular act of terrorist violence).

32. *See* Roth v. Islamic Republic of Iran, 78 F. Supp. 3d 379, 399 (D.D.C. 2015) ("The elements of causation and injury under section 1605A(c) require plaintiffs 'to prove a theory of liability' which justifies holding the defendants culpable for the injuries that the plaintiffs have allegedly suffered.") (citation omitted); Valore, 700 F. Supp. 2d at 73 (explaining that Section 1605A's substantive cause of action requires that plaintiffs "prove a [tort] theory of liability under which defendants caused the requisite injury or death"). Even though jurisdiction and liability under Section 1605A should be considered separately, some courts have collapsed the inquiry. *See* Wyatt v. Syrian Arab Republic, 908 F. Supp. 2d 216, 231 (D.D.C. 2012), *aff'd,* 554 F. App'x 16 (D.C. Cir. 2014) ("This Court concludes that, having established the requirements of causation and injury necessary to establish subject matter jurisdiction and a waiver of immunity under § 1605A, plaintiffs have also established Syria's liability under § 1605A(c)").

33. Federal courts are not permitted to fashion new law in determining whether plaintiffs have successfully articulated a substantive claim under Section 1605A(c), and instead must rely on "well-established principles of law, such as those found in the Restatement. . .of Torts and other leading treaties, as well as those principles that have been adopted by the

considering these tort causes of action, courts have adopted the same flexible approach to causation taken under Section 1605A's jurisdictional provision and required only proximate, but not factual, causation.[34] As for the other elements of substantive tort claims under the statute, courts have been relatively forgiving[35] in determining those elements to be satisfied,[36] especially when it comes to issues of fault.[37]

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majority of state jurisdictions." Roth, 78 F. Supp. 3d at 399 (internal quotations and citation omitted). *See also* Valore, 700 F. Supp. 2d at 76 (holding that courts construing Section 1605A(c) must look to the Restatement on Torts, as well as other sources for well-established standards to evaluate plaintiff's claims); Estate of Heiser v. Islamic Republic of Iran, 659 F. Supp. 2d 20, 24 (D.D.C. 2009) (same).

34. *See* Spencer v. Islamic Republic of Iran, 71 F. Supp. 3d 23, 29 (D.D.C. 2014) (holding that the causation language in Section 1605A(c) is satisfied by a showing of proximate causation); Owens v. Republic of Sudan, 71 F. Supp. 3d 252, 256 n.2 (D.D.C. 2014) (holding that under Section 1605A(c), only proximate causation, and not factual causation, must be shown); Valore, 700 F. Supp. 2d at 75-76 (holding that, like Section 1605A(a), Section 1605A(c) only requires a showing of proximate causation).

35. Because there was no independent cause of action under Section 1605(a)(7), plaintiffs had to bring their claims under state or foreign law. *Owens II*, 826 F. Supp. 2d at 147. Even though Section 1605A remedied this issue, plaintiffs may still bring their substantive claims under state and foreign law. Valore, 700 F. Supp. 2d at 81 n.15. Nevertheless, the federal cause of action under 1605A(c) arguably makes it easier for plaintiffs to succeed on their claims by allowing federal courts to rely on a uniform body of tort law, which is often more forgiving to plaintiffs. *See infra* notes 37-38 and accompanying text. By contrast, under Section 1605(a)(7), plaintiffs' claims would sometimes fail because of the onerous requirements of some state or foreign tort laws. *See Owens II*, 826 F. Supp. 2d at 147-48 (noting that under Section 1605(a)(7) some plaintiffs were barred from recovery where they could not satisfy the elements of their state law cause of action); In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 49 (D.D.C. 2009) (noting that, under Section 1605(a)(7), "hundreds of. . . dissevering plaintiffs had their claims denied because they were domiciled in jurisdictions that did not afford them a substantive claim").

36. As one example, courts have often been flexible in construing claims for intentional infliction of emotional distress brought by family members of victims of terrorism. Typically, such claims require, amongst other things, that the family member be present at the time the harmful conduct occurred to their loved one. RESTATEMENT (SECOND) OF TORTS § 46(2)(a). Courts considering claims for IIED under Section 1605A(c) have, however, often done away with this requirement and allowed IIED claims to proceed even where family members were not present at the terrorist attack. Braun, 228 F. Supp. at 81-82. *Accord* Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93, 115 (D.D.C. 2015); Wyatt, 908 F. Supp. 2d at 229; Valore, 700 F. Supp. 2d at 80.

