BLOOD LIBEL: RADICAL ISLAM’S CONSCRIPTION OF THE LAW OF DEFAMATION INTO A LEGAL JIHAD AGAINST THE WEST—AND HOW TO STOP IT

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AND HOW TO STOP IT

ABSTRACT

On May 19th, 2009, a panel of distinguished legal professionals assembled in Washington, D.C. at a conference, entitled Libel Lawfare: Silencing Criticism of Radical Islam, to discuss radical Islam’s exploitation of Western libel laws to silence authors and journalists who seek to expose terror-financing networks and criticize radical Islam. The debate also embodied a cresting wave of public concern about the surprising ways Western laws enable this assault.

This paper seeks to call attention to two critical mistakes, which were perpetuated by panelists at the conference and which are consistently present in current libel lawfare scholarship. Foremost, no one has yet arrived at an adequate definition for libel lawfare; instead, scholars consistently talk past one another as they rely on a number of different terms to describe the same phenomenon. Second, no one has sufficiently identified the crucial distinction between small- and large-scale libel lawfare; instead, scholars talk of libel lawfare as if it were one big problem. The purpose of this paper is to clear up the confusion caused by the foregoing mistakes, examine how these mistakes affect current legislative efforts to combat libel lawfare, and offer a new way of looking at the libel lawfare problem as a whole.

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**TRANSCRIPTIONS & BROADCASTS:**


INTRODUCTION: WHAT’S WRONG WITH THE LIBEL LAWFARE DEBATE

On Tuesday morning, May 19th, 2009, a panel of distinguished legal professionals, national security experts, and public intellectuals assembled in Washington, D.C. at a conference (“Conference”) titled Libel Lawfare: Silencing Criticism of Radical Islam. The Conference provided a forum for what proved to be an incandescent—and oftentimes incensed—debate about radical Islam’s exploitation of Western libel laws to silence authors and journalists, who expose terror-financing networks and criticize radical Islam. More than this though, the debate embodied a cresting wave of public concern—a culmination of almost a decade of anxiety—about the surprising ways Western laws enable this assault.

The received wisdom, at least among the panelists at the Conference, is that libel lawfare is a genuine threat to free speech. Many of the panelists cited the iconic Rachel Ehrenfeld case as one among many stirring reasons why the United States Congress should pass federal legislation, titled the Free Speech Protection Act (2009), banning the enforcement of foreign libel judgments. They also intermittently bewailed United Nation’s Resolution 7/19 “Combating defamation of religions”—along with many European and British hate speech laws—as embodying similarly disturbing methods used by radical Islam to subvert free speech globally. Despite their urgency and good intentions, the panelists at the Conference perpetuated two crucial mistakes.

Foremost, they consistently failed to provide an adequate definition for libel lawfare. For example, the panelists used the terms radical Islam, lawfare, Islamist lawfare, legal jihad, soft jihad, libel tourism, and libel terrorism in a synonymous and remarkably haphazard fashion. The resulting confusion, at its worst, seemed like a

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1 The Legal Project at the Middle East Forum, which arranges for pro bono legal representation for authors and journalists, provides financial support for court costs, and tracks instances of libel lawfare, sponsored the conference, along with organizations such as The Federalists Society.

2 The Rachel Ehrenfeld case (“Ehrenfeld case”) was a highly publicized defamation action brought in British courts by Saudi billionaire Khalid bin Mahfouz over allegations in Ehrenfeld’s book linking him to terrorism. A synopsis of the case is included in Part II.B.

McCarthy-esque vilification of anyone even accused of association with radical Islam and, at its best, a colossally confusing whine-fest. Part I of this paper, titled THE NEW DICTIONARY OF LIBEL LAWFARE, is devoted to clearing up this semantic confusion by offering a definitive lexicon for future debates. It begins with some fairly self evident—but critical—observations about radical Islam, and proceeds to define other terms, including libel lawfare itself, that have been consistently misused. 4

The second mistake follows from the first. Despite revealing a profound grasp of certain aspects of libel lawfare, the panelists consistently ignored a crucial distinction necessary for a deeper understanding of the libel lawfare problem as a whole. 5 As a result, the debate fell short of accurately depicting the libel lawfare problem for what it truly is—the conscription of two very different components of the Law of Defamation into a single legal jihad against the West. 6 Part II of this paper, titled RE-ENVISIONING LIBEL LAWFARE: A CRUCIAL DISTINCTION, proposes a strategic vision that holistically reinterprets the libel lawfare problem. To do so, it divides libel lawfare into two new concepts—Individual Libel Lawfare and Global Libel Lawfare—which more aptly describe the bigger picture. Each subsection of Part II examines in further depth the crucial distinction embodied by these terms and analyzes and recommends ways to improve current efforts to combat libel lawfare.

Finally, credible arguments exist that downplay the existence of a libel lawfare problem at all. Notable media lawyer John J. Walsh warns that, “if there is a [free speech] chilling effect coming from overseas or anywhere else,” he hasn’t seen it, calling libel lawfare an overplayed concept, which disrupts comity between friendly allies and presents enormous mischief making opportunities for retaliation. 7 It is self-evident, however, as we peruse online forums, legal scholarship, and Washington D.C. ballrooms,

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4 Debates involving core values like religion and free speech often neglect to perform elementary tasks like this at the outset. This omission usually transforms an otherwise thoughtful debate into an unhelpful shouting match, where scholars simply talk past one another.

5 At the conference, Alan Dershowitz stated, “It sounds like you’re lumping together a range of issues with a very different case. You have to persuade people by using finer distinctions.” Professor Alan Derschowitz, Remarks at Libel Lawfare: Silencing Criticism of Radical Islam conference, (May 19, 2009).

6 We use the term the Law of Defamation to describe the corpus of Western laws designed to protect all kinds of reputational interests. These include libel and slander law in America and England, the concept of “defamation of religion,” and hate speech and blasphemy laws.

7 See also, John J. Walsh, The Myth of Libel Tourism, 238 N.Y.J.L. 2, (Nov. 20, 2007).
which are littered with armchair polemics about radical Islam’s use of *libel lawfare*, that a problem—either real or perceived—exists.

**I. THE NEW DICTIONARY OF LIBEL LAWFARE**

At the conference, Brooke Goldstein, the Director of the Legal Project at the Middle East Forum, along with esteemed panelists Alan Dershowitz, Frank Gaffney, Andy McCarthy, Douglas Murray, and many others, used the following terms almost interchangeably: *Radical Islam, Lawfare, Islamist Libel Lawfare, Libel Lawfare, Soft Jihad, Legal Jihad, Libel Tourism, and Libel Terrorism*. Legal debates like this one often confront what Ronald Dworkin calls the semantic problem.8 Namely, if we insist on taking the position that *libel lawfare* is a problem, we must accurately and consistently define the terms we use to describe it.

**A. RADICAL ISLAM**

Of late, there has been a great deal of careless lip wagging by commentators who aspire to transform *radical Islam* into something fundamentally indistinguishable from Islam generally.9 Although it appears obvious that Islam should not be convicted of the sins of its radical offspring, a brief digression into the definition of *radical Islam*—and how it differs from Islam—is still warranted. Also known as the Islamist Movement or Islamism, *radical Islam* seeks to impose “the tenets of Islam and Shari’a [law] as a legal, political, and judicial authority both in Muslim states and in the West. It is composed of two wings—that which operates violently . . . and that which operates lawfully, conducting a ‘soft jihad,’ within our media, government and court systems; through

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8 The idea of the semantic problem as it pertains to questions of legal philosophy is best illustrated by Ronald Dworkin:

> We can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound . . . . You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I call pivotal cases. If you do not count my copy of Moby-Dick as a book because in your view novels are not books, any disagreement is bound to be senseless.


