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SUING ISLAM: TORT, TERRORISM AND THE HOUSE OF SAUD

DONALD W. GARNER* & ROBERT L. MCFARLAND**

*Wahabism produced the religious schools; the religious schools produced the jihadists. Among them was Osama bin Laden and the nineteen perpetrators of September 11.*¹

Introduction

As the new millennium dawned with the fiery collapse of the World Trade Center Towers, America awoke to the reality of Islamic terrorism.

In the days following 9/11 many eyes turned to Saudi Arabia after it was reported that all of the bombers were committed to Wahhabism, Saudi Arabia's particular brand of Islam. Fifteen of the 9/11 *jihadists* were Saudi nationals.² Osama bin Laden was born and schooled in the desert Kingdom

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1. WALID PHARES, *FUTURE JIHAD: TERRORIST STRATEGIES AGAINST AMERICA* 63 (2005). Dr. Phares is a professor of Middle Eastern studies and an expert on global terrorism. He serves as a Senior Fellow at the Foundation for the Defense of Democracies in Washington, D.C., and a Visiting Fellow at the European Foundation for Democracy in Brussels. See Short CV of Dr. Walid A. Phares, http://www.walidphares.com/artman/publish/article_2.shtml (last visited Oct. 17, 2007). In *Future Jihad*, Dr. Phares documents the prominent role of Saudi Arabia and its Wahhabist religious establishment in the creation of the global jihadist. The work provides substantial support for the factual record of Saudi Arabia's role in sustaining the ideological justification for terror discussed *infra* Part I.

2. For biographical data regarding the 9/11 terrorists, see NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 215-39 (2004) [hereinafter 9/11 COMMISSION REPORT]. See also TERRY McDERMOTT, *PERFECT SOLDIERS: THE 9/11 HIJACKERS* (2005).

and there acquired not only his wealth but religious zealotry as well.³ In the six years since 9/11 many other connections between *al Qaeda* and Saudi Arabia's Wahhabism continue to emerge.⁴

Saudi Arabia quickly denied any involvement in or responsibility for 9/11.⁵ But, notwithstanding the Kingdom's denials, it is Wahhabist Islam that sustains al Qaeda, and it is Saudi Arabia that sustains Wahhabist Islam. A close examination of the Kingdom's historical commitment to the propagation of Wahhabism, coupled with an appreciation of the intense means and methods of Wahhabist indoctrination practiced by the House of Saud, allows the reasonable mind to hold the Kingdom morally and civilly responsible for the physical consequences of Wahhabist *jihad* outside of Saudi Arabia's geographic borders. The purpose of this article is to give legal expression to the Kingdom's responsibility for acts of Wahhabi terror by articulating a factual and jurisprudential basis to hold Saudi Arabia civilly liable in tort for the death and suffering wrought upon America on 9/11. If the Kingdom's liability for 9/11 can be proven, then the murders at Beslan, Bali, London, and Madrid might also be opened to judicial inquiry where the role of Saudi Arabia can be considered anew.

Recognition of the Kingdom's liability begins with an examination of an eighteenth century Arabian Islamic scholar named Muhammad ibn Abd al Wahhab. Wahhab, celebrated to this day in the Kingdom as one of its founding fathers, is a key figure in the historical development and propagation of an ultra-orthodox view of Islam justifying violent *jihad*. Wahhab devoted his long life to the creation of a pure and unyielding Islam unencumbered by the tolerance, free thought, and mercy he believed had polluted it during the twelve-hundred years following the death of Muhammad.⁶ Building on a long line of Islamic thought,⁷ Wahhab demanded a return to "the pure and authentic

3. See DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR* 96-97 (2002).

4. See, e.g., *id.* at 41-43 (describing the connection between Jamal Ahmad al-Fadl, a former *al Qaeda* member involved in the bombing of the 1998 embassy bombings in Sudan, and the teachings of Ibn Taymiyya, the predecessor to Wahhabism).

5. See, e.g., *Frontline: Interview with Bandar bin Sultan, Saudi Arabia's Former Ambassador to the United States* (PBS television broadcast Oct. 9, 2001), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/terrorism/interviews/bandar.html>.

6. See MADAWI AL-RASHEED, *A HISTORY OF SAUDI ARABIA* 16-17 (2002) (introducing Wahhab as an Islamic reformer who sought to purify Islam); see also MALISE RUTHVEN, *ISLAM IN THE WORLD* 4-5 (3d ed. 2006) (explaining that Wahhab "sought a return to the 'purity' of the original Islam of the Prophet and his companions").

7. Wahhab's doctrine of Islamic purity largely rests on the Islamic thought of another notable figure in Islamic history, Ibn Taymiyya. See HAMID ALGAR, *WAHHABISM: A CRITICAL ESSAY* 8-9 (2002). Taymiyya was a fourteenth-century reformer who demanded a return to the explicit commands found in the *Qur'an* and the *Sunna*. He also taught that *jihad* was obligatory

Islam of the Founder, removing and where necessary destroying all the later accretions and distortions.”⁸ Wahhab allowed no room for diversity or disagreement in his Islam.⁹

Instead, Wahhab insisted that Muslims of pure faith submit to Allah’s will in everything, including *Qur’anic* teachings regarding militant *jihad*.¹⁰ Wahhab then declared those who disagreed with his teachings, even his Muslim neighbors, to be faithless and, therefore, suitable targets for his purifying *jihad*.¹¹

and should be recognized as one of the pillars of faith. *See infra* notes 41-43 and accompanying text.

8. BERNARD LEWIS, *THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR* 120 (2003). Wahhab’s followers literally destroyed external manifestations of any faith practiced contrary to their beliefs. For example, Wahhabists in Saudi Arabia destroyed domes over buildings in Mecca “reputed to have been the birthplaces of the Prophet, Khadijat al-Kubra, Imam ‘Ali, and Abu Bakr al-Siddiq.” ALGAR, *supra* note 7, at 27. Wahhabists in Saudi Arabia have also destroyed numerous tombs and mausolea in order to carry out Wahhab’s teachings that such symbols were forbidden by the Prophet. *See id.* In 2001, the Taliban carried on Wahhab’s tradition of destruction by blowing up the ancient Buddhas of Bayman. *See, e.g.,* W.L. Rathje, *Why the Taliban Are Destroying Buddhas*, USATODAY.COM, Mar. 22, 2001, <http://www.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm>.

9. *See* LEWIS, *supra* note 8, at 122.

The ire of the Wahhabis was directed not primarily against outsiders but against those whom they saw as betraying and degrading Islam from within They were of course strongly opposed to any school or version of Islam, whether Sunni or Shi’ite, other than their own. They were particularly opposed to Sufism, condemning not only its mysticism and tolerance but also what they saw as the pagan cults associated with it.

Id.

10. *See* AL-RASHEED, *supra* note 6, at 16 (explaining that Wahhab “distinguished himself by insisting on the importance of monotheism, the denunciation of all forms of mediation between God and believers, the obligation to pay *zakat* (Islamic tax to the leader of the Muslim community), and the obligation to respond to his call for holy war against those who did not follow these principles” (emphasis added)); *see also* BENJAMIN & SIMON, *supra* note 3, at 41-54 (discussing the historical roots of Wahhab’s teachings); ANIS A. SHORROSH, *ISLAM REVEALED: A CHRISTIAN ARAB’S VIEW OF ISLAM* 37 (1988) (noting that the war cry of those heeding Wahhab’s call to holy war was, “Kill and strangle all infidels which give companions to Allah”). The text of *Qur’anic* suras regarding *jihad* are provided *infra* note 43.

11. *See* AL-RASHEED, *supra* note 6, at 16; *see also* ALGAR, *supra* note 7, at 34.

The corollary of identifying Muslims other than the Wahhabis as *mushrikin* [apostates] was that warfare against them became not simply permissible but obligatory: their blood could legitimately be shed, their property was forfeit, and their women and children could be enslaved. As the events of Karbala and Ta’if in 1217/1803 made plain, the Wahhabis by no means shrank from the duties of butchery their doctrine imposed on them.

Id.

Wahhab's style of fundamental Islam got him kicked out of his tribe and family, but he thereafter found great favor in the eyes of a local tribal leader named Muhammad ibn Saud.¹² Saud, recognizing the great power inherent in Wahhab's message, welcomed him with open arms. In 1744, Saud's affinity for Wahhab was formalized in a historic pact in which Saud adopted Wahhab's religious ideology and agreed to protect Wahhab and lead his effort to indoctrinate the whole of the Arabian Peninsula.¹³ Armed with Wahhab's supreme vision of Islam, the descendants of the House of Saud waged over a century of internecine war in Arabia. The Saudi royalty and their Wahhabbi followers finally subjugated all the neighboring tribal communities and, in 1932, the Kingdom of Saudi Arabia was born.¹⁴

Throughout the Kingdom's history, and to this very day, the only religious belief allowed by the Saudi King is Wahhab's particular version of Sunni Islam, now commonly known as Wahhabism.¹⁵ The Kingdom employs

12. See AL-RASHEED, *supra* note 6, at 17-18. See also *infra* notes 45-46 and accompanying text for a discussion of the immediate rejection of Wahhab's teachings by his tribe and family.

13. See AL-RASHEED, *supra* note 6, at 17-18. "[T]he Sa'udi ruler agreed to support the reformer's demand for *jihad*, a war against non-Muslims and those Muslims whose Islam did not conform to the reformer's teachings. In return the Sa'udi amir was acknowledged as political leader of the Muslim community." *Id.* at 18.

14. See *id.* Religious fundamentalism, enforced by the *jihadist*, is the foundation upon which the Kingdom of Saudi Arabia is built:

In creating his dynastic state Ibn Saud had followed the time-honoured pattern, exemplified by his own ancestors, of combining military force with religious enthusiasm. The storm-troopers on whom he relied for his victories, known simply as the Ikhwan ("Brothers") . . . when not actually fighting, . . . observed a spartan and puritanical regime closely modeled, as they supposed, on the first Islamic community established by the Prophet in Madina. The Ikhwan were extremely rigid and literalistic in their behaviour: they cut their *thaubes* (or gowns) short above the ankles, trimmed their moustaches to a shadow while letting their beards grow freely, and eschewed the black *aghal* or rope-ring which secures the Arab head-dress, all because it was said in certain *hadiths* (traditions) that the Holy Prophet was thus attired or trimmed. Above all, they were utterly fearless in battle, and brutal as well, having defined themselves as the only true Muslims in a world of backsliding heretics.

RUTHVEN, *supra* note 6, at 5.

15. See U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2004, S. Prt. No. 108-59, at 589 (Comm. Print 2004) [hereinafter 2004 STATE DEPARTMENT REPORT], available at <http://foreignaffairs.house.gov/archives/109/20429.pdf>. It is a capital offense for a Christian or Jew to enter the Islamic holy places in Mecca. See RUTHVEN, *supra* note 6, at 12. Wahhabism is also commonly referred to as Salafism in acknowledgement of the link between Wahhabism and the Egyptian Salafi movement. See, e.g., MCDERMOTT, *supra* note 2, at 100-01. Salafism and Wahhabism share a common desire to create an Islamic utopia where Muslims "revert to the pure Islam of the Prophet Muhammad's generation and the two generations that followed his." *Id.* at 101.

religious police, the notorious Mutawwa'in, to strictly enforce its Wahhabist orthodoxy.¹⁶ These religious police control the lives of Saudi subjects from the day's attire to the manner, timing and substance of the day's prayer.¹⁷ It is the Saudi religious police that impose the restraints upon women, keeping them hidden away from much of society.¹⁸ The religious authorities do not stop at controlling the activities of Saudi subjects but also practice vigorous forms of thought control by regulating educational texts and curriculum, media, and even the sermons delivered in the country's Wahhabi mosques.¹⁹

It was in Saudi Arabia that Osama bin Laden received his religious training and, not surprisingly, learned to hate the West.²⁰ Indeed, it was from the sands of Saudi Arabia that fifteen of the nineteen suicide bombers sprang on the morning of September 11, 2001.²¹ While Saudi Arabia is surely not the only source of Islamic terrorism,²² it is difficult to ignore the numerous and strong connections between Saudi Arabia's Wahhabist religious establishment and the ideology sustaining worldwide Islamic *jihad*.²³ It is now beyond serious

16. See 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 589.

17. See *id.* at 594.

18. David Pryce-Jones, *Foreword* to ROBERT SPENCER, *ISLAM UNVEILED: DISTURBING QUESTIONS ABOUT THE WORLD'S FASTEST-GROWING FAITH*, at xi-xii (2002). Recently, Dr. Sleiman Al-'Eid, head of the Islamic culture department at King Saud University, reasoned that Saudi women must not be permitted to drive because:

Driving will lead women to leave their homes a lot, whether they need to or not. In principle, women should stay at home, as everybody knows.

. . . .

Another consequence of this will be the diminishing of men's guardianship over women. If a wom[a]n drives, she will have a certain degree of independence, and she will come and go, travel, and so on. This will also lead to an increase in suspicions. When she has her own car, she will go out and return late.

Saudi Intellectuals Discuss Whether Women Should Be Allowed to Drive (Lebanese Broadcasting Corp. television broadcast May 19, 2007), transcript available at http://www.memritv.org/clip_transcript/en/1475.htm.

19. See *infra* Part I.B.1-3.

20. BENJAMIN & SIMON, *supra* note 3, at 96-97. Bin Laden was stripped of his Saudi citizenship in 1994. See NATANA J. DELONG-BAS, *WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD* 266 (2004).

21. See 9/11 COMMISSION REPORT, *supra* note 2, at 371 ("Saudi Arabia has been a problematic ally in combating Islamic extremism. At the level of high policy, Saudi Arabia's leaders cooperated with American diplomatic initiatives At the same time, Saudi Arabia's society was a place where al Qaeda raised money . . . [and it] was the society that produced 15 of the 19 hijackers.").

22. We are not arguing that Saudi Arabia is the only source of Islamic terrorism. In his excellent book, *Faith at War*, Yaroslav Trofimov documents numerous connections between the current global *jihad* and numerous Islamic states, including Tunisia, Yemen, Kuwait, Afghanistan, Lebanon, and Mali. See YAROSLAV TROFIMOV, *FAITH AT WAR* (2005).

23. See Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and*

dispute that the ideology that old king Saud used to conquer Arabia is now being used by the *jihadists* to wage religious war against the West.

This article rests upon our belief that a nation that fosters terrorist ideology should be liable to pay for the damages caused when that ideology seeps across its borders. This article lays out the factual and legal predicates for a viable civil cause of action against the Kingdom of Saudi Arabia for its role in creating the ideological infrastructure supporting Islamic terrorism.

It may strike some as ludicrous that Saudi Arabia's dedication to building Wahhabism globally should make Saudi Arabia civilly liable for at least some small part of the harm caused by Wahhabist-inspired terrorists. But we believe that, irrespective of the realpolitic need of the White House to accommodate the House of Saud, the families of those injured by acts of Islamic terrorism occurring on American soil deserve their day in court. It does not seem too much to ask that a small part of the riches of a Kingdom that taught, nurtured, and filled *jihadists* with thoughts of eternal rewards²⁴ for acts of murder should be used to compensate those injured by such *jihadists*.

The courtroom is an excellent forum for the factfinding necessary to follow radical Islam's ideology to its lair. Saudi Arabia should have no disagreement with this point in that the Kingdom regularly uses foreign courtrooms to sue critics of its policies.²⁵ An American courtroom provides due process to all sides in a calm and deliberate forum. If it is but a stunning statistical anomaly

Religious Liberty, 27 WHITTIER L. REV. 3, 20-21 (2005).

The connection between Saudi Arabia and Wahhabi-inspired terrorism is [] apparent. . . .

The Saudi regime has engaged in a dangerous devil's bargain: By supporting *madrasas* (religious schools) and mosques, it has been able to deflect attention from its failed domestic programs. "In the past [thirty] years Saudi-funded schools have churned out tens of thousands of half-educated, fanatical Muslims who view the modern world and non-Muslims with great suspicion. America, in this world view, is almost always evil."

The Saudis also spend seventy billion dollars funding a Wahhabist, anti-Western agenda, as well as terror groups around the world. Nevertheless, although in July 2002 the Pentagon's Defense Policy Board said "that Saudi Arabia was an enemy of the United States . . . [and] that the Saudis were active at every level of the terror chain," various United States administrations have adopted a policy of determined non-confrontation with the House of Saud.

Id. (bracketed alterations and second ellipses in original) (footnotes omitted); *see also* RUTHVEN, *supra* note 6, at 368 ("The role of Saudi Arabia in fomenting the modern Islamist movement cannot be underestimated.").

24. Saudi Arabia's role in creating the modern *jihadist* is discussed *infra* Part I.

25. *See, e.g.*, Rachel Ehrenfeld, *The Saudi Connection: Their Oil Is Thicker Than Our Blood*, NAT'L REV. ONLINE, June 1, 2004, <http://www.nationalreview.com/comment/ehrenfeld/200406010834.asp>.

that every 9/11 bomber was a committed Wahhabist, then our case is lost. But we believe that a civil trial will expose and document our real foe in the ideological war now confronting us.²⁶

Lawsuits exposing facts regarding the ideological sources of Islamic terrorism will not only allow compensation of victims but will also inform the American public and therefore improve public discourse regarding a wide range of vital issues: foreign policy, energy policy, diplomatic policy, and the deployment of our military forces around the world. An adversarial proceeding conducted in a neutral court of law will produce a sterling public record preserved for the archives of history. Our hope is that, at least in some small way, tort lawsuits will help America thoughtfully defend itself against Islamic intolerance and violence that is being driven by Wahhabist ideology.²⁷

Part I of this article provides a brief history of the Kingdom of Saudi Arabia and its program of Wahhabist indoctrination and propagation. This section also documents the distinctive totalitarian relationship existing between the Kingdom and its subjects, and provides the factual basis of the tort theories discussed in Part II.

Part II outlines two independent sources of tort liability resting on these facts. First, the Kingdom has created an unreasonable risk of harm by inciting its subjects to kill in the name of Allah. We inelegantly label this basis of liability “negligent incitement of terrorism.” Second, the Kingdom’s unique

26. See, e.g., President George W. Bush, Remarks to the National Endowment for Democracy, 41 WEEKLY COMP. PRES. DOC. 1502, 1503 (Oct. 6, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd10oc05_txt-15.pdf (describing the war on terrorism as primarily an ideological war against an enemy with a “clear and focused ideology, a set of beliefs and goals that are evil but not insane”).