37. Assault and battery claims are exemplary of the flexible, plaintiff-friendly approach courts often take to questions of fault under Section 1605A(c). As intentional torts, both assault and battery require defendant intend to cause a harmful contact of the other or a third person or imminent apprehension of such contact. RESTATEMENT (SECOND) OF TORTS § 13 (battery); RESTATEMENT (SECOND) OF TORTS § 21(1) (assault); *but see* Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 571 n.47 (noting debate over whether battery requires intent to do harm). Rather than evaluating the particular facts of each case, courts have often held that the intent requirement for assault and battery is satisfied in Section 1605A cases because "acts of terrorism are, by their very

Under Section 1605B—the most recent addition to the menu of private terrorism statutes—[38] "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state or any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."[39]

Section 1605B does not require that foreign state defendants be designated as state sponsors of terrorism. And while liability under Section 1605B is not limited to material support cases, the statute's drafters designed the statute primarily to allow plaintiffs to target foreign sovereigns that provide material support to terrorist groups or activities.[40] Indeed, Section 1605B case law has focused so far on a range of material support claims,[41] including financing, the provision of weapons, and logistical support to terrorist groups or activities.[42]

Unlike Section 1605A, Section 1605B is primarily jurisdictional.[43] That jurisdiction will not lie, however, where defendant is accused of

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nature, intended to harm and to terrify by instilling fear of further harm." Worley, 75 F. Supp. 3d at 336 (internal quotations and citation omitted). *Accord* Gill v. Islamic Republic of Iran, 249 F. Supp. 3d 88, 101-02 (D.D.C. 2017); Braun, 228 F. Supp. 3d at 80; Valore, 700 F. Supp. 2d at 76-77.

38. Section 1605B was passed as part of JASTA. Pub. L. No. 114-222, §§ 2(a)(1), 2(a)(4), 130 Stat. 852 (2016).

39. 28 U.S.C. § 1605B (2016).

40. *See* JASTA, § 2(b) (noting that JASTA's purpose "is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided *material support*, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.") (emphasis added).

41. An earlier version of Section 1605B incorporated the same definition of material support used by Sections 1605A and 2333(a). 162 CONG. REC. 6,093 (2016). While this language was removed from the final statute, and although available judicial decisions have not explicitly addressed the issue, the definition of material support used in Section 2333(a) and 1605A cases likely applies to Section 1605B.

42. In re Terrorist Attacks on September 11, 2001, 298 F. Supp. 3d 631, 646-48 (S.D.N.Y. 2018).

43. While not creating an independent cause of action, Section 1605B allows U.S. nationals to bring substantive claims under Section 2333(a) against foreign government defendants (something that is not generally allowed per 18 U.S.C. § 2337). 28 U.S.C. § 1605B(c). This means the plaintiff-friendly approach to Section 2333(a) ostensibly applies to those claims. While foreign nationals cannot take advantage of this part of Section 1605B, the statute does not appear to prevent them from bringing claims under 1605B pursuant to state tort law or other substantive laws that are not limited to U.S. nationals.

"omissions or [of] acts that merely amount to negligence."[44] Put simply, in order to trigger Section 1605B, a plaintiff must establish that a defendant behaved recklessly, knowingly, or intentionally. Nevertheless, as with the other private terrorism statutes, there is no need to show that defendant specifically intended to further terrorist violence or a particular terrorist act.[45] Instead, plaintiffs can satisfy Section 1605B's jurisdictional requirements by simply demonstrating that defendant "knowingly or deliberately provi[ded] . . . material support to terrorists."[46] Like Sections 2333(a) and 1605A, plaintiff need only show that defendant's material support was the proximate—and not the factual—cause of terrorist violence.[47]

CONNECTING THE PRIVATE AND PUBLIC IN TERRORISM SUITS

In addition to providing remedies for injuries suffered by private parties, suits under Sections 2333(a), 1605A, and 1605B further and support the U.S. government's own terrorism-related priorities, especially when it comes to its criminal material support prosecutions under 18 U.S.C. § 2339A ("Section 2339A") and 18 U.S.C. § 2339B ("Section 2339B").[48] Since 9/11, Sections 2339A and 2339B have been central to the government's terrorism prosecutions in federal courts.[49] Under these laws, providing material support to terrorist groups or activities is a federal crime.[50] By

44. 28 U.S.C. § 1605B(d).