9 See, e.g., Andrew C. McCarthy, _Beyond Terrorism; The Islamist Threat is worse than you think_, _The National Review_, April 20, 2009, at 39.
Shari’a banking; and within our school systems . . . “”10 “Islam is not merely a religion” for those who interpret the Koran and the Hadith literally and institutionalize the harshest characteristics of Shari’a law in countries like Taliban-led Afghanistan, Saudi Arabia, and Northern Sudan. “It is a comprehensive socioeconomic and political system, which believers take to be ordained by Allah, its elements compulsory, and non-negotiable.”11

Globally, it dominates enormous oil wealth, many large states and terror organizations, and seeks to bring about an Islamic world order.12 With respect to free speech and libel lawfare,

[o]ne tenet of Shari’a law is to punish those who criticize Islam and to silence speech considered blasphemous of its prophet Mohammed. While the violent arm of the Islamist movement attempts to silence speech by burning cars when Danish cartoons of Mohammed are published, [and] by murdering film directors such as Theo van Gogh . . . the lawful arm is skillfully maneuvering within Western court systems, hiring lawyers and suing to silence its critics.13

In the same way that Stalinist Communism differed from Maoist or Marxist Communism (and yet still pursued a materialist goal), different camps of radical Islam can operate independently without compromising their common pursuit of an Islamic world order.14

The Sufi Islamic tradition, which is prominent in Turkey, for example, is a religion of peace and tolerance, and is compatible with Western values such as free

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11 McCarthy, supra note 9, at 40.
12 “Shari’a is a world program aimed at the imposition of global theocracy.” Frank Gaffney, Remarks at Libel Lawfare: Silencing Criticism of Radical Islam Conference, (May 19, 2009).
13 Goldstein and Meyer, supra note 10, at 16.
14 Two cogent works on this topic are SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER, (Simon and Schuster. New York, NY.) (1996) and THOMAS P.M. BARNETT, THE PENTAGON’S NEW MAP, (Penguin Books, New York, NY.) (2004). In The Clash of Civilizations, Samuel P. Huntington hypothesized a post-Cold War world order in which the increased role of religion in world politics filled the vacuum created by a loss of political ideologies such as Soviet Communism. Because this culture war sees mutually exclusive ideologies battle for supremacy—the West and liberal democracy vs. radical Islam and Shari’a law—a clash of civilizations becomes unpreventable. Likewise, The Pentagon’s New Map explains how, when globalization and Internet connectivity increases across borders, Western-dominated civilizations inevitably clash with areas suffused with high levels of religiosity—in this case, Islamic Southwest Asia and the Middle East. The resistance to such connectivity, based on religion or culture, becomes a radical and existential struggle to cling to traditional values.

Thus, any detractor from the danger that radical Islam poses to free society, who dismisses the whole affair as conspiratorial fidgeting, arguably misses the broader cultural and geo-political reasons for radical Islam’s ascendancy.
speech and women’s rights.  *Radical Islam*, on the other hand, is very dangerous. It endorses violence, terrorism, subjugation of women, and the overthrow of the West and its freedoms. Martin Amis summarizes more perfectly:

> So to repeat, we respect Islam—the donor of countless benefits to mankind and the possessor of a thrilling history. But Islamism? No, we can hardly be asked to respect a creedal wave that calls for our own elimination. Even more, we regard the Great Leap Backwards as a tragic development in Islam’s story, and now in ours. Naturally, we respect Islam. But we do not respect Islamism, just as we respect Muhammad but do not respect Muhammad Atta.\(^\text{15}\)

**B. LAWFARE**

Generally, *lawfare* can be defined as “the use of the law as a weapon of war,”\(^\text{16}\) or the pursuit of strategic aims through aggressive legal maneuvers. By itself, it does not refer specifically to libel or to *radical Islam*. It has been used in the aftermath of World War II, in the Israeli-Palestinian conflict, in China’s rise as a global superpower, and in other sanguinary conflicts throughout the years.\(^\text{17}\) Put simply, *lawfare’s* goal is to exploit the law as an unconventional means of confronting a superior military power.\(^\text{18}\)

**C. ISLAMIST LAWFARE**

*Islamist lawfare* is simply the use of *lawfare* by Islamists. Again, the term does not refer specifically to libel. For example, “Al-Qaeda training manuals instruct its captured militants to file claims of torture or other forms of abuse so as to reposition themselves as victims against their captors.”\(^\text{19}\) Likewise during the protracted Palestinian-Israeli conflict, the Islamist group Hamas has arguably used *lawfare* in the conflict over Israel’s controversial security fence.\(^\text{20}\) These instances clearly constitute *lawfare*, conducted by Islamists, but have no relation to libel law. *Islamist lawfare* is

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\(^\text{17}\) See generally, Goldstein and Meyer, *supra* note 10.

\(^\text{18}\) Id.

\(^\text{19}\) Id.

\(^\text{20}\) Goldstein and Meyer attribute to lawfare the “2004 decision by the United Nations International Court of Justice declaring Israel’s security fence a crime against humanity . . . .” *See id.*
often used synonymously with the legal jihad, or soft jihad.  

D. ISLAMIST LIBEL LAWFARE AND LIBEL LAWFARE

The term, Islamist libel lawfare, (or just libel lawfare, its abbreviation) shapes the philosophical core of this paper.  

It describes the use of lawfare, by Islamists, in the area of libel law. Unfortunately, commentators repeatedly make two major errors. First, libel lawfare is oftentimes used interchangeably with the term libel tourism. This generates much confusion among legislators who incorrectly propose cures for the libel tourism problem, when they likely mean to propose cures for libel lawfare. Second, the term is inherently flawed. That is, it imputes guilt to any individual who sues a journalist for allegations about ties to radical Islam—regardless of whether those allegations are true or false. Subsection 1 defines libel tourism and distinguishes it from libel lawfare, while subsection 2 investigates the term libel lawfare’s semantic shortcomings.

1. LIBEL LAWFARE IS NOT LIBEL TOURISM

Libel tourism is not coextensive with libel lawfare. It is far more expansive and arises out of the plaintiff-friendly nature of English libel law—or conversely, the plaintiff-hostile nature of American libel law. It refers to the improper use, by any kind of plaintiff (not just Islamists), of English libel law. Under English law, a libel claimant must prove, on balance of the probabilities, that the defendant “published” a defamatory statement referring to the claimant. The claimant does not have to prove that the statement was false or that the defendant was at fault. Moreover, non-resident claimants are entitled to bring their claim in England, so long as they possess a modicum of reputation in the jurisdiction and the defamatory communication was published more than a de minimis number of times there.  

Because American defamation law has been constitutionalized, i.e., the common law must comport with the United States Constitution’s First Amendment, a claimant

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21 These synonyms for Islamist lawfare were widely employed at the conference. Reference to the “jihad” clearly invokes the ideological mainstay of Islamism and the use of “soft” or “legal” as a prefix clearly invokes the lawfare tactic.

22 The term libel terrorism is also a synonym for Islamist libel lawfare and libel lawfare. It also happens to be a dysphemistic sound-alike for libel tourism, which is probably the source of some confusion and one of the reasons we choose to omit it from the discussion.

bears a higher burden of proof if they bring their case stateside. Depending on the public reputation of the claimant and, sometimes the defendant, the claimant may be required to prove both the falsity of the statement and the fault of the defendant. The bellwether American case here is *New York Times v. Sullivan,* which, along with its progeny, holds that if the claimant is a “public official” or a “public figure”, the claimant is required to prove that the defendant acted with “actual malice,” which has been defined as actual knowledge of the falsity of the statement or reckless disregard as to its falsity.

