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## ARTICLES

### RESOLVED, OR IS IT? THE FIRST AMENDMENT AND GIVING MONEY TO TERRORISTS

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#### INTRODUCTION

Americans are governed by a concept known as the “rule of law.” It is an idea we embrace so passionately that we seek to instill it in developing countries. One of the hallmarks of the rule of law in Anglo-American thinking is legal certainty: the concept that the “government in all its actions is [to be] bound by rules fixed and announced beforehand.”<sup>1</sup> These fixed rules include the freedom of expression and association and the recognition that the act of giving

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1. GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA* 6 (Basic Books 1979) (quoting FRIEDRICH A. VON HAYEK, *ROAD TO SERFDOM* 72 (Univ. of Chi. Press 1976)).

money is sometimes protected from government infringement because it involves these freedoms.<sup>2</sup>

This legal certainty, of course, does not mean that the government may not regulate financial transactions, as we have many federal agencies doing just that. Rather, it means that official actions cannot unduly infringe on “expressive association,” lest these actions be ruled unconstitutional.<sup>3</sup> Legal certainty is achieved by seeing how courts have judged government actions in the face of claims that those actions violate the First Amendment.

This Article seeks to show that legal certainty has been achieved in an arena that is very important: whether the U.S. government can limit the giving of money to terrorist groups. In this field, there is a regulatory regime, a series of statutes, and a corpus of prosecutions and civil lawsuits arising from these laws that the American courts have found to comport with the First Amendment.<sup>4</sup> The test for legal certainty is relatively easy, if one agrees that the question is binary: either the enactment of a particular rule or law, or government action in initiating a criminal prosecution or permitting a private civil action, is constitutional, or it is not. The cases where these arguments are considered provide the answer. It is just a matter of keeping score until it gets rather lopsided and then declaring a winner and concluding that the constitutional issue has been settled.<sup>5</sup> At that point, people know exactly what is prohibited, to the extent there was any doubt.

If legal certainty has been achieved, why do we still see claims that the United States’ actions in the counterterrorism field violate the First Amendment? Good question. The only explanation is that there are still lawyers and legal strategists engaging in wishful thinking, almost to the point of bad faith. The problem with this practice, beyond wasting judicial resources, is the inconsistency, since their arguments—if accepted—would take the United States away

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2. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (“Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).

3. See *id.* at 25 (stating that there is a fundamental right to free speech and freedom of association protected by the Constitution, which the government can abridge but only if its abridgement survives strict scrutiny analysis).

4. See, e.g., *id.* at 143 (holding congressional action limiting an individual’s free speech via campaign contributions to be constitutional).

5. By this statement, I do not mean to imply that there are no more constitutional controversies in American counterterrorism efforts. Rather, I am asserting that certain aspects of these efforts are now constitutionally settled, as described in this Article.

from the goal of the rule of law and jeopardize legal tools about which these strategists themselves are enthusiastic.

This Article seeks to illustrate this point. Part I describes the easy cases on constitutional counterterrorism in America. Part II takes them a step further and discusses the constitutional challenges as American counterterrorism efforts have sought to reach the non-violent actors in the terrorist infrastructure, by attacking the act of giving money. Part III considers the next constitutional battlefield and explains why people who continue to push the view that terrorist financing cannot be constitutionally targeted through legal proceedings will, if successful, eliminate remedies they themselves enjoy.

### I. THE EASY PRINCIPLE IN COUNTERTERRORISM

In counterterrorism and the First Amendment, there is an easy principle: One cannot rely on the First Amendment to defend oneself from being punished for engaging in politically inspired violence.<sup>6</sup> This is true even though the First Amendment arguably protects political expression more than other types of speech-related conduct.<sup>7</sup> For example, Sheik Omar Abdul Rahman failed in his attempt to cloak his violent conduct in First Amendment-protected activity,<sup>8</sup> as did American *jihadist* John Walker Lindh.<sup>9</sup> They each acted according to their religious beliefs.<sup>10</sup> Both are now in prison.<sup>11</sup>

What about people whose conduct was further removed from violence? In Virginia after 9/11, Sheik Ali al-Timimi was convicted of

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6. See, e.g., *United States v. Rahman*, 189 F.3d 88, 114 (2d Cir. 1999) (noting that Rahman's challenge to his conviction—arguing that the Seditious Conspiracy Statute violated his freedom of speech—was not a valid claim).

7. See *Buckley*, 424 U.S. at 15 (“The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”) (internal quotation marks and citations omitted).

8. See *Rahman*, 189 F.3d at 114 (arguing that the seditious conspiracy statute, 18 U.S.C. § 2384, was facially unconstitutional and overbroad and that his conviction “rested solely on his political views and religious practices”).

9. See *United States v. Lindh*, 212 F. Supp. 2d 541, 569 (E.D. Va. 2002) (“There is, in other words, a clear line between the First Amendment protected activity and criminal conduct for which there is no constitutional protection.”).

10. See *Rahman*, 189 F.3d at 103 (describing Rahman as a Islamic scholar and cleric leading a jihad against the enemies of Islam and as viewing the United States as the primary oppressor of Muslims); *Lindh*, 212 F. Supp. 2d at 565–66 (highlighting Lindh's contention that he provided services to the Taliban for religious reasons in contrast to others who did so for non-religious reasons).