45. *See* In re Terrorist Attacks on September 11, 2001, 298 F. Supp. 3d at 647 (holding that plaintiffs had failed to demonstrate that a Saudi-owned entity had provided material support that directly or indirectly contributed to the 9/11 attacks but not requiring that plaintiffs show it was defendant's purpose or intent to facilitate those attacks).

46. *Id*.

47. *Id*. at 644-46. While the proximate causation requirement is based on Section 1605A, it is too early to say what sort of showing courts will demand, in practice, under Section 1605B. *Id*. at 645-646.

48. There are other criminal statutes prohibiting material support of terrorism and terrorist groups, including 18 U.S.C. § 2339C (2006), 18 U.S.C. § 2339D (2004), and 18 U.S.C. § 2332d (2002). Because Sections 2339A and 2339B are at the heart of the government's criminal prosecution of material support, they are the sole focus of this Article. *See infra* note 50 and accompanying text.

49. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 5–6 (2005); Norman Abrams, *A Constitutional Minimum Threshold for the Actus Reus of Crime? MPC Attempts and Material Support Offenses*, 37 QUINNIPIAC L. REV. 199, 212–14 (2019).

50. *See* 18 U.S.C. § 2339A(a) (2009) ("Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out [various crimes associated with terrorism] or attempts or conspires to do such an act" is guilty of violating the statute.); 18 U.S.C. § 2339B(a)(1) (2015) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so" violates the statute.).

targeting similar types of cases, furthering the same legislative purpose and objectives, and facilitating collaboration between private parties and the U.S. government in its "fight" against terrorism, suits under the private terrorism statutes supplement Section 2339A and 2339B prosecutions, and further the government's counterterrorism priorities more broadly.

Starting with the first category—similarity in case type—the criminal and private terrorism laws penalize similar types of behavior and implicate similar "terrorist" organizations. Because of their shared focus on material support, the criminal and private terrorism laws sweep in nearly any behavior connected in some way to terrorism or terrorist entities. On the criminal side, because they prohibit a wide range of conduct and do not require the actual commission of terrorist violence, the criminal material support laws allow the government to prosecute individuals and entities "regardless of their proximity to terrorism or terrorist groups . . . ."[51] While the private terrorism laws do require an act of violence, Sections 2333(a), 1605A, and 1605B also empower plaintiffs to pursue expansive theories of liability against defendants with loose ties to particular terrorist acts or groups. For example, because of flexible judicial approaches to scienter and causation applied to claims under Section 2333(a), plaintiffs have historically been able to pursue defendants that have engaged in activities several degrees removed from terrorist groups or activities.[52]

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51. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 579.

52. *Id*. at 619. *Strauss v. Credit Lyonnais, S.A*. is one example of how Section 2333(a) has historically exposed defendants far removed from terrorist groups or activities to liability. 2006 WL 2862704. In *Strauss*, plaintiffs brought claims against defendant, a French bank, under Section 2333(a) relating to various terrorist attacks committed by the Palestinian group, Hamas. *Id*. at *2-6. Plaintiffs alleged the defendant bank had violated Section 2333(a) by providing routine financial services to various Palestinian charities, which were allegedly tied to Hamas. *Id*. at *4-6. In allowing plaintiffs' claims to move forward, the court did not demand a specific causal link between defendant's activities and particular acts of terrorist violence, or any meaningful showing that defendant had knowingly or intentionally provided its services to terrorist groups or in furtherance of terrorist activities. *Id*. at *13-15. More recently, however, some courts appear to be restricting Section 2333(a)'s expansive reach. This is a product, in part, of the *Linde* decision's focus on Section 2331(1)'s definition of international terrorism. Indeed, in light of *Linde*, in 2019, the court in *Strauss*—which had not considered Section 2331(1) in its earlier decisions—dismissed the case against defendant because plaintiffs could not satisfy the elements of Section 2331(1). *Strauss I*, 379 F Supp. 3d at 156-161. Some courts also appear to be restricting Section 2333(a)'s reach by back-tracking on earlier, more forgiving approaches to proximate causation. For example, in *Kemper v. Deutsche Bank, A.G.*, the Seventh Circuit "clarified" its proximate cause holding in *Boim II*, which it said could be "read to suggest that something less than proximate cause might suffice to prove (Section 2333(a)) liability." 911 F.3d at 391; *see* In re Chiquita Brands Int'l, 284 F. Supp. 3d at 1312 (observing that *Boim II* "adopted a 'relaxed' standard of proximate causation"). In *Kemper*, the court made clear that proximate causation was both required to prove a Section 2333(a) claim and that "foreseeability, directness, and the substantiality of the defendant's conduct. . .are relevant to the inquiry." *Id*. at 391-92. This is arguably a more demanding approach than that taken in *Boim II*, as well as in *Strauss* and