In practice, proving actual malice is very difficult, except in the most egregious cases. Because defamation cases are harder to prove in America, well-known claimants, i.e., public officials or public figures, would rather bring libel claims in England if they meet the minimal requirements of English law. Thus, in one sense, *libel tourism* is nothing more than good, old-fashioned forum shopping. For instance, *libel tourism* encompasses seemingly trivial cases, such as when “film stars and pop idols, claiming their reputations have been tarnished by the U.S. tabloids, have decided that London is the place to sue their antagonists,” and not-so-trivial (but nonetheless non-*lawfare*) cases, such as when Russian oligarchs sue American magazines for unflattering stories about thuggish business tactics.

When those accused of links to *radical Islam* take advantage of England’s favorable libel laws, the term *libel tourism* also encompasses the term *libel lawfare.* Because of this overlap, people often mistakenly assume that *libel tourism* means the same thing as *libel lawfare.* Because of this confusion, the public debate has unfortunately lumped them together and given the same moral urgency to *libel tourism* as should be legitimately commanded by *libel lawfare,* thereby diluting the legitimate distinction and making it more difficult to construct a workable jurisprudence to address

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26 Id.
27 Robert Verkaik, *Libel Tourist Invasion: U.S. celebrities are being actively courted by media lawyers to take advantage of Britain’s tougher libel laws and bring their cases to London,* The Independent, U.K., August 21, 2008. Verkaik states that “tales of adultery and spiteful tittle-tattle” used to be the price of celebrity in America until the U.K. declared itself open for libel tourism.
28 See id. (describing the *Berezovsky* case).
libel lawfare. As Part II of this paper delves into the fine distinctions between two kinds of libel lawfare, the analysis will no doubt benefit from removing the confusing term, libel tourism, from the discussion.29

2. THE TERM LIBEL LAWFARE IS INHERENTLY FLAWED

Having distinguished libel tourism from libel lawfare, another very serious issue to address is that the term libel lawfare imputes guilt to any individual who sues a journalist for allegations about ties to radical Islam—regardless of whether the allegations are true or false. Although some radical Islamists probably do use this tactic to subvert free speech, no doubt some individuals have been wrongly associated with radical Islam and have rightly sued to clear their names. In the latter cases, the term libel lawfare is clearly being misapplied. However, how do we know where to make a legitimate legal distinction?

The only way to legally determine if someone accused of having ties to radical Islam actually has those ties is through fact-finding in a lawsuit, the fear of which many of the panelists cited as the primary chilling effect on free speech. This tautology reveals an embarrassing and sobering fact—“libel lawfare” cases, such as the Ehrenfeld case, may not even be libel lawfare after all. Although some of the panelists at the conference may be happy to “call ‘em like they see ‘em,” and brand any libel suit brought by someone accused of having ties to radical Islam as libel lawfare, rigorous scholarship demands something more.

There may be no good way out of this dilemma—the term may just be inherently flawed. However, if the panelists and future commentators realize that no effective gatekeeping tool has yet been identified by which to determine the good cases from the bad ones, they may not be as quick to brand every case involving allegations about radical Islam as libel lawfare. Part II of this paper suggests a way to alleviate the problem even further. By renaming small-scale libel lawfare, such as the Ehrenfeld case, with the prefix “Individual,” it suggests that individual libel lawfare embodies disputes that should be evaluated on an individual, case-by-case basis—and thus can probably be addressed

29 It’s unlikely that states like New York would have passed the Libel Terrorism Protection Act—nor Congress entertained the Free Speech Protection Act (2009)—if all they were worried about was a little celebrity forum-shopping.
without resort to federal legislation by the United States Congress. Conversely, by renaming large-scale libel-lawfare, such as hate speech laws and U.N. Resolutions “Combating defamation of religions,” with the prefix “global,” it suggests that global libel lawfare has a worldwide effect not only upon writers and journalists in the West but also upon moderate Muslims living in Islamist countries who may bravely seek to out their radical co-religionists. This act of renaming hopefully will create a new strategic vision, which reinterprets libel lawfare as the conscription of two very different components of the Law of Defamation into a single legal jihad against the West.

II. RE-ENVISIONING LIBEL LAWFARE: A CRUCIAL DISTINCTION

On the day of the conference, Aaron Eitan Meyer and Brooke Goldstein published an article in Newsweek and on Washingtonpost.com that signaled a turning point in our understanding of libel lawfare. The article, titled The Next Phase of Islamist Lawfare, hinted at a deeper, more comprehensive connection between individual libel lawfare cases and a steady increase in some alarming global developments, such as the U.N. Resolution “Combating Defamation of Religions,” England’s denial of entry to the Islamist critic and member of European Parliament, Geert Wilders, and the maelstrom surrounding the republication of the Danish cartoons of Muhammad.30 The Washington Times ran a companion article on the same day, in which Meyer reemphasized his point. “Along with a number of individual lawsuits aimed at silencing critics of radical Islam, terrorism, and terrorist funding, freedom of speech is under siege . . . and . . . while steps have been taken to counteract some forms of this legal warfare, or “lawfare,” there is a distinct need for a counteroffensive.”31 Despite the cogency of Meyer and Goldstein’s deep concerns, their articles would have benefitted from analyzing the real distinction between the small- and large-scale types of libel lawfare. In order to effectively mount a “counteroffensive” to defend Western values, the nature of these two threats must be understood

A. WHAT IS INDIVIDUAL LIBEL LAWFARE?  

*Individual libel lawfare* primarily occurs in two situations. Foremost, it occurs when individuals with tenuous connections to England bring libel suits for allegations, which claim the individuals have ties to terrorism. This is *libel lawfare* with a *libel tourism* overlap, i.e., when radical Islamists go forum shopping in England; thus, it should be called *international individual libel lawfare*. It can also occur in American courts if, for example, the claimant is unable to confect a sufficient jurisdictional nexus in England. This is *libel lawfare* without a *libel tourism* overlap, i.e., when radical Islamists file frivolous libel suits in the “correct” jurisdiction; thus, it should be called *homegrown individual libel lawfare*. 

To be fair, many of the homegrown *individual libel lawfare* cases brought in America and in England ultimately end in dismissals in favor of the defendant. However, often the mere threat of suit is enough to intimidate publishers into silence, regardless of the merit of their author's works. In 2007, when wealthy Saudi Arabian businessman, Khalid bin Mahfouz, threatened to sue Cambridge University Press for publishing the book *Alms for Jihad* by American authors Robert Collins and J Millard Burr, Cambridge Press immediately capitulated, offered a public apology to Mahfouz, took the book out of print and ordered the destruction of all unsold copies and the

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32 There has been a steady increase in *individual libel lawfare* in the past ten years. For an exhaustive listing of some of the more shocking instances, see Brooke Goldstein, *Welcome to ‘Lawfare’—A New Type of Jihad,* “Family Security Matters, April 14, 2008, available at http://www.legal-project.org/article/241. A summary of these instances, obtained from the above-mentioned article, is included below:

In 1998, a Muslim visitor to an AOL chat room named Noah considered posts by other visitors blasphemous and defamatory against Islam. Noah then sued AOL for libel, attempting a class action on behalf of all Muslim chat room participants and claiming that AOL wrongfully refused to prevent participants from posting anti-Islamic comments. The court properly dismissed the case against AOL, for failure to state a cause of action. In 2003, the Council on American-Islamic Relations (“CAIR”) sued U.S. Congressman Cass Ballenger after a *Charlotte Observer* interview was published, in which Ballenger called CAIR "a fundraising arm for Hezbollah." The court ruled that Ballenger's statements were made in the scope of his public duties and were therefore protected speech in the interest of public concern. In 2004, CAIR sued Andrew Whitehead, an American activist and blogger, for $1.3 million for maintaining the website Anti-CAIR.net.org, on which Whitehead listed CAIR as an Islamist organization with ties to terrorist groups. After CAIR refused Whitehead's discovery requests, CAIR withdrew its claims against Whitehead and the case was dismissed with prejudice. In 2008, when Joe Kaufman, chairman of Americans Against Hate, traveled to Texas to lead a ten-person protest against the Islamic Circle of North America outside an event the group was sponsoring at Six Flags theme park, he was served with a temporary restraining order and sued for defamation and harassment. (Since publication of Goldstein’s article, the Texas federal court has dismissed Joe Kaufman’s suit). Id.