27. Before moving on, we note, but do not consider in any depth, the implications of our “follow the ideology” liability theory as it might be applied to other sponsors of terrorism. There are other theocratic states, and there are other sponsors of religiously-motivated terrorism in the world. We believe the theories of liability discussed in the article may be applicable to varying degrees in these cases. Whether California *Imam* Muzammil Siddiqi, who indoctrinated the “American *al Qaeda*” Adam Yahye Gadahn (nee Pearlman) and brought him into radical Islam, should be held civilly liable for the violence that his student now promises to bring to the world is beyond the scope of this article. See, e.g., Debbie Schlussel, Adam Gadahn’s Extremist American Imam (May 28, 2004), <http://www.debbieschlussel.com/columns/column052804.shtml>. We do note in passing that such individual liability could not be based on the unique facts generated by the case against Saudi Arabia for its state-sponsored indoctrination of its subjects. Whether individual mullahs, priests or rabbis should bear legal responsibility for any harm inflicted by their faithful followers heeding the religious call to action is beyond the scope of this article. Constitutional concerns for individual freedom of speech and religion, defenses wholly inapplicable to the case against Saudi Arabia, complicate the question of liability in individual cases.

totalitarian relationship with its subjects generates an independent basis of negligence liability. The Second Restatement of Torts and a number of cases recognize tort responsibility for the actions of third parties if there is a “special relationship” between the defendant and the third-party actor. Where a defendant has some unique authority over a potentially dangerous person and fails to exercise that authority, the failure to control the danger and prevent the harm justifies the imposition of civil liability. Saudi Arabia had a very special relationship with the 9/11 *ihadists* and did nothing to stop them.

Part III discusses the central procedural hurdle to the civil lawsuit we propose: the doctrine of foreign sovereign immunity. This defense has thus far prevented the current set of 9/11 litigants from presenting their case in the litigation pending in New York federal court.²⁸ We argue that Saudi Arabia does not enjoy immunity in the particular tort actions we propose in Part II.

We, of course, recognize that any lawsuit seeking to expose sources of Islamic fundamentalism will be an especially difficult legal endeavor. Tort law rarely focuses on theological indoctrination and the case grows even more complex when the defendant sponsor of the ideology is a foreign sovereign nation. But complexity, difficulty, and novelty do not mean that the case against Saudi Arabia should not be heard.

Consider the lessons of the Tobacco Wars. Thirty years ago, it struck most observers as crazy that tobacco companies should be held accountable for the social costs of their deadly products.²⁹ Yet it was through tobacco lawsuits that the American public came to appreciate the real deceptiveness and destructiveness of Big Tobacco.³⁰ Only by getting to know the cigarette industry, via the exposure and documentation of facts in courts of law, was that industry brought to justice. Only by getting to know Saudi history and theology can Islamic terrorism be brought to justice.

I. The Factual Record

It is certainly true that terrorism is incongruous with the faith of many of the world’s more than one billion Muslims.³¹ But, given the numerous connections between Wahhabism and the 9/11 *ihadists*, it is foolishness to deny the connection between Saudi Arabia’s Wahhabism and terrorism. We

28. See *infra* notes 215-22 and accompanying text.

29. See generally Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977).

30. See generally Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331 (2001).

31. See, e.g., LEWIS, *supra* note 8, at xxxii (explaining that “for many, perhaps most Muslims, . . . [bin Laden’s] declaration [of *ihad* on the United States] is an equally grotesque travesty of the nature of Islam, and even of its doctrine of *ihad*”).

acknowledge that Saudi Arabia, as a matter of official Kingdom policy, did not intend to harm the United States or its other global neighbors. We do argue, however, that Saudi Arabia, despite its strategic alliance with the United States, instilled, through its state-sponsored Wahhabism, a uniquely intolerant and dangerous version of Islam now resulting in *jihad* throughout the world. The princes of the House of Saud may have been surprised that the Kingdom's ideology spawned a generation of *jihadists*, but such naïveté is not a legal defense.

If the United States is to be victorious in its ideological war on terror it must confront the true ideological enemy.³² Despite numerous speeches on the subject of Islamic terrorism, the current administration has barely mentioned Saudi Arabia. Instead, the focus of the war on terror has turned to Iraq even though half of the *jihadists* detained in Iraq are Saudi nationals.³³ As policy-makers attempt to identify the ideological roots of terror, they should not ignore centuries of history pointing with surprising clarity directly at the modern homeland of Mecca and Medina.

This section provides a brief history of the Kingdom of Saudi Arabia and is intended to highlight the facts necessary to establish the liabilities outlined in Part II of this article. In order to achieve this purpose we provide a capsule summary of the Wahhabist ideology propagated by the desert Kingdom. We begin the factual record with Wahhab and end it with an outline of Saudi Arabia's totalitarian program of Wahhabist indoctrination.

A. Historical Development of Wahhabism in Saudi Arabia

Three decades before the American Revolution, the founders of the House of Saud were making their own revolutionary plans in the Arabian Desert. The 1744 meeting between Mahammad ibn Saud, the patriarch of the House of Saud, and Mullah Wahhab, Saudi Arabia's spiritual father, cemented a political and religious relationship that would, over the next one hundred and fifty years, lead to the creation of the Kingdom of Saudi Arabia in 1932. The Saud/Wahhab pact³⁴ dedicated the Saudi Kingdom to spreading and securing

32. See BENJAMIN & SIMON, *supra* note 3, at 40-41 ("Only by understanding the religious nature of the attacks of September 11 can we make any sense of their unprecedented scale and their intended effects. And only by doing so will we have any chance of understanding the enemy and arriving at a plan to defeat it . . .").

33. Donna Abu-Nasr, *We Are Just Instruments of Death*, TORONTO STAR, July 31, 2007, at AA01 (explaining that, according to Iraq's national security advisor, Saudis make up nearly half of the foreign *jihadists* detained in Iraq).

34. Professor Al-Rasheed describes the pact between Saud and Wahhab as follows:

[Wahhab] arrived in Dir'iyyah, forty miles away from 'Uyaynah, with the hope of convincing its Saudi amir to adopt his message.

[Wahhab's] reputation had already reached the small oasis. . . . According to

Wahhab's vision of Sunni Islam throughout Arabia and also throughout the world. Since the date of that historic pact, the House of Saud has been true to its commitment to Wahhab's teachings.

Unlike other middle-eastern areas of the time, the interior of the Arabian Peninsula in the 1700s was not directly controlled by the Ottoman Empire.³⁵ The absence of Ottoman rule allowed local tribal leaders to emerge as the governing authorities over tribal settlements throughout the region.³⁶ The progenitor of the modern Kingdom of Saudi Arabia, Muhammad ibn Saud, was one of these tribal leaders who ruled a small desert oasis settlement in central Arabia known as Dir'iyyah.³⁷

Prior to his alliance with Wahhab, Saud's influence outside his small desert settlement was very limited and he needed something to enable him to defeat his regional enemies and thereby extend his rule.³⁸ He found what he was looking for in the riveting message of the Islamic preacher Wahhab.

Wahhab was born in 1703 into an influential religious family in eastern Saudi Arabia.³⁹ This religious heritage led Wahhab to pursue four years of Islamic training in the holy city of Medina.⁴⁰ There Wahhab found his calling

one source: "Muhammad ibn Sa'ud greeted Muhammad ibn 'Abd al-Wahhab and said, 'This oasis is yours, do not fear your enemies. By the name of God, if all Najd was summoned to throw you out, we will never agree to expel you.' Muhammad ibn 'Adb al-Wahhab replied, 'You are the settlement's chief and a wise man. I want you to grant me an oath that you will perform *jihad* (holy war) against the unbelievers. In return you will be *imam*, leader of the Muslim community and I will be leader in religious matters.'" According to this narrative, the Saudi ruler agreed to support [Wahhab's] demand for *jihad*, a war against non-Muslims and those Muslims whose Islam did not conform to [Wahhab's] teachings. In return, the Saudi amir was acknowledged as political leader of the Muslim community.

AL-RASHEED, *supra* note 6, at 17-18.

35. *Id.* at 14.

36. *Id.*

37. *Id.* at 15. At the time of Saud's emergence, it is unlikely that there were more than seventy households in Dir'iyyah. *Id.* Saud's position in Dir'iyyah was a result of several factors. First, his family likely founded the desert settlement. He also possessed great wealth and land enabling him to finance many local merchants and thereby gain their allegiance. Additionally, Saud possessed the political and military acumen necessary to rule the settlement. *Id.*

38. *Id.*

39. Wahhab's family was not wealthy. But they were well known for their contributions to Islam. Several members of his family were Islamic scholars. *Id.* at 16. Wahhab's father was also the *qadi*, or Islamic judge, who was responsible for administering the *shari'a* in al'-Uyayna. *Id.*

40. *Id.*

in the writings of Taqi al-Din ibn Taymiyya⁴¹ and dedicated his life to restoring Taymiyya's militant message of *jihad* to its full power.⁴²

Wahhab, armed with his understanding of Taymiyya's teachings regarding *jihad*,⁴³ returned to his hometown intending to purify the faith of those living

41. Taymiyya was a prolific fourteenth-century Islamic jurist and scholar whose teachings are frequently cited by modern Islamists. A recent study published by the Combating Terrorism Center at the United States Military Academy reveals that Taymiyya is the Islamic scholar most cited by modern advocates of global *jihad*. COMBATING TERRORISM CTR., MILITANT IDEOLOGY ATLAS 18 (William McCants ed., 2006), available at <http://www.ctc.usma.edu/atlas/Atlas-ExecutiveReport.pdf>. This reveals the surprising relevance of Taymiyya's centuries-old teachings to the modern world.

Taymiyya was deeply convinced that Muslims of his day had been corrupted by the influences of Christianity, Judaism, and paganism. See BENJAMIN & SIMON, *supra* note 3, at 46. He believed this corruption of faith occurred due to the departure of strict obedience to authoritative Islamic texts. Accordingly, he called for personal examination of the *Qur'an* and the *Sunna* (the words and deeds of the Prophet Muhammad) recorded in the *Hadith* literature in order to find the true path of Islamic purity. See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 63 (1982).

42. RUTHVEN, *supra* note 6, at 266; see also SCHACHT, *supra* note 41, at 66.

43. Taymiyya's hermeneutic commitment to a literal application of the words of Islamic holy texts led him to his most significant contribution to the modern world, his teachings regarding *jihad*. Taymiyya rejected as apostasy the notion that *jihad* was an optional or incidental aspect of a Muslim's faith. See BENJAMIN & SIMON, *supra* note 3, at 49-50.

Breaking with the authorities of his day, ibn Taymiyya placed *jihad* on the same level as the "five pillars" of Islam: prayer, pilgrimage, alms, the declaration of faith ("There is no God but Allah, and Muhammad is his prophet"), and the fast of Ramadan. Most clerics did not regard participation in *jihad* as a *sine qua non* of piety. Ibn Taymiyya again returned to scripture: he argued that since prayer and *jihad* were such important themes in early, authoritative narratives about Muhammad, clearly these activities were God's two essential requirements for all conscientious, able-bodied Muslims. The goal of *jihad* is God's victory; anyone who opposes *jihad* is therefore an enemy of God.

Id.

Taymiyya's teachings rest on methodical application of numerous *Qur'anic* commands to wage *jihad*. For example, Sura 2:190-93:

Fight for the sake of God those that fight against you, but do not attack them first. God does not love aggressors.

Slay them wherever you find them. Drive them out of the places from which they drove you. Idolatry is more grievous than bloodshed.

....

Fight against them until idolatry is no more and God's religion reigns supreme.

AL-QUR'AN 2:190-93 (N.J. Dawood trans., Penguin Books 2003). And Sura 2:216:

Fighting is obligatory for you, much as you dislike it. But you may hate a thing although it is good for you, and love a thing although it is bad for you. God knows, but you [do] not.

Id. at 2:216. For a collection of other *Qur'anic* verses commanding *jihad*, see IBN WARRAQ, LEAVING ISLAM: APOSTATES SPEAK OUT 414-24 (2003).

there.⁴⁴ Wahhab's radical message⁴⁵ was not well received even by his own

Relying on these explicit *Qur'anic* commands, Taymiyya concluded that it was the ordained duty of every Muslim to fight the enemies of God wherever they be found. See BENJAMIN & SIMON, *supra* note 3, at 50-55.

Taymiyya also utilized the pattern and statements of the Prophet as recorded in the *Hadith* literature to support his doctrine of *jihad*. Professor Bernard Lewis has collected a few samples of *Hadith* literature upon which Taymiyya undoubtedly relied to defend this position. These are words ascribed to the Prophet Muhammad:

Jihad is your duty under any ruler, be he godly or wicked.

A Day and a night of fighting on the frontier is better than a month of fasting and prayer.

The nip of an ant hurts a martyr more than the thrust of a weapon, for these are more welcome to him than sweet, cold water on a hot summer day.

He who dies without having taken part in a campaign dies in a kind of unbelief.

God marvels at people [those to whom Islam is brought by conquest] who are dragged to Paradise in chains.

Learn to shoot, for the space between the mark and the archer is one of the gardens of Paradise.

Paradise is in the shadow of swords.

LEWIS, *supra* note 8, at 32 (bracketed alteration in original).

Taymiyya's doctrine of *jihad* also rests on rewards promised to the faithful *jihadist*:

Indeed the martyr has seven special favours from Allah: all his sins are forgiven at the first spurt of his blood, he sees his place in Paradise as his blood is shed (before his soul leaves the body), he tastes the sweetness of iman (faith), he is married to seventy-two of the Beautiful Maidens of Paradise, he is protected from the Punishment of the Grave, he is saved from the Great Terror (on The Day of Judgment), there is placed upon his head a crown of honour a jewel of which is better than the whole world and everything in it, and he is granted permission to intercede for [seventy] members of his household to bring them into Paradise and save them from the Hell Fire.

RUTHVEN, *supra* note 6, at 407 (emphasis added).

Taymiyya's doctrine of obligatory *jihad* caught Wahhab's attention. And his teachings regarding *jihad* remains vital in Wahhabism today. See COMBATING TERRORISM CTR., *supra* note 41, at 15 (noting the frequent citations to Wahhab in modern *jihadist* propaganda).

44. AL-RASHEED, *supra* note 6, at 16; see also RUTHVEN, *supra* note 6, at 267. Wahhab, like Taymiyya, demanded a return to the literal words of the *Qur'an* and the *Hadith*. See ALGAR, *supra* note 7, at 10 (explaining that the whole purpose of Wahhabism is to "dismantle the complex and intricate structures of law, theology and mysticism, not to mention religious practice, that had grown up since the completion of the Qur'anic revelation, and to find a way back directly to the twin sources of Islam, to the Qur'an and the Sunna [of the *Hadith* literature]").

45. The danger of Wahhab's ideology was immediately recognized by his contemporaries. Ahmad bin Zayni Dahlan, the *mufti* of Mecca in 1871 and one of the spiritual leaders of Islam in Arabia at the time, described the immediate rejection of Wahhab's message, including rejection from the members of Wahhab's own family:

[Wahhab] began as a student of the religious sciences in al-Madina al-

family and tribe.⁴⁶ Wahhab was sentenced to death by the leaders of his tribe but he escaped and fled to the protective arms of ibn Saud.

Why did Wahhab's teachings so provoke his peers? The answer is found in Wahhab's novel extension of the doctrine of *jihad*. Taymiyya had taught that *jihad* was justified as a matter of self-defense and preservation at a time when mongols had invaded and were subjugating the Middle East. Taymiyya authorized *jihad* in order to defend the faith from external infidel forces, but he did not authorize *jihad* against other Muslims.⁴⁷

Wahhab did. Convinced that the real threat to the Islamic community lay within, Wahhab authorized *jihad* against those Muslims he identified as apostates.⁴⁸ Wahhab taught Muslims to kill Muslims in order to purify the faith.⁴⁹

Munawwara, peace and blessings be upon the one dwelling there. His father was a righteous scholar, as was his brother, Shaykh Sulayman. Together with his teachers, both of them began to suspect that he would give rise to error and misguidance, on account of various sayings, acts and tendencies they observed in him. They reproached him and warned people against him. God proved their suspicions to be justified when by way of unjustified innovations (*bid'a*) he propagated error and misguidance, leading the ignorant astray in opposition to all the established leaders in matters of religion (*a'immat al-din*). *He went so far as to declare the believers unbelievers. . . .*

The [Islamic] scholars wrote numerous treatises in refutation of [] Wahhab; included among them were his own brother, Shaykh Sulayman, and his teachers.

ALGAR, *supra* note 7, at 78-80 (emphasis added).

46. The tribal chiefs of Hasa and Najd, the regions where Wahhab began preaching his message of purification, "resented the reformer and feared the spread of his message." AL-RASHEED, *supra* note 6, at 17. These leaders were so concerned about Wahhab's message that they ordered his death. *Id.*

47. RUTHVEN, *supra* note 6, at 267. Unlike Wahhab, Taymiyya tolerated varying views within the Islamic community of faith: "Taymiyya, although opposed to certain aspects of Sufism in his time which he regarded as erroneous or degenerate, did not reject it *in toto*; he was himself an initiate of the Qadiri *tariqa* [a Sufi organization]." ALGAR, *supra* note 7, at 9-10.

48. During his study of Taymiyya's scholarship, Wahhab developed an "uncompromising hostility to . . . the contamination of Islam by non-Muslim innovations or practices borrowed from Christianity or introduced by the Sufi *tariqas*." RUTHVEN, *supra* note 6, at 266; *see also* DELONG-BAS, *supra* note 20, at 8. "For eighteenth-century reformers, one of the major signs of the deterioration of Islam was the adoption of rituals and beliefs from other religions, like praying to saints and believing that saints could grant blessings or perform miracles." *Id.*

49. ALGAR, *supra* note 7, at 21 (explaining that the Wahhabis declared *jihad* against other Muslims who disagreed with Wahhab's interpretations of the holy texts). Wahhab's message of purification prompted religious battles in Arabia between Wahhabis and their impure Muslim rivals (non-Wahhabis). RUTHVEN, *supra* note 6, at 267.