11. See *Rahman*, 189 F.3d at 111 (sentencing Rahman to life in prison); *Lindh*, 227 F. Supp. 2d at 572) (sentencing Lindh to 240 months in prison).

soliciting his adherents to travel abroad to engage in violence.<sup>12</sup> A key factor in judging his First Amendment challenge was whether his speech, which occurred in the context of a religious sermon, was “imminent.”<sup>13</sup> This concept is a settled one and originated in *Brandenburg v. Ohio*,<sup>14</sup> where a Ku Klux Klan leader was prosecuted under an Ohio statute that criminalized being a member of an organization that advocated criminal syndicalism (terrorism as a means of effecting political change).<sup>15</sup> It was in *Brandenburg* that the Supreme Court issued these famous words:

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.<sup>16</sup>

So there you have it, some element of legal certainty: Statutes that criminalize advocacy, and prosecutions arising out of them, are only constitutional if they include within their scope only speech that reaches the incitement of imminent lawlessness.<sup>17</sup> Did Sheik al-Timimi’s prosecution qualify? As Professor Wayne McCormack has noted, the al-Timimi case unquestionably pushes the envelope of incitement law because al-Timimi’s actions were “at least two steps removed from physical violence.”<sup>18</sup> However, it did not help al-Timimi’s constitutional arguments that some of his adherents actually complied with his words and in fact traveled abroad to engage in violence.<sup>19</sup> Not only was the threat imminent, but it actually happened.<sup>20</sup>

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12. See *United States v. Chandia*, 514 F.3d 365, 369 n.1 (4th Cir. 2008) (stating that Ali al-Timimi was convicted of solicitation to levy war, among other things, in 2005).

13. See generally Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785 (2006) (discussing the al-Timimi conviction and whether his speech was protected by his First Amendment rights or prohibited as unlawful incitement).

14. 395 U.S. 444 (1969).

15. *Id.* at 444–45.

16. *Id.* at 447–48.

17. See *id.*

18. WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 122 (LexisNexis 2007).

19. See Indictment of Defendant at 6–8, *United States v. Al-Timimi*, No. 1:04cr385 (E.D. Va. 2004), available at <http://www.milnet.com/terr-prosecutions/al->

So speech that threatens violence may be constitutionally prosecuted. Consider a case from a few years ago in which a defendant was convicted of cross-burning with “an intent to intimidate.”<sup>21</sup> In upholding the conviction, over First Amendment objections, the Supreme Court recognized that the government has a legitimate interest in preventing fear:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where the speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>22</sup>

Thus, we can draw the line between protected and proscribed speech, even where the speech is political and therefore entitled to the highest degree of First Amendment protection.<sup>23</sup> For example, the ability to vocalize one’s disagreement with the President is surely one of the key objects of the First Amendment.<sup>24</sup> That does not prevent the government from prosecuting someone for the crime of threatening the life of the President, an essentially verbal crime.<sup>25</sup> Even if the threat is merely an expression of political disagreement, the government can constitutionally punish these speakers.<sup>26</sup> For example, in the case of a threat to the President, the Secret Service is deployed at the mere mention of the prospect. This vigilance is

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Timimi\_indict.pdf (recounting al-Timimi’s instructions to others that training in Pakistan was appropriate, as well as how to reach the camp undetected, and the individual’s actions in reaching the training camp).

20. On appeal, al-Timimi moved to have his conviction vacated and remanded, and the court granted his motion. *United States v. Al-Timimi*, No. 05-4761, CR-04-385, 2006 US App. LEXIS 32554, at \*1–2 (4th Cir. Apr. 25, 2006).

21. *Virginia v. Black*, 538 U.S. 343, 347 (2003).

22. *Id.* at 359–60 (citations omitted).

23. *See id.* at 365–67 (explaining that cross-burning may be considered to be either proscribable intimidation, or protected political speech, and declaring the Virginia statute at issue unconstitutional for blurring the line between what is proscribed and what is protected).

24. *See id.* at 361–62 (noting that the First Amendment protects most content-based speech from governmental prohibition).

25. *See* 18 U.S.C. § 871 (2000) (proscribing threats made against the President of the United States).

26. *See id.* (stating any threat to the President “shall be fined . . . or imprisoned not more than five years, or both”).

essential to prevent harm, which means the threat causes consequences that should be discouraged through the risk of prosecution.

## II. GIVING MONEY TO TERRORISTS

What about when the expressive association is represented by the act of giving money? Can non-violent financial supporters of terrorists be constitutionally prosecuted? There is no question that they can be. In 1994, Congress enacted the first “material support” law, which criminalized the act of providing funds “knowing or intending that they are to be used in preparation for, or in carrying out, [a terrorism crime].”<sup>27</sup> This statute is constitutional, despite the fact that the act of giving money is also an act of expression, because it requires proof that the defendant intended to support violence.<sup>28</sup> This would seem to comport with *Brandenburg*.<sup>29</sup>

The intent element of this first “material support” statute—the price of it being obviously constitutional—is so exacting that the statute has limited utility. Realizing this, Congress two years later enacted the second material support crime statute, which prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization . . . .”<sup>30</sup> It is this second statute—18 U.S.C. § 2339B—and the prosecutions arising under it that have generated First Amendment litigation that continues to this day.<sup>31</sup>

This is not particularly surprising. Where the designated foreign terrorist organizations included Islamic groups, the First Amendment issue was in some ways inevitable because Islamic law mandates that members give alms, known as *zakat*, calculated on the basis of accumulated wealth.<sup>32</sup> Thus, the giving of money to groups that represent their objectives to be humanitarian complicates Western

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27. 18 U.S.C. § 2339A(a) (2000).