33 When the homegrown kind occurs in America, it can be considered more uniformly frivolous, since the expectation of winning in America is greatly diminished by the “actual malice” standard of *New York Times v. Sullivan.*
removal of the book from the shelves of libraries – a directive certain libraries refused to follow.\textsuperscript{34}

The \textit{Alms for Jihad} case involves homegrown \textit{individual libel lawfare} because the book was published in England and the suit was brought in that jurisdiction. However, homegrown cases are financially burdensome and riddled with elements of intimidation.\textsuperscript{35} In \textit{Alms for Jihad}, the burden was apparently so great that the publishing arm of the world’s second oldest English-speaking university “completely capitulated to Mahfouz, offering a comprehensive apology and substantial damages,” despite the book being properly sourced with hundred of references, and despite Cambridge Press being provided with all the source materials by the book’s authors.\textsuperscript{36}

Although the \textit{Alms for Jihad} case shows the danger of homegrown \textit{individual libel lawfare}, the most famous instance of \textit{international libel lawfare}, which is also the most popular kind, is the Ehrenfeld case. By understanding the facts of the case what really went on in the Ehrenfeld case—as opposed to the rhetoric of its critics on both sides—we can examine the motivations behind \textit{individual libel lawfare} suits, explore the legal questions raised, and investigate America’s efforts to combat them, namely New York’s \textit{Libel Terrorism Protection Act} and its proposed federal counterpart, the \textit{Free Speech Protection Act of 2009}.

\textbf{B. THE EHRENFELD CASE}

Dr. Rachel Ehrenfeld’s book, \textit{Funding Evil: How Terrorism is Financed and How to Stop It}, identified Khalid bin Mahfouz, a wealthy Saudi businessman, as a terror financier. In Chapter Two, Ehrenfeld writes, “Saudi charities that are known to have funded al-Qaeda and other Islamist groups often have incestuous ties to one another . . . . Among the charities that have been supported by the prominent Saudi banking families, the al-Rajhi and the bin Mahfouz, that have been identified in either a court of law or


\textsuperscript{35} Because of the presence of conditional fee agreements and win uplifts of up to one hundred percent for claimant’s lawyers, legal costs in defamation and privacy suits in England can be enormous. In \textit{Campbell v. MGN Ltd.}, [2004] UKHL 22, [2004] 2 AC 457, in which famous fashion model Naomi Campbell sued for invasion of privacy over pictures taken of her outside a drug rehab facility, trial costs were 377,000, appeal costs were 114,000, and House of Lords costs were 594,000 (British Pounds).

government reports as supporting al-Qaeda are: (Ehrenfeld goes on to list over ten different charities.)”

The book was published widely in the U.S. and was available through online retailers. Ehrenfeld’s British publisher declined to publish the book because bin Mahfouz threatened to sue the publisher for defamation. Bin Mahfouz nevertheless sued Ehrenfeld in a British court after twenty-three copies of her book were sold online in the United Kingdom. Ehrenfeld chose not to appear before the British court. Thus, bin Mahfouz obtained a default judgment against her, including a substantial monetary award and an injunction against distribution of the book in the United Kingdom.

Ehrenfeld sought declaratory relief in the Southern District of New York to prevent enforcement of the judgment in the U.S.38 However, in 2006, the court granted bin Mahfouz’s Motion to Dismiss for Lack of Personal Jurisdiction, on the correct doctrinal basis that Mahfouz had not purposefully availed himself of the laws of New York and therefore “could not be haled into court there.” After this procedural defeat, Ehrenfeld began her public campaign to change American law to protect authors like herself from becoming legal fugitives from English libel judgments and from being forced to live under the shadow of potential enforcement of those judgments in the U.S. By 2008, Ehrenfeld had persuaded the state of New York to pass the Libel Terrorism Protection Act, also known as Rachel’s Law. Similar federal legislation, The Free Speech Protection Act (2009) has passed the United States House of Representatives and is currently pending in the Senate Judiciary Committee.40

C. WHAT’S WRONG WITH THE AMERICAN LEGISLATIVE RESPONSE

Rachel’s Law, much like the proposed Free Speech Protection Act, consists of two central provisions. First, a foreign defamation judgment need only be recognized if the court determines that the law applied by the foreign jurisdiction provides the same

39 Purposeful availment is a linchpin issue for purposes of obtaining personal jurisdiction over a non-resident defendant, i.e., the defendant must have purposefully availed himself of the benefits and laws of that jurisdiction before being haled into court there. See Worldwide Volkswagen v. Woodsen, 444 U.S. 286 (1980).
40 See Acts, supra note 3.
freedom of speech protections guaranteed by the constitutions of New York and the United States. Second, New York courts have personal jurisdiction over any claimant who has obtained a foreign defamation judgment against a resident of New York . . . for the purpose of granting declaratory relief with respect to the foreign judgment.\textsuperscript{41} In other words, the Act denies judges discretion to determine whether a given judgment is constitutionally sound, that is, if the foreign court applied less expansive free speech protections than those provided by the First Amendment.\textsuperscript{42} Because the First Amendment provides the most robust protection of free speech in the world, this amounts to an outright ban on the enforcement of foreign, defamation judgments in the U.S. Unfortunately, the outright ban miscalculates the nature of individual libel lawfare in the following four ways and, as a result, probably does more harm than good.

1. The current legislation ignores the fact that Individual libel lawfare cases contain truth claims

Individual libel lawfare cases contain truth claims, i.e., either bin Mahfouz funded terror or he did not. This fact may seem self-evident but it is consistently ignored. For example, bin Mahfouz claims to have successfully sued or settled with over thirty other publications linking him with terrorism. Moreover, he publishes those judgments on his website, as testament to his “innocence.” Because a billionaire Saudi banker probably doesn’t need the proportionately paltry sums he is awarded in these cases, only two other possible motivations exist for his suits. Either he is innocent and suing to vindicate his tarnished reputation or guilty and engaged in a baseless scheme to subvert the truth. Whatever conclusion courts reach, one thing remains clear—examination of the evidence and motivations underlying each case is the only way to make these determinations. One cannot simply rely on the kind of law being applied to the case—one must look at the case itself.\textsuperscript{43} A mandatory federal ban precludes such an inquiry.

\textsuperscript{41} Id.
\textsuperscript{42} In addition to allowing journalists to obtain personal jurisdiction over foreign litigants, the federal legislation also allows for the award of treble damages if, during the action for declaratory judgment, it is determined that the person bringing the foreign lawsuit intentionally engaged in a scheme to suppress rights under the First amendment. Id.
\textsuperscript{43} At the conference, John J. Walsh stated, “[t]here has never been a successful enforcement [in America] yet of an English libel case since New York Times v. Sullivan. All of them have been defeated on basis of the public policy exception. A lot of you will think that’s as it should be. My problem with libel tourism laws is that they are based on a simple comparative law test, i.e., that our system is more protective of free
2. THE CURRENT LEGISLATION IGNORES THE FACT THAT MANY INDIVIDUAL LIBEL LAWFARE CASES CAN BE DEFEATED BY “RESPONSIBLE JOURNALISM” IN ENGLAND AND IN AMERICA