Wahhab taught others how to easily identify apostasy. All one had to do was observe the external practices of one's neighbor. If the neighbor was not living life exactly as Wahhab taught that it should be lived, then he was an apostate, no matter what he said he believed. *See,*

The old Saud recognized the power in Wahhab's message and used it ruthlessly.⁵⁰ Saud and his descendants, supported by the preaching of their Wahhabi clerics, indoctrinated and subjugated⁵¹ the Arabian peninsula utilizing Wahhab's vision of *jihad* to unite once separate tribes under the rule of the House of Saud.⁵²

For a time the Ottomans held Saud and the Wahhabis in check. However, the weakness of the Empire and its collapse following World War I provided new opportunities for the heirs of the Saud/Wahhab pact.⁵³ In 1932, after nearly thirty years of renewed religious war,⁵⁴ Abd al-Aziz ibn Abd al-Rahman Al Saud, a direct descendent of Ibn Saud, became the first monarch of the Kingdom of Saudi Arabia.⁵⁵ The tribes of Arabia were then formally united

e.g., RUTHVEN, *supra* note 6, at 267-68 (explaining that the original Wahhabis focused on external practices such as "banned music, dancing, poetry, silk, gold, all ornaments and jewelry because of *hadiths* condemning them").

50. See ALGAR, *supra* note 7, at 19-20 (explaining that Saud, utilizing Wahhab's ordination, engaged in "a campaign of killing and plunder all across Arabia").

51. Saud used his status as *Imam*, granted to him by Wahhab, to declare *jihad* on "unbelievers" throughout the Arabian Peninsula. Saud relied on Wahhab, and the clerics he trained, to go out before Saud's army and indoctrinate the people of Arabia. ALGAR, *supra* note 7, at 20 ("In 1159/1746, the Wahhabi-Saudi state made a formal proclamation of *jihad* against all [those] who did not share their understanding of *tauhid*, for they counted as non-believers, guilty of *shirk* and apostasy. It is significant that whenever the term 'Muslims' occurs in [Saudi history] it refers exclusively to the Wahhabis."). Wahhabi clerics demanded that true Muslims "swear allegiance to its religio-political leadership and demonstrate their loyalt[ies] by agreeing to fight for its cause and pay *zakat* to its representatives." AL-RASHEED, *supra* note 6, at 19. Those who rejected Saud's authority were severely punished or killed. "Preaching and raids progressed simultaneously." *Id.* This pattern of religious indoctrination and violence intensified during the collapse of the Ottoman Empire as Wahhabist clerics moved rapidly to destroy opposition to Saudi authority and establish the sovereignty of the Saudi King. *Id.* at 50-52.

52. Wahhab's doctrine of *jihad* and his willingness to declare neighboring Muslims infidels "impregnated the Sa'udi leadership with a new force, which proved to be crucial for the consolidation and expansion of Sa'udi rule. Wahhabism promised [the House of Saud] clear benefits in the form of political and religious authority [as well as] material rewards, without which the conquest of Arabia would not have been possible." AL-RASHEED, *supra* note 6, at 19.

53. The Ottoman Empire was the dominant power on the Arabian Peninsula from the sixteenth century until its decline in the twentieth century. See *id.* at 14-38.

54. See ALGAR, *supra* note 7, at 42 ("Nor was the establishment of the Kingdom of Saudi Arabia a peaceful affair. The second Wahhabi-Saudi conquest of the peninsula came at a cost of some 400,000 killed and wounded. . . . The governors of the various provinces . . . are said to have carried out 40,000 public executions and 350,000 amputations in the course of subduing the peninsula.").

55. *Id.* at 39.

under their Saudi King and Wahhabi-inspired forces killed any apostate refusing to recognize Saud as their king.⁵⁶

B. Continuing Wahhabist Indoctrination in Saudi Arabia

From 1932 to 9/11 the heirs to the Saud/Wahhab pact maintained their absolute fidelity to Wahhabist principles. During this period the Saudi crown, in league with the Wahhabist clerics, force fed *jihad* to young Saudis. Saudi Arabia's role in creating and inspiring *jihadists* continues. In the spring of 2007, a U.S. advisor in Baghdad summed up the point we make in this article: "Saudi Arabia is the engine of Jihad."⁵⁷

Many other observers who possess great knowledge and sophistication concerning Islam recognize that Saudi Arabia has provided the ideology sustaining terror. For instance, the Islamic Sufi (mystic) Steven Swartz reports that:

The state religious dispensation, the Wahhabi sect of Islam, preaches violence against non-Wahhabi Muslims, Christians, Jews, Hindus, and others. Throughout the Iraq war, Wahhabi preachers spewed forth anti-American vitriol. Saudi fanatics went north to die fighting the Western infidels — some directed the Ansar ul-Islam terrorist group that was destroyed in Iraqi Kurdistan by our troops. And Saudis incited people in the town of Falluja, where Sunnis were stirred to rise up and die confronting our forces.⁵⁸

Senator Charles Schumer, who, like many in New York on 9/11, had a real introduction to Wahhabism in practice, believes that Saudi Arabia is the fountainhead of the world's Islamic terrorism: "[M]ore than just about

56. *Id.* at 49-62 (describing the process of indoctrination and force used to establish the Saudi Kingdom). A key component in the initial program of indoctrination was the elimination of all divergent religious viewpoints among the '*ulama* (group of men educated in Islam). While the religious leaders in the Arabian '*ulama* initially had "unhesitatingly rejected the doctrines of Wahhabism; now they were compelled to submit." *Id.* at 27. The Kingdom as a political entity "was simply the political and the military arm of the Wahhabi sect." *Id.* at 19.

The Saudi ruler was initially granted the title *Imam* by Wahhab himself. *See id.* at 17-18. The *Imam* is the leader of the *umma*, the Muslim community. The *Imam*, as the political leader of the *umma*, is responsible for conducting *jihad*. *Id.* The legitimacy of the House of Saud's continued rule in Saudi Arabia rests on the blessings from the Wahhabist clerics in the '*ulama*. *Id.* at 50.

57. *See* Rod Nordland & Babak Dehghanpisheh, *Surge of Suicide Bombers*, NEWSWEEK, Aug. 13, 2007, at 30; *see also* Abu-Nasr, *supra* note 33, at AA01 (explaining that, according to Iraq's national security advisor, Saudis make up nearly half of the foreign *jihadists* detained in Iraq).

58. Stephen Schwartz, *The Real Saudi Arabia*, WALL ST. J., May 15, 2003, at A16.

anything else, the root cause of terrorism is the Saudi propagation of Wahhabism.”⁵⁹ From the formation of the Saudi Kingdom to the present, Saudi Arabia has actively indoctrinated the Saudi population with Wahhab’s message of *jihad* and religious intolerance.⁶⁰ As detailed below, the Saudi government used, and continues to use, schools, media, and mosques to indoctrinate its subjects.⁶¹ As a result, “[t]he role of Saudi Arabia in fomenting the modern Islamist movement cannot be underestimated.”⁶²

1. Indoctrination in Saudi Schools

Saudi Arabia’s government controls and regulates all education, public and private, in the country. The Saudi educational program is mandatory and explicit — only Sunni Wahhabism can be taught in Saudi schools.⁶³ Private schools with alternative curriculum are forbidden.⁶⁴ The Saudi Ministry of Education publishes authorized textbooks, all of which propagate the teachings of Wahhab.⁶⁵ Any books authored by non-Wahhabi educators are banned.⁶⁶

59. Editorial, *For the Senate: Schumer*, N.Y. POST, Oct. 13, 2004, at 28.

60. See RUTHVEN, *supra* note 6, at 368. Professor Algar discusses the effectiveness of the Saudi program of indoctrination:

But the Wahhabi dismissal of all Muslims other than themselves as non-believers is of more than historical significance. Discreetly concealed over the years because of a variety of factors — above all the desire of the Saudi regime to portray itself as a protector of Muslim interests, despite abundant evidence to the contrary — this attitude of monopolistic rejection continues to inform the attitudes to[towards] Muslims held by contemporary Wahhabis and those under their influence, even when not fully articulated.

ALGAR, *supra* note 7, at 20.

61. See RUTHVEN, *supra* note 6, at 368 (describing the historic program of indoctrination in Saudi Arabia in which the Wahhabis used the media, police power, schools and government to transfer “an exclusivist and puritanical mentality that anathematized Shiites, Christians and non-Salafist groups such as the Barelwis and other Sufi-oriented traditions”); see also ALGAR, *supra* note 7, at 27-28 (describing the indoctrination of the Arabian people accompanying formation of the Saudi state).

62. RUTHVEN, *supra* note 6, at 368.

63. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 593.

64. *Id.*

65. See ARNON GROISS, CTR. FOR MONITORING THE IMPACT OF PEACE & AM. JEWISH COMM., THE WEST, CHRISTIANS AND JEWS IN SAUDI ARABIAN SCHOOLBOOKS (2003), available at <http://www.ajcarchives.org/main.php?GroupId=4070>. Indeed, one of the texts still used in the ninth grade curriculum in Saudi schools is a book entitled *Monotheism* authored by Wahhab centuries ago. See *Saudi Intellectuals Discuss Saudi Curricula* (Lebanese Broadcasting Corp. television broadcast Nov. 5, 2006), transcript available at <http://www.memri.org/bin/opener.cgi?Page=archives&ID=SP139006>.

66. *Id.*

This follows from the unique belief that all children are born Muslim and, thus, it is a small step to deny families the freedom to choose their children's religion.⁶⁷ Indeed, Saudi children, irrespective of their religion or that of their parents, are "coerced to conform to Islamic norms and practices, although forcible conversion is prohibited."⁶⁸ The Saudi educational system reinforces "a deeply conservative and devout Muslim society, [where] there is intense pressure to conform to societal norms."⁶⁹

The Saudi Education Ministry has adopted as official government policy the following educational goal: "to prepare students physically and mentally for *jihad* for the sake of Allah."⁷⁰ Another stated goal of the Saudi educational system is "to arouse the spirit of Islamic *jihad* in order to fight our enemies, to restore our rights and our glory, and to fulfill the mission of Islam."⁷¹ Thus Saudi textbooks expound the obligation to wage continuous religious war.⁷² Sheik Saleh Al-Fawzan, a member of the highest rank in Saudi society and a believer in both *jihad* and slavery in the service of Islam, wrote many of the textbooks used in Saudi Arabian schools.⁷³

Wahhibist indoctrination in Saudi schools is comprehensive.

The royal family has [] given the clergy a lot of control over education. Hours are spent studying the official religion at the expense of other subjects. The curriculum endorses the exclusivity of their brand of faith. A high school text book warns of the dangers of having Christian and Jewish friends. It reads, "It is compulsory

67. U.S. DEP'T OF STATE, 108TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2003, at 546 (Comm. Print 2003) [hereinafter 2003 STATE DEPARTMENT REPORT], available at <http://www.foreignaffairs.house.gov/archives/108/91075e.pdf>. Under Saudi Arabian law, all children of male citizens are Muslim. Therefore, children who have been taken from non-Muslim countries by their Muslim fathers and brought to Saudi Arabia are coerced to conform to Islam. *Id.*

68. *Id.*

69. *Id.*

70. See Y. Admon, Saudis Criticize Their School Curricula — Again (Feb. 7, 2007), <http://memri.org/bin/opener.cgi?Page=archives&ID=IA32507>.

71. *Id.*

72. Steven Stalinsky, Preliminary Overview — Saudi Arabia's Education System (Dec. 20, 2002), <http://www.memri.org/bin/opener.cgi?Page=archives&ID=SR01202>.

73. Sheikh Saleh Al-Fawzan is a member of the Senior Council of Clerics, the Council of Religious Edicts and Research, the *Imam* of Prince Miteab Mosque in Riyadh, and a professor at *Imam* Mohamed Bin Saud Islamic University. See Daniel Pipes, Saudi Religious Leader Calls for Slavery's Legalization (Nov. 7, 2003), <http://www.danielpipes.org/blog/123>. Al-Fawzan is on record as supporting both *jihad* and slavery as part of Islamic law. *Id.* He is also a leading opponent of changing the Saudi school curriculum and has stated that "[s]lavery is a part of Islam. Slavery is part of jihad." *Id.*

for Muslims to be loyal to each other and consider the infidels their enemy.”⁷⁴

Religious hatred is actively promoted in the Saudi educational curriculum.⁷⁵ A few statements from Saudi grammar school textbooks make the point:

The Jews are wickedness in its very essence.⁷⁶

There is no doubt that Muslims’ power irritates the infidels and spreads envy in the hearts of the enemies of Islam — Christians, Jews and others — so, they plot against them, gather . . . force[s] against them, harass them and seize every opportunity in order to eliminate the Muslims.⁷⁷

Many of [New York’s] inhabitants are Jews who help strengthen the Israeli occupation of the land of Palestine.⁷⁸

Not only are Saudi students exposed to this religious hatred, but they are instructed to heed the Wahhabi call to *jihad* as well.

God in His mercy has legislated many ways for guarding religion. Among them are . . . [k]illing apostates and heretics [and] [j]ihad in the cause of God by soul and property.⁷⁹

Jihad against the enemies is a religious duty.⁸⁰

Jihad in God’s cause is the path to victory and to strength in this world, as well as to attaining Paradise in the hereafter.⁸¹

There are two happy endings for *jihad* fighters in God’s cause: victory or martyrdom.⁸²

Saudi Arabia now asserts that it is in the process of reforming its educational curriculum.⁸³ Many question their progress. On October 26, 2005, United States Representative Jim Davis, along with forty-eight co-sponsors, introduced

74. *Frontline: Saudi Time Bomb?* (PBS television broadcast Nov. 15, 2001), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/saudi/etc/script.html>.

75. See GROISS, *supra* note 65, at 3-6; see also PBS Frontline: Religious Textbooks, <http://www.pbs.org/wgbh/pages/frontline/shows/saudi/etc/textbooks.html> (last visited Aug. 29, 2007).

76. See GROISS, *supra* note 65, at 92.

77. *Id.* at 67.

78. *Id.* at 106.

79. *Id.* at 153 (alteration in original).

80. *Id.* at 154.

81. *Id.* at 153.

82. *Id.* at 154.

83. See, e.g., *id.* at 10.

House Resolution 275, “Expressing Sense of Congress Regarding Education Curriculum in Saudi Arabia.”⁸⁴ House Resolution 275 “urges the Government of Saudi Arabia to reform its textbooks and education curriculum” and “expresses extreme disappointment with the slow pace of education reform in the Kingdom of Saudi Arabia.”⁸⁵ The resolution also urges the President and State Department to more aggressively pursue education reform in Saudi Arabia. Representative Lantos, standing in support of the resolution, noted that Saudi Arabia has thus far failed to reform its curriculum: “The extremist Wahhabi religious education which is present in Saudi schools encourages and promotes extremism, viciously anti-American, anti-Western, and anti-Semitic attitudes. . . . The vile hatred filling the minds of so many young Saudis in schools makes them prime targets for terrorists and other extremist groups.”⁸⁶ Representative Davis, in support of his resolution, explains that the Wahhabi indoctrination occurring in the Saudi classroom “is, in fact, one of the root causes of terrorism. It is the creation of extremism and extremists in the schools of Saudi Arabia in the Kingdom of Saudi Arabia.”⁸⁷

2. Indoctrination in Saudi Mosques

The message of hatred and religious intolerance learned in the classroom is reinforced in Saudi Wahhibist mosques. For example, in the Suleiman Bin Muqiran mosque in Riyadh, Sheikh Majed Abd Al-Rahman Al-Firian demanded that Muslims “educate their children to *Jihad*. This is the greatest benefit of the situation: educating the children to *Jihad* and to hatred of the Jews, the Christians, and the infidels; educating the children to *Jihad* and to revival of the embers of *Jihad* in their souls.”⁸⁸

The U.S. State Department, in a 2003 Report condemning Saudi religious intolerance, notes that Mosque preachers, all of whom are paid and supervised by the state, continued their frequent use of violent anti-Jewish and anti-Christian preaching after 9/11.⁸⁹ Even after the 2003 Riyadh bombing by *al Qaeda*, mosque speakers “have prayed for the death of Jews and Christians, including from the Grand Mosque in Mecca and the Prophet’s Mosque in

84. See H.R. Con. Res. 275, 109th Cong. (2005).

85. *Id.*

86. 151 CONG. REC. H12,187 (daily ed. Dec. 18, 2005) (statement of Rep. Lantos), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=H12187&position=all.

87. *Id.* (statement of Rep. Davis). H.R. Con. Res. 275 was referred to the Senate Foreign Relations Committee in January of 2006. See THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.con.res.00275>: (last visited Sept. 4, 2007).

88. Stalinsky, *supra* note 72.

89. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 546.

Medina.”⁹⁰

The effects of this teaching recently moved a Saudi Crown Prince to publicly chastize a group of *imams*: “Do you know that your sons who go to Iraq are used only for blowing themselves up? . . . Are you happy for your children to become instruments of murder?”⁹¹

3. Indoctrination in Saudi Media

In addition to the schoolhouse and pulpit teachings, Saudi-controlled media participate in the systematic propagation of Wahhabism on behalf of the Saudi government. Wahhabist clerics initially resisted the innovation known as television. After overcoming their aversion to this new medium, the Saudi religious establishment took control of three major television channels: TV1, TV2 and Iraqa TV.⁹² These stations now participate in the systematic indoctrination of the call to Islamic violence. For example, Sheik Abdallah Al-Muslih, chairman of the Saudi Commission on Scientific Signs in the Koran and Sunnah of the Muslim World League, appeared on Iraqa TV on May 20, 2004, and proclaimed:

Regarding a person who blows himself up There is nothing wrong with [martyrdom] if they cause great damage to the enemy. We can say that if it causes great damage to the enemy, this operation is a good thing.⁹³

On State-controlled television, even after the Riyadh bombing and the small steps that the state made to rein in the most hateful of *imams*, a learned discussion could be found on May 24, 2004.⁹⁴ On that day, Sheik Dr. Ahmad Abd Al-Latif, who is a professor at Um Al-Qura University, appeared and was asked: “Some imams and preachers call for Allah to annihilate the Jews and those who help them, and the Christians and those who support them Is it permitted according to Islamic law?”⁹⁵ Dr. Al-Latif answered: “What made them curse the Jews is that the Jews are oppressors The same goes for Christians, because of their cruel aggression against Islamic countries . . . [their] goal is to harm Muslims. Cursing the . . . Jews and . . . Christians . . . is permitted.”⁹⁶ The Saudis have been very successful in their goal of

90. *Id.*

91. See Nordland & Dehghanpisheh, *supra* note 57, at 32.

92. Steven Stalinsky, Incitement to Jihad on Saudi Government-Controlled TV (June 24, 2004), <http://www.memri.org/bin/opener.cgi?Page=archives&ID=SR2904>.