Similarity in case type between the criminal and private material support laws is also a result of the "terrorist" entities targeted by these suits. This targeting is primarily a byproduct of the relationship (both formal and informal) between these statutes and the government's designation of foreign terrorist organizations ("FTOs"). To trigger prosecution under Section 2339B, material support must be given to a designated FTO.[53] Much like the designation of state sponsors of terrorism, the U.S. State Department is responsible for designating FTOs.[54] Like Section 2339B cases themselves, Section 2333(a) suits based on underlying violations of Section 2339B[55] can only be brought for material support going to an FTO.[56] While Section 2333(a) cases that are based on Section 2339A can implicate terrorist activities by non-FTO groups, winning those cases is difficult absent a relationship between the group in question and a designated FTO.[57]

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other earlier case law. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 595-97; In re Chiquita Brands Int'l, 284 F. Supp. 3d at 1312-14. Other recent cases have similarly embraced a more demanding approach to proximate causation under Section 2333(a). *See, e.g.* Crosby v. Twitter, 921 F.3d 617, 624 (6th Cir. 2019) (holding that under Section 2333(a) "substantiality, directness, and foreseeability are all relevant in a proximate cause determination"); Owens v. BNP Paribas, S.A., 897 F.3d 266, 276 (D.C. Cir. 2018) ("[W]hen a defendant is more than one step removed from a terrorist act or organization, plaintiffs suing under (Section 2333(a)) must allege some facts demonstrating a substantial connection between the defendant and terrorism").

53. 18 U.S.C. § 2339B(a)(1) (2015).

54. Under federal law, the Secretary of State can declare a group to be an FTO as long as it: (a) "is a foreign organization"; (b) "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism"; and (c) "threatens the security of [U.S.] nationals or the national security of the United States." 18 U.S.C. § 1189(a)(1)(A)–(C) (2004).

55. Nearly all Section 2333(a) cases are based on underlying violations of Sections 2339B and/or 2339A. Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, *supra* note 2, at 562 n.7. Violations of these statutes theoretically satisfy subsection (A) of the definition of "international terrorism." Linde, 882 F.3d at 325-26; *see also* Boim v. Quranic Literary Inst. & Holy Land Found., 291 F.3d 1000, 1015 (7th Cir. 2002) [hereinafter *Boim I*] (concluding that Section 2333(a) claims can be based on underlying violations of Section 2339A and 2339B, which constitute acts of "international terrorism"). Defendants need not be convicted under Sections 2339A or 2339B to be sued under Section 2333(a). *Boim I*, 291 F.3d at 1015.

56. *See, e.g.*, Weiss v. Nat'l Westminster Bank PLC, 768 F.3d 202, 204–05 (2d Cir. 2014) (Section 2333(a) case involving underlying Section 2339B claim alleging material support to a charity that provided funds to Hamas, a designated FTO); Strauss v. Credit Lyonnais, S.A., 925 F. Supp. 2d 414, 419, 442 (E.D.N.Y. 2013) (Section 2333(a) case involving underlying Section 2339B claim alleging material support to purported alter-egos of Hamas).

57. For example, in *Ahmad v. Christian Friends of Israeli Communities*, the court dismissed a Section 2333(a) claim—based in part on underlying violations of Section 2339A—brought against U.S. charities purportedly providing financial support to Israeli settlers. No. 13 Civ. 3376, 2014 WL 1796322, at *5 (S.D.N.Y. May 5, 2014). Even though plaintiffs had presented allegations that arguably made out a claim that the settlers had engaged in

Even though Section 1605A does not expressly condition suit on FTO support, many of these cases involve aid to such groups.[58] As for Section 1605B, while these suits also do not depend on the involvement of FTOs, the majority of cases brought so far have focused on terrorist activity by an FTO.[59]