Even if the evidence reveals that the claimant was “defamed,” authors and journalists can still avoid liability if they used reliably high standards in going forward with those facts. Ehrenfeld relied upon official government and CIA documents, which named bin Mahfouz as a terror financier. This would almost certainly satisfy the standard elucidated under England’s Reynolds privilege\(^\text{44}\) and, although not preventing the case from being brought, would likely result in summary dismissal or success at trial. Many critics incorrectly suggest that, in Mahfouz’s High Court case, Ehrenfeld was not allowed to rely on a Reynolds privilege and was actually expected to prove that her allegations were true, even though as a journalist she had no access to classified information and no subpoena power to compel officials to verify it. This is simply not true. Had Ehrenfeld actually submitted to jurisdiction, she stood a very good chance of winning the case on the merits by relying on Reynolds, Justice Eady’s notoriously prejudicial comments notwithstanding.\(^\text{45}\) Because she simply failed to show up, the High Court was left with

\[^{44}\text{In England, reliable standards of journalism are outlined in Reynolds v. Times Newspapers Ltd [2001] 2 AC 127. Qualified privilege, at English common law, attached to any occasion where the person who makes a communication has an interest or duty to do so. This usually arose in small, reciprocal relationships, such as writing a job reference. Reynolds extended this privilege for media defendants to disseminate political or public interest information to the public at large, even allowing for the dissemination of false political or public facts, so long as the defendant can prove it acted responsibly. In Reynolds, Lord Nichols created a non-exclusive list of factors courts should consider when assessing the “responsibility” of the journalism, such as the seriousness of the allegations, the urgency of the matter, and the inclusion of both sides of the story. Id.}\]

\[^{45}\text{In the trial court, Justice Eady ordered Ehrenfeld to apologize, retract, pay $225,913.37 in damages, and destroy copies of her book. After Justice Eady was informed that former CIA director James R. Woolsey had written the forward for Ehrenfeld’s book, he notoriously retorted, “Say no more, I award you a judgment by default, and if you want, an injunction too.” See Lappen, supra note 37.}\]

However, since issuing the default judgment, the House of Lords has re-emphasized that it nonetheless intends to enforce Reynolds—and it did so in a case whose facts are almost indistinguishable from Ehrenfeld’s. On October 11, 2006, in Jameel v. Wall Street Journal Europe [2006] UKHL 44, [2007] 1 A.C. 359 (Eng.), just months after the High Court issued its (default) in Ehrenfeld case, it gave a ringing endorsement of Reynolds. On February 6, 2002, the Wall Street Journal Europe ran an article titled Saudi Officials Monitor Certain Bank Accounts: Focus is on Those with Potential Terrorist Ties. The article
little choice but to award Mahfouz’s judgment. Therefore, those pursuing individual libel lawfare cases can be defeated by the Reynolds privilege; this militates in favor of a case-by-case analysis, in which courts take the time to examine the standards of the journalism employed.

3. THE CURRENT LEGISLATION MISTAKES FREE SPEECH — AND NOT JURISDICTIONAL ISSUES — AS THE CENTRAL DIVIDE BETWEEN ENGLAND AND AMERICA’S RESPONSE TO INDIVIDUAL LIEBEL LAWFARE

Although the panelists at the conference bewailed the absence of free speech protections in England, individual libel lawfare has less to do with free speech and more to do with thorny jurisdictional issues, which arise out of an underdeveloped approach to jurisdiction in the Internet age. Commentators insist that the probability of winning the case is not enough, i.e., American authors and journalists should not be forced to submit to a suit in a foreign jurisdiction in the first place, but this jurisdictional problem is not addressed in the current legislation.

Before the “emergence of the Internet, each country could workably set its own ceiling for the protection of expression without having an adverse impact on other countries that might make a different choice.” Now, however, the Internet has placed enormous strains on national free speech protections, particularly America’s. While other countries fear the imposition of American free speech hegemony, America fears that free speech protections for its own citizens will be undermined by global connectivity. The

specifically named a number of companies whose accounts were being monitored, including a company operated by Mohammed Abdul Latif Jameel. Jameel brought suit against the Wall Street Journal alleging that he had been defamed for being associated with terror financing. The jury found against the defendants and awarded Jameel a monetary judgment. The Court of Appeal affirmed the decision. The House of Lords reversed, finding that the trial court and the Court of Appeals had erred in denying the defendants’ qualified privilege. See generally, Martin Roger Scordato, The International Legal Environment For Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law, 40 Conn. L. Rev. 165, 175-76 (2007).

Panelists at the conference and sponsors of the bills in the legislature constantly extolled the virtues of America’s free speech framework as compared to that of England. England is the possessor of a rich free speech tradition from John Locke, to John Stuart Mill, to Thomas Paine and the Areopagitica. Moreover it continues to reinforce the rights of journalists and authors, evidenced by both the Reynolds and Jameel decisions. England also has a rich history of protecting reputational interests; thus, it is forced to grapple with the inherent tensions between the two rights to a greater degree than America is. Despite its lack of a First Amendment, England still protects speech in as robust a way as any other country besides America. American commentators spend too much time focusing on the minute differences in the two countries’ approach to free speech and not enough time recognizing that England is America’s closest free speech ally in a war against an ideology that affords speech no premium at all.

Ehrenfeld case saw a Saudi banker suing an American journalist in English courts, over the unintended publication of twenty-three books from an online retailer located in America. Ehrenfeld did not intentionally publish in England; yet because of the omnipresence of Internet publication, England felt justified in assuming jurisdiction over her.\textsuperscript{48} For many common sense American legalists, this offends fundamental concepts of due process and comity. They often ask what possible interest England could have in vindicating the reputation of a Saudi billionaire “defamed” by an American journalist, when the American journalist had no intention of publishing under England’s jurisdiction and when that billionaire possessed only minimal contacts to England’s jurisdiction?

If anything, the Ehrenfeld case proves that Internet jurisdiction has become a global problem and is in need of a global solution. It is beyond the scope of this paper to propose a comprehensive jurisdictional plan; suffice it to say, American legislative efforts have ignored the problem altogether, satisfied instead to focus on a largely-imagined free speech divide. The \textit{individual libel lawfare} debate could benefit greatly from minimizing with the rhetoric and focusing, instead, on the emerging jurisdictional problems. Both countries could benefit from studying the enlightened approach followed by the European Union in its E-Commerce Directive, in which the “law of the country of origin” principle minimizes most of the difficult issues, jurisdictional or otherwise, arising with international content litigation.\textsuperscript{49}

4. \textsc{The Current Legislation Only Attempts to Provide a Uniform Solution to International Individual Libel Lawfare, While Completely Ignoring a Uniform Solution to the Homegrown Kind.}

In addition to its misguided approach to international \textit{individual libel lawfare}, the current legislation does nothing to prevent homegrown \textit{individual libel lawfare}, i.e., harassment suits that are jurisdictionally sound but are nonetheless designed to chill free

\textsuperscript{48} See \textit{Berezovsky}, supra note 24, in which Lord Steynn held that claimants are entitled to bring the claim in the U.K, so long as they possess a modicum of reputation in the jurisdiction and the defamatory communication was published more than a \textit{de minimis} number of times.

\textsuperscript{49} See generally, \textit{Wimmer}, supra note 49. On June 8, 2000, the EU adopted Directive 2000/31/EC, which establishes basic harmonized rules on cross-border Internet publication. In it, companies are subjected only to the jurisdiction and the law of the Member State in which they are established, i.e., the country of origin principle. \textit{Id}.
speech. Just as a case-by-case approach, coupled with jurisdictional reform, is probably the most principled solution for international *individual libel lawfare*, Anti-SLAPP legislation, which is used in some—but not all—states, represents a more principled way to combat the homegrown *individual libel lawfare*.

Strategic Lawsuits Against Public Participation (SLAPP) are suits brought against people participating in the democratic process by people claiming to have been wronged by that participation, i.e., a defamation action against citizens exercising first amendment rights. Therefore, by definition, Anti-SLAPP legislation is perfectly suited to combat both kinds of *individual libel lawfare*. Because not all states have enacted anti-SLAPP legislation, it simply has not received the kind of attention needed to constitute a sufficient disincentive against *individual libel lawfare*. That, however, is changing in America, if not in England. In California, which has the most robust Anti-SLAPP legislation of any state, “there has been a fairly dramatic decline in the number of libel cases being filed . . .”