93. *Id.*

94. *Id.*

95. *Id.* (alterations in original).

96. *Id.* (first and second alterations in original).

“[i]mplanting Islamic principles in the pupil’s soul,”⁹⁷ and seeing that “Islamic viewpoints . . . are placed by the State above its [other] goals.”⁹⁸

Saudi Arabia’s indoctrination does not stop at its borders. The Saudi religious establishment spends billions of dollars every year to propagate this ideology “quite successfully” throughout the world.⁹⁹ Using its “petrodollars,” Saudi Arabia has worked to spread its version of Islam around the world. Wahhabist indoctrination occurs throughout the world in Saudi-sponsored “private schools, religious seminars, mosque schools, holiday camps and, increasingly, prisons.”¹⁰⁰ Some of these institutions are *al Qaeda*’s minor-leagues, preparing youngsters for the true path of Allah.¹⁰¹

4. The Totalitarian Saudi State

The message taught in Saudi schools, mosques, and media is significantly amplified by virtue of the fact that Saudi Arabia allows no competing voices. It is a totalitarian state unfettered by any democratic voice or organ of government.¹⁰² The Saudi King, a member of the patriarchal House of Saud, “mediate[s] the existence” of Saudi subjects and his rule “penetrates all aspects of economic and social life.”¹⁰³ The Kingdom even bears the patriarchal name

97. GROISS, *supra* note 65, at 33.

98. *Id.* at 37 (bracketed alteration in original).

99. See TROFIMOV, *supra* note 22, at 9; see also ALGAR, *supra* note 7, at 44, 46-48 (describing the association of Egyptian Salafism and Wahhabism resulting from “broad propagation of Wahhabism fuelled by petrodollars”).

100. LEWIS, *supra* note 8, at 128.

101. See Doug Bandow, *Befriending Saudi Princes: A High Price for a Dubious Alliance*, POL’Y ANALYSIS, Mar. 20, 2007, at 5-6, available at <http://www.cato.org/pubs/pas/pa428.pdf>.

102. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sa.html>; see also AL-RASHEED, *supra* note 6, at 87-89 (describing the King’s complete executive and legislative control over the Kingdom).

“The royal family dominates all political life in the country to an extent that has few parallels in the contemporary world.” Graham Fuller & Thomas S. Szayna, *The Saudi Arabian Prospective Case*, in IDENTIFYING POTENTIAL ETHNIC CONFLICT 239, 241 (Thomas S. Szayna ed., 2000). Reforms intended to appear democratic were enacted by the Saudi King over the past few years in response to growing public criticism and pressure from the West. See AL-RASHEED, *supra* note 6, at 87-89. However, these reforms actually resulted in the consolidation of the King’s power in the country. See *id.* This council “has an advisory function and can be dismissed at will [by the King].” Fuller & Szayna, *supra*, at 242.

For a recent description of the ongoing failures of Saudi democratic reforms, see Hassan M. Fattah, *After First Steps, Saudi Reform Efforts Stall*, INT’L HERALD TRIB., Apr. 27, 2007, at 2 (explaining that the recently elected municipal councils are heavily regulated by the Saudi crown, lack power to enact binding legislation, act largely in secret, and do not adequately represent the interests of Saudi citizens).

103. See AL-RASHEED, *supra* note 6, at 126.

of its ruling family, an appropriate symbol of the House of Saud's ownership of the Kingdom and its people.

Basic freedoms are not recognized in Saudi Arabia. Freedom of press does not exist. Thus, even in the face of the May 2003 Riyadh bombings, there appeared no criticism of the intolerance of Wahhabism which inspired the attacks.¹⁰⁴ A Saudi journalist was recently sentenced to lashings for writing a *New York Times* editorial criticizing the Saudi religious establishment.¹⁰⁵ This lashing was mild compared to other available penalties frequently employed by the Saudi crown, including death.¹⁰⁶

There is no freedom of thought in the Kingdom. The Kingdom vigorously enforces its commitment to Wahhabism by preventing its citizens from converting. Recently a Saudi schoolteacher was tried for apostasy (non-conformance to Wahhabist doctrine) and was found guilty. But she was shown mercy by receiving the light sentence of three years imprisonment and three hundred lashes.¹⁰⁷

There is also no freedom of religious expression allowed to non-Muslims present in the Kingdom.¹⁰⁸ Wahhabist Saudi Arabia not only excludes other religions, it violently opposes them. Christians, Jews, and Hindus are

104. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 542.

[T]here was a greater degree of public discussion of the conservative religious traditions than previously seen. Particularly after the May 12 terror attacks in Riyadh, some citizen writers began to criticize abuses committed by the religious police (the Committee to Promote Virtue and Prevent Vice, commonly called the "Mutawwa'in"). However, discussion of religious issues is severely constrained, and the editor of a major local daily newspaper was fired from his position after he allowed the publication of a series of articles and cartoons critical of the religious establishment.

Id.

105. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 593.

106. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 543-45. Apostasy is the conversion by a Muslim to another religion. Apostates are subject to death sentences if they do not recant. *Id.* at 543.

107. See 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 591.

108. The Kingdom justifies its very existence with these words attributed to the Prophet: "Let there not be two religions in Arabia." LEWIS, *supra* note 8, at xxix. Islam's first Caliph initiated execution of this command by ordering the expulsion of Jews and Christians from Arabia. *Id.* But the House of Saud brought the command to its fruition.

According to the school of Islamic jurisprudence accepted by the Saudi state and by Usama bin Laden and his followers, for a non-Muslim even to set foot on the sacred soil is a major offense. In the rest of the Kingdom, non-Muslims, while admitted as temporary visitors, [are] not permitted to establish residence or practice their religions."

Id. at xxx; see also, TROFIMOV, *supra* note 22, at 8 ("Freedom of religion, in the concise words of the U.S. State Department's annual human rights report, 'does not exist' in Saudi Arabia.").

imprisoned, lashed, deported, and “sometimes torture[d].”¹⁰⁹ Brian O’Connor, an Indian Christian, is a case in point.¹¹⁰ After he had a dispute with his employer, the Saudi religious police arrested him, beat him, and confiscated two Bibles along with other personal property.¹¹¹ To cover this abuse, the Mutawwa’in accused him of using alcohol.¹¹² In a previous State Department Report, the fate of two Filipino Christians was made known.¹¹³ They were conducting a private Roman Catholic prayer group in their home; they were imprisoned in Dammam, sentenced to 150 lashes, and deported following a thirty-day jail sentence.¹¹⁴ In a raid on two private houses where services were being held, twenty-six Christians were arrested in downtown Riyadh.¹¹⁵ After a few days most were released, but three were imprisoned,¹¹⁶ and all Bibles, chairs, microphones, and musical instruments were taken — even the curtains ripped from the walls.¹¹⁷

There are ongoing reports of surveillance of Christian religious services by security personnel, and there are many other reports of deportations and beatings.¹¹⁸ Needless to say, mail is monitored and Bibles are confiscated.¹¹⁹ No Christian ministers are allowed to enter the country, even to administer the sacraments.¹²⁰ While distributing Bibles is illegal, there are aggressive means taken to convert all people to Islam by the five hundred persons who work in about fifty “Call and Guidance Centers” located throughout the country.¹²¹ Special identity cards are required for different religions.¹²²

The official government policy of brutalizing Christians is backed up by an active campaign of vigilantes, who have “harassed, assaulted, battered, arrested, and detained citizens and foreigners” for supposedly practicing their religious

109. See 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 543.

110. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 593-94.

111. *Id.*

112. *Id.* at 594.

113. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 545.

114. *Id.*

115. *Id.*

116. *Id.* Although twenty-three of the Christians were released, one Sudanese and two Sri Lankans were kept in detention and moved to another Riyadh prison. When these three prisoners were released, the two Sri Lankans were deported and the Sudanese national was resettled in the United States. *Id.*

117. *Id.*

118. *Id.* at 544-46.

119. *Id.* at 544.

120. *Id.* at 543.

121. *Id.*

122. *Id.* These legal resident identity cards, called Iqamas, contain a religious designation for “Muslim” or “non-Muslim.” *Id.*

convictions.¹²³ To make sure the message that Christians are worthless and dangerous is not forgotten, shops are prohibited from selling anything to do with Christmas, including tree decorations or gifts. And Valentine's Day has been outlawed by the Grand Mufti,¹²⁴ as a "pagan Christian holiday."¹²⁵

The Wahhabi cry for *jihad* has been answered by *al Qaeda* in both the Kingdom and beyond.¹²⁶ In the attack in Riyadh on a Western housing compound in al-Khobar in 2004, terrorists singled out non-Muslims for execution and justified their murder on religious grounds.¹²⁷ It was in this environment of religious persecution that Osama bin Laden was born and raised. Is it any wonder that he now feels no pity for the thousands of individuals murdered by his command?

The Kingdom not only forbids the religious freedom of non-Muslims, it also oppresses Muslims who do not adhere to Wahhab's Islam.¹²⁸ Saudi Arabia's most notorious acts of religious violence have been directed at fellow Muslims. More than 40,000 public executions and 350,000 public amputations have been carried out by Saudi Wahhabists in their effort to "purify" the Islamic community of the Arabian Peninsula from wrong-believing Muslims.¹²⁹ To this day *Shi'a* Muslims living in eastern Saudi Arabia and members of the *Ismaili* sect of Islam in southern Saudi Arabia hide their true faith in order to avoid religious persecution.¹³⁰ Despite the U.S. alliance with Saudi Arabia, the State

123. *Id.* at 546.

124. The Grand Mufti is the religious leader. See 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 116 (describing a mufti as "an Islamic leader").

125. *Id.* at 594.

126. *Id.* at 594-95.

127. *Id.*

128. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 541-44. Approximately two million citizens are *Shi'ite* Muslims. The majority of *Shi'a* live in the eastern province, where they make up about one-half of the population there. *Id.* at 541; see also, ALGAR, *supra* note 7, at 11-14 (explaining that Wahhab's teachings were mainly concerned with condemnation of Muslims he considered to be apostates).

129. See ALGAR, *supra* note 7, at 42. The Saudis were especially harsh in dealing with the *Shi'a* population, "executing thousands of people and decimating both the religious and tribal leadership of the *Shi'i* community." *Id.* at 42-43.

130. See, e.g., TROFIMOV, *supra* note 22, at 34-38. In a recent essay commenting on the treatment of *Shi'ite* faithful in Saudi Arabia, Tarek Heggy writes:

If I were a *Shi'ite* from Saudi Arabia, I would familiarize the world with the injustices done to many Saudi *Shi'ites* since the establishment of the Saudi Kingdom in 1932 and since the Wahhabis took control of the Arabian Peninsula.

...

....

If I were a *Shi'ite* from Saudi Arabia, I would make the world understand that the issue of the *Shi'ites* in Saudi Arabia is one of the symptoms of a [certain] mentality whose influence has spread through this region of the world, and that

Department finally recognized Saudi Arabia as a religiously intolerant country and, in its 2003 report denoted the Kingdom a “Country of Particular Concern.”¹³¹

Article 18 of the Universal Declaration of Human Rights, endorsed by Saudi Arabia via its participation in the United Nations, declares that, “Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”¹³² But Saudi Arabia refuses to actually comply with this Declaration and shows its intolerance to non-Wahhabism in every facet of government and society.¹³³ Recent State Department Reports are replete with examples of extreme religious persecution including imprisonment, lashing, torture, and expulsion of the infidel.¹³⁴ *Shi’a* leaders are detained, and the members are discriminated against in all fields.¹³⁵

The Saudi crown says it respects the right to worship in private. But that

all humanity must force [those with] this mentality to reconsider this discriminatory path.”

Egyptian Intellectual Tarek Heggy: ‘If I Were a Shi’ite from Saudi Arabia . . .’ (June 15, 2007), <http://www.memri.org/bin/opener.cgi?Page=archives&ID=SP162307>.

131. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 596.

132. See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* [http://www.un.org/Docs/asp/ws.asp?m=A/RES/217%20\(III\)](http://www.un.org/Docs/asp/ws.asp?m=A/RES/217%20(III)).

133. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 589-96.

134. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 543. These examples of persecution are highlighted in the State Department Report: In January 2002, the *Wall Street Journal* published Sheikh Ahmed Turki al-Saab’s comments that were very critical of Saudi Arabia’s policies toward the *Shi’ites*. One week later, he was arrested, and in April 2002, he was sentenced to flogging and seven years in prison. *Id.* at 545. In that same year, there were reports of fourteen Christians deported for spreading their religious beliefs. *Id.* In May 2002, the Mutawwa’in in Jeddah arrested eleven Christians, including foreign nationals from both Ethiopia and Eritrea, for allegedly engaging in activities that violated restrictions against public worship. All eleven were later deported. *Id.* At the beginning of 2003, the Mutawwa’in arrested and imprisoned four emigrant Protestants without charge. Two of them were later released and deported, but it is believed that at least one is still imprisoned. *Id.*

135. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 589. The Government detains *Shi’a* religious leaders and members of the *Ismaili Shi’a* community in Najran province. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 541. The *Shi’a* members still face political and economic discrimination, “including limited employment opportunities, little representation in official institutions, and restrictions on the practice of their faith and on the building of mosques and community centers.” *Id.* *Shi’ite* admission to universities is severely restricted, and members of the *Shi’a* are discriminated against in public employment and lack representation in government agencies. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 592.

concession is often violated.¹³⁶ The Saudi population is approximately twenty-four million, with about six to seven million foreigners.¹³⁷ Among these foreigners are between 500,000 and one million Catholics.¹³⁸ These people live and work in Saudi Arabia but they are confronted with *de jure* discrimination at every turn. For instance, under Saudi law, Shari'a, tort damages for a Jew or Christian are one-half that of a Muslim.¹³⁹ For polytheistic Hindus and Sikhs they get but one-sixteenth of the damages available to Muslims.¹⁴⁰ And the testimony of non-Sunnis in court is often ignored.¹⁴¹

All of this demonstrates that, when all of Saudi Arabia's available state power is devoted to justifying, promoting, and enforcing religious intolerance, it is not surprising that someone might be listening. When the reality of living under a Saudi theocratic dictatorship is combined with the Wahhabi call for martyrdom, it is little wonder that it was Saudi Arabian subjects and not citizens of Finland who murdered the infidels working in the World Trade Center.

II. Saudi Arabia's Civil Liability

This section outlines Saudi Arabia's civil liability that we see as resting on ordinary principles of negligence tort law. Our point is simple, Saudi Arabia should reap what it has sown.

We recognize that the facts are extremely unusual. But developed and reasoned personal injury law is flexible and powerful enough to give the victims of Saudi inspired terrorism their day in court.

We are not arguing that Saudi Arabia intended any harm to the United States or its citizens. Saudi Arabia's link to 9/11 is not like Libya's link to the bombing of Pan-Am Flight 103. Unlike Libya, we are not arguing that Saudi Arabia organized, commanded, or executed any act of state-sponsored terrorism. Our point is not that Saudi Arabia committed an intentional tort, but it was negligent.

Saudi Arabia should have foreseen the harm it was inspiring by its relentless teaching of Wahhabism. Saudi Arabia should have foreseen that its brutal support of Sunni Wahhabism gave radical elements of that faith an exclusive

136. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 589.

137. *Id.* at 590. The foreign population includes approximately 1.4 million Indians, 1 million Bangladeshis, 900,000 Pakistanis, 800,000 Filipinos, 750,000 Egyptians, 250,000 Palestinians, 150,000 Lebanese, 130,000 Sri Lankans, 40,000 Eritreans, and 30,000 Americans. *Id.*

138. 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 541.

139. 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 590-91.

140. *Id.*

141. *Id.* at 592. The Saudi religious police also prohibit the observance of the Prophet's birthday because such observance is considered idol worship. *Id.* at 591.

and uncontested ideological pulpit from which they could incite others to action. Saudi Arabia's failure to prevent their state-paid religious clerics from igniting a worldwide *jihad* supports the imposition of civil liability for at least part of the huge damages that have been wrought.

Presently pending before a federal court in New York are several consolidated multi-billion dollar lawsuits seeking, in part, to hold Saudi Arabia accountable for its role in 9/11.¹⁴² To date these suits have failed. This litigation will be more fully described in Part III,¹⁴³ but it suffices to say here that procedural and jurisdictional hurdles limiting the use of American courts for resolution of claims against foreign nations, principally, the doctrine of foreign sovereign immunity, have proven formidable. However, the plaintiffs' choice of theories also burdens these suits. Most litigants are pursuing theories of liability resting only on Saudi Arabia's funding of Islamic charities.¹⁴⁴

Instead of focusing just on the money trail, we believe these litigants should also focus on Saudi Arabia's extraordinary and unstinting support of the key ideological foundation of Islamic terrorism through its teaching of Sunni Wahhabism.¹⁴⁵ It was religion, not money, which ignited and sustains the present and consuming terrorism.¹⁴⁶

Saudi Arabia's negligence liability is much like that of the benighted farmer in the simple old case of *Vaughan v. Menlove*.¹⁴⁷ In that case, the farmer's poorly constructed hayrick caught fire and burned down his own barn and then

142. See discussion *infra* Part III.A.

143. See discussion *infra* Part III.A.

144. See discussion *infra* Part III.A.

145. The district court in the 9/11 litigation said as much: "Rather than pleading specific facts showing that the Kingdom caused Plaintiffs' injuries, the . . . Plaintiffs focus predominantly on the [Saudi-supported] charities' actions." *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 803 n.31 (S.D.N.Y. 2005).

146. See 9/11 COMMISSION REPORT, *supra* note 2, at 54 ("Yet as political, social, and economic problems created flammable societies, Bin Laden used Islam's most extreme, fundamentalist traditions as his match."); see also, e.g., Bush, *supra* note 26, at 1505 ("The murderous ideology of the Islamic radicals is the great challenge of our new century.").

Saudi Arabia, according to a report submitted to the President of the United Nations Security Council, has played a significant role in terrorism financing. According to the report:

By mixing religious beliefs, tools and interpretations with financial purposes, without proper regulations and controls, Saudi Arabia opened an avenue for terrorism financing through the traditional Zakat, a legal almsgiving conceived as a way for purification by the Prophet that turned into a financial tool for terrorists.