28. *See id.* (proscribing material support to terrorists where the individual “know[s] or intend[s] that [the material is] . . . to be used in preparation for, or in carrying out” proscribed acts).

29. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting that a state can proscribe speech “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

30. 18 U.S.C. § 2339B (2000). The courts sometimes refer to this statute as the AEDPA—the Antiterrorism and Effective Death Penalty Act of 1996.

31. *See, e.g., United States v. Chandi*, 514 F.3d 365, 371 (4th Cir. 2008) (involving a defense by Chandi that 18 U.S.C. § 2339B was unconstitutional because it violated his First Amendment rights).

32. *See Raj Bhala, Theological Categories for Special and Differential Treatment*, 50 KAN. L. REV. 635, 677 (discussing the five pillars of Islam: profession of faith, prayer, alms (*zakat*), fasting, and pilgrimage).

efforts to prevent the flow of funds to Islamic groups that both help people and engage in violence, such as Hizballah and Hamas.<sup>33</sup>

In enacting § 2339B, Congress intended to prohibit all financial support to terrorist groups, including donations intended for purely humanitarian purposes.<sup>34</sup> Persons who unwittingly provide such funding cannot be prosecuted, since the statute requires the donor to “knowing[ly]” support terrorism.<sup>35</sup> The questions faced by the courts included whether financial support for a group’s political or humanitarian activities could be constitutionally criminalized.<sup>36</sup>

The First Amendment challenge to the government’s ability to prohibit the transfer of United States-based funds—“humanitarian” funds—to designated terrorist organizations came in the form of one prospective criminal prosecution and five actual ones.<sup>37</sup>

The prospective one involved the claim by a charity that wanted to support the Tamil Tigers and the Kurdistan Workers’ Party that § 2339B chills its freedom of association.<sup>38</sup>

Plaintiffs claim that such support would be directed to aid only the nonviolent humanitarian and political activities of the designated organizations. Being prohibited from giving this support, they argue, infringes their associational rights under the First Amendment. Because the statute criminalizes the giving of material support to an organization regardless of whether the donor intends to further the organization’s unlawful ends, plaintiffs claim it runs afoul of [the First Amendment].<sup>39</sup>

The United States Court of Appeals for the Ninth Circuit rejected this argument.<sup>40</sup> As Chief Judge Alex Kozinski wrote,

The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What [§ 2339B] prohibits is the act of giving material support, and

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33. See, e.g., *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 710 (7th Cir. 2007) (Hamas); *United States v. Hammoud*, 381 F.3d 316, 325 (4th Cir. 2004) (Hizballah).

34. See, e.g., *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005) (explaining Congress’s concern that terrorist organizations would receive funding “under the cloak of a humanitarian or charitable exercise”) (internal quotations omitted).

35. 18 U.S.C. § 2339A(a) (2000).

36. See, e.g., *Chandi*, 514 F.3d at 371 (assessing the constitutionality of 18 U.S.C. § 2339B, which criminalizes material support to terrorist organizations).

37. See *infra* notes 38, 45–46 and accompanying text (discussing the hypothetical and actual cases, respectively).

38. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

39. *Id.* at 1133.

40. *Id.*

there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.<sup>41</sup>

Money, it seems, is different from pure speech. Sure, the act of transferring money has First Amendment symbolism. However, money is also more difficult to control because it is fungible, which means even donations that are motivated by benevolence can be mixed with other receipts, thereby freeing up more proceeds which terrorist groups may use to kill people. In addition, the government limits what people can do with their money all the time. One cannot give an unlimited amount of money to a political candidate of one's choice.<sup>42</sup> One cannot buy Cuban cigars from Fidel Castro.<sup>43</sup> What you do with your money is not sacrosanct. Financial transactions may be regulated and are regulated. This regulation is constitutional. The government's authority to regulate financial transactions is supported by a long history of precedent, dealing with campaign financing rules and the President's embargo authority, among other things.<sup>44</sup>

The actual "material support" prosecutions involved people charged with providing funds to Hizballah, Hamas, the Palestinian Islamic Jihad ("PIJ"), and worldwide Islamic jihad generally.<sup>45</sup> In these cases, the courts denied the defendants' First Amendment claims, each of which was based on the argument that the government cannot constitutionally limit the sending of funds to terrorist organizations.<sup>46</sup>

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41. *Id.*

42. *See* Buckley v. Valeo, 424 U.S. 1, 29 (1979) (holding the contribution limitation to individual political candidates constitutional).

43. *See* 22 U.S.C. §§ 6001–6010 (2000) (codifying the trade embargo with Cuba and providing sanctions for U.S. citizens and corporations that violate the embargo).

44. *See supra* notes 42–43 and accompanying text (highlighting that restrictions on campaign contributions and trade with Cuba are permissible impingements upon one's right to expend money as one sees fit).