As a result of the success of Anti-SLAPP legislation, one provision in New York’s *Rachel’s Law* and in the *Free Speech Protection Act (2009)* is worth saving—the award of treble damages if it is determined that the person bringing the foreign lawsuit intentionally engaged in a scheme to suppress free speech rights. This provision is

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50 In England and America respectively, the *Alms for Jihad* case and the Joe Kaufman case, outlined above, would fit the bill.
52 *Id.* California’s Anti-SLAPP legislation provides for a special motion that a defendant can file at the outset of the lawsuit to strike a complaint, where the complaint arises from conduct that falls within constitutionally protected rights, such as petition or free speech. *See* Cal. Code of Civil Procedure 425.17 (a) (stating participation in matters of public significance . . .should not be chilled through the judicial process.)
53 *Id.*
54 Judith Miller, *A SLAPP Against Freedom: Attorneys have an effective new way to defeat Islamic groups’ libel suits*, City Journal, Autumn 2007. A classic example of the effective use of Anti-SLAPP legislation concerns the Matthew Levitt litigation in California. KinderUSA, an Islamic charity charged Levitt, a former Treasury Department Official, for making false statements about KinderUSA’s ties to terrorist groups such as Hamas. Instead of settling, Levitt cited California Anti-SLAPP and KinderUSA dropped the suit less than six weeks later. This article goes on to list instances in which Anti-SLAPP legislation has resulted in summary dismissals in *individual libel lawfare* cases in Massachusetts, California, and Minnesota. *Id.*
55 *See* Acts, *supra* note 3. The “act does not coerce other nations. It would simply tell the *libel tourist*, ‘if you scheme to deprive Americans of fundamental rights, you can no longer do it with impunity. We will arm Americans to sue you for reciprocal damages in a court far from your home, albeit one that will surely
effectively international anti-SLAPP legislation and remains sound because it protects authors and journalists from frivolous lawsuits, while still insisting on a case-by-case analysis of each instance of individual libel lawfare.

**D. Conclusion to Individual Libel Lawfare**

One thing needs to be made abundantly clear—the above section questioning the wisdom of legislative efforts combating individual libel lawfare in no way means to suggest that individual libel lawfare is somehow imagined or unintimidating. However, legislative responses either continue to miss the mark or are not yet sufficiently robust. Thus, the foregoing represents an attempt to clearly define individual libel lawfare as its own distinct phenomenon, to describe the different kinds of it, i.e., homegrown and international, and to explore areas where England’s and America’s “counteroffensive” can be improved. While individual libel lawfare represents a dire threat to free speech, it should still be addressed on a case-by-case level, with a higher premium paid to jurisdictional reform than to federal legislation, which places the law of free nations into formal disharmony with one other.

**E. What is Global Libel Lawfare?**

*Global libel lawfare* is any large-scale “attempt by regional and global organizations to redefine . . . freedom of speech,” i.e., to prohibit speech critical of religion, specifically Islam. As a result, it is far more dangerous to free speech than individual libel lawfare, in large part because of its avowed purpose—that “religious freedom must be silenced and critique of radical Islam and Muslims [must be] branded as racism and ‘defamation of an ‘established religion.’” In other words, it insists that Muslims’ right to practice religion freely is coextensive with the right to practice it free of criticism—and that genuine criticism about human rights abuses perpetrated by radical Islam is tantamount to religious intolerance.

*Global libel lawfare* relies heavily on the concept of defamation of religion, which is essentially nothing more than the concept of blasphemy (defamation of God),

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56 *See* Goldstein and Meyer, *supra* note 31.
57 *See Dr. Sami Alrabaa,* *Exclusive: Radical Muslims Abuse Western Lawfare Systems to Advance their Jihad Agenda,* Family Security Matters, June 24, 2009.
58 At the conference, Brooke Goldstein made remarks to this effect.
coupled with the concept of religious hate speech (defamation of the Godly). Of course, blasphemy not a new concept, nor is it peculiar to radical Islam. Many Christian blasphemy laws in England, America, and elsewhere were widely in effect—if not uniformly prosecuted—from medieval times up until the present day. However, while blasphemy laws have been instituted among all the great monotheisms of the world, “not all monotheisms are [acting] exactly the same at the moment” and only one is making attempts to criminalize “defamation of religion” on a global scale through religious hate speech laws and global resolutions like the recent U.N. Resolution 7/19 “Combating defamation of religions.”

In this sense, global libel lawfare is the name we give to a culture war, in which Western values, such as freedom of speech and religion, skepticism, and free inquiry, clash with an oppressive ideology that seeks to maintain power by silencing religious and cultural dissent through violence and intimidation. Through a steady increase in the promulgation and enforcement of laws that destroy Western values, radical Islam is making significant inroads, in part because most in the West do not recognize the invidious culture war in which they are engaged. Although America probably retains a sufficiently robust defense against these assaults because of First Amendment protection, “blasphemy [laws and hate speech laws] in the U.K., Austria, the Netherlands, Switzerland and Germany [and, most recently, the U.N. Resolution “Combating defamation of religion’”]. . . are aiding jihadists advance their theocratic agenda.”

\[59\] See Robert A. Brazener, Validity of Blasphemy Statutes or Ordinances, 41 A.L.R. 3d 519 (1972) (outlining blasphemy statutes by state and showing that, when blasphemy statutes were held to be constitutionally valid in America, it was because the court could find a “secular purpose.”). In England, the common law offences of blasphemy and blasphemous libel were finally abolished in 2008, due largely in part to their under-inclusiveness, i.e., it only prohibited blasphemy against the Christian God. It was replaced, instead with The Racial and Religious Hatred Act, (2006) (Eng.) which broadens the swath of the blasphemy law to create an offense of inciting hatred against a person on the grounds of any religion. See Ivan Hare, Crosses, Crescents, and Sacred Cows: Criminalising Incitement to Religious Hatred, [2006] Public Law, 520-537.


\[61\] The Organization of the Islamic Conference’ (“OIC”), which is the U.N.’s largest voting block, first introduced a binding resolution “Combating defamation of Islam” over ten years ago (spearheaded by Pakistan) and has tried uniformly, at Durban I and recently at Durban II, to pass more neutered versions, such as recent U.N. Resolution 7/19 “Combating defamation of religion.” Res. 7/19, U.N. Doc. A/Res/7/19 (March 27, 2008).

\[62\] See Huntington and Barnett, supra note 14.

\[63\] See Alrabaa, supra note 59.
Accordingly, to mount a counteroffensive against *global libel lawfare*, one must first identify few of the most alarming instances of *global libel lawfare*, and, thereafter, highlight the bizarre social and legal reasoning underpinning each. As we conclude, we will briefly examine ways to combat this threat to free speech and Western values head on.

**F. Instances of Global Libel Lawfare**

1. **Salman Rushdie and The Moral Inversion**

The modern era of *global libel lawfare* probably began with the 1988 publication of Salman Rushdie’s the *Satanic Verses*, when “Iran’s Ayatollah Khomeini issued his infamous fatwa against Rushdie, a British citizen at the time.” As Brooke Goldstein and Aaron Eitan Meyer point out, “the fatwa marked the beginning of the end on open discourse—fictional or otherwise—about Islam.” At the time, Rushdie was not prosecuted under any hate speech or blasphemy law, but whether he would be today remains in question. Indeed, when asked to weigh in on the controversy, many world political and religious leaders at the time, such as the Archbishop of Canterbury, His Holiness the Pope, and the Chief Rabbi of Israel, made remarks suggesting that the issue in Rushdie’s case did not lie with the suborning of murder for the act of writing a work of fiction but rather with blasphemy.