As for the second category—furthering the same legislative purpose and objectives—support for the U.S. government's "fight" against terrorism is at the heart of both the criminal and private terrorism statutes. In considering passage of Section 2339B, for example, Congress noted that "law enforcement at all levels must be given reasonable and legitimate investigative tools to enhance their capability of thwarting, frustrating, and preventing terrorist acts before they result in death and destruction."[60] Similarly, the legislative histories of Sections 2333(a), 1605A, and 1605B make clear that they are aimed not only at providing remedies for individual harm, but also at combatting the threat of terrorism itself. In describing the need for Section 2333(a), one senator declared that "[n]ow more than ever, countries around the world must be vigilant and relentless in the fight against terrorism."[61] In passing the original version of Section 1605A, the House Report struck a similar note. An exception to foreign sovereign immunity was necessary, in Congress's view, because state sponsors had "become better at hiding their material support for their [terrorist] surrogates . . . ."[62] Congressional commentary on Section 1605B's role in the "fight" against terrorism is especially explicit in drawing the connection

terrorist activity, the court dismissed the complaint. *Id*. at *3. In doing so, it suggested that a "knowing" donor to Israeli settler groups would not, inevitably, know their money would support terrorist activities; while, by contrast, a knowing donor to Hamas "would know that Hamas was gunning for Israelis . . . and that donations to Hamas . . . would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel." *Id*. In this fashion, the court intimated that being affiliated with the sort of "established terrorist organization[s]" typically designated as an FTO—like Hamas—was highly persuasive, even in Section 2333(a) cases based on violations of Section 2339. Though plaintiffs' complaint suffered from other shortcomings, the fact the alleged terrorist activity involved a group that defied government-sanctioned views on terrorist organizations arguably weighed heavily on the court's dismissal decision. *See id*.

58. *See, e.g.*, Braun, 228 F. Supp. 3d at 64 (Section 1605A case involving alleged material support to Hamas, a designated FTO); Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1 (D.D.C. 2016) (same); Roth, 78 F. Supp. 3d at 379 (same).

59. As discussed below, Section 1605B was primarily designed to allow suits related to the 9/11 attacks—which were perpetuated by al Qaeda, a designated FTO—and has been almost exclusively used for that purpose so far. *See infra* notes 76, 89 and accompanying text; *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited Sept. 2, 2021) (listing al Qaeda as a designated FTO since 1999).

60. H.R. REP. NO. 104-383, at 42 (1995).

61. 137 CONG. REC. 3303 (1991).

62. H.R. REP. NO. 104–383, 62.

between private terrorism suits and the government's counterterrorism efforts. In articulating the need for the statute, Congress noted both that "[i]nternational terrorism is a serious and deadly problem that threatens the vital interests of the United States,"[63] and that the U.S. government "has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims. . ."[64]

The final way in which private terrorism suits support the government's criminal terrorism prosecutions and counterterrorism activities more generally is by facilitating collaboration between private parties and the government.[65] Indeed, some private terrorism plaintiffs view their work as aimed at supporting the government's counterterrorism efforts.[66] Some have even felt duty-bound to share relevant evidence with the U.S. government. For example, in several cases, plaintiffs have provided information to assist with ongoing criminal material support suits or investigations.[67] On certain occasions, the U.S. government has returned the favor

63. JASTA, Pub. L. No. 114-222, §§ 2(a)(1), 130 Stat. 852 (2016).

64. *Id*.

65. The one arguable exception to this rule is Section 1605B. Even at its inception, Section 1605B created more friction than collaboration between prospective plaintiffs and the Executive branch. Though ultimately overridden by Congress, President Barack Obama vetoed JASTA because it included Section 1605B—which is broadly understood to target Saudi Arabia, an important U.S. ally, for alleged involvement in the 9/11 attacks. *See* 162 CONG. REC. 13,539 (2016) (Justice Against Sponsors of Terrorism Act-Veto reflecting Obama's veto of JASTA); David Smith, *Congress Overrides Obama's Veto of 9/11 Bill Letting Families Sue Saudi Arabia*, GUARDIAN (Sept. 29, 2016), http://www.theguardian.com/us-news/2016/sep/28/senate-obama-veto-september-11-bill-saudi-arabia (describing Congress's override of Obama's veto of JASTA); *infra* notes 89-90 and accompanying text (describing JASTA as targeting Saudi Arabia). Beyond this initial tense history, Section 1605B includes a provision that could further exacerbate friction between plaintiffs and the Executive, by giving the latter authority to resolve Section 1605B cases. *See* JASTA, § 5 (provision allowing the U.S. government to intervene and stay Section 1605B cases where the Secretary of State certifies the government is engaged in good faith discussion with the foreign sovereign to resolve the suit). Whether this provision will, in fact, create friction between plaintiffs and the Executive branch will likely turn on the identity of the defendant. If the defendant state is a U.S. ally, like Saudi Arabia, the Executive branch may be less inclined to work with plaintiffs in a collaborative fashion.