45. *See, e.g.,* United States v. Hammoud, 381 F.3d 316, 325 (4th Cir. 2004) (noting that Hammoud was convicted on several counts for his support of Hizballah); United States v. Marzook, No. 03 CR 0978, 2005 WL 3095543, at \*1 (N.D. Ill. Nov. 17, 2005) (noting that the indictment was for the defendant's alleged assistance to Hamas); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1328 (M.D. Fla. 2004) (noting that the accused allegedly supported the PIJ through operating and directing fundraising activities in the United States).

46. *See, e.g.,* Hammoud, 381 F.3d at 329 (rejecting the argument that § 2339B impermissibly restricts the First Amendment right of association); United States v. Holy Land Found. for Relief and Dev., No. 3:04-CR-240-G, 2007 WL 2004452, at \*1 (N.D. Tex. July 11, 2007) (rejecting the argument that the government had criminalized their religious obligation to engage in *zakat*-charitable giving); United States v. Jayyousi, No. 04-60001-CR, 2007 WL 781373, at \*2 (S.D. Fla. Mar. 12, 2007) (stating that there is no First Amendment protection for providing resources

When it comes to giving funds to terrorist organizations, it seems the law is settled. Money—even “humanitarian money,” funds intended for benevolent purposes—simply cannot go to foreign groups that engage in political violence. People who knowingly defy this prohibition can be prosecuted.<sup>47</sup> People can also be constitutionally prosecuted for the separate crime of lying about their terrorist-support activities.<sup>48</sup>

There has yet to be a court that disagrees with this conclusion, yet the argument that § 2339B infringes on speech and amounts to an unconstitutional assessment of “guilt by association” has been pushed time and time again, without success.<sup>49</sup> When it comes to the act of giving funds to designated terrorist groups, the constitutionality of the § 2339B prohibition is so well established that it can be considered a legal certainty.<sup>50</sup>

### III. WHAT ABOUT PRIVATE ACTIONS AGAINST TERRORIST FINANCIERS?

There is an aspect of American counterterrorism efforts that has not been considered as much as criminal prosecutions: the legal remedies that permit private parties to sue terrorists in American courts on behalf of the people they have killed and injured.

The civil counterpart to U.S. counterterrorism is just that, since its power lies in its borrowing from § 2339B jurisprudence. Congress saw fit to permit federal civil actions in American courts on behalf of victims killed and injured by the actions of international terrorist organizations.<sup>51</sup> The Antiterrorism Act of 1990 (“ATA”) provides:

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knowing and/or intending that they will be used for terrorist activities); *Marzook*, 2005 WL 3095543, at \*4–6 (rejecting the argument that the indictment impinges on defendant’s First Amendment rights of freedom of speech and association); *Al-Arian*, 308 F. Supp. 2d at 1341–42 (rejecting the argument that the indictment attempts to criminalize their First Amendment rights of speech in support of and association with the PIJ).

47. See *supra* note 35 and accompanying text (explaining that to be liable under the statute a donor must know he is supporting terrorism).

48. Cf. *United States v. Mubayyid*, 476 F. Supp. 2d 46, 52 (D. Mass. 2007) (“The Court sees no reason why providing a complete and truthful description of the organization’s planned activities in order to obtain tax-exempt status—whether or not those activities are religiously motivated—inhibits or substantially burdens the exercise of religious freedom.”).

49. See, e.g., *supra* notes 45–46 and accompanying text.

50. I am not referring to the “training,” “personnel,” and “expert assistance” type of prohibited “material support,” where the constitutional issue is admittedly a closer one. My argument that the constitutionality of § 2339B is clear involves its use against those who provide funds to terrorists. I am also not referring to the question of whether the terrorist designation system complies with principles of due process, which is not a First Amendment issue.

51. See, e.g., *Boim v. Quranic Literacy Inst.*, 340 F. Supp. 2d 885, 890 (N.D. Ill. 2004) (citing 18 U.S.C. § 2333 (2000)), *rev’d*, 511 F.3d 707 (7th Cir. 2007)

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 . . . recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.<sup>52</sup>

With the advent of § 2339B, the terrorism-related statute extending criminal culpability to those who provide humanitarian money to terrorist groups, plaintiffs in the ATA cases realized that they were also beneficiaries of the law because it extended liability to people in the United States who have provided money to international rogues.

Like criminal defendants charged under § 2339B, the organizations and individuals sued in these cases, and their supporters cried foul, arguing that this civil remedy infringed on their First Amendment rights.<sup>53</sup> A court that considered this argument explained that the conduct defined by the criminal material support statutes qualifies as an act of "international terrorism" itself and therefore can establish civil liability under the ATA.<sup>54</sup> Thus, people sued under the ATA were stuck with the settled jurisprudence on the constitutionality of § 2339B, and the ATA plaintiffs were the beneficiaries.<sup>55</sup> Thereafter, courts in the ATA cases involving the transfer of money construed the pleadings according to the law relating to § 2339B.<sup>56</sup> This meant that banks could be sued under the ATA for their financial transactions with terrorists.<sup>57</sup>

It is ironic that these Islamic litigants so often cloak themselves in First Amendment values,<sup>58</sup> where Muslims so frequently seek through

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(addressing a cause of action brought under the Antiterrorism Act to hold defendants civilly liable for acts of international terrorism).

52. 18 U.S.C. § 2333.

