

PolicyWatch #1316 : Special Forum Report

Libel, Terrorism, and the Assault on Academic Freedom

Featuring Judith Miller and Ruth Wedgwood
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On November 15, 2007, The Washington Institute held a Policy Forum with Pulitzer Prize-winning journalist Judith Miller and Ruth Wedgwood, the Edward B. Burling professor of international law and diplomacy and director of the International Law and Organizations Program at the Johns Hopkins School of Advanced International Studies. The following is a rapporteur's summary of their remarks.

JUDITH MILLER

In the early 1980s, two University of Denver professors, George Pring and Penelope Canan, noted an epidemic of libel lawsuits whose intent was not to be successful, but to intimidate and prevent measures such as lodging a complaint about sexual harassment or filing a government petition. Such measures are protected by the First Amendment but were subject to defamation lawsuits. Pring and Canan called these lawsuits SLAPP actions, coining the term "strategic litigation against public participation." They pointed out that even if the suits failed in court, they succeeded in their primary goal of chilling free speech.

Thanks partly to their research, twenty-four states have now enacted "anti-SLAPP" legislation, which attempts to discourage such lawsuits through a variety of tactics. Some states provide for an expedited judicial process by allowing the defendant to submit a prediscovery defense to prove good faith and no malicious intent, and, if successful, to convince the court to dismiss the suit as "frivolous" or induce the plaintiff to settle or risk having to pay the defendant's legal fees.

At present, there are roughly twenty libel lawsuits in U.S. courts filed by Islamic groups against publications that have criticized them. But three recent results are beginning to level the playing field. The first was this year's victory by Matthew Levitt, The Washington Institute, and Yale University, in which California anti-SLAPP legislation permitted the defendants to file an early motion -- requesting a dismissal and the payment of legal fees -- that induced the plaintiffs, KinderUSA and Layla al-Maryati, to drop their suit. In the second case, a group of defendants, including journalists, successfully fought off a Boston libel suit brought against them by an Islamic group, but only after a long process of discovery and an appeal.

The third case, in Minnesota, involved a group of imams who were removed from a flight after several passengers reported suspicious activity. The imams subsequently sued not only the airline, but also the passengers who had reported them. This case demonstrates the need for anti-SLAPP legislation, because retroactive legislation was required to protect the passengers who had reported the suspicious activity. In the case of the "flying imams," as they became known, lawyers committed to defending the right to report suspicious behavior led the defense at no charge to the defendants. But it is not always possible to find lawyers who will work pro bono.

Since there are still many libel lawsuits in process, what can be done to protect free speech and the right of authors to publish without fear of legal intimidation? Part of the difficulty is that groups and individuals certainly have a right not to be slandered and libeled, so there must be mechanisms in place to protect plaintiffs in cases of true defamation. So far, however, the record suggests that most of the recent suits

involving Islamic groups have been frivolous, as none of them have prevailed in a U.S. court. If there are this many lawsuits all being filed in the same pattern with the same claims, it is also natural to wonder whether they are part of a strategy for deflecting criticism of these groups. The way the law is stacked, especially in states without anti-SLAPP protections, plaintiffs benefit simply by filing such suits, which is unfair if the sole goal of the current wave of such suits is to chill speech rather than prosecute genuine libel.

Enactment of a federal law is not the answer, since libel claims fall under the jurisdiction of state law. Rather, more states should pass anti-SLAPP laws, and the states that already enacted such laws should strengthen them.

RUTH WEDGWOOD

One key aspect of the libel issue is international in nature. That is, many assume that the law on free speech and freedom of the press is the same in the United States and the United Kingdom, but it is not. The U.S. Supreme Court has expanded First Amendment constitutional protections over the last several decades in order to protect the robust debate necessary for democracy. In libel cases, this translates into a system that offers special protections when writers and commentators seek to address the conduct of public figures and officeholders. In particular, in American law, the plaintiff in a libel case carries the burden of proof and is required to show both the falsity of a factual statement and the malicious intent (or reckless disregard) of the writer. Burden of proof, in practical life, is enormously important.

In England, the weight of the burden of proof is reversed. When a lawsuit is filed, it becomes the burden of the journalist or scholar as a civil defendant to prove to a court's satisfaction that the proffered statement was true, or that, if arguably false, that "responsible" methods of journalism were used. And of great pertinence to American writers and scholars, the British courts have begun to take a potentially expansive view of the extraterritorial application of this restrictive law. Any English-language book available for purchase or newspaper available for viewing on the internet may be considered to have been "published" in England.

This has far-reaching consequences. It would have a chilling effect on American writers and investigative journalism, in part because libel lawsuits dismissed as frivolous in America can succeed in England. It may be technologically possible for an American newspaper to "block" downloads by English readers. But it is surely tedious to require a newspaper to anticipate the libel laws of each country in order to publish on a universally accessible web. In practical terms, it means that writers would have to go to their lawyers before publishing. It would become a lowest common denominator for freedom of speech and harm the "open source" analysis that is important in American policy and politics.

Another source of harm lies in the phenomenon of high attorney fees and costs. In the United States, generally speaking, both the plaintiff and defendant pay their own fees and costs. But in the UK, an unsuccessful defendant ends up paying the fees of any attorney engaged by the plaintiff. The fees are often much higher in the UK than in the United States, and few authors or publishers dare risk the daunting cost. And as seen in a recent case, if the publisher concludes that he cannot afford to litigate to defend an author, the negotiated settlement may require a ceremony of formal recantation that sounds, to those accustomed to broad freedom of speech, not only tendentious, but even frightening. Typically, to settle a case, not only is the allegedly false statement withdrawn, but the writer or publisher is required to assert that the opposite viewpoint is, in fact, true.

There are several remedies that the United States should consider to protect its authors in the international sphere. The recognition and enforcement of foreign judgments has never been the subject of U.S. treaties, and instead depends on the doctrine of "comity." Congress should consider a federal statute that would bar enforcement of any judgment for libel or slander that would otherwise violate the standards of the First Amendment. Congress could restrict the enforcement of foreign libel judgments to cases in which the burden of proof falls on the plaintiff. Congress could also hold hearings about the reach of the UK's extraterritorial laws, as well as other countries' libel laws, that affect the capacity of American writers and journalists to

exercise their constitutional freedoms.

The bottom line is that American writers cannot currently publish material that would be protected in U.S. courts without entertaining the fear of being prosecuted abroad. This is already beginning to have a discernible effect on speech in the United States, and it is an important problem for any country that values the freedom of inquiry, as well as the right of reputation.

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