This instance of *global libel lawfare* highlights a serious issue that sits at the root of the problem—moral inversion. By willingly or unwittingly relinquishing speech rights and companion Western values in favor of hate speech and blasphemy laws, which seek to protect against “giving offense” to religions, Western countries make a step towards legitimizing the violence committed by radical Islamists in the name of “having been offended.” Regardless of how deep this offense might be, the laws of free society should never tacitly condone individuals to engage in violent self-help.

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65 Id.
67 Directly after the publication of the *Satanic Verses*, for example, “Sayed Abdul Quddus, the secretary of the Bradford Council of Mosques, claimed that Rushdie ‘tortured Islam and deserved to pay the penalty by hanging’ and that ‘Muslims here would kill him and I would willingly sacrifice my own life . . . to carry out the Ayatollah’s wishes.’” See *Melanie Phillips, Londinistan: How Britain Has Created A Terror State Within*, 46 (Gibson Square, London 2008) (2006). “Such scenes in Britain were
In the end, the moral inversion problem is admittedly not a legal argument against *global libel lawfare* but rather a common sense one. Indeed, as western societies contemplate the passage of or the repealing of hate speech and blasphemy laws, they would do well to begin with something so fundamental.

2. **GEERT WILDERS & THE NETHERLANDS—DRAWING A CLEAR LINE?**

Member of European Parliament, Geert Wilders, released a ten-minute self-produced film titled *Fitna*, which contains quotations from the Koran inciting violence or death to infidels, counterpoised against images of the September 11th attacks and of Imams preaching death to the Jews. Six months after the public prosecutor’s office determined that Wilders should not be prosecuted, the court did an about-face and decreed that charges may be brought against him because they would be “in the public interest.” The court ruled that Wilders had personally insulted Muslim believers by attacking the symbols of Islam and by injuring “Muslims in their religious dignity.” In doing so, it stated that in “a democratic legal system a clear line about hate speech in the public debate must be drawn.”

*unprecedented.* The home of free speech was playing host to the burning of books and an openly homicidal witch-hunt. Yet not one person who called for Rushdie to be killed was prosecuted for incitement to murder.”

What was also on conspicuous display was the mind-twisting, back-to-front reasoning that is routinely used by many [radical] Muslims to turn their own violent aggression into victimhood. [Radical] Muslim leaders claimed that the refusal by the British government to ban The Satanic Verses showed that Muslims in Britain were under attack, with the political and literary establishment trying to destroy their most cherished values. Of course, it was Britain that was under attack from an Islamism that required the British state to dump its most cherished values in order to placate the Muslim minority. Yet this was promptly inverted to claim that it was Islam that was under attack.

*Id.* at 47.

In August 2009, having recently pulled the actual cartoon images from a would-be definitive, academic book about the Danish cartoon controversy, the Director of Yale University Press, John Donatich, defended the decision, stating that, “when it came between that and blood on my hands, there was no question.” Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, New York Times, (August 12, 2009). In an editorial published on Slate.com, Christopher Hitchens rightly condemned this latest moral inversion unequivocally, stating, “[w]e should deny absolutely that publishing cartoons would instigate some murderer to do so and we should state directly and in advance that he is solely responsible for any blood that is on his hands.” Christopher Hitchens, *Yale Surrenders: Why did Yale University Press Remove Images of Muhammad from a book about the Danish Cartoons*, Slate.com, (August 17, 2009).

If convicted of the prosecution in the Netherlands, he faces up to sixteen months of jail time and a fine of over ∙9,000. Moreover, on February 12, 2009, the United Kingdom denied Wilders entry to the U.K. on the grounds that he was a threat to public order and public harmony, despite the fact that he had been invited there by two members of the House of Lords for a showing of *Fitna* in the Palace of Westminster. News Staff, *Geert Wilders prosecuted for Hate Speech*, NRC Handelsblad, (January 21, 2009).

*Id.*
The Dutch court was right to insist upon drawing a clear line in public debate; however, its erroneous ruling blurred the line in the extreme. While every jurisdiction has its own legal framework for determining when a statement is defamatory, some principles should be universal. First, in any free society, the truth of the statement should always protect the speaker from liability. This seems axiomatic but Wilders simply cited quotations from the Koran and counterpoised them against images of terror. Although provocative, inflammatory and, at most, out of context, nothing in the film misquoted the Koran or lied about terror attacks. Yet, he was still prosecuted. If speakers are not even allowed to speak the truth, regardless of how inflammatory it may be, how can there be any objective standard by which to measure what speech is permissible and what is not? Indeed, Wilders “cited to the Koran itself. How much truer can you get? Now, it is being institutionalized into Western laws that we can’t do it because it gives offense?”

The criminalization of “giving offense” leads to the second objection to the Dutch court’s ruling. In any free society, speakers must be able to determine, in advance, whether their statement will subject them to liability. When analyzing if a statement will offend the listener(s), a speaker can never know if what they are saying will actually cause offense until someone later subjectively finds it offensive. An insidious tautology lurks here, which in Wilders’ case, invariably creates a chilling effect on open and free discourse. Geert Wilders may be an inflammatory and utterly unpleasant person. However, in a free society, the millions of Muslims he may have offended would also be free to say something to that effect—or worse. But that is where the legal line should be drawn. After the decision to prosecute Wilders, however, even Muslims should fear that their own statements condemning him might cause offense to someone whose religion

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71 Here’s another example the criminalization of the truth: Susanne Winter, a member of the Austrian FPO party and member of parliament, was sentenced to three months of prison on probation and a fine of €24,000 for stating “if the prophet Muhammad were living, he would be indicted as a child abuser.” Muhammad married Aisha, a nine-year old girl, and consummated this marriage years before she had her first menses. Although it may be unfair to hold medieval figures to 21st century standards of moral conduct, the statement, on its face, is probably true. Nonetheless, the Judge sentencing Winter stated, “it is outrageous to defame an established religion.” See Alrabaa, supra note 59.

72 Frank Gaffney, Remarks at Libel Lawfare: Silencing Criticism of Radical Islam Conference, (May 19, 2009).

73 At the conference, Alan Derschowitz made a similar point that, in America, this would be a classic violation of the Due Process clause of the 14th Amendment, which requires that the government may only enforce laws by which citizens will know in advance how to guide their actions. Professor Alan Derschowitz, Remarks at Libel Lawfare: Silencing Criticism of Radical Islam conference, (May 19, 2009).
consists of enlightenment values and, in a bizarre but perfectly legitimate twist, subject them to liability for offending them.

3. **U.N. Resolution 7/19 “Combating Defamation of Religions”**

Perhaps the single biggest instance of global libel lawfare is the one that has been consistently perpetrated by the Organization of the Islamic Conference (“OIC”) in the U.N.’s Human Rights Council every year for the past ten years. The most recent attempt, Resolution 7/19 “Combating defamation of religions” received widespread notoriety last year. Deceivingly innocuous in its purported attempt for adequate protection against acts of hatred, discrimination, intimidation, and coercion resulting from “defamation of religion,” the resolution, on its face, seems like a good idea, i.e., why would anyone be against protecting religion? However, those who dismiss it as a benign, multi-cultural attempt to protect the integrity of all world religions have obviously failed to read it. Islam is the only religion mentioned by name in any of the so-called “defamation of religions” resolutions, which purport to protect other “divine religions” but which mentions them nowhere. Resolution 7/19 states in part,

*The Human Rights Council . . . .
Noting with deep concern the increasing trend in recent years of statements attacking religions, including Islam and Muslims, in human rights forums,
1. Expresses deep concern at the negative stereotyping of all religions and manifestations of intolerance and discrimination in matters of religion or belief;
2. Also expresses deep concern at attempts to identify Islam with terrorism, violence and human rights violations and emphasizes that equating any religion with terrorism should be rejected and combated by all at all levels;
3. Further expresses deep concern at the intensification of the campaign of defamation of religions and the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001. . . .*

Despite its one-sidedness, the resolution seeks to exert global legal influence, urging states to adopt measures that would provide private direct rights of action for

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74 Even though the resolution passed by a recorded vote of 21-10, with 14 abstentions, the following countries were, in fact, against it: Canada, France, Germany, Italy Netherlands, Romania, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.
75 See U.N. Res. 7/19, *supra* note 63 (emphasis added).
citizens injured by this so-called defamation. Subsection 9 of the resolution, “urges states to provide, within their respective legal and constitutional systems, adequate protection . . .” Id. Should states comply, especially Western ones, they would be forced to ignore two longstanding tenets of defamation law. Foremost, in purporting to protect against defamation of Muslims everywhere, the resolution makes a mockery of group defamation law. In America, and to a large degree in England,

[w]hen a defamation concerns a group of people, and one or more of that group bring a libel or slander action, thorny questions are presented as to whether communication is “of and concerning” the plaintiff. The general rule is that if the group is so large that “there is no likelihood that a reader would understand the article to refer to any particular member of that group,” it is not libelous of any individual. As the size of the group increases, it becomes more and more difficult for the plaintiff to show that he was the one at whom the statement was directed.