66. As the lead plaintiff in one Section 1605A case said about her family's motivations for filing suit, "[w]e don't want to be victims of terror anymore. We want to be soldiers in the war on terrorism; the courtroom is our battlefield." Newsweek Staff, *We Want to Hurt Iran*, NEWSWEEK (Mar. 18, 2003), http://www.newsweek.com/we-want-hurt-iran-132447. Plaintiffs in a leading Section 2333(a) case expressed a similar desire to "shut[] down the [terrorist] fundraising network" and set a broad precedent to deter future funding of terrorism, rather than to simply collect damages. ORDE KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 59 (2015).

67. For example, plaintiffs in the *Boim* case provided evidence they had gathered to the U.S. government to help with a criminal case against several *Boim* defendants. KITTRIE,

and directly collaborated with private terrorism plaintiffs. In at least one case, the U.S. government reportedly sent a team of FBI agents to the Gaza Strip to collect evidence on a plaintiff's behalf.[68] In another suit, the U.S. Department of Treasury provided information to the plaintiffs' lawyers so that they could attach funds held in U.S. bank accounts in fulfillment of a Section 1605A judgment against Iran.[69]

DISCRIMINATORY EFFECTS

There is another important way in which private terrorism suits align with the government's criminal terrorism prosecutions. Like those efforts, private terrorism case exhibit a disproportionate and discriminatory focus on Arabs and Muslims, by design. While Section 2339A and 2339B prosecutions primarily target Muslim and/or Arab individuals or those connected with Muslim and/or Arab groups, suits under Sections 2333(a), 1605A, and 1605B primarily implicate, directly or indirectly, Muslim and /or Arab individuals, groups, and countries.

Though scattered, available information suggests most federal terrorism prosecutions, including for material support, have been brought against Arabs and/or Muslim individuals, or those connected with Arab or Muslim groups, often for vague or non-violent crimes.[70] One study found that of the 519 individuals charged with terrorism-related crimes or who died allegedly engaged in such crimes since 9/11, 465 were Muslim.[71] Another recent study found that between 2012 and 2017 nearly all forty-five indictments charging violations of Section 2339A involved individuals who "came under the scrutiny of law enforcement based on the perception they

supra note 67, at 59–60. Plaintiffs in another 2333(a) case, *Linde v. Arab Bank*, also reportedly provided materials to the U.S. government to assist with its investigation into defendant, Arab Bank. *Id*. at 64.

68. *Id*. at 71.

69. *Id*. at 79.

70. *See* Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1560 (2017) (Muslims are disproportionately prosecuted in the War on Terror"); LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA, 7–8 (2015) (noting that, between March 2014 and December 2015, the overwhelming majority of U.S.-based ISIS supporters (73%) were not involved in plotting terrorist attacks in the U.S., and instead were arrested for "intent to do harm" overseas or for providing materials support, specifically "personnel and funds," to fighters in Syria and Iraq); WADIE SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF CRIMES OF TERROR 147 (2015) (noting that "only a very small percentage of terrorism prosecutions have reflected an actual security threat . . . .").

71. Peter Bergen et al., *Terrorism in America After 9/11, Part II,: Who Are the Terrorists?*, NEW AM., https://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists/ (last visited Sept. 3, 2021).

sympathized, or had declared allegiance to, self-proclaimed Islamist militants abroad."[72]

Section 2333(a), 1605A, and 1605B cases exhibit a similar focus on the Arab and Muslim world. Of the over ninety cases brought under Section 2333(a), over seventy have involved underlying terrorist activity allegedly committed by Arab and/or Muslim entities.[73] The lion's share of Section 1605A litigation has also been raised against Arab and/or Muslim-majority countries.[74] Section 1605B litigation has, at least to date, almost exclusively been aimed at Saudi Arabia or Saudi-owned entities.[75]

Arabs and Muslims are obviously not the only ones who engage in terrorist violence.[76] Nevertheless, criminal and private terrorism suits inevitability target these groups disproportionately. The main reasons for this have to do with the political economy of FTO designations; the law's implicitly international focus even where prosecutions do not depend on FTO designations; the political economy of state sponsor designations; and the explicit motivation behind passing some of these laws.

As mentioned earlier, Section 2339B requires a connection to a designated FTO.[77] Since the State Department first began making those

72. Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/.