53. *See, e.g.*, *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1016 (N.D. Ill. 2001) (stating that "§§ 2339A and 2339B clearly indicate that Congress did view [material support]" as international terrorism for which the ATA provides a cause of action).

54. *Id.*

55. *See, e.g.*, *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 571 (E.D.N.Y. 2005) (suing financial institutions for the plaintiffs' injuries from terrorist activities).

56. *See, e.g., id.* (relying on § 2339B in dismissing claims of defendant bank, which engaged in acts of international terrorism by providing material support to terrorist organizations).

57. *See, e.g., id.* at 587 ("Section 2339B is violated if [a] Bank provides material support in the form of financial services to a designated foreign terrorist organization and the Bank either knows of the designation or knows that the designated organization has engaged or engages in terrorist activities.").

58. *See Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 536 (E.D. Va. 2003) (assessing Noah's First Amendment claims alleging that AOL terminated his account and failed to restore previous postings in order to prevent his and other Muslims pro-Islam speech); *Islamic Soc'y of Boston v. Boston Herald, Inc.*, No. 05-4637, 2006 WL

litigation to prevent the dissemination of information of which they do not like.<sup>59</sup> The First Amendment is not a one-way street. It is not a weapon to defend your own speech and association while insisting on the right to control that of others. The rule of law means neutral operation and application of legal principles.

Is this happening with private terrorism lawsuits? It would be disturbing if the individuals who argue that financing terrorism is constitutional also simultaneously avail themselves of the legal remedies they attack. Are the critics of § 2339B attacking the tools Congress has granted victims of terrorism, while relying on them?

For example, following a recent decision by the United States Court of Appeals for the Seventh Circuit in one of these civil cases, the Council on American Islamic Relations (“CAIR”) issued a press release that suggested the “rule of law” requires that the Muslim organization defendants be exonerated:

The defendants in this case have endured a seven-year legal battle in which their reputations have been smeared and their assets confiscated. While the destruction of American Muslim groups who have committed no wrong-doing is irreparable, today’s decision, in which the rules of law were finally applied, helps restore the American people’s trust in the system.<sup>60</sup>

In fact, the opinion CAIR heralded was not a vindication for these Muslim groups or a ruling that they committed no wrongdoing.<sup>61</sup>

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2423287, at \*12 (Mass. Super. July 21, 2006) (addressing the First Amendment argument for a right to petition).

59. See Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006) (addressing a defamation suit for Ballenger’s statement explaining that he and his wife split in part because they lived across the street from CAIR); Global Relief Found., Inc. v. N.Y. Times Co., 390 F.3d 973, 975 (7th Cir. 2004) (involving a libel and slander lawsuit for reporting that the Global Relief Foundation was accused of providing funds to Bin Laden); Ghafur v. Bernstein, 32 Cal. Rptr. 3d 626, 627 (Cal. Ct. App. 2005) (addressing a libel suit for a letter stating that an investigation into Ghafur should be made due to his ties with Islam); Talal v. Fanning, 506 F. Supp. 186, 186 (N.D. Cal. 1980) (involving a suit about a television movie depicting the execution of a Saudi Princess for adultery, alleging that it was defamatory to Islam); Mumin v. Dees, 663 N.W.2d 125, 128 (Neb. 2003) (addressing a libel suit for statements made concerning members of the Islamic Faith); Farrakhan v. N.Y.P. Holdings, Inc., 638 N.Y.S.2d 1002, 1005 (Sup. Ct. 1995) (assessing a libel suit brought by Minister Farrakhan and the Nation of Islam against an article published by the *New York Post*); Khan v. Newsweek, Inc., 554 N.Y.S.2d 119, 119 (App. Div. 1990) (involving a libel suit brought by Khan alleging libel based on an article published that stated a businessman was linked to arms dealing in a new business in Peshawar).

60. Press Release, CAIR, CAIR Welcomes Overturning of \$156M Judgment in Charity Case (Dec. 28, 2007), <http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=24013&&name=n&&currPage=1> [hereinafter CAIR Press Release] (discussing Boim v. Holy Land Found. for Relief and Dev., 511 F.3d 707, 710 (7th Cir. 2007)).

61. See Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707, 710 (7th Cir. 2007) (remanding for a determination of causation).

Rather, the case was a remand back to the trial court with instructions on how the plaintiffs—whose son was killed in 1996 by Hamas, which was allegedly aided by financial contributions of persons and organizations within the United States—could satisfy the causation element to the Seventh Circuit’s satisfaction.<sup>62</sup> What about these defendants? One of them, the Holy Land Foundation (“HLF”), was described by the Seventh Circuit in a manner that hardly suggests, as CAIR asserted, it was wrongly accused:

The ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing HLF’s role in the funding of Hamas and of its terrorist activities is incontrovertible. . . . Even following the district court’s judgment, while HLF attempted to supplement the record on appeal, the supplementary material could not have defeated the proposition established by the record evidence that Holy Land was a funder of the terrorist organization Hamas.<sup>63</sup>

So what does CAIR mean when it refers to the “rules of law”?<sup>64</sup> Is it referring to legal certainty and the application of neutral principles to different people—such as the notion that the U.S. government can constitutionally prevent people from giving money to Hamas? If so, this is not something CAIR or the American Civil Liberties Union (“ACLU”)<sup>65</sup> believes has been sufficiently settled.<sup>66</sup>

The rule of law, understood in the context of civil lawsuits, properly suggests that the jurisprudence that has settled the constitutionality of § 2339B would allow groups like CAIR and the ACLU to avail themselves of the same tort remedies being used against various Muslim groups—those accused of supporting Hamas—to sue people they believed to be international villains. The problem is that if they have done so, they cannot very well attack those legal remedies as being unconstitutional, without being fairly

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62. *Id.*

63. *Id.* at 724.