Put in another way, the law on group defamation protects the reputations of individuals, not the beliefs or the hurt feelings of groups. Thus, the only way to create any workable protection against so-called group defamation would be through the implementation of some kind of wide-sweeping hate speech law, which we have already shown is fraught with its own set of pitfalls.

Second, the resolution ignores the fact that determining the truth or falsity of religious claims is arguably impossible. Divine revelation is not objective. Suffice it to say, the opening verse of the Koran, when translated, states “This book is not to be doubted.” By definition then, any scientific claim about the origins of the universe or one from a competing religion that diverges from Islamic dogma, necessarily “defames” Islam and could potentially subject the speaker of it to liability. When interviewed on CNN about the U.N. Resolution, Christopher Hitchens explained, “Islam [like any religion] makes quite large claims for itself, doesn’t it? The claim of Islam is that it is the last and final revelation from God to humanity. You don’t need another book after the Koran. Now that’s okay, but now [the resolution] want[s] to say that if you have any difficulty or any doubts about that, you are not allowed to express them because, if you

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76 Subsection 9 of the resolution, “urges states to provide, within their respective legal and constitutional systems, adequate protection . . .” Id.
D. CONCLUSION TO GLOBAL LIBEL LAWFARE

Again, another thing needs to be made abundantly clear—the above section questioning the wisdom of hate speech laws in no way means to suggest that tolerance, religious sensitivity, and respectful discussion are to be discarded. There is obviously great benefit to respectful discussion about controversial claims. However, *global libel lawfare* seeks both to silence civilized discussion and eviscerate free speech by insisting that it could not only cause offense but also subject Muslims to hatred and intimidation on the basis of their religion. Far from protecting Muslims, *global libel lawfare* actually places moderate Muslims living in the theocratic countries that institutionalize this concept in the most danger. While authors and journalists in the West face lawsuits, moderate Muslims, who speak out about the human rights abuses perpetrated by radical Islam and who live in countries that forbid “defamation of religion,” face an existential threat.

In the end, *global libel lawfare* is than nothing more than recasting of the medieval vice of blasphemy, used by ruthless theocracies for centuries, into a multicultural virtue by a coalition of radical Islamists, many Islamic governments, and members of Western society unconvinced of radical Islam’s threat. Hence, the first step towards combating this great leap backwards is to recognize that it exists. America is probably safe for now. Panelist James Taranto convincingly reminded the conference that the U.S. has an “expansive and robust free speech regime that is in no danger of being overturned.” Other countries are not so safe, however. Their first line of defense is an awareness of how legally and socially dubious the concept of “defamation of religions” really is. When faced with the passage of or the repealing of hate speech and blasphemy laws, England and Europe must be alert to the true intent of these laws.

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79 See Hitchens, supra note 68.
80 Taranto stated, America protects “free speech and hate speech all at once. Neo-Nazis have a constitutional right to march through a neighborhood full of holocaust survivors, as seen in the case *National Socialist Party v. Skokie*, 432 U.S. 43 (1977).” He also pointed out that the Supreme Court extended this protection in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), holding that there is a difference between advocacy and incitement, and that a government cannot punish inflammatory speech unless it is directed to incitement and is likely to cause imminent lawless action. James Taranto, Remarks at *Libel Lawfare: Silencing Criticism of Radical Islam* conference, (May 19, 2009).
If this defense is insufficient, Aaron Eitan Meyer has proposed a more proactive solution: “If Europeans can be prosecuted by Islamists using the European Union’s legal system, should it not follow that radical Imams in Muslim countries can be cited by European citizens and extradition requested by them to European courts for their anti-Semitic and anti-Christian rhetoric?” Since Meyer was one of the first writers to discuss the crucial distinction between individual libel lawfare and global libel lawfare, we would be wise to give his ideas, fantastic or not, the benefit of the doubt. Indeed, if the West does not wish to fight for its core values, then at least it could try to beat radical Islam at its own game. As a result of their constant vitriol, the first people who would be prosecuted under these global libel lawfare laws would probably be the radical Islamists themselves.

**CONCLUSION**

The foregoing represents a synthesis of some of the most meaningful—and controversial—ideas currently being promulgated in the libel lawfare debate. Part I was devoted to eliminating unnecessary semantic confusion plaguing the debate. By defining and distinguishing many of the terms that have been consistently misused in the debate, like radical Islam, libel tourism and libel lawfare, Part I offered a more principled approach to analyze libel lawfare on a fundamental level. Part II was devoted to exploring the crucial distinction between the small- and large-scale types of the phenomenon. Part II.A began by defining individual libel lawfare as individual libel cases in England and America, like the Ehrenfeld and Alms for Jihad cases, and in so doing, identified the two different kinds of individual libel lawfare, i.e., homegrown and international. Finally, it explored England and America’s “counteroffensive” and showed how most of the legislative responses, like the Free Speech Protection Act and Anti-SLAPP legislation, either continue to miss the mark or are not yet sufficiently robust. It concluded by determining that, while individual libel lawfare represents a dire threat to free speech, it should still be addressed on a case-by-case level, with a higher premium paid to jurisdictional reform than to federal legislation, which places the law of free nations into formal disharmony with one other.

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81 See Goldstein and Meyer, supra note 32.
Part II.E began by defining global libel lawfare as large-scale attempts by regional and global organizations to redefine freedom of speech to prohibit speech critical of religion, specifically Islam. It proceeded to outline a few of the most shocking instances of global libel lawfare, such as the prosecution of Geert Wilders and U.N. Resolution 7/19 “Combating defamation of religions.” Each individual instance was then used to illustrate the legally dubious reasoning underpinning many hate speech and blasphemy laws in England and Europe. It concluded by showing that global libel lawfare seeks both to silence civilized discussion and eviscerate free speech by insisting that speech critical of Islam could not only cause offense but also subject Muslims to hatred and intimidation on the basis of their religion. Far from protecting Muslims, global libel lawfare actually places moderate Muslims living in the theocratic countries that institutionalize this concept in the most danger. Accordingly, when faced with the passage of or the repealing of hate speech and blasphemy laws, England and Europe must be alert to the true intent of these laws.

By recognizing that two different kinds of libel lawfare exist, future debates can propose more precise tactics in combating them. Where this counteroffensive is weak or misguided (individual libel lawfare) or where Western society often fails even to realize that a problem even exists (global libel lawfare), the failures must be highlighted, the underlying causes examined, and compelling alternatives explored. It is only by these investigations that we can glimpse the future of the libel lawfare counteroffensive, which remains in a jungle, finding its way by trial and error, building the road behind it as it proceeds.82

82 A similar quotation—“We are in a jungle and find our way by trial and error, building our road behind us as we proceed.”—has been attributed to Max Born, Quantum Physicist, Nobel Prize Winner, 1882-1970.