JEAN-CHARLES BRISARD, TERRORISM FINANCING: ROOTS AND TRENDS OF SAUDI TERRORISM FINANCING 3 (2002), available at <http://www.nationalreview.com/document/document-un122002.pdf>. We are not arguing that Saudi Arabia's role in terrorism financing should be ignored. Instead, we propose tort liability resulting from much more than mere contributions to charitable organizations somewhat removed from *al Qaeda*.

147. 132 Eng. Rep. 490 (C.P. 1837).

his neighbor's house. The court ruled that the farmer's freedom to do what he wished on his own property was tempered by the duty not to negligently harm his neighbors. It was no defense that he might have been a little stupid or that he built the best hayrick he knew how to build. The farmer's duty, the standard of care he owed to his neighbor, was an objective one. Would a person of ordinary intelligence have built the same sorry hayrick? If not, the farmer, even if he intended no harm, must nevertheless pay for the harm his negligence caused.

Like the farmer, Saudi Arabia must pay, not because it intentionally waged war on the United States, but because its negligence ignited a *jihadist* fire that harmed its neighbors. If that fact can be proven, as Part I of this article argues, then the law provides ample room in the negligence action for the imposition of civil liability based on either or both of the following theories of liability.

A. *Negligent Incitement*

Our first theory of liability, based on training Saudi subjects to hate others, appears closely related to many other cases in American law attempting to hold the media liable for some outrage. Cases such as those involving hearing violent rock songs, reading bad books, seeing sadistic movies, and playing bloody video games have all generally failed.¹⁴⁸ These cases involved attempts

148. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002) (dismissing negligence and products liability claims against video game manufacturer because student's conduct in killing three students at school was not reasonably foreseeable conduct to the manufacturer, and no special relationship existed between the manufacturer and the deceased students); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002) (dismissing negligence and wrongful death claims against producer of violent video game on several grounds, including that producer owed injured party no duty of care); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (holding that musical compositions which express the view that suicide is acceptable are entitled to First Amendment protection and a listener's suicide from such musical compositions was not a reasonably foreseeable consequence of distributing such music). But see *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (holding the act of publishing a manual detailing how to kill someone was actionable under Maryland law); *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992) (affirming award of punitive damages against magazine defendant for negligently publishing an advertisement that created an unreasonable risk of solicitation of violent criminal activity); *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. 1975) (holding that it was foreseeable that a broadcaster's youthful listeners would race to find a prize, and in so doing, disregard demands of highway safety); *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998) (remanding negligence and intentional tort claims against producer of the movie *Natural Born Killers* and announcing a two-part test to determine when speech should be restrained because it was an incitement; (1) speech must be directed or intended toward the goal of producing imminent lawless conduct and (2) such speech was likely to produce such imminent conduct).

to hold media defendants, such as a publisher,¹⁴⁹ broadcaster,¹⁵⁰ musician,¹⁵¹ producer,¹⁵² and video-game manufacturer¹⁵³ liable for physical injuries inflicted by those who are allegedly inspired by the violent content they consume. Some of these cases were dismissed on First Amendment grounds.¹⁵⁴ Others were dismissed because the producer of the violent media was held not to have a duty to prevent such harm or that the media message did not cause the harm.¹⁵⁵

149. *See Rice*, 128 F.3d 233; *see also Braun*, 968 F.2d 1110; *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (holding a retail book dealer was not liable under the UCC to purchaser of cookbook for injuries and damages caused by improper instructions or lack of adequate warnings as to poisonous ingredients used in recipe); *Smith v. Anheuser-Busch, Inc.*, 599 A.2d 320 (R.I. 1991) (dismissing claims of negligence, products liability, and express and implied warranties against brewer for advertisements because the plaintiff could not identify specific advertisement he had seen and he could not reasonably rely on any representation in media advertising that driving while intoxicated was safe or acceptable); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. App. 1993) (using a risk-utility analysis and holding that a magazine publisher did not have a duty to not publish a firearms supplement or to add warnings about danger of firearms and ammunition).

150. *See Sakon v. PepsiCo, Inc.*, 553 So. 2d 163 (Fla. 1989) (holding that a soft drink manufacturer did not breach any duty by airing a television advertisement containing a dangerous stunt simply because plaintiff subsequently attempted same stunt); *see also Weirum*, 539 P.2d 36.

151. *See Davidson v. Time Warner, Inc.*, 25 MEDIA L. REP. (BNA) 1705 (S.D. Tex. 1997) (granting motion for summary judgment on behalf of defendant artist and recording company because the probability of harm arising from lyrics in a rap song is very low, while the burden of preventing such harm is very high); *see also McCollum*, 249 Cal. Rptr. 187; *Pahler v. Slayer*, No. CV 79356, 2001 WL 1736476 (Cal. Super. Ct. Oct. 29, 2001) (barring plaintiff's wrongful death cause of action against music industry defendants because of principles of free speech, duty, and foreseeability).

152. *See Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (granting summary judgment on First Amendment grounds to producer and distributor of movie which did not overtly advocate or encourage unlawful or violent activity on part of viewers).

153. *See James*, 300 F.3d 683; *see also Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002) (dismissing products liability, filial loss of consortium, and intentional infliction of emotional distress claims against manufacturer of "Mortal Kombat" video game on several grounds, including First Amendment protection); *Sanders*, 188 F. Supp. 2d 1264.

154. *See Watters v. TSR, Inc.*, 715 F. Supp. 819 (W.D. Ky. 1989) (prohibiting imposition of liability on manufacturer of game based on content of the game because the First Amendment extends protection to such materials even though they may offend the sensibilities of some people); *see also Pahler*, 2001 WL 1736476 (barring plaintiff's wrongful death cause of action against music industry defendants because of principles of free speech, duty, and foreseeability); *DeFilippo v. Nat'l Broad. Co.*, 446 A.2d 1036 (R.I. 1982) (holding that a broadcast of a hanging stunt did not constitute an incitement to produce harmful action in such a manner for the broadcast to lose its First Amendment protection).

155. *See James*, 300 F.3d 683 (dismissing on grounds of negligence and products liability); *Sanders*, 188 F. Supp. 2d 1264 (dismissing because producer owed no duty of care); *Smith v. Anheuser-Busch, Inc.*, 599 A.2d 320 (R.I. 1992) (dismissing claims of negligence, products

A recent example of how these cases are lost on non-constitutional grounds is found in *Sanders v. Acclaim Entertainment, Inc.*¹⁵⁶ In *Sanders*, the family of a teacher killed in the Columbine High School shootings alleged that the producers of violent media (video games and movies) were liable for the teacher's death in that "but for the actions of the . . . Defendants . . . the multiple killings at Columbine High School would not have occurred."¹⁵⁷ The district court dismissed the claims, finding that the defendant media companies owed no duty of care,¹⁵⁸ and that the violent media could not have anticipated that its games and movies would lead to the death of the teacher.¹⁵⁹

The weakness of the *Sanders* case distinguishes it from an incitement claim against Saudi Arabia. First, regarding foreseeability, the *Sanders* court explained that the media defendants "had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers."¹⁶⁰ The plaintiffs had alleged that "children who witness acts of violence and/or who [are] interactively involved with creating violence or violent images often act more violently themselves and sometimes recreate the violence . . ."¹⁶¹ The plaintiff's vague sociological allegation of foreseeability did not sustain their case.¹⁶² The court explained that at most "these Defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. A speculative possibility, however, is not enough to create a legal duty."¹⁶³ A number of analogous "media harm"¹⁶⁴ cases have similarly held that a violent response to violent media is not foreseeable.¹⁶⁵

liability, and express or implied warranty); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. App. 1993) (finding no duty on publisher using risk-utility).

156. 188 F. Supp. 2d 1264 (D. Colo. 2002).

157. *Id.* at 1268 (citing Plaintiff's Amended Complaint).

158. The *Sanders* court's determination that the media producers owed no legal duty to the injured party was based on three factors: (1) the intentional violent conduct of the teenagers was not foreseeable; (2) violence as expressed in art and entertainment has social utility; and (3) the intrusion into First Amendment rights was an impermissible burden to place on the media defendants. *Id.* at 1271-75.

159. *Id.* at 1275-76. The court also held that the media defendants were entitled to First Amendment protection from liability. *Id.* at 1280-82.

160. *Id.* at 1272.

161. *Id.*

162. *Id.*

163. *Id.*

164. Professor David Anderson of the University of Texas has aptly named cases like *Sanders* "media harm" cases. See David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 958 (2002).

165. See *id.* at 977-79 (discussing media harm cases that examine the question of foreseeability).

But the Kingdom of Saudi Arabia did not just produce a rock song or violent movie. Saudi Arabia prohibited freedom of thought and religion and then instilled, from birth, a loathsome vision of the infidel. The country's very existence is inextricably linked with the effort to carry forward the hateful and intolerant Wahhabist theology. In that regard it has succeeded marvelously; indeed, Saudi Arabia has infected the world.

Unlike the entertainment media at issue in *Sanders*, the inciting communications and conduct in the case against Saudi Arabia is as different as a flood from a summer shower. The message from Saudi Arabia is not in the incidental movie or video game. A message condoning religious violence pervades the life of a Saudi Wahhabist Muslim.¹⁶⁶ Saudi children learn to hate Jews and Christians from textbooks, Saudi adults are bombarded with the same message in state-run media, and state-sponsored Saudi clerics not only preach, but enforce this religious totalitarianism. This is not the occasional movie, but instead real and daily life for the Saudis.

The substance of the messages at issue is also very different. Privately produced and distributed entertainment, at issue in *Sanders* and the other media harm cases, bears little resemblance to the Kingdom-produced and distributed religious messages in the case against Saudi Arabia. When the message at issue is contained in commercial entertainment, the foreseeable response is that the recipient, if he or she chooses to buy the entertainment, will be entertained but take no real life action. But when the violent message is instilled from birth by powerful and persuasive state-sponsored religious pulpits, from the classroom to the mosque, the religious speaker should not be surprised when some recipient heeds the call and responds with violent action.¹⁶⁷ Media is intended to entertain. Religion is intended to inspire faith and provoke action. Unlike the harm in the media cases, it is foreseeable that a constant religious message condoning, and in some cases commanding, violence against Christians, Jews or the secular West will result in religiously motivated violence.

Although many media cases are resistant to the imposition of liability, there are some notable exceptions. Consider the case of *Weirum v. RKO General, Inc.*¹⁶⁸ There the California Supreme Court held a radio station liable because it was foreseeable that a teenage listener of a broadcaster's audience would be inspired to speed around town in search of a prize. The case involved a contest sponsored by the radio station. Listeners were invited to tear around Los Angeles in search of a popular disc jockey and claim a cash prize by being the

166. See discussion *supra* Part I.B.

167. See, e.g., Lasson, *supra* note 23, at 20-21.

168. 539 P.2d 36 (Cal. 1975).

first to locate him. One listener, in a desperate attempt to claim the prize, negligently ran another car off the road, killing the driver.

The radio station piously claimed that it owed no duty of care to the injured party. It relied on two familiar common law rules. First, the station argued that “an actor is entitled to assume that others will not act negligently.”¹⁶⁹ The court held that the station’s reliance on this rule was misplaced because the rule was valid “only to the extent the intervening conduct was not to be anticipated.”¹⁷⁰ The key inquiry, according to the court, was the foreseeability that the station’s broadcast would induce listeners to react in a hazardous manner. Because the radio station knew that its audience was young, of significant size, and very likely to respond to a cash-giveaway contest, the station had a duty to exercise reasonable care in its broadcast.

The radio station also argued that it owed no duty to the injured party because it did not have a special protective relationship with the injured party or the negligent listeners. This argument was based on the general rule that “absent a special relationship, an actor is under no duty to control the conduct of third parties.”¹⁷¹ The court also rejected this argument and explained that the special relationship rule “has no application if the plaintiff’s complaint, as here, is grounded upon an affirmative act of [the] defendant which created an undue risk of harm.”¹⁷² The radio station started the mess and they had to clean it up.

Like the plaintiffs in *Weirum*, we assert that the Saudi Government, by affirmative acts of the most consistent and vigorous nature, created an undue, indeed an absolutely stunning risk of harm through its indoctrination of Wahhabist ideologies justifying and encouraging violence.¹⁷³

Perhaps Saudi Arabia might have taken care that its propagation of Wahhabist doctrine in Saudi Arabia did not result in harm to those outside Saudi Arabia by shutting down the most incendiary of mullahs or changing the school curriculum. But the point here is not that Saudi Arabia is liable only for its failure to control or mitigate the risk it created, but that it is liable because it created the undue and foreseeable risk in the first place. Incitement is enough on its own to constitute a cause of action, and the Kingdom’s failure to reign in its excited subjects is merely an independent breach of a separate duty of care.

169. *Id.* at 40.

170. *Id.*

171. *Id.* at 41.

172. *Id.* This explanation is based on the classic distinction between misfeasance and nonfeasance in tort. *Id.* Where liability is based solely on nonfeasance (i.e., failure to warn or failure to control), then a duty will arise only if the plaintiff demonstrates a special relationship exists between the defendant and either the injured party or the third-party tortfeasor. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 315 (1965).

173. See *supra* Part I.B.

The farmer in *Vaughan* was held liable not because he failed to fight the fire, but because he negligently started it.

Additional justification for imposing a duty to refrain from inciting violence is found in the famous hit man cases. In *Rice v. Paladin Enterprises, Inc.*,¹⁷⁴ the plaintiffs sued the publisher of the book *Hit Man: A Technical Manual for Independent Contractors*, seeking compensation for the brutal murders of plaintiffs' family members carried out by a reader of the murder instruction book. The Fourth Circuit held that the act of publishing a how-to-kill manual was actionable under Maryland law. The court explained that under Maryland law a defendant who "by any means (words, signs, or motions) encourages, incites, aids or abets the act of the direct perpetrator of the tort" is jointly liable for the perpetrator's actions.¹⁷⁵ How-to-kill manuals and why-to-kill sermons have a great deal in common in that they both encourage, incite, aid or abet another's act of killing. Why-to-kill sermons, however, are more dangerous in that they provide a religious justification motivating others to take action. The how-to-kill manual on its own does not motivate anyone to take any action. If a publisher who does nothing but print the book about how to kill is held liable, then surely a state that produces a culture based on why to kill should be held liable. Matched up against the comparatively innocent publisher, no tears should be shed for Saudi Arabia if it is made to pay back to American victims some of the petrodollars Americans pay to Saudi Arabia.

When Saudi Arabia authored textbooks teaching its children to hate Jews and Christians, could it foresee potential harm? When Saudi Arabia destroyed the religious autonomy of its citizens by outlawing any religious belief or practice other than Sunni Wahhabist Islam, could it foresee potential harm? When Saudi Arabia established mosques and madrassas in other parts of the world propagating Sunni Wahhabist Islam and justifying violence in the name of Islam, could it foresee any potential harm?

We believe that pleading these facts would support an incitement tort trial if a United States district court were ever to have the courage to look with a steady gaze towards the source of *jihadist* terrorism. We realize that there are difficult causation issues, perhaps impossibly difficult issues in tying the actions of individuals to the culture of the state. Only a tiny fraction of the Saudi people ever act on the messages of violence, the bombers of 9/11 made a deliberate choice to sacrifice their lives and murder thousands without any coercion, and there was considerable time, space, and many contributing events and voices that separated 9/11 from actions of the Saudi state. We also

174. 128 F.3d 233 (4th Cir. 1997).

175. *Id.* at 251 (quoting *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 665 A.2d 1038, 1049 (Md. 1995)).

acknowledge that a number of geopolitical concerns, such as the creation of the State of Israel and the stationing of American troops in Saudi Arabia, contributed to the ideological motivation of the 9/11 *ihadists*. But the undeniable fact is that, in the wise words of *Reynolds v. Texas & Pacific Railway Co.*, the actions of the Saudi Arabia “greatly multiplied” the chances that harm would occur.¹⁷⁶

In *Reynolds*, a very obese lady was rushing to catch a train with her loyal retainers in tow down a negligently unlighted railroad stairway. Of course she falls and of course it will never be known why.¹⁷⁷ She could have slipped for many reasons, but the Louisiana Supreme Court recognized that causation is a mystery that often can only be considered in terms of chances.¹⁷⁸ Professor Anderson of the University of Texas makes the point that in media harm cases, “Tort law generally allows causation to be inferred from evidence that the defendant’s negligence increased the likelihood of the result, and juries can be convinced in these cases that but for the publication, the [harm] would not have happened.”¹⁷⁹

The better view of causation is not to say with false certainty that “Saudi Arabia caused the towers to fall” but to ask whether the towers would likely still be standing if Saudi Arabia had not instilled Wahhabist beliefs in its loyal subjects. It is simply beyond cavil that the bombers were, to a man, committed Sunni Wahhabists¹⁸⁰ and that the fountainhead of Sunni Wahhabism springs from the sands of Saudi Arabia.

One thing can be said with some certainty about Saudi civil liability. The Kingdom is not a citizen of the United States and does not in law enjoy, nor should it enjoy, any special United States First Amendment constitutional protection for its Wahhabist totalitarian program. The American cases of media liability are closely scrutinized due to the chilling effect of civil liability on civil rights recognized in *New York Times v. Sullivan*.¹⁸¹ But Saudi Arabia enjoys no

176. 37 La. Ann. 694, 698 (La. 1885) (holding that if the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to the accident, the possibility that the accident might have occurred with no negligence on behalf of the defendant does not break the causation chain). A corpulent, 250-pound woman was chasing a train down a dimly lit stairwell when she slipped and fell. The railway was negligent in not providing enough light in the stairwell, but argued that their negligence was not the cause of the corpulent woman’s injuries. The Louisiana Supreme Court rejected this argument because the lighting greatly multiplied the chances of injury to the plaintiff. *Id.* at 696-98.

177. *Id.*

178. *Id.* at 698.

179. Anderson, *supra* note 164, at 972.

180. See generally MCDERMOTT, *supra* note 2, at 100-01 (explaining the background of Wahhabists).

181. 376 U.S. 254 (1964) (holding the Constitution requires a federal rule that a public

First Amendment protection. While Saudi Arabia can destroy every civil liberty it wishes inside its borders, our law is perfectly clear that Saudi Arabia has no right to assert our individual American Constitutional rights in defense of the harm it has inflicted upon Americans.¹⁸²

B. Special Relationship Liability

A second basis for liability is found in the tort that has come to be known as “special relationship” liability.¹⁸³ The idea is that when someone has some

official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves, with convincing clarity, the statement was made with actual malice). The “actual malice” standard placed a new hurdle in defamation litigation, because at common law, truth was an absolute defense to defamation, and the burden was on the defendant to prove the statements were not false. After *New York Times*, the burden shifted to the plaintiff to show the statements were made with “actual malice.” See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991) (noting that in order to prove defamation, the First Amendment requires “a plaintiff to prove that the defamatory statements were made with what we have called ‘actual malice,’ a term of art denoting deliberate or reckless falsification”).