64. CAIR Press Release, *supra* note 60.

65. On December 11, 2007, the ACLU disseminated the following statement:

Some of [the terms of § 2339B] are so sweeping that they encompass activity that is protected by the First Amendment. . . . In its current form, the statute allows a person to be criminally prosecuted for donations that may be entirely innocent, because the statute fails to require the government to show that the donor actually intended to support illegal activity. We continue to believe that, in its current form, the entire law is unconstitutional.

Press Release, ACLU, Court Rules “Material Support” Provision of Patriot Act Unconstitutional (Dec. 11, 2007), <http://www.aclu.org/safefree/general/33115prs20071211.html>.

66. *See id.* (“We continue to believe that, in its current form, the entire law is unconstitutional.”).

accused of hypocrisy. The rule of law surely cannot mean that the legal remedies are constitutional when they are useful to you but are otherwise constitutionally infirm.

Has this happened? Consider that the Center for Constitutional Rights (“CCR”), the organization employing the lawyers who have most vehemently argued that material support statutes are unconstitutional, has represented plaintiffs suing an American equipment manufacturer for products it shipped to Israel.<sup>67</sup> As a further example, a lawyer who argued that the government could not constitutionally limit support to the Tamil Tigers and the Kurdistan Worker’s Party<sup>68</sup> also served as the plaintiffs’ attorney in lawsuits seeking damages on behalf of an economist killed by Chilean military officers,<sup>69</sup> persons injured and killed by Ethiopian guards,<sup>70</sup> Argentinean soldiers,<sup>71</sup> and El Salvadorian death squads,<sup>72</sup> as well as Burmese villagers dislocated as a result of a pipeline involving Unocal.<sup>73</sup> The ACLU, which has continued to argue that § 2339B

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

68. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) (noting the argument that prohibiting support to terrorist organizations violates First Amendment freedom of association rights).

69. *See Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1331–32 (S.D. Fla. 2002), *aff’d*, 402 F.3d 1148 (11th Cir. 2005) (addressing plaintiffs’ argument that defendant may be liable for indirect participation, or for aiding and abetting others in the commission of various human rights abuses); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1350–51 (S.D. Fla. 2001) (explaining procedural history of plaintiffs’ suit against defendant for crimes against humanity).

70. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 845–46 (11th Cir. 1996) (describing cruel and inhumane acts for which appellant Ethiopian guard was being charged); *Abebe-Jiri v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304, at \*4 (N.D. Ga. 1993) (declaring defendant Ethiopian guard responsible for acts that he personally committed and for acts that he ordered, aided and abetted, or participated in).

71. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (elaborating on plaintiff’s argument that Argentina was responsible for official acts of torture committed by military personnel stemming from religious persecution).

72. *See Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1315 (D.D.C. 1985) (summarizing plaintiff’s complaint against not only El Salvador for the acts committed by its agents, but also against U.S. officials for failure to investigate adequately and report victim’s death).

73. *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000), *rev’d*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (considering plaintiffs’ claim that Unocal was liable for human rights violations committed against them by Burmese military officials acting in furtherance of an oil pipeline project involving Unocal); *Nat’l Coal. Gov’t of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335 (C.D. Cal. 1997) (entertaining a cause of action against defendant Unocal for acts committed by Burmese agents against Burmese villagers because of Unocal’s alleged implied partnership with the Burmese government).

violates the First Amendment, has similarly brought lawsuits against a number of international villains.<sup>74</sup>

Of course, many of these cases may be distinguished from the terrorist-financing ATA cases because they sought damages directly from individuals who themselves engaged in the violent acts abroad, rather than those who provided them support stateside.<sup>75</sup> This distinction, however, would not explain the position the ACLU and the CCR took in civil lawsuits involving American entities that provided support to the Apartheid regime in South Africa<sup>76</sup> and Israel.<sup>77</sup>

To appreciate this inconsistency, one must visit the arguments. In *Boim v. Quranic Literacy Institute*,<sup>78</sup> a private citizen sued the HLF, which invoked the First Amendment right of free association.<sup>79</sup> The HLF argued that “[t]o allow a cause of action to proceed against a charitable organization, absent any meaningful allegation of involvement in terrorist acts or intent to fund terrorist activity, chills the organization’s ability to raise funds and provide relief to those in desperate need of humanitarian aid.”<sup>80</sup>

Essentially, the plaintiff’s claim was that any individual or group that donates money for lawful, humanitarian purposes in areas of the world in which terrorist organizations operate, from Northern

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74. See, e.g., *Abebe-Jira*, 72 F.3d at 844 (ACLU representing a plaintiff against an Ethiopian guard charged with leadership and participation in a campaign of torture and violence known as the “Red Terror”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1327–29 (N.D. Ga. 2002) (ACLU representing a plaintiff against a former Bosnian Serb police officer for acts of brutality directed at and committed against Bosnian non-Serbs); *Kline*, 603 F. Supp. at 1314 (ACLU representing a plaintiff against El Salvador for acts committed by its soldiers and against U.S. officials for allegedly covering up the events surrounding the victim’s death).