73. Maryam Jamshidi, Section 2333(a) Table of Cases (Sept. 3, 2021) (unpublished research) (on file with author).

74. According to publicly accessible case law on Westlaw, in comparison to the more than 100 cases brought under Section 1605A against Arab and/or Muslim majority states, there have been far fewer cases against those designated state sponsors of terrorism that are non-Arab/Muslim: specifically, less than twenty cases against Cuba and six against North Korea, as of this writing. *See infra* note 88, for a complete list of state sponsors of terrorism past and present.

75. *In re Terrorist Attacks on September 11, 2001*, 03-MDL-1570, in the Southern District of New York is the primary line of litigation in which Section 1605B has been used.

76. For over twenty years, domestic right-wing extremist groups have been responsible for most U.S. terrorism incidents that have resulted in fatalities. According to a 2017 report from the Government Accountability Office (GAO), far right-wing violent extremists—which include white supremacists, neo-Nazis, and members of the Ku Klux Klan— have been responsible for 73 percent of terrorism-related incidents that resulted in deaths from September 12, 2001 to December 31, 2016. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ADDRESS PROGRESS OF FEDERAL EFFORTS 4, 29 (2017), https://www.gao.gov/assets/690/683984.pdf. According to reports from the Anti-Defamation League, which tracks extremist violence in the United States, right-wing groups were responsible for almost all "extremist-related" murders in 2018 and 2019. ANTI-DEFAMATION LEAGUE, A REPORT FROM THE CENTER ON EXTREMISM: MURDER AND EXTREMISM IN THE UNITED STATES IN 2018 10 (2019), https://www.adl.org/media/12480/download; ANTI-DEFAMATION LEAGUE, A REPORT FROM THE CENTER ON EXTREMISM: MURDER AND EXTREMISM IN THE UNITED STATES IN 2019 18 (2020), https://www.adl.org/media/14107/download.

77. 18 U.S.C. § 2339B(a)(1) (2015).

designations in 1997,[78] sixty-six of the eighty-six total FTOs have been Arab and/or Muslim.[79] Reflecting on the political nature of these designations, one scholar described the government as "effectively employ[ing] its designation authority to halt almost all domestic activities and organizations associated with the Middle East or Islam under the auspices of combating terrorism."[80]

As for Section 2339A, despite eschewing a FTO requirement or any express limitation to foreign terrorism, the predicate crimes that trigger Section 2339A often have an international nexus.[81] For example, Section 2339A prohibits material support in connection with "[a]cts of terrorism transcending national boundaries"[82] or conspiracy "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in . . . the United States."[83] This focus on international activity has effectively oriented Section 2339A around individuals allegedly aligned with Muslim and/or Arab entities, which are disproportionately associated with international rather than domestic terrorism.[84]

Given its reliance on Sections 2339A and 2339B, it is unsurprising that Section 2333(a) cases reflect a similarly disproportionate focus on Arab and/or Muslim groups. As for Section 1605A, the U.S. Secretary of State has broad discretion in designating state sponsors of terrorism,[85] with designation decisions often turning less on a country's terrorist activities and more on political considerations.[86] Since the original version of Section 1605A was initially passed in 1996, there have been eight designated state

78. Sean D. Murphy, *U.S. Designation of Foreign Terrorist Organization*, 94 AM. J. INT'L L. 365, 365 (2000).

79. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited Sept. 3, 2021). I have used my own expertise and research on this issue to distinguish between groups that are and are not Arab and/or Muslim.

80. Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism*, 9 TEX. J. ON C.L. & C.R. 45, 91 (2003).

81. Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1357 (2019).

82. 18 U.S.C § 2332b (2015); *see* 18 U.S.C. § 2339A(a) (2009) (listing Section 2332b as a predicate crime).

83. 18 U.S.C § 956 (1996); *see* 18 U.S.C. § 2339A(a) (listing Section 956 as a predicate crime).

84. Sinnar, *supra* note 82, at 1337.

85. The State Department also enjoys broad discretion in designating FTOs, though there are arguably more constraints on that designation process. *See* Jamshidi, *The Discriminatory Executive and the Rule of Law*, *supra* note 2, at 114-15.

86. Troy Homesley III, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 819 & n.137 (2017).

sponsors of terrorism with six being Arab and/or majority Muslim.[87] As a result of its dependence upon this politically-charged list, Section 1605A's disproportionate impact on Arab and/or Muslim states is unavoidable.