182. See, e.g., *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) (holding that Libya, as a foreign nation, could not assert a constitutional defense to a civil case brought by two American citizens in the United States). Libya tried to assert a Fifth Amendment Due Process defense against a civil suit brought by two American citizens who were detained in Libya for distributing propaganda, and were subsequently beaten in jail. In denying Libya’s due process claim, the court gave three reasons why a foreign country is not entitled to a constitutional defense. First, a foreign sovereign is not a “person” within the meaning of the Constitution. *Id.* at 96. A state of our own Union is not classified as a person and is not entitled to raise a constitutional defense. *Id.*; see also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Accordingly, a foreign sovereign should not be considered a person that is entitled to raise a constitutional defense. *Price*, 294 F.3d at 96. Second, the *Price* court denied Libya’s due process defense because of the policy that a foreign state is external to our constitution and federal system. “[W]e think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system.” *Id.* Finally, federal precedent prohibited the court to allow Libya to assert a constitutional defense. Because the relationship between the United States and foreign sovereigns is usually based on international law and comity, and because federal nations are external to the constitutional compact of the United States, a foreign nation should not be allowed to assert a constitutional defense. *Id.* at 97-99.

We note that a case brought against Wahhabist clerics who are American citizens pursuant to our indoctrination theory might implicate constitutional concerns. For example, a case against Muzammil Siddiqi, the Wahhabi cleric who recruited Adam Pearlman (a/k/a the “American *al Qaeda*”), would likely implicate First Amendment issues not relevant to the case against Saudi Arabia. For an interesting account of Pearlman’s transformation from California teenager to *al Qaeda* fighter, including the influence of Saudi-sponsored mosques in the United States, see Schluskel, *supra* note 27.

183. See RESTATEMENT (SECOND) OF TORTS § 315 (1965).

There is no duty so to control the conduct of a third person as to prevent him from

authority over a dangerous person, that authority must be exercised to keep the other in check so that he does not harm a third party. Thus, while a true stranger can sit back and watch all the world go to hell, when a stranger forms a “special relationship” with a potentially harmful person, that stranger is drawn into a web of civic responsibilities and must take care to protect the innocent by controlling the harmful person or by warning others of the danger.¹⁸⁴

In 1934, Professors Harper and Kime explained this special relationship liability as follows: “If the conduct of the actor has brought him into a human relationship with another, of such character that sound social policy requires either some affirmative action or some precaution on his part to avoid harm, the duty to act or take the precaution is imposed by law.”¹⁸⁵

This second theory of liability looks back at the actions of Saudi Arabia and asks whether it took the necessary steps to control the actions of its subjects or properly warned the West. Saudi Arabia’s establishment of a theocratic monarchy mandating Sunni Wahhabism and forbidding any divergent religious thought created a special relationship and imposes on Saudi Arabia special governmental responsibilities. Saudi Arabia, by its choice to control the religious thought of its subjects, has assumed a duty to see that its subjects do no harm in the name of their state-imposed religious beliefs. Saudi Arabia’s special relationship justifies a duty to control its subjects so that they do not act out the violent message of the state or, at the very least, the duty to warn or take other measures to protect the world from the subjects who are out of control. Special relationship liability is based on Saudi Arabia’s failure to ameliorate the risk of harm posed by those under its control.

The Saudi monarchy has forged with its subjects a bond that denies the subjects any personal autonomy, religious choice, or individual freedom. We are not arguing that the relationship between government and citizen is a relationship that often justifies a special governmental duty to control its citizens. But where the government exercises supreme authority over its subjects, it assumes a special responsibility to use that authority to control the violent tendencies that the government has inculcated. The unique totalitarian

causing physical harm to another unless:

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

184. *Id.*

185. Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 886 (1934).

relationship between the Saudi monarchy and its subjects is a connection strong enough to justify the imposition of “special relationship” liability.

A most realistic analogy of the relationship between Saudi Arabia and its subjects is found in the law of parent and child. Parents have authority over their children and must exercise that authority in a reasonable manner so as to protect innocent third parties.¹⁸⁶ Numerous cases have forthrightly held that parents owe an affirmative duty to third parties to prevent their children from causing injury.¹⁸⁷ These cases do not impose a vicarious liability such as that between employer and employee. These are not cases where Adam pays for the sins of Cain by virtue of his *fatherhood*. Instead, Adam pays because of his personal failure to act to prevent harm in situations where a reasonable parent would realize that his scion is a bloody menace. This duty is justified because parents are in a unique position to identify foreseeable harm and prevent its occurrence. Another common justification, also applicable in the case against Saudi Arabia, is that recovery from the children for their torts is unlikely just as recovery from Osama bin Laden for his torts is unlikely.

A good case demonstrating the potential civil liability for American parents who fail to properly raise and control their children is seen in *Nieuwendorp v. American Family Insurance Co.*,¹⁸⁸ decided in 1995 by the Wisconsin Supreme Court. There the court held the parents were under a duty to exercise reasonable care in controlling their very troubled fourth grader who attacked his teacher after being taken off his ADHD medication. The parents were held to

186. See RESTATEMENT (SECOND) OF TORTS § 316 (1965); see also Wade R. Habeeb, Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by a Minor Child*, 54 A.L.R.3d § 10[a], at 974 (1973) (citing cases from numerous courts holding parents liable for their negligent failure to prevent the tortious conduct of their children).

187. See, e.g., *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979) (holding the relationship between parent and child is a special relationship that gives rise to a duty of the parents to prevent their child from harming third parties); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990) (holding that generally there is no duty to control conduct of third persons unless a special relationship exists, and that such a special relationship exists between parent and child).

188. 529 N.W.2d 594 (Wis. 1995). The child was diagnosed with Attention Deficit Hyperactivity Disorder, or ADHD, and the child was prescribed Dexedrine to help alleviate the symptoms. *Id.* at 596. The child engaged in a variety of bad behavior, “including kicking, biting, using vulgar language, fidgeting, and making inappropriate noises.” *Id.* His parents quit giving the child Dexedrine after ten months of use, but failed to consult with a doctor or conduct independent research to educate themselves on the effects of discontinuing Dexedrine. *Id.* at 596-97. The parents also failed to inform the school that the child was not taking Dexedrine. *Id.* at 597. With no medicine to help alleviate the external manifestations of his ADHD, the child, in a fit of insubordination, lashed out at his special needs teacher, the plaintiff, and pulled her hair so violently that she herniated a disc in her neck that subsequently required surgery. *Id.*

have breached that duty by not informing themselves of the consequences of discontinuing the child's medication, not seeking information regarding alternative forms of treatment for their child's hyperactivity, and by not informing the child's school that the potentially violent child was no longer taking the medicine.¹⁸⁹ While the parents were said not to be negligent in their decision to take the child off his medication, the parents were held liable for failing to inform the school that he was Dexedrine free. Additionally, they did not talk about their decision with a doctor or research alternative forms of care available to their child. The court held that the parents' negligence was a substantial factor in the plaintiff-teacher's injuries.¹⁹⁰ The court based its decision on the special relationship between a parent and child. This relationship requires reasonable parental care over their children in order to keep their children from inflicting harm on others.¹⁹¹

As an intense theocratic monarchy, Saudi Arabia has quite intentionally forged a parent-like relationship of control over its subjects. The autonomy of the subject, like that of a child, is severely impeded by the authority and control of the Kingdom.¹⁹² It is difficult for the Western mind to grasp the intimacy between the Saudi government and its subjects. The King's rule is complete and his commands are supported by a council of religious clerics who give the

189. *Id.* at 598-99. The court was guided by the RESTATEMENT (SECOND) OF TORTS § 316 (1965) ("A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.").

190. The test for causation in Wisconsin is whether a defendant's negligence was a substantial factor in producing the injury. *Clark v. Leisure Vehicles, Inc.*, 292 N.W.2d 630, 635 (Wis. 1980).

191. *Nieuwendorp*, 529 N.W.2d at 601.

192. *See supra* Part I.B.4; *see also* 2 DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, S. Prt. 109-34, at 1967-69 (Comm. Print 2005) [hereinafter 2004 HUMAN RIGHTS REPORT], available at <http://foreignaffairs.house.gov/archives/109/23016.pdf>. The report details how the Saudi government inspects Saudi subjects' mail and maintains a system of informants to report on "seditious ideas" spread by Saudi subjects. *Id.* at 1967. The Saudi government maintains and enforces strict rules on who Saudi subjects can marry. *Id.* The government also enforces "strict standards of social behavior" regarding when businesses can operate, what clothing people can wear in public, and what public places men and women can congregate together in. *Id.* at 1968. The government arrests non-married men and women found in public together. *Id.* The government also bans all books and magazines "that it consider[s] sexual or pornographic in nature" and either censors or flatly prohibits "public artistic expression" and "public musical and theatrical performances." *Id.* at 1969. Public meetings are segregated by sex, and the government monitors "any large gatherings of persons." *Id.*

Saudi King's commands the imprimatur of Islamic law.¹⁹³ Unlike the relationship between citizens of the United States and their government, a Saudi subject's daily life (social, religious, and personal) is heavily regulated by the crown and cleric.¹⁹⁴ We argue that this close relationship is akin to that found between parent and child and should create a duty on the part of the Kingdom to use reasonable care to prevent its agitated subjects from causing harm to others.

Another analogous relationship creating a duty of care exists between schools and pupils. Many states have recognized that schools have a legal duty to prevent schoolchildren under their supervision from causing harm to others.¹⁹⁵ This duty is based on the special relationship between the school and the children it supervises and, thus, gives rise to a claim against the government for its negligent failure to supervise children in its care.

In *Mirand v. City of New York*, the New York Court of Appeals held that schools have a duty to supervise their students and prevent them from taking a hammer to each other when a threatened attack is brought to their attention.¹⁹⁶ The court noted that schools are not insurers of safety, and "are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another.'"¹⁹⁷ But if the school had knowledge or notice of the "dangerous conduct which caused injury," the resulting injury is deemed to be foreseeable.¹⁹⁸ The court stated the test to be applied to determine the school's liability is "whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence."¹⁹⁹

193. See 2004 HUMAN RIGHTS REPORT, *supra* note 192, at 1963-79; see also Fuller & Szayna, *supra* note 102, at 249-53.

194. See 2004 HUMAN RIGHTS REPORT, *supra* note 192, at 1967-69.

195. See *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1241 (Miss. 1999) (discussing school system's statutory duty to exercise reasonable care in controlling its students).

196. 637 N.E.2d 263 (N.Y. 1994). The plaintiffs were sisters, and while one was waiting on the other to get out of class, another student threatened to kill her. *Id.* at 266. The sister tried to report this to the security office at school, but did not get any response. *Id.* at 265. The sister did, however, inform an art teacher of the threat, but the art teacher took no action. *Id.* Subsequently, the student made good on her threat, hitting both sisters in the knee, head, and hand with a hammer. *Id.*

197. *Id.* at 266 (quoting *Lawes v. Bd. of Educ.*, 213 N.E.2d 667, 668-69 (N.Y. 1965)). The court noted that "[t]he duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians." *Id.*

198. *Id.* Here, the school was put on constructive notice of the impending danger when the student informed the art teacher about the threat. *Id.*

199. *Id.*

The California Supreme Court has also imposed a duty on schools to prevent schoolchildren under their supervision from causing harm to others. In *Dailey v. Los Angeles Unified School District*, the court imposed a duty on schools to “supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.”²⁰⁰ The court held that either a total lack of supervision by the teachers, or ineffective supervision, could constitute lack of ordinary care.²⁰¹ The court did not allow the teachers to escape liability when the teachers effectively turned their back on their supervisory duties and refused to break up a fight on the playground.

Saudi Arabia has a relationship with its subjects much akin to that between a school and its pupils. Saudi Arabia serves as an educator while immersing the citizenry of Saudi Arabia in Wahhabist Islam.²⁰² As the relationship between a school and its pupils gives rise to a legal duty imposed on the school to prevent its schoolchildren from inflicting harm on others, so should Saudi Arabia be held liable for not preventing its citizenry from inflicting harm on American cities and American citizens.

The duty to prevent harm to others is famously illustrated in *Tarasoff v. Regents of the University of California*.²⁰³ In *Tarasoff*, the California Supreme Court held that a psychotherapist had a duty to exercise reasonable care in preventing a mentally unstable student from murdering, as he had promised to do, the girl of his dreams.²⁰⁴ This duty rested on the foreseeability of harm to the girl and a “special relation[ship]” between the psychotherapist and the patient.²⁰⁵ The link between the patient and the therapist was a sufficient basis for the imposition of a duty because:

200. 470 P.2d 360, 363 (Cal. 1970) (internal quotation marks omitted). Two students began to “slap fight” after lunchtime, when the students were left unsupervised. *Id.* at 362. As a result of the “slap fight,” a sixteen-year old student fell to the asphalt and cracked his skull, leading to his subsequent death. *Id.* There was a teacher close by, but the teacher spent the entire lunch period in his office not supervising any of the students. *Id.* at 362-63.

201. *Id.* at 363.

202. See, e.g., 2004 STATE DEPARTMENT REPORT, *supra* note 15, at 593 (explaining that the government requires all public schools to give religious instruction related to Wahhabi Islam); 2003 STATE DEPARTMENT REPORT, *supra* note 67, at 542 (“The [Saudi Arabian] Government follows the rigorously conservative and strict interpretation of the Salafi (often referred to as ‘Wahhabi’) school of the Sunni branch of Islam and discriminates against other branches of Islam. The Government limits the practice of all but the officially sanctioned version of Islam, and prohibits the public practice of other religions. Neither the Government nor society in general accepts the concept of separation of religion and state, and such separation does not exist.”); see also 2004 HUMAN RIGHTS REPORT, *supra* note 192, at 1970 (noting that Islamic religious education is mandatory in all public schools).

203. 551 P.2d 334 (Cal. 1976).

204. *Id.* at 345.

205. *Id.* at 343.

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment.²⁰⁶

If the relationship between a therapist and college out-patient is sufficient to justify the imposition of a legal duty to restrain the patient or warn the intended victim, then the relationship between the Saudi monarchy and its subjects is most certainly sufficient. If our judicial system cannot tolerate a psychiatrist's concealment of a danger learned via a confidential conference with a patient, how can our system of justice tolerate Saudi Arabia's knowing indoctrination of a theology justifying the use of violence against those who disagree?

A final case is found in a recent decision of the New Jersey Supreme Court that fits Saudi terrorism exceptionally well.²⁰⁷ In that case a husband molested two neighborhood children in his barn. The only thing his wife seems to have known was that these prepubescent girls were visiting her husband and riding horses with him daily. When the molestation was discovered, a suit was brought against the husband and wife. Since the husband was in jail and judgment-proof, the only way to obtain recovery was from the wife.²⁰⁸

The claim against the wife was shockingly minimalist. She was not claimed to have aided, abetted, lured the girls or accommodated the molestation in any way. Instead the theory of the wife's direct liability was that she should have known or had reason to know that her husband might be abusing the neighbor's children.²⁰⁹

The New Jersey Supreme Court allowed the case to go to trial on this bare allegation because of New Jersey's strong public policy to protect children from sexual abuse.²¹⁰ The court demanded that the wife be alert to tale-tale signs of abuse such as clothing left at the house or inappropriate remarks by the husband. If she had any reason to suspect molestation then she had a legal duty to warn the parents of the children.²¹¹

206. *Id.* at 347.

207. *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998).

208. *Id.* at 926.

209. *Id.* at 926-27.

210. *Id.* at 930.

211. *Id.* at 934.

If New Jersey's wives may be held liable for failing to recognize tale-tale signs that their husbands may be sexual predators on the basis of a strong social policy against abuse of children, then the enormously important policy against terrorism should require Saudi Arabia to be vigilant in recognizing, reporting, and controlling the dangers posed by its Wahhabist-inspired nationals. America's interest in the avoidance of acts that harm America's great cities demands at least as much respect as New Jersey's policy to prevent sex crimes.

We acknowledge that there are numerous authorities refusing to recognize a governmental duty of care to prevent citizen wrongdoers from harming third-parties.²¹² We are not saying that all governments are liable for the wrongdoings of their citizens. Governments are generally not vicariously liable in an employer/employee sense, nor is the ordinary government under a civil duty to prevent its citizens from harming others based on the government's relationship with its citizens. Just as the government owes no general duty to do the right thing and enforce its law,²¹³ civil liability ordinarily does not attach where the government only fails to control the conduct of its citizens. Making a tort out of an ordinary breakdown in law-enforcement is not only too expensive for any state, it is also an arrogation of power from the democratic and executive organs of government for courts to assume the duty of running the police-power in America through civil lawsuits.

But we say again, Saudi Arabia is unique. The Saudi monarchy has chosen to carve out a very special relationship with its subjects. The monarchy has chosen to rule its people in a manner depriving them of independent thought or action. This is not a normal state where there is freedom of religion, expression and thought. Instead, the Kingdom of Saudi Arabia, through its ruling clerics, controls the life of its subjects. With this degree of control comes the duty to exercise it reasonably.

In sum, Saudi Arabia has sown a crop of dragon's teeth and it must pay for the harvest.

III. Is Saudi Arabia Immune from Suit?

Before proving any tort against Saudi Arabia, a significant, but surmountable, procedural hurdle stands in the way: the doctrine of sovereign

212. See, e.g., *Dore v. City of Fairbanks*, 31 P.3d 788 (Alaska 2001) (holding that public policy did not impose on police department a duty to protect third-parties where police failed to execute an arrest warrant).

213. The public duty doctrine states that when a governmental entity owes a duty to the public in general, it owes no duty at all to specific individuals. See Suzanne M. Dardis, Note, *Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity*, 43 S.D. L. REV. 706, 707 (1998).

immunity from suit. This section focuses on Saudi Arabia's central defensive strategy, its potential sovereign immunity.²¹⁴

214. The concept of foreign sovereign immunity from suit was first recognized at common law in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, two American citizens filed an admiralty action alleging that French soldiers acting under the orders of Napoleon wrongfully seized and disposed of the Americans' ship. *Id.* France was served process but no answer was filed. *Id.* Instead, the United States Attorney General intervened and argued that the case should be dismissed, asserting that France enjoyed immunity from suit in United States courts. *Id.* The alleged acts of France, the United States argued, could only be remedied through diplomatic negotiation, reprisals, or by a declaration of war. *Id.* at 117-18. Relying on "the law of nations," the U.S. Attorney argued that relief for injury inflicted by a foreign sovereign could only result from diplomatic negotiations and executive reprisals, not judicial action. *Id.* at 123.