75. See *supra* notes 73–74 and accompanying text (listing numerous cases).

76. See, e.g., *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254, 257 (2d Cir. 2007) (stating plaintiffs’ position that several corporate defendants were responsible for cooperating with the South African government in maintaining apartheid).

77. See generally *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1022–23 (W.D. Wash. 2005) (plaintiffs contending that Caterpillar should be liable for their family member’s death, since it provided the bulldozers to Israel), *aff’d*, 503 F.3d 974 (9th Cir. 2007). The fact that the U.S. government sought dismissal of the lawsuit on foreign policy grounds does not indicate that it is guilty of the same inconsistency I have highlighted in this Article. The basis for the government’s position in *Corrie* did not include the argument that § 2339B is unconstitutional, which I agree would be disingenuous. If the United States took such position that the lawsuit seeks to hold Caterpillar liable for First Amendment-protected activity, the inconsistency might be fairly argued. It did not.

78. 291 F.3d 1000 (7th Cir. 2002).

79. *Id.* at 1007.

80. Brief of the Appellants at 39, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002), Nos. 01-1969 and 01-1970, 2001 WL 34106475, at \*39.

Ireland to Sri Lanka, can and may be sued for civil damages by U.S. victims of violence far from U.S. shores.<sup>81</sup>

The amicus brief filed by the CCR in *Boim* disagreed, arguing that “Section 2339B penalizes financial contributions to any designated foreign terrorist organization, regardless of whether they are directed towards the organization’s legitimate political and humanitarian activities or its illegal activities.”<sup>82</sup> However, as described in Part I of this Article, above, the application of § 2339B to prohibit giving money to terrorist groups does not violate the First Amendment.<sup>83</sup>

The Israel case, *Corrie v. Caterpillar*,<sup>84</sup> involved a lawsuit against the Caterpillar company by the family of Rachel Corrie, an American peace activist killed by the Israel Defense Forces with a Caterpillar-provided bulldozer.<sup>85</sup> The CCR represented the plaintiffs, arguing that imposition of civil liability on Caterpillar was appropriate because its action gave substantial assistance to Israel toward the accomplishment of a tortious result.<sup>86</sup> This standard of liability, the CCR argued, did not impose liability by association nor did it erect vicarious or strict liability.<sup>87</sup> “[I]mposing liability for knowingly providing substantial assistance in the commission of internationally wrongful conduct requires no revolutionary insight. It only requires faithful adherence to the understanding of the [American law] at its inception and the application of modern common law principles.”<sup>88</sup> Meanwhile, however, the CCR filed an amicus brief in support of the plaintiffs’ case in the South Africa Apartheid case, *Khulumani v. Barclay National Bank, Ltd.*<sup>89</sup>

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81. *See id.* at \*3 (stating that U.S. law, 18 U.S.C. § 2333, provides a legal remedy for U.S. citizens who are victims of terrorism violence and that those individuals who aid the terrorists may be held liable under the law).

82. Amici Curiae Brief of the National Coalition to Protect Political Freedom and the Center for Constitutional Rights in Support of Defendants-Appellants’ Appeal from the Denial of Their Motions to Dismiss the Complaint at 25, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (No. 00 C 2905), 2001 WL 34106476, at \*25.

83. *See supra* notes 2–3 and accompanying text (explaining that the freedom of association can extend to financial transactions but is not absolute by any means).

84. 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff’d*, 503 F.3d 974 (9th Cir. 2007).

85. *Id.* at 1022–23.

86. *Id.* at 1023.

87. *See id.* at 1024 (noting Caterpillar’s argument that it could not be liable for merely doing business with Israel).

88. Jeff Breinholt, *J’Accuse: Lawfare Lawyers Storming the Courts*, ACCURACY IN MEDIA, Jan. 24, 2008, <http://www.aim.org/guest-column/jaccuse-lawfare-lawyers-storming-the-courts>.

89. *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (arguing that defendants actively worked with the South African government in perpetuating the Apartheid system of government).

How can these seemingly conflicting positions be harmonized? One argument for the CCR is that the *Khulumani* and *Corrie* lawsuits were brought under a different statute than what was in play in *Boim*, and the former did not depend on § 2339B to establish liability by the defendants.<sup>90</sup> However, their constitutional arguments in the § 2339B and ATA cases cannot be limited to the statute, since the claims in *Khulumani* and *Corrie* sought to do the same thing that the ATA did for the plaintiffs in *Boim*—extend liability to people uninvolved in the direct violence, whose only role was providing the resources that made the violence possible.<sup>91</sup> In other words, if § 2339B is unconstitutional because of this impact, so is the application of any other statute that has the exact same impact in a particular case.