When it comes to Section 1605B, even though it is not limited to Saudi Arabia, the statute is a result of political efforts to salvage various civil suits that tried, but failed, to hold Saudi Arabia and its state-owned entities liable for the 9/11 attacks.[88] Indeed, some members of Congress supported the statute's passage based, at least in part, on the (dubious) logic that because the majority of 9/11 attackers were Saudi, Saudi Arabia itself might be liable for 9/11.[89] Given this backdrop, it is less than surprising that Section 1605B has nearly exclusively targeted the Saudi government and its related organizations.

In disproportionately impacting Arab and Muslims individuals, groups, and entities, criminal and private terrorism laws reinforce discriminatory stereotypes of Arabs and Muslims as being predisposed to terrorism.

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87. These Arab and or Muslim majority countries are Iran, Libya, Sudan, Syria, South Yemen, and Iraq. Cuba and North Korea have also been designated as state sponsors of terrorism. Sudan, Iraq, South Yemen (which no longer exists), and Libya, have been removed from the state sponsor list. *See* DIANNE E. RENNACK, CONG. RESEARCH SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM — LEGISLATIVE PARAMETERS: IN BRIEF 8–9 (2006), https://fas.org/sgp/crs/terror/R43835.pdf; Eyder Peralta, *Sudan Which Once Sheltered Bin Laden, Removed from U.S. Terrorism List*, NPR (Dec. 14, 2020), https://www.npr.org/2020/12/14/946207797/sudan-who-once-sheltered-bin-laden-removed-from-u-s-terrorism-list. Currently, Iran, Syria, Cuba, and North Korea are listed as state sponsors. *State Sponsors of Terrorism: Bureau of Counterterrorism*, U.S. DEP'T OF ST., https://www.state.gov/state-sponsors-of-terrorism/ (last visited Sept. 3, 2021).

88. Lelchook v. Islamic Republic of Iran, 224 F. Supp. 3d 108, 113 n.1 (D. Mass. 2016); Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SECURITY (Apr. 18, 2016), https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/.

89. In expressing support for Section 1605B, Congressman Lloyd Dogget argued that:

> The [Saudi] Kingdom has blood on its hands. Is it the blood of the victims of 9/11? Possibly. Fifteen of the nineteen hijackers were Saudis. Some Saudis were permitted to flee this country without thorough interviews. Saudi Arabia has long been considered the primary source of funding for al Qaeda.

Statement by Congressman Lloyd Doggett, 162 CONG. REC. 12,171 (2016) (internal quotation marks and citation omitted). Doggett's logic, suggesting that the nationality of the attackers points to potential Saudi liability, is far from uncommon and has been endemic since the attacks occurred. *See, e.g.*, Tim Golden and Sebastian Rotella, *The Saudi Connection: Inside the 9/11 Case that Divided the FBI*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/magazine/9-11-saudi-arabia-fbi.html (noting that "[f]rom the day of the attacks, the trail seemed to point to Saudi Arabia. . . . [in part because] there was the inescapable fact that, like Osama bin Laden, 15 of the 19 hijackers were Saudis"). This is not to say that Saudi Arabia was not involved in the attacks (though multiple government commissions and agencies have concluded that they were not, *see id*.), but rather to underscore the political economy behind allegations of Saudi involvement.

Similarly, they depend on the normative assumption that to be a terrorist is to be a member of a certain racial, religious, or national community—specifically, to be or appear to be Arab or Muslim or from an Arab or Muslim country.[90] These laws effectively exclude numerous individuals (as well as groups and countries) who do not belong to one of these communities, even if they have engaged or have attempted to engage in criminal or violent activity. In these ways, the criminal and private terrorism laws, and indeed the U.S. government's counterterrorism policies more generally, are notably reminiscent of other forms of racial stereotyping and discrimination that have been exposed as illegitimate, including practices of equating "African American and Latino appearance . . . with criminality, Latino appearances with illegal border crossings, and Asian appearance with treason."[91]

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In reflecting on the legacy of 9/11, it is important to understand the ways in which public and private discrimination against Arabs and Muslims intertwine and reinforce one another. The relationship between private terrorism suits and criminal prosecutions of terrorism are a prime example of this relationship—one that should be central to any effort to address national security and counterterrorism-related discrimination against Arabs and Muslims going forward.

90. Shortly after 9/11, Professor Leti Volpp captured the new power of this normative stereotyping of Arabs and Muslims, arguing that "September 11 facilitated the consolidation of a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim'" and describing this consolidation as "reflect[ing] a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens." Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

91. Muneer I. Ahmed, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278 (2004).