Justice Marshall characterized the question presented as a "very delicate and important inquiry" that called on the Court to determine whether and to what extent a citizen of the United States could challenge France's title to a vessel flying its colors entering an American port. *Id.* at 122, 135. The Court thoughtfully held that there was no jurisdiction in the case because France was entitled to immunity from suit in the courts of the United States given that France was a co-equal sovereign power. *Id.* at 136. In dicta, Justice Marshall also expressed his doubt that the actions of foreign sovereigns were ever appropriate for judicial review. *Id.* at 145-46. Justice Marshall explained that France did not waive its sovereign immunity by entering waters controlled by the United States because:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

Id. at 137.

In the years following *The Schooner Exchange*, courts routinely dismissed suits filed against foreign governments as a matter of course. Courts began to struggle with such absolute immunity as foreign governments became more involved with the daily life of American citizens. Over time the wall of absolute immunity began to erode. A number of exceptions developed in response to increasing contact between American citizens and foreign governments. See Letter from Jack B. Tate, Acting Legal Advisor of the Dep't of Justice, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in 26 DEP'T OF STATE BULL. 984 (1952) (summarizing the erosion of the absolute theory of sovereign immunity).

As these exceptions developed, confusion over the availability of immunity was a political problem. Courts began deferring to the recommendations of the United States Department of State regarding the availability of immunity in particular cases. See H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606. Judicial deference to the Executive Branch, in the words of the House Committee on the Judiciary, presented litigants with "considerable uncertainty" as to whether a foreign state enjoyed immunity. See *id.* at 9.

A. Saudi Arabia's Sovereign Immunity Claim

Saudi Arabia will undoubtedly assert its sovereign immunity from our suggested “follow the theology” lawsuits just as it has done in the 9/11 “follow the money” litigation currently pending in federal court in New York.²¹⁵ Plaintiffs in the 9/11 litigation allege that the Kingdom of Saudi Arabia and members of the Saudi royal family²¹⁶ provided “massive financial, logistical and other support” to *al Qaeda* prior to 9/11.²¹⁷ September 11, 2001, according to these litigants, was a “direct, intended and foreseeable product of the Kingdom of Saudi Arabia’s participation in al Qaida’s jihadist campaign.”²¹⁸ Despite these allegations, all claims against Saudi Arabia, and most claims against members of the Saudi royal family, were summarily dismissed solely on the basis of sovereign immunity.²¹⁹ Saudi Arabia was not required to answer any of the plaintiffs’ claims.

We believe that had the plaintiffs in the 9/11 litigation pled the theories of “follow the theology” liability asserted in Part II of this article, they could have overcome the hurdle of sovereign immunity. Further, we also believe that the federal judge too quickly dismissed the 9/11 litigants’ “follow the money” claims on the basis of sovereign immunity.

The scope of Saudi Arabia’s sovereign immunity is limited by the “Torts Exception” to sovereign immunity contained in the Foreign Sovereign Immunities Act of 1976 (FSIA).²²⁰ Congress’ decision to subject foreign governments to the original jurisdiction of federal courts where the torts of the foreign government cause injury on American soil must be honored.²²¹ The

215. Victims of 9/11 have filed several lawsuits against Saudi Arabia and members of the Saudi royal family. These cases have been consolidated pursuant to 28 U.S.C. § 1407 (2000). *See In re Terrorist Attacks* on Sept. 11, 2001, 295 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003), and cases cited therein.

216. The 9/11 plaintiffs seek recovery from two Saudi princes: Prince Sultan bin Abdulaziz Al-Saud, the Saudi Arabian Minister of Defense and Aviation and Inspector General of Saudi Arabia’s armed forces; and Prince Turki Al-Faisal bin Abdulaziz Al-Saud, Saudi Arabia’s ambassador to the United Kingdom and former Director of Saudi Arabia’s Department of General Intelligence. *In re Terrorist Attacks* on Sept. 11, 2001, 349 F. Supp. 2d 765, 783-86 (S.D.N.Y. 2005).

217. *See id.* at 786 (“Plaintiffs claim that ‘[m]ore than any other factor, al Qaida’s phenomenal growth and development into a sophisticated global terrorist network were made possible by the massive financial, logistical and other support it received from the Kingdom of Saudi Arabia, members of the Saudi Royal family, and prominent members of Saudi society.’” (quoting Plaintiffs’ Complaint ¶ 398)).

218. *Id.* (quoting Plaintiffs’ Complaint ¶ 425).

219. *Id.* at 789-804.

220. 28 U.S.C. § 1605(a)(5) (2000).

221. *See, e.g., Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983) (noting that

Supreme Court has admonished all courts construing the FSIA to stay focused on the primary objective: determining the scope of jurisdiction over foreign governments “in the exact degrees and character which to Congress may seem proper for the public good.”²²² In other words, the core of the immunity question is whether Congress intended for American citizens to have an avenue for relief in American courts when Saudi Arabia’s tort caused the loss of life and property in the United States. In the context of the 9/11 litigation, did Congress intend for Saudi Arabia to enjoy immunity from suits by U.S. citizens claiming that the Kingdom funded or indoctrinated the terrorists? The answer to that question must be no.

B. The FSIA and Its Torts Exception

Historically, nations enjoyed almost absolute immunity from suit in foreign courts. However, the scope of sovereign immunity significantly eroded as foreign governments became more closely connected with the affairs of private citizens. In 1976, Congress rejected the absolute view of immunity and defined the scope of sovereign immunity in the FSIA.²²³ The FSIA codified the common law that had developed around both the availability²²⁴ and limits²²⁵ of immunity of foreign states in American courts.²²⁶ The FSIA provides the sole

the Court “has deferred to the decisions of the political branches” with regard to foreign sovereign immunity).

222. *Argentine Repub. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (citing *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

223. 28 U.S.C. §§ 1602-1611 (2000).

224. The FSIA grant of immunity reads as follows:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

225. The limitations on immunity provided by the FSIA are found in 28 U.S.C. §§ 1605-1607.

226. FSIA defines foreign states as follows:

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity . . .

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

basis for jurisdiction over a foreign sovereign in American courts.²²⁷

Critically, § 1605(a)(5) of the FSIA, commonly known as the “Torts Exception,” knocks a gigantic hole in the wall of absolute sovereign immunity by allowing citizen suits for torts that foreign countries commit causing injury in the United States. Section 1605(a)(5) lifts the sovereign immunity of foreign sovereigns in all actions:

[I]n which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.²²⁸

This Torts Exception explicitly authorizes suits against foreign sovereigns where their non-commercial torts cause injury to plaintiffs in the United States. As described in Part II, Saudi Arabia has committed non-commercial torts causing substantial injury to American citizens in the United States. Accordingly, the FSIA’s Torts Exception provides a basis for federal court jurisdiction in the ideology lawsuit proposed in this article *and*, we argue, over the funding suits presently before the New York federal court.

Saudi Arabia’s immunity argument is based on three limitations to the FSIA Torts Exception. The first argued limitation is that because the FSIA now contains an explicit State Sponsor of Terrorism Exception,²²⁹ all other claims

The central purpose of the FSIA is to clearly define the cases where foreign states may assert sovereign immunity. See 28 U.S.C. § 1602. Congress intended for the FSIA to be the sole basis for immunity from suit. See *Amerada Hess Shipping*, 488 U.S. at 434. However, the FSIA legislative history also explains that Congress did not intend to disturb the doctrine of “diplomatic immunity.” See H.R. REP. NO. 94-1487, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606. The scope and extent of diplomatic immunity are beyond the purpose of this article.

227. See *Amerada Hess Shipping*, 488 U.S. at 434 (“We think that the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”).

228. 28 U.S.C. § 1605(a)(5).

229. 28 U.S.C. § 1605(a)(7) (lifting sovereign immunity for any country designated “a state sponsor of terrorism”).

related to terrorism are preempted unless authorized by the new exception. Second, Saudi Arabia will argue that the Torts Exception does not apply to torts committed, in part, outside the territorial jurisdiction of the United States. Finally, the Kingdom will argue that the discretionary function limitation embedded in § 1605(a)(5) is applicable and preserves its immunity in this case.²³⁰ Overcoming these arguments is the key to establishing federal court tort jurisdiction in the lawsuit we propose. We address each of these critical arguments in turn.

1. Does the Torts Exception Apply in Tort Actions Based on Acts of Terrorism?

This first argument rests on the relationship between the Torts Exception and a corollary exception contained in § 1605(a)(7) commonly referred to as the “State Sponsor of Terrorism Exception.” The statutory question is whether the enactment in 1996 of the “State Sponsor of Terrorism Exception”²³¹ effectively trumps the applicability of the Torts Exception in cases related to acts of terrorism. In other words, are the two exceptions mutually exclusive?

230. Section 1605(a) provides that the Torts Exception is inapplicable to torts “based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.” 28 U.S.C. § 1605(a)(5)(A).

231. See 28 U.S.C. § 1605(a)(7). Congress added the “State Sponsor of Terrorism Exception” to the FSIA as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43. The State Sponsor of Terrorism Exception lifts sovereign immunity where:

[M]oney damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state . . . except that the court shall decline to hear a claim under this paragraph —

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or section 620A of the Foreign Assistance Act of 1961 . . . at the time the act occurred . . .

28 U.S.C. § 1605(a)(7). This exception is only applicable if the Executive Branch designates a foreign nation as a “state sponsor of terrorism.” See *id.*; see also *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 796-97 (S.D.N.Y. 2005) (explaining that Congress made a policy decision that the Executive Branch, and not the courts, have the authority to label a foreign nation as a terrorist). Clearly the State Sponsor of Terrorism Exception is an insufficient basis for jurisdiction in the suit we propose because the Executive Branch has not designated Saudi Arabia a state sponsor of terrorism.

Saudi Arabia raised this argument in the 9/11 litigation²³² and District Judge Casey rightly rejected it.²³³ Congress did not make the exceptions mutually exclusive.²³⁴ Other provisions of the FSIA contain language that is clearly mutually exclusive.²³⁵ “But when [Congress] drafted the state sponsor of terror exception it did not include mutually exclusive language that would preclude the application of the torts exception here.”²³⁶

The explicit language of the FSIA does not make the Torts Exception and the State Sponsor of Terrorism Exception mutually exclusive. But even when one moves beyond the plain meaning of the words of the statute, it is clear that Judge Casey’s conclusion on this issue is correct. The two exceptions serve entirely different pools of injured citizens. The Torts Exception applies where injury occurs in the United States. The State Sponsor of Terrorism Exception applies where injury occurs overseas.

Congress did not intend for the State Sponsor of Terrorism Exception to displace the Torts Exception. Rather, Congress intended this State Sponsor exception to expand the availability of judicial relief when American citizens are injured by foreign governments. Prior to the addition of the State Sponsor exception, American citizens injured abroad had no recourse against foreign governments due to the geographic limitations in the Torts Exception. The State Sponsor exception filled that gap. The Torts Exception still applies where American citizens are injured in the United States. These two exceptions work hand in hand to accomplish Congress’ true intent — a judicial forum for American citizens injured by the conduct of foreign governments wherever the injury occurs.²³⁷

It would be a strange result indeed to conclude that Congress, by enacting legislation creating a new exception limiting the scope of sovereign immunity, actually intended to expand the scope of immunity. If Saudi Arabia commits torts causing injury to American citizens, the Torts Exception applies on its own terms without regard to the State Sponsor of Terrorism Exception. The two exceptions are not mutually exclusive.

232. See *In re Terrorist Attacks*, 349 F. Supp. 2d at 794-95 (“Second, Defendants claim that Plaintiffs impermissibly seek to contort a § 1605(a)(7) state sponsor of terrorism claims into a § 1605(a)(5) tort claim.”).

233. See *id.* at 796 (“[T]he court will not rule as a matter of law that subsections (a)(7) and (a)(5) are mutually exclusive.”).

234. See *id.*

235. See *id.*

236. *Id.*

237. See *id.* at 796 (explaining that the State Sponsor of Terrorism Exception has been interpreted to apply to situations where conduct occurring outside the United States causes injury to U.S. citizens abroad).

2. *Does the Torts Exception Apply to Torts Occurring, in Part, Outside the United States?*

Saudi Arabia's next argument is more challenging, but still surmountable. The Torts Exception authorizes suits "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state"²³⁸ Certainly what Saudi Arabia did, it did on the sands of the desert Kingdom. Courts interpreting the scope of this "occurring in the United States" language have split regarding its applicability where part of the actionable tortious conduct occurs outside of the United States but the harm occurs inside the United States.

For example, in *O'Bryan v. Holy See*,²³⁹ Judge Heyburn determined that for the Torts Exception to apply, "both the injury and the tortuous act or omission must occur in the United States."²⁴⁰ On this basis Judge Heyburn concluded that the Torts Exception did not authorize suits against the Vatican for its alleged tortious conduct occurring outside of the United States even though its conduct caused injury to American citizens in the United States.²⁴¹

In an analogous case involving the same foreign sovereign, another court reached the opposite conclusion. In *Doe v. Holy See*,²⁴² Judge Mosman rejected the argument that every part of an alleged tort must occur in the United States in order to lift the veil of immunity. Citing prior Ninth Circuit authority, this district court concluded that "as long as plaintiff alleges facts sufficient to show both the injury and the conduct (action or inaction) giving rise to the tort occurred in the United States, the [torts] exception applies."²⁴³ On this basis, Judge Mosman concluded that the Torts Exception did lift immunity because at least a portion of the Vatican's alleged conduct caused injury in the United States.²⁴⁴

These are not the only cases discussing the territorial scope of the Torts Exception. They are introduced to highlight the split of authority on the issue. This split is the result of ambiguous *dicta* in a Supreme Court decision discussing the Torts Exception. In *Argentine Republic v. Amerasia Shipping Corp.*,²⁴⁵ a case proving that strange facts result in confusing law, the Supreme Court examined the relationship between the FSIA and the

238. 28 U.S.C. § 1605(a)(5) (2000).

239. 471 F. Supp. 2d 784 (W.D. Ky. 2007).

240. *Id.* at 790.

241. *See id.*

242. 434 F. Supp. 2d 925 (D. Or. 2006).

243. *Id.* at 952 (citing *Olsen v. Gov't of Mexico*, 729 F.2d 641, 645-46 (9th Cir. 1984)).

244. *Id.* at 953.

245. 488 U.S. 428 (1989).

jurisdictional provisions of the Alien Tort Statute.²⁴⁶ The Plaintiffs in the case were two Liberian corporations affiliated with the American oil industry.²⁴⁷ A shipping vessel owned by the plaintiffs, while navigating international waters, was bombed by Argentinean warplanes.²⁴⁸ Consequentially, the plaintiffs were forced to scuttle the vessel.²⁴⁹ The plaintiffs attempted to invoke the jurisdiction of the federal court via the jurisdictional grant in the Alien Tort Statute.²⁵⁰ The Court held that the FSIA effectively repealed the Alien Tort Statute and provided the sole basis of jurisdiction over foreign governments in American courts.²⁵¹

The Court then went on to examine whether jurisdiction over the government of Argentina was permitted by any of the FSIA exceptions. The plaintiffs attempted to invoke the Torts Exception by arguing that even though the bombing took place on the high seas the injury to their vessel nevertheless occurred “in the United States,” for purposes of § 1605(a)(5) because it occurred within the admiralty jurisdiction of the United States.²⁵² The Court rejected this fanciful argument, finding the Torts Exception only applicable when injury actually occurs in the United States, not just where its admiralty writs might run.²⁵³

So far this case is unproblematic. The acts of terrorism which are the focus of our lawsuit caused injury in the United States. But the Court, after announcing its holding in *Amerada Hess Shipping*, continued, in dicta, to create confusion regarding the scope of the Torts Exception. The Court noted that:

[t]he result in this case is not altered by the fact that petitioner’s alleged tort may have had effects in the United States. . . . Congress’ decision to use explicit language [in other FSIA sections regarding the effects of commercial conduct in the United States] and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.²⁵⁴

246. 28 U.S.C. § 1350 (2000).

247. *Amerada Hess Shipping*, 488 U.S. at 431.

248. *Id.* at 432.

249. *Id.*

250. *Id.*

251. *Id.* at 437-38. As explained in the opinion, the Alien Tort Statute was passed by the first Congress in 1789 to authorize original jurisdiction in federal court over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.* at 436 (quoting 28 U.S.C. § 1350) (internal quotation marks omitted).

252. *Id.* at 440-41.

253. *Id.* at 440.

254. *Id.* at 441 (emphasis added).

Saudi Arabia will surely argue, relying on this statement, that the FSIA Torts Exception only applies where the entire chain of actionable tortious conduct occurs in the territorial jurisdiction of the United States.²⁵⁵ And as explained above, this argument has found currency in some of the circuits, including the Second Circuit.²⁵⁶

In the current 9/11 litigation, Saudi Arabia argued the Torts Exception was inapplicable because its alleged tortious conduct (funding Islamic organizations) occurred outside the United States.²⁵⁷ The 9/11 court, to a certain extent, sidestepped the argument by explaining that the actionable torts in the case “[were] the attacks of September 11.”²⁵⁸ The plaintiffs had not alleged that Saudi Arabia participated in the 9/11 attacks directly. The 9/11 court offers up little legal analysis on this issue.

We argue that courts reading the Torts Exception to require every tortious act and consequence to both occur in the United States are ignoring the plain meaning of the statute. The statute’s geographic limitation, by its very words, is connected to the situs of the injury, not the defendant’s conduct. The statute allows recovery for “injury . . . occurring in the United States.”²⁵⁹

Furthermore, courts should not read the dicta in *Amerada Hess Shipping* to substantially limit the scope of the Torts Exception. There the Court, in light of the facts of the case, was rightly concerned about *foreign* parties using American courts to seek remedy from *foreign* sovereigns for injury occurring many thousands of miles outside the territories of the United States. The Court’s dicta responded to the argument that the injury on international waters occurred in the United States. The Court was concerned about opening the doors of the federal courthouse to foreign citizens injured anywhere in the world’s international waters. The Court was not considering whether Congress intended the Torts Exception to lift immunity where *American* citizens are injured or killed in the United States. The Court’s dicta based on such a distinguishable set of facts should not be read to limit the availability of the Torts Exception to American citizens injured at home.

255. See, e.g., *O’Bryan v. Holy See*, 471 F. Supp. 2d 784 (W.D. Ky. 2007).

256. See *Cabiri v. Gov’t of Repub. of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999).

257. See *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 794-95 (S.D.N.Y. 2005).

258. See *id.* at 795.

259. 28 U.S.C. § 1605(a)(5) (2000).

3. Does the Discretionary Function Limitation Preserve Saudi Arabia's Immunity?

Saudi Arabia's most potent challenge to the applicability of the Torts Exception is found in § 1605(a)(5)(A). There Congress preserved immunity in "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."²⁶⁰ This statutory language was borrowed from the Federal Tort Claims Act²⁶¹ (FTCA) which allows and regulates suits against the United States. Thus it is to the Supreme Court's interpretation of the FTCA that we must turn to find the meaning of the discretionary function limitation in the FSIA.²⁶²

A unanimous Court in *Berkovitz v. United States* announced a two-pronged test to determine whether the discretionary function bars suit: (1) Does the actionable conduct involve an element of judgment or choice; and (2) If so, is the judgment or choice "of the kind that the discretionary function exception was designed to shield."²⁶³ The Court also explained that application of this test requires an understanding that while Congress intended to allow recovery for tortious conduct, it also intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."²⁶⁴ The discretionary

260. 28 U.S.C. § 1605(a)(5)(A) (2000).

261. 28 U.S.C. §§ 2671-2680. Specifically, the FTCA provides

The provisions of this chapter . . . shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. § 2860.

262. See *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018 (9th Cir. 1987). "The existence of a discretionary function [exception] under the FSIA is generally analyzed under the principles developed pursuant to the Federal Tort Claims Act's ('FTCA') discretionary function exception." *Id.* at 1026; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 454 cmt. d (1987) (explaining that "[the FSIA torts exception] follows the corresponding provisions of the Federal Tort Claims Act").

263. 486 U.S. 531, 536-37 (1988). *Berkovitz* involved an infant injured when he ingested a dose of a drug previously licensed by the National Institutes of Health and approved by the Food and Drug Administration. *Id.* at 533. The plaintiffs sought recovery from the United States under the FTCA alleging that the license and approval were improperly granted. *Id.*

264. *Id.* at 536-37 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)) (internal quotation marks omitted).

function limitation is irrelevant unless the challenged conduct “involves the permissible exercise of policy judgment.”²⁶⁵

In *United States v. Gaubert*,²⁶⁶ the Court offered further guidance in the application of the *Berkovitz* test. *Gaubert* arose out of the savings and loan crisis. In the case, a shareholder of a defunct Texas savings and loan sought over \$100 million in damages from the United States on the basis of the alleged negligence of federal regulators.²⁶⁷ The district court dismissed the case, finding that all the alleged administrative negligent acts were discretionary and thus barred by the FTCA.²⁶⁸ The Fifth Circuit, citing precedent pre-dating *Berkovitz*, distinguished protected policy and planning level decisions from operational level decisions. The court of appeals reversed the lower court to the extent that it had precluded operational level claims.²⁶⁹

The Court rejected the lower court’s distinction between operational level and planning level decisions and reaffirmed the *Berkovitz* test.²⁷⁰ Governmental decisionmaking, at any level, involving an element of judgment or choice is shielded from judicial review so long as it is a decision rooted in considerations of public policy.²⁷¹ The Court went on to analyze whether the governmental conduct was discretionary in light of the *Berkovitz* test. The Court determined that the governmental actions in the case were actions involving judgment or choice because the governmental conduct was not “controlled by mandatory statutes or regulations.”²⁷² This provides some clarity in applying the first prong of *Berkovitz*. Courts are to determine whether the governmental action is controlled by law. If not, the act is discretionary.

Even if the acts are discretionary, courts must move on to the second inquiry: whether the challenged discretionary act involves the type of policy judgment that Congress intended to shield from judicial review.²⁷³ This step in the *Berkovitz* analysis is critical to proper application of the discretionary function limitation. *Gaubert* explains that the second prong of the *Berkovitz* test is intended to allow the efficient operation of the regulatory state by preventing judicial review of agency decisions.²⁷⁴

265. *Id.* at 537.

266. 499 U.S. 315 (1991).

267. *Id.* at 319-20.

268. *Id.* at 320.

269. *Id.* at 322 (citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)).

270. *Id.* at 328-29.

271. *Id.* at 325-26.

272. *Id.* at 328 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

273. *Id.* at 332.

274. *Id.*; see also Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 371-72 (1995).

The point of this discussion is that the co-opting of the FTCA discretionary function cases is not very helpful in determining whether the FSIA's discretionary function limitation should apply. As *Berkovitz* and *Gaubert* demonstrate, the concern in the FTCA is striking the proper balance between an individual's right to recovery and the federal government's interest in making decisions of public policy without judicial interference. This is not the balance Congress was attempting to make in the FSIA. Congress was not attempting to strike a balance between individual rights and the common good in the FSIA. Instead, Congress intended to protect American citizens from injury while balancing the national interest in stable foreign relations. Applying the *Berkovitz* test to strike this balance is odd, to say the least.

Nevertheless, a court applying the *Berkovitz* framework in the lawsuit we propose should conclude that its tortious acts were not the type of conduct the discretionary function was designed to shield. A decision to murder 3000 United States citizens at the World Trade Center, for example, is not a discretionary act by the Kingdom of Saudi Arabia that Congress wished to immunize. And if we take Saudi Arabia at its word, that it did not intend to harm America, that it is an ally, that it was shocked that most of the 9/11 *ihadists* were Saudis, then how can the bombing be considered any kind of discretionary choice or act by Saudi Arabia, much less one that Congress wished to immunize?

This is supported by cases interpreting the FSIA's discretionary function limitation. For example, in *Olsen v. Government of Mexico*, a plane owned by the Mexican government was flying some Americans back to the United States for imprisonment pursuant to Mexico's treaty obligations with the United States.²⁷⁵ It was a stormy night and the pilots, after entering United States airspace, tried to land by instrument with the assistance of San Diego-based air controllers.²⁷⁶ The Mexican airport air controller equipment was broken, the pilots did not speak English, they disregarded instructions to try another airport, flew too low and hit a telephone pole, killing everyone on board.²⁷⁷ The Ninth Circuit held that this conduct was not a discretionary act of Mexico, but was instead the negligence of governmental agents carrying out the policy choice of Mexico to have a prisoner exchange program with the United States government.²⁷⁸

Although *Olsen* applied the planning versus operational level test disapproved by *Gaubert*, the outcome is perfectly consistent with the idea that the discretionary act exception does not apply to actions by government agents

275. 729 F.2d 641, 643 (9th Cir. 1984).

276. *Id.* at 642-43.

277. *Id.* at 643-44.

278. *Id.* at 647.

in derogation of the official policy of their government. Mexico made no policy level decision to crash its airplane into a San Diego telephone pole. Similarly, Saudi Arabia made no decision to crash two airplanes into the twin towers. But in both instances, the negligence of the foreign government damaged citizens of the United States and tort recovery is appropriate.

Our conclusion that the FSIA's discretionary function limitation is inapplicable is further supported by a recent case analyzing a more arguable discretionary setting. In the Oregon *Doe v. Holy See* litigation,²⁷⁹ the plaintiff, a victim of alleged sexual abuse committed by a Catholic priest, sought recovery from the Holy See for its negligence.²⁸⁰ The Vatican claimed that it was immune from suit on the basis of its foreign sovereign immunity.²⁸¹ The Vatican also claimed that its decision to relocate a priest was shielded from review because it was a decision involving a high degree of judgment and involving decisions rooted in the public policy of the Catholic Church — a classic discretionary function of a foreign sovereign.²⁸²

The Oregon district court, applying the *Berkovitz* two-prong test, rejected the Vatican's argument. The court held that the decision to relocate a priest did involve discretion and thus satisfied the first level of the inquiry.²⁸³ Moving on to the second question, the court determined that "a sovereign's failure to warn of a known danger is not the type of policy-based decision the discretionary function exception was designed to shield."²⁸⁴ The court went on to explain that where "the [foreign] government or agency is responsible for creating the danger or exposing the public to a hazard that otherwise would not exist, the failure to warn of the known danger is not the type of judgment the discretionary function was designed to shield."²⁸⁵

Similarly, even if Saudi Arabia's decisions to indoctrinate are discretionary, its failure to control the danger it created is not the type of policy level decision the discretionary function was designed to shield. The court's analysis in *Doe* is instructive. It takes a high level judgment and planning at the top levels of the Vatican to move a priest from Ireland to the United States. But that is not where the discretionary function analysis ends. The critical question is whether the act or failure to act in the context of the specific allegations of the lawsuit is the type of policy-based decision the discretionary function is designed to

279. 434 F. Supp. 2d 925 (D. Or. 2006).

280. *Id.* at 931-32.

281. *Id.* at 931.

282. *Id.* at 953.

283. *Id.* at 954.

284. *Id.* at 955 (citing *Oberson v. U.S. Dep't of Agric.*, 441 F.3d 703, 710-12 (9th Cir. 2006)).

285. *Id.*

shield. As the *Doe* court explains, “Failure to act after notice of illegal action does not represent a choice based on plausible policy considerations.”²⁸⁶ Like the Holy See, Saudi Arabia is “responsible for creating the danger or exposing the public to a hazard that otherwise would not exist, and thus the failure to warn of the known danger is not the type of judgment the discretionary function was designed to shield.”²⁸⁷ It does not enjoy the protection offered by the discretionary function limitation.

Once again, we take Saudi Arabia at its word that it did not choose to send the 9/11 *jihadists* on their mission. We claim only that the decision to inculcate Wahhabism in its citizens without any restraints on how it would be propagated nor any restraints placed on those who drank too deeply from the Salfist well is simply negligence, not choice and above all not a discretionary act that Congress wished to insulate from judicial inquiry.

Even if Saudi Arabia were now to confess that it desired the murder of the 9/11 victims, the discretionary function safe-harbor would still not apply. In *Letelier v. Republic of Chile*,²⁸⁸ one of the earliest cases to interpret the FSIA Torts Exception, the court explained that whatever policy options may exist for a foreign country, “there is no discretion to commit, or to have one’s officers or agents commit, an illegal act.”²⁸⁹

The *Letelier* litigation arose from the assassination of Chilean ambassador Orlando Letelier and Ronni Moffitt in Washington, D.C. on September 21, 1976.²⁹⁰ Plaintiffs in the wrongful death action alleged that the Chilean government ordered its agents to commit the killings.²⁹¹ Chile did not appear in the action, but through the United States Department of State, Chile informally informed the court that it contested the court’s subject-matter jurisdiction on the basis of sovereign immunity.²⁹² Chile denied involvement, but argued that even if it had ordered the assassination, its actions were decisions of a foreign government shielded by the FSIA.²⁹³ Chile argued that Congress did not intend for the Torts Exception to immunity to apply to “public” torts, but instead intended the Torts Exception to be limited only to small time “private” torts like auto-accidents and the like.²⁹⁴

286. *Id.* (quoting *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995)) (alteration in original) (internal quotation marks omitted).

287. *Id.* at 955.

288. 488 F. Supp. 665 (D.D.C. 1980).

289. *Id.* at 673.

290. *Id.* at 665.

291. *Id.*

292. *See id.* at 669 n.4.

293. *Id.* at 671.

294. *Id.*

Despite the fact that Chile had not formally appeared in the action, the district court carefully analyzed the FSIA and determined that it possessed jurisdiction.²⁹⁵ One of Chile's arguments was that the Torts Exception was exceedingly narrow, demonstrated by several references to auto-accidents in the FSIA's legislative history.²⁹⁶ Applying a plain meaning construction of the statute, the court rejected Chile's argument:

Nowhere is there an indication that the tortious acts to which the [FSIA] makes reference are to only be those formerly classified as "private," thereby engrafting onto the statute, as the Republic of Chile would have the Court do, the requirement that the character of a given tortious act be judicially analyzed to determine whether it was of the type heretofore denoted as *jure gestionis* or should be classified as *jure imperii*. Indeed, the other provisions of the Act mandate that the Court not do so, for it is made clear that the Act and the principles it sets forth in its specific provisions are henceforth to govern all claims of sovereign immunity by foreign states.²⁹⁷

The court then examined the discretionary function language. The decision to assassinate a public official was a policy level decision. However, because it was a decision to commit an illegal act, the court, citing cases interpreting the FTCA, correctly determined that it was not the type of decision the FSIA's discretionary function provision was intended to protect.²⁹⁸ If Chile cannot murder in Washington D.C., Saudi Arabia cannot murder in New York.

This article is not intended to demonstrate that Saudi Arabia decided to harm the United States, devised a plan to harm the United States, wanted to harm the United States, or intended to harm the United States. American tort law requires actors who, without harmful intent, make mistakes that cause injury to reimburse the injured. It is on this ancient distinction between negligence and intentional tort that our proposed "follow the ideology" case and the current "follow the money" case against Saudi Arabia fit squarely within the FSIA's Torts Exception and should be preserved. In both cases, negligence is the heart of the action.

Congress wanted cases of negligent injury to Americans tried in United States courts and that is why it passed the Torts Exception. And that is why this case should not be swept away by exaggerated notions of sovereign "discretion" borrowed from American administrative law. Ours is a theory of

295. *Id.* at 674.

296. *Id.* at 671.

297. *Id.*

298. *Id.* at 673-74.

liability that falls well within FSIA's invitation to bring tort suits seeking recovery for injury occurring in the United States in federal court.²⁹⁹

Conclusion

On October 16, 1946, when Julius Streicher stood in front of the Nuremberg hangman, his last words were "Heil Hitler."³⁰⁰ True to the end, Streicher had for twenty-two years published *Der Stuermer* ("The Storm"), which had vilified every Jew as "a germ and a pest" and "a parasite."³⁰¹ "The Jew must die" was a common refrain in his very popular speeches.³⁰² The defeat of the Nazis meant the trial of those who were most responsible for the war and the Holocaust. Though there was no evidence that publisher Streicher had ever killed, harmed or participated in harming another person, he was indicted and found guilty of acting in concert with those who murdered the Jews, a "Crime Against Humanity."³⁰³

299. The "Commercial Activity Exception" to immunity is found in § 1605(a)(2) of the FSIA:

A foreign state shall not be immune [in any case in which the action is based] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (2000).

Plaintiffs in the 9/11 litigation argued that Saudi Arabia's financial contributions to Islamic charities known to support terrorist activities constituted a "commercial activity." See *In re Terrorist Attacks on Sept. 11th, 2001*, 349 F. Supp. 2d 765, 793 (S.D.N.Y. 2005). The court disagreed, holding that the Commercial Activity Exception was inapplicable to the allegations against Saudi Arabia and the Saudi princes. *Id.* The court noted that "for purposes of FSIA, a commercial activity must be one in which a private person can engage lawfully." *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 360-62 (1993); *Letelier v. Repub. of Chile*, 748 F.2d 790, 797-98 (2d Cir. 1984)). The court held that the alleged illegal money laundering did not constitute a "commercial activity" as the term is used in the FSIA. *Id.*

While the authors respectfully disagree with the district judge regarding his decision that the provision of financial support does not constitute a commercial activity, this ruling does not interfere with our central assertion that Saudi Arabia's tortious conduct vests the court with jurisdiction under the FSIA Torts Exception.

300. ERIC. A. ZILLMER ET AL., *THE QUEST FOR THE NAZI PERSONALITY: A PSYCHOLOGICAL INVESTIGATION OF NAZI WAR CRIMINALS* 157 (1995).

301. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 39 (2000).

302. EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS* 50 (Univ. of Mo. Press 1997) (1966).

303. See *Streicher Nuremberg Judgment*, <http://www.ess.uwe.ac.uk/genocide/Streicher2.htm> (last visited Sept. 27, 2007). For more information regarding Julius Streicher, see *Julius Streicher: Biography*, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007316> (last visited Sept. 26, 2007).

Streicher hung, not for what he did, but for what he said and taught. Streicher's hands had no blood on them, only ink. Yet his hateful message was judged by the rest of the world to be so serious that he deserved death.

Streicher's rhetoric is hauntingly similar to that used in Saudi Arabia to demonize "infidels" and Jews, including such sickening libels as accusing Rabbis of "spilling" and consuming human blood on Jewish holidays, which was recently published on the front page of a Saudi managed national newspaper and written by a Saudi paid professor.³⁰⁴ If those who inspired Fascist crimes against humanity can be hanged, then America can, with a clear conscience, hold those who inspire Islamic crimes against humanity liable in tort.³⁰⁵

304. See, e.g., Anti-Defamation League, Fueling Today's Anti-Semitism: Demonizing Jews: Anti-Semitism in the Saudi Media, http://www.adl.org/Anti_semitism/arab/saudi_blood_1.asp (last visited Sept. 25, 2007) (quoting an article authored by a member of the Islamic Clerics Association of Saudi Arabia published in a Saudi daily newspaper on September 6, 2002, claiming that the Jewish festival of Purim is celebrated by the consumption of pastries made with human blood).

For this holiday, the Jewish people must obtain human blood so that their clerics can prepare the holiday pastries. In other words, the practice cannot be carried out as required if human blood is not spilled!!

Before I go into the details, I would like to clarify that the Jews' spilling human blood to prepare pastry for their holidays is a well-established fact, historically and legally, all throughout history. This was one of the main reasons for the persecution and exile that were their lot in Europe and Asia at various times.

Id. (internal quotation marks omitted).

305. A less dramatic example of the justice in holding responsible those who incite others to crime was recently witnessed in New Jersey where the United States government successfully prosecuted the ring leaders of an animal rights group, Stop Huntington Animal Cruelty (SHAC), for inciting others to harass employees of a company. Huntington Life Services (HLS) was involved in animal testing. SHAC's crime was that "it posted and applauded acts of extreme harassment, intimidation, vandalism and violence against HLS, its employees and others." See Press Release, U.S. Dep't of Justice, Three Militant Animal Rights Activists Sentenced to Between Four and Six Years in Prison (Sept. 12, 2006), *available at* <http://www.usdoj.gov/usao/nj/press/files/pdf/shac0912rel.pdf>.