In response to this argument, the CCR might argue that the plaintiffs in *Khulumani* and *Corrie* had to prove the foreseeability to the defendants of the consequences of providing support. This legal requirement distinguishes those two cases from *Boim*. About the *Corrie* lawsuit, Jennifer Green, Senior Attorney for CCR, stated, “International law clearly provides that corporations can be held accountable for violations of international human rights. Rachel Corrie, a young American killed abroad because Caterpillar purposefully turns a blind eye as to how their products are used, must have access to justice.”<sup>92</sup>

However, foreseeability is exactly what the § 2339B designation process was intended to instill; with the designation of Hamas, everyone is on constructive or actual notice that terrorist acts by Hamas are a foreseeable consequence of providing money to Hamas. If anything, foreseeability is even greater in the conduct alleged in *Boim*. Because the United States has made the former illegal per se, an individual who provides funds to Hamas causes more foreseeable, and therefore greater, harm than does an individual who provides bulldozers to the Israeli government or banking services to the Apartheid government of South Africa. Judged this way, the *Boim* lawsuit presents First Amendment issues of less magnitude than *Corrie* and *Khulumani*. Still, to groups like the CCR, *Boim* reflects an

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90. Compare *Khulumani*, 504 F.3d at 258 (Alien Tort Claims Act), and *Corrie*, 403 F. Supp. 2d at 1023 (Torture Victim Protection Act), with *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (18 U.S.C. § 2333).

91. See *Boim*, 291 F.3d at 1000–03 (stating that the Boims argue that the defendants should be held liable for their son’s death due to the defendants’ financial support of Hamas, a known terrorist organization).

92. Arab America Media Services, *Rachel Corrie’s Family Files Lawsuit Against Caterpillar* (Mar. 15, 2005), <http://www.aams.blogspot.com/2005/03/rachel-corries-family-files-lawsuit.html>.

unconstitutional application of § 2339B in the civil context, whereas the lawsuits in the other cases should be permitted. That is a bizarre double standard which, to my knowledge, has never been discussed publicly.

For these lawyers to continue to decry the constitutionality of § 2339B is thus not merely wishful thinking,<sup>93</sup> but an attempt to establish a double standard. The implications of their arguments are anomalous. If they were to succeed in getting § 2339B declared unconstitutional (an unlikely prospect given all that has been decided), they will be a victim of their own success. The very lawsuits they champion would fall by the wayside.

To be sure, one person's terrorist is another person's freedom fighter. However, arguing that civil remedies are unconstitutional while simultaneously relying on those same remedies for one's pet causes is hypocritical and problematic. If the rule of law requires legal certainty and the application of rules across the board, these lawyers cannot have it both ways.

#### CONCLUSION

Clearly, the United States can constitutionally limit where one sends money. After all, it happens all the time, in a variety of different regulatory contexts. This authority must be exercised in the area of terrorism if the United States wants to maintain its leadership role in the civilized world. Despite my criticism of those who argue that § 2339 and the corresponding civil remedies are

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93. It seems this wishful thinking is even exhibited in this very law review issue. Professor David Cole's commentary indeed claims that the material support crime cannot be constitutionally applied to the act of giving money, despite all that has been decided. *See* David Cole, *Anti-Terrorism on Trial; Why the Government Loses Funding Cases*, WASH. POST, Oct. 24, 2007, at A19 ("For all practical purposes, the [material support] law imposes guilt by association."). He also argues, curiously, that there was no evidence that the defendants in the Holy Land Foundation prosecution provided money to Hamas (which would raise the question of why the defendant's motion for acquittal was denied by the court and the case sent to the jury) and that it was denied the opportunity to present exonerating evidence that the Holy Land Foundation was not affiliated with Hamas in the civil challenge to its December 2001 designation. *Id.* The D.C. Circuit's opinion referred to the evidence presented by the organization, which means that it is hardly true that it was denied this opportunity. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164-66 (D.C. Cir. 2003) ("Holy Land did respond and the Treasury considered its response as well as the new evidence before deciding to redesignate HLF in May 2002. . . . HLF has had every opportunity to come forward with some showing that that evidence is false or even that its ties to Hamas had been severed."). Significantly, the D.C. Circuit referred to the Holy Land Foundation-Hamas link as "incontrovertible," which seems to be inconsistent with Professor Cole's claim that there was "no evidence" of such a link. *See id.* at 165-66 (stating that the supplemental evidence HLF provided on appeal, while ultimately rejected from the administrative review claim, "would have made no difference").

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unconstitutional in the face of what has become the legal certainty of its constitutionality, I am not critical of their efforts to seek justice on behalf of aggrieved victims of international crime. In fact, I commend them for these courageous lawsuits and wish them well. In fact, I cringe whenever the United States seeks dismissal of these cases on foreign policy grounds. What I do criticize is the tendency for certain lawyers to talk out of both sides of their mouths. The law is settled. It is high time to get on with enforcing it more aggressively against international outlaws of all political stripes. Hopefully, the next President, no matter his or her political party, will agree.

As we enter into the second decade of a terrorist financing regime that involves a system of publicly designating international terrorist organizations, the law is far clearer than it might have been in October 1997, when the first round of designated foreign terrorist organizations was announced. This clarity not only helps people like me involved in criminal justice, but it is also a boost for people who seek to fight all brands of international violence through the American tort system. These two sides have not yet come together, which is a shame. Imagine how powerful our various legal remedies would be if the U.S. intelligence community had access to information developed by private lawyers in these matters and vice versa. I hope that is what the future holds. Yes, I am suggesting that the fields of human rights and counterterrorism be joined.

One way of getting there is to firmly understand that the law is settled on whether the United States and her private lawyers can hold unscrupulous people responsible for what they do with their money and get busy with the tough task of litigating